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Annual Report on Competition Policy Developments in Peru

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This report is submitted by Peru to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 November 2018.

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1. Executive Summary

1. The year 2017 was particularly important for the defense of competition in Peru. In fact, it will be remembered for the strengthening of the powers of the Peruvian agency through the investigation of cases of collusion and the imposition of fines in relevant markets, and the publication of the Peruvian Leniency Program Guidelines for developing more the rules of this important tool contained in the Peruvian Competition Act.

2. Changes to competition law

2. There were no changes to the Peruvian Competition Act¹. However, in 2017 the Leniency Program Guidelines was enacted.

2.1. Leniency Program Guidelines

3. In August 2017, Indecopi published its Leniency Program Guidelines, in both Spanish and English. The objective of the guidelines was to develop more broadly the rules contained in the Peruvian Competition Act and thereby improve the transparency and predictability of the program, with the aim of promoting its use by practitioners.

4. The draft guidelines were published in 2016 in order to receive comments from the general public. The Commission for the Defense of Free Competition evaluated and debated each of the comments and finally approved the Guidelines in 2017. Among its main rules, the following should be mentioned:

- The Guidelines focus on the detection of horizontal agreements. - The benefits for collaboration are only available for undertakings involved in this type of cartels because these are the most difficult conducts to detect, as well as the most serious. Accordingly, vertical restrictions have been excluded from its scope.
- The benefits are available for companies and individuals.- Two types of leniency are set forth: corporate leniency and individual leniency. It should be noticed that the first allows to extend the leniency benefits received by an undertaking to its employees, as long as they collaborate with the authority and the company.
- The sooner an undertaking approaches Indecopi to reveal an anticompetitive conduct, the greater the benefits that it can receive.- Full leniency is assured only to those who report their participation in a cartel before Indecopi detects it or undertakes investigation actions (for example, dawn raids).
- The reductions of fines rely on the added value of the information provided by an applicant.- An applicant for a reduction of fine will be able to obtain greater benefits if it is able to provide additional information that adds value to the investigation and contributes significantly to the initiation of an administrative proceeding. The Guidelines contain examples of what is considered as ‘added value’.
- There is no leniency regarding the liability for the damages caused by the cartel. - The benefits obtained by an applicant through its collaboration cannot be

¹ Enacted by means of Legislative Decree 1034 (2008) and amended by means of Legislative Decree (2015). Also, there were no changes in the Merger Control Act for the Electricity Sector Act (1996).

extended to the civil liability that could be determined by courts towards the clients or consumers affected by the cartel.

- Definition of the duty of collaboration.- Those interested in obtaining benefits must cooperate fully, continuously and diligently, providing all the information and evidence that is in their possession.
- Consultations.- Those interested in seeking leniency can approach the authority in a confidential manner, in order to know the availability of benefits, markers and the rules of the program.

3. Enforcement of competition law

3.1. Actions against anticompetitive practices, including agreements and abuse of dominant position

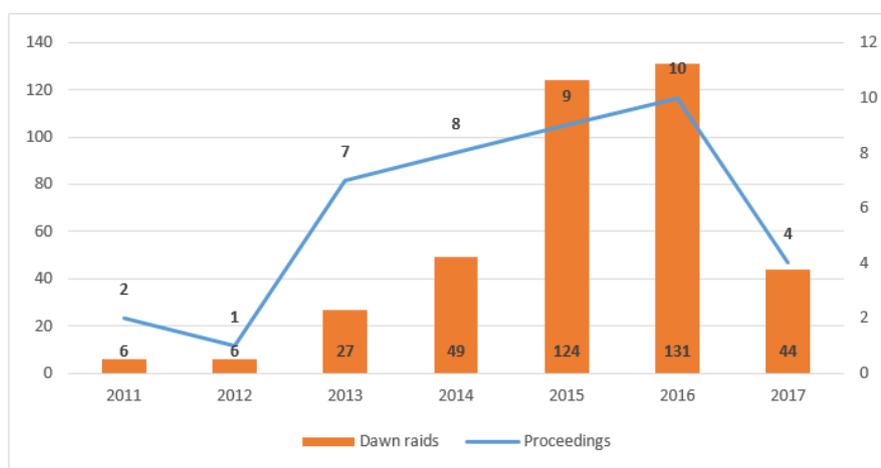
3.1.1. Summary of activities by the Competition Authority

Dawn raids

5. Article 15 of the Peruvian Competition Act entitles the Technical Secretary to carry out inspections, with or without previous notification, in an individual's domicile or a company's premises. Copies of physical files, magnetic or electronic, as well as of any other document, pictures or videos deemed relevant could be seized.

6. 375 dawn raids have been performed by Indecopi in the past five years regarding competition matters, as shown below. The number of dawn raids has been increasing. In 2012 six dawn raids were performed, then 27 in 2013, and 49 in 2014. In 2015 and 2016 the number of dawn raids nearly doubled.

Figure 1. Dawn raids [2011 – 2017]



Source: Technical Secretariat – Commission for the Defense of Free Competition (INDECOPÍ).

7. In 2017, the competition authority performed 44 dawn raids. In contrast to 2015-2016, the Technical Secretariat performed dawn raids on markets with a reduced number

of economic agents but with great importance for consumers. For example, sectors like construction, supermarket sales of food, fuel, among others.

3.1.2. Description of significant cases

Decided cases

8. The activities of the Commission for the Defense of Free Competition can be measured according to different criteria such as the number of cases decided and the importance of the assessed markets, among others. For example, in 2017, Indecopi imposed fines for anticompetitive infringements for more than US\$ 46 million, which represents a tenfold increase over the previous year (2016), thus reinforcing the deterrence of anticompetitive conducts.

9. Regarding the cases of anti-competitive behavior decided by the Commission in 2017, the following can be highlighted:

Toilet paper cartel:

10. This cartel involved the two largest producers of toilet paper and other products made by tissue paper in Peru, which accounted for the 88% of the market. It is the longest-running cartel (10 years) detected and sanctioned by Indecopi since its creation. The overprices imposed by the cartel on its customers (distributors, wholesalers and supermarkets) amounted, in some cases, to more than 20%.

11. The investigation revealed that the agreements to increase prices were reached through meetings in hotel rooms or cafés between the general managers and other executives of both companies, including subsequent telephone contacts. The infringement was proven through electronic mails and records, hotel meeting bills, an agenda from the secretary of one of the former general managers containing phone calls and meeting records, testimonials, and statistical evidence about price movements in the market.

12. The fines for the companies and their executives amounted to approximately USD 16 million, after discounting the benefits granted to those who collaborated via the leniency program. However, not only fines were imposed to those who were responsible, a 5-year Compliance Program was also imposed to the companies as a corrective measure, which includes an annual training for executives, the identification of potential breaches of compliance with competition rules, the adoption of measures to avoid such risks, the approval of codes of conduct and the hiring of an external and independent Compliance Officer for each company.

13. Indecopi's decision was consented by the sanctioned companies and by 11 of their 14 executives. However, this decision was appealed by three of the sanctioned executives. As a result, the case was revised by the Specialized Chamber in Defense of Competition of the Tribunal of Indecopi and later confirmed, with minor changes to the fines imposed to the appellees.

14. This is the first cartel detected and sanctioned under our leniency program, which would have been difficult to detect through conventional methods such as screening or dawn raids, due to the following reasons: the increases were not simultaneous but with lags of more than one month, one of the toilet paper brands of a company was not subject to cartelization and the agreements were carried with a high degree of confidentiality.

15. The ruling of the case also served for the diffusion of the leniency program and to demonstrate its usefulness in the prosecution of cartels. Even though the media campaign undertaken by Indecopi achieved the expected results, some of the congressmen who became aware of the program described it as excessively benevolent. Indecopi, together with local experts in the antitrust field, have opposed any bill that could affect the leniency program and has publicly defended its utility in the detection and prosecution of cartels.

Liquefied Petroleum Gas case (LPG):

16. The cartel was formed by the 3 main manufacturers of LPG cylinders, which represented approximately 73% of the market. LPG cylinders are used mainly in homes as fuel for cooking. In 2011, 78% of homes nationwide used the LPG cylinder as an energy source, with a monthly consumption of 6.3 million cylinders of 10kg. In other words, on average Peruvian households consumed around 1 cylinder per month.

17. The cartel, which lasted from 2008 to 2011, imposed on its distributors increases between USD 0.07 to USD 0.61 per cylinder of 10 kilograms (main product concerned), increases that were later translated to the consumers in the products' final prices. The agreement also included maintaining the prices charged to the distributors after the Government decreed a reduction of 1% (from 19% to 18%) in all the sales affected by the VAT. The objective of the colluded companies was to avoid the transfer of the tax reduction to their clients and continue charging the same price.

18. The sanctioned cartel operated secretly through coordinations mainly between Directors, General Managers and Commercial Managers. The cartel was discovered thanks to the monitoring of the market carried out by the Technical Secretariat and the information obtained allowed the authority to conduct dawn raids in the premises of the investigated companies.

19. The three companies and seven of their executives were sanctioned with fines amounted to USD 22 million. This is the case with the highest fines imposed up to date by Indecopi and, in addition, it is the first case where an executive was sanctioned with the maximum fine allowed by law, which is USD 127,000.

20. As in the toilet paper case, Indecopi ordered as a corrective measure the implementation of compliance programs for a period of 3 years, with the purpose of preventing these illegal acts to happen again. The execution of the compliance program must be reported to Indecopi.

21. Given that the decision of the first instance of Indecopi was appealed, the case is currently under revision of the Specialized Chamber in Defense of Competition of the Tribunal of Indecopi.

The cartels of LPG for vehicle use in Chimbote and Chiclayo:

22. These cartels, different from each other due to the companies and the geographical areas concerned, were active at the time the Technical Secretariat conducted dawn raids, so these actions put an end to the illegal conducts.

23. The first cartel, comprised of 16 companies, developed in the northern city of Chimbote and operated between 2012 and 2014 through coordinations carried out between filling stations or through the association that grouped them. The association acted as a facilitator of the anticompetitive conducts by fulfilling the following roles: it

convened meetings for anti-competitive purposes, supervised the agreements adopted at the meetings and set up committees that could communicate the agreements to the interested parties. The cartel imposed on its customers (mainly taxi drivers) an average overprice of 15,03% for each liter of LPG. The agreement impacted negatively on the cost of the taxi passenger transport service and, therefore, on the users of this means of transport. Consequently, the companies were sanctioned with fines amounted to USD 3.6 million.

24. The second cartel, similar to the one in Chimbote but comprising 14 companies, took place in the northern city of Chiclayo and developed between 2009 and 2014 through coordinations between officials or employees of the investigated companies. The cartel imposed an average overprice of 9.70% for each liter of LPG on its customers, hence increasing the cost of the taxi passenger transport service in the aforementioned city. The companies were sanctioned with fines up to USD 3 million.

25. In both cases, the companies appealed the decisions of the Commission for the Defense of Free Competition and are currently being revised by Indecopi's second administrative instance.

26. The outcome of these cases showed the competition authority's will to supervise markets not only in the country's capital (Lima) but also in the regions, for the benefit of local consumers.

4. Resources of the competition authority

4.1. Resources overall

4.1.1. Annual budget

27. The following table presents the total budget of the Commission and its Technical Secretariat. It also shows the total budget of the Specialized Chamber in Defense of Competition of the Tribunal of Indecopi, in charge of revising the appeals to the decisions issued by the Commission and the Technical Secretariat. It is worth to mention that such Chamber is also in charge of the revision of appeals on unfair competition, unfair and deceitful advertisement and antidumping proceedings.

28. Finally, this table also includes the budget of the Economic Studies Department, though only a part of its resources are actually focused on market assessment activities and activities related to competition issues. The Economic Studies Department supports other areas of Indecopi.

Table 1. Annual budget of branches of Indecopi related to competition activities

2015-2017			
Branches	2015	2016	2017
Commission and Technical Secretariat	3 207 991.31 PEN 943 526.85 USD	2 527 269 PEN 749 931.45 USD	3 284 639 PEN 1 012 215.41 USD
Specialized Chamber in Defense of Competition	3 111 573.42 PEN 915 168.65 USD	2 774 818 PEN 823 388.13 USD	2 733 249 PEN 842 295.53 USD
Economic Studies Department	1 596 719.80 PEN 469 623.47 USD	1 574 852 PEN 556 335.91 USD	1 922 423 PEN 592 426.19 USD
Indecopi Total	7 916 284.53 PEN 2 328 318.97 USD	6 876 939 PEN 2 129 655.49 USD	7 940 311 PEN 2 446 937.13 USD

Note: PEN = Peruvian Nuevos Soles (local currency). 1 PEN = 0.324 USD.

Source: INDECOPI.

4.1.2. Number of employees (person-years)

29. The following table includes information of employees from the Commission, the Technical Secretariat, the Economic Studies Department, and the Specialized Chamber in Defense of Competition of the Tribunal. It also includes personnel that work part-time for the authority, such as Commissioners and Members of the Tribunal (Competition branch).

Table 2. Employees of Indecopi working on competition activities

2015-2017			
Employees	2015	2016	2017
Economists	24	21	24
Lawyers	23	27	31
Support staff	4	4	3
Indecopi Total	51	52	58

Source: INDECOPI.

4.2. Human resources

30. Considering that in Peru, no merger control regulations have been enacted (except for the electricity sector), human resources data here presented are not differentiated by the type of enforcement (*ex ante* or *ex post*).

Table 3. Employees of Indecopi related to competition activities

2015-2017			
Employees	2015	2016	2016
Enforcement and Advocacy	46	47	53
Market assessment	5	5	5
Indecopi Total	51	52	58

Source: INDECOPI.

5. Merger control and studies on competition policy issues

5.1. Merger Control

31. In 2017, Indecopi received 3 pre-merger notifications in the electricity sector, which is the only sector that is subject to merger control in Peru. At the end of 2017, one of these 3 requests were resolved. The merger, involving agents that perform the activities of generation and transmission of electric power in Peru, was approved by Indecopi without conditions after determining that it did not affect competition in the analyzed markets.

5.2. Competition Advocacy

32. The promotion of more competitive markets is one of the main tasks on Indecopi's agenda. In exercise of its powers of competition advocacy, INDECOPI recommended to the Provincial Municipality of Urubamba that, in order to promote competition, it should call for a tender to choose a new operator for the tourist transport service on the route that leads to the Inka Citadel of Machupicchu, Peru's main tourist attraction, due to the fact that there is a strong evidence that show that the current route operator's contract might not be valid. For purposes of the tender, Indecopi considered that transparent rules should be established, and that competition should be promoted among bidders. For example, none of the participants could have any kind of relationships with public officials from the contracting authority, as was the case in the past.

5.3. Opinions on Congress Bills

33. As part of its efforts to promote competition, the Technical Secretariat issued 13 reports in 2017, individually or in collaboration with other areas of Indecopi, regarding several legislative proposals that could affect -positively or negatively- the competitive development of various sectors of the Peruvian economy.

34. In particular, the Technical Secretariat has raised its concerns regarding several bills aimed at reforming the Peruvian Competition Act. For example, through Technical Report 058-2017/ST-CLC-INDECOPI, the Technical Secretariat disagreed with Congress Bill 1579/2016-CR, which proposed to eliminate the possibility of granting full leniency to a first applicant, allowing only a reduction of fine up to 80%. On this regard, the Technical Secretariat stressed the importance of the Leniency Program in the detection of cartels and the motivations that full leniency bring to the dismantle of an anticompetitive agreement by incentivizing cartelists to be the firsts to go before the Competition Agency and reveal an illegal conduct. Moreover, it was explained that full leniency is recommended by the OECD as a fundamental tool in the fight against the cartels and that it is a common practice adopted by many competition agencies in Latin America and other regions.

5.4. Competition condition reports in port services

35. The Peruvian Government has granted a concession to APM Terminals Callao S.A. (APM) for the operation of the Multi-Purpose Terminal located at the Port Terminal of Callao. It also has granted a concession to Concesionaria Puerto Amazonas S.A. (Copam) for the operation of the Port Terminal of Yurimaguas-Nueva Reforma.

36. The classification of the port services, provided by the concessionaire, are established in the Concession Agreement. The classification is made according to the nature of the services in two groups of services: (a) *standard services* which are basic services to be provided to the ship and cargo and (b) *special services* which are additional services to be provided to the ship and cargo. Potentially, rates for these services can be subject to regulation.

37. The Concession Agreement provides that, prior to the provision of a new service, the concessionaire is required to obtain the opinion of Indecopi about the competitive conditions for the provision of that specific service. If Indecopi determines that the evaluated service would be provided under competitive conditions, the concessionaire could provide the service with no restriction on prices established. By contrast, if Indecopi determines that the evaluated service would not be provided under competitive conditions, the concessionaire would only provide such service subject to the regulated prices established by Ositran (the transport infrastructure regulator).

38. In 2017, within the framework of the Concession Agreement between APM Terminals Callao S.A. and the Peruvian State, the Commission assessed the conditions of competition for the port service called "breakage of seal and/or container opening without cargo handling". The Commission determined that such service could be provided under conditions of competition.