

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE****Annual Report on Competition Policy Developments in Peru****-- 2019 --****10-12 June 2019**

This report is submitted by Peru to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 10-12 June 2020.

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Peru

Executive Summary

1. 2019 was a particularly important year for the defense and promotion of competition, due to the issuing of guidelines aimed at deterring cartel formation, the enactment of the Pre-Merger Control Act and the establishing of the OECD Regional Centre for Competition in Latin America in Lima.
2. Indeed, after several years of debate, a Pre-Merger Review Act was finally enacted by means of the Emergency Decree 13-2019 on November 2019. Before 2019, Indecopi had powers to assess the impact of mergers only in the electricity sector (according to the Pre-Merger Control for the Electricity Sector Act of 1997). The entry into force of the new Pre-Merger Control Act (by March 2021) will repeal the special provisions for the electricity sector.
3. Also, Indecopi was chosen by the Organization for Economic Cooperation and Development (OECD) as one of the only three countries in the World that runs a Regional Competition Center (RCC). Since 2019, OECD and Indecopi are offering training to officials from the Latin American competition authorities in order to enhance the application of competition policies and the promotion of a competition culture.

1. Changes to Competition Law

1.1. Summary of new legal provisions of competition law

4. On November 19, 2019, the Pre-Merger Control Act was approved by means of Emergency Decree 013-2019. An Emergency Decree is an exceptional statute issued by the Executive Power. It has the same authority as an Act from the Congress.
5. The Pre-Merger Control Act establishes the mandatory notification of mergers that cross the following thresholds:
 - The combine gross sales of the companies involved in the merger, in the year previous to the notification, is equal to or greater than USD 150 million, approximately.
 - The gross sales of at least two companies involved in the merger, in the year previous to the notification, is equal to or greater than USD 23 million, approximately.
6. According to the Pre-Merger Control Act, the notification of mergers that have effects in Peru for prior authorization of Indecopi is mandatory, subject to the aforementioned thresholds. Companies that carry out the merger without prior notification or without waiting for Indecopi's decision, can be subject to fines up to 12% of the gross income of the involved companies in the previous year.
7. The Emergency Decree will come into effect on March 1st, 2021. After 5 years, the Congress will assess the Pre-merger control and evaluate its continuity.

2. Soft Law

2.1. Guide to Fight Collusion in Public Procurement

8. The Guide to Fight Collusion in Public Procurement¹ issued by the Competition Commission was presented by Indecopi with the participation of the National Public Procurement Supervisory Agency (OSCE), and “Peru Compras”, a public body that runs a digital platform that facilitates acquisition of frequent and strategic goods and services by public entities. The aforementioned document is mainly addressed to the officials who participate in public procurement processes with a double objective: to help them to design competitive and efficient procurement processes within the current legal framework, and to provide them with tools to detect possible indications of anti-competitive conduct within public bids.

9. As part of the dissemination activities of the Guidelines by Indecopi, more than 400 officials in charge of the design and management of public procurement processes nationwide were trained to identify possible anticompetitive behavior during the development of said processes.

2.2. Guidelines on Trade Associations and Competition

10. The Guidelines on Trade Associations and Competition² were issued by the Competition Commission aiming at providing recommendations so that business associations -trade associations, federations, chambers, professional associations, etc.- and their members can detect and minimize the risks of incurring anticompetitive practices, in particular, business cartels.

2.3. Antitrust Rewards Program Guidelines

11. In December 2019, the Competition Commission approved its Antitrust Rewards Program Guidelines³, establishing the framework (rules, requirements and procedure) to grant rewards to whistleblowers, informants that would provide decisive information to detect and prosecute cartels.

12. The Guidelines establish criteria, deadlines, proceedings and conditions that will allow the Technical Secretariat of the Competition Commission to grant rewards to individuals who provide decisive information for the investigations, prosecution and sanction cartels; as long as they comply with the requirements laid down in the regulation. In this way, the Guidelines seek to increase the probability of detecting these illegal practices and also to deter individuals and companies from participating in these violations.

¹ See the Guide to Fight Collusion in Public Procurement. Available at the following link: [https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas+\(versi%C3%B3n+en+Ingl%C3%A9s\)/](https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas+(versi%C3%B3n+en+Ingl%C3%A9s)/)

² See the Guidelines on Trade Associations and Competition. Available at the following link: <https://www.indecopi.gob.pe/documents/1902049/3761587/Guidelines+on+Trade+Associations+and+Competition.pdf/682f9c46-6950-7301-cc62-20d2a8600dad>

³ See the Antitrust Rewards Guidelines. Available at the following link: <https://www.indecopi.gob.pe/documents/51771/4402954/Peruvian+Antitrust+Rewards+Guidelines/>

13. The Technical Secretariat's power to grant financial rewards to informants is recognized by section 28 of the Peruvian Competition Act. Among the main criteria and conditions established in the Antitrust Rewards Program Guidelines are the following:

- Rewards can only be claimed for information related to cartels, which are the most serious and difficult-to-detect violations in the Peruvian Competition Act.
- Rewards could reach around 130,000 USD when collaboration is especially valuable, and the whistleblower has incurred in significant costs.
- Partial payments can be made while the investigation and the sanctioning proceedings are being developed.
- Indecopi will ensure that the identity of the whistleblower and his collaborative activities are kept confidential, in order to avoid retaliation.
- Certain individuals are not eligible to apply for rewards for their collaboration. These include persons who planned, conducted or facilitated the cartel, lawyers and compliance officers of the investigated companies, as well as Indecopi's officials and other public servants regarding information obtained in the exercise of an official duty.

2.4. Guidelines on Antitrust Compliance Programs (Draft)

14. In September 2019, Indecopi released for public discussion the Draft of the Guidelines on Antitrust Compliance Programs⁴, an instrument aimed at encouraging companies to voluntarily adopt compliance programs, by providing a reference framework to do so. The Guidelines identify the main components of an antitrust compliance program, taking into account characteristics as the size of the company. Also, the document provides guidance to the Competition Commission when imposing compliance programs as injunctions to infringing companies.

3. Enforcement of Competition Law

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

3.1.1. Description of significant cases

Cases decided by the first administrative instance

PET preforms case:

15. The Competition Commission decided the cartel case started against 2 companies for an anticompetitive agreement in the form of distribution of customers in the 'spot' segment of the PET preforms market from 2008 to 2016, nationwide.

16. This case concluded with the approval of a 'cessation commitment', an early termination mechanism that concludes the proceedings for the prosecuted companies in

⁴ See the Draft of the Guidelines on Antitrust Compliance Programs. Available at the following link: <https://www.indecopi.gob.pe/documents/51771/2962929/Guidelines+on+Antitrust+Compliance+Programs/c61aa6ae-645c-17a1-5483-db1d99090f0c?version=1.1>

exchange of implementing measures to counteract the effects of anti-competitive conduct. This form of early termination is similarly used in other countries in the enforcement of their competition statutes such as the United States of America (plea agreements), the United Kingdom, Spain, Brazil and Mexico, among others. It is worth mentioning that, as part of their commitments, the parties assumed the obligation to pay around USD 3.8 million and to adopt antitrust compliance programs overseen by Indecopi.

Cases decided cases by the appeals administrative instance

17. During 2019, the Tribunal of Indecopi has decided 6 appeals on antitrust cases, including cartels in the LPG (liquified petroleum gas) for domestic use in the city of Lima and nationwide, and the vehicular LPG commercialization for vehicle use in the cities of Chiclayo and Chimbote markets.

LPG for domestic use in the city of Lima and nationwide

18. In August 2019, the Tribunal upheld the Competition Commission's decision to fine the three main companies in the LPG for domestic wholesale distribution market for their engagement in a horizontal collusive practice (cartel).

19. Earlier, the Commission determined the existence of an agreement to increase the prices of LPG for domestic use in 10kg cylinders, in the wholesale market, in the cities of Lima and Callao during 2008. Similarly, concerted prices were also verified at the national level, during 2009, for 45kg cylinders and between 2009 and 2011, for 10kg cylinders.

20. The Tribunal's decision, upholding the ruling of the Commission took was based on the joint analysis of daily prices series by each company and in-house e-mails by the officials of the companies involved. These pieces of evidence demonstrated the coordinated behavior of the companies aimed at increasing or keeping their prices high, affecting final prices paid by consumers.

21. The case included fines not only against the companies involved but also against several executives who participated in the planning and executing of the anticompetitive agreement.

22. A total fine of USD 14.9 million dollars was imposed and the Tribunal also upheld the corrective measures consisting on the implementation of compliance programs for a period of 3 years to prevent future illegal conducts.

LPG for vehicle use provided by service stations in the city of Chiclayo

23. In September 2019, the Tribunal upheld the Competition Commission's decision to fine thirteen (13) companies running service stations for taking part of a cartel that increased the prices of LPG for vehicle use during various periods between December 2009 to June 2014, in the city of Chiclayo.

24. The Tribunal based its decision on the joint analysis of daily prices series by each company and in-house e-mails by the officials of the companies involved. These pieces of evidence demonstrated the coordinated behavior of the companies to establish their prices jointly.

25. Finally, the Tribunal confirmed fines for the companies of around to USD 2 million and upheld the injunction imposed by the Commission mandating the companies to implement compliance programs.

LPG for vehicle use provided by service stations in the city of Chimbote

26. In December 2019, the Tribunal upheld the Competition Commission's decision to fine fifteen (15) companies running service stations for taking part of a cartel that increased the prices of LPG for vehicle use during various periods between June 2012 to February 2014, in the city of Chimbote. In this case, the companies were members of an association that acted as a facilitator of the anticompetitive conducts by convening meetings among competitors, supervising the agreements adopted and establishing committees to disseminate the agreements among them.

27. The Tribunal based its decision on the joint analysis of evidence such as daily prices series by each company, in-house e-mails by the officials of the companies involved and e-mails sent through their business association. The evidence demonstrated that the companies established and modified their prices in a coordinated manner.

28. The Tribunal sanctioned the companies with a total fine of around USD 2.6 million and upheld the injunction imposed by the Commission mandating the companies to implement compliance programs for a period of three (3) years.

4. Resources of the Competition Authority

4.1. Resources overall

4.1.1. Annual budget

29. The following table presents the total budget of the Competition Commission and its Technical Secretariat. It also shows the total budget of the branch of the Tribunal of Indecopi in charge of reviewing appeals against decisions of the Competition Commission and the Technical Secretariat, though it is worth mentioning that such branch of the Tribunal also analyzes appeals against decisions on unfair competition, advertisement and antidumping proceedings.

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

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

[2017 – 2019]			
Branches	2017	2018	2019
Commission and Technical Secretariat	3 284 639 PEN 1 012 215.41 USD	3 374 901 PEN 1 001 454.30 USD	4 203 749.82 PEN 1 266 189.70 USD
Tribunal (Competition branch)	2 733 249 PEN 842 295.53 USD	3 332 442 PEN 988 855.19 USD	3 680 335.17 PEN 1 108 534.69 USD
Economic Studies Management	1 922 423 PEN 592 426.19 USD	2 141 131 PEN 635 350.44 USD	1 819 168.28 PEN 547 942.25 USD
Indecopi Total	7 940 311 PEN 2 446 937.13 USD	8 848 474 PEN 2 625 659.94 USD	9 703 253.27 PEN 2 922 666.65 USD

Note: PEN = Peruvian Nuevos Soles (local currency)

Source: INDECOPI

4.1.2. Number of employees (person-years)

31. The following table includes information of employees from the Commission, the Technical Secretariat, the Economic Studies Department, and the Tribunal of Indecopi (Competition branch). 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

Employees	2019
Economists	20
Lawyers	24
Support staff	5
Indecopi Total	49

Source: INDECOPI

4.2. Human resources

32. Considering that the Pre-Merger Control Act in Peru has just been recently enacted and so the merger branch is currently under development, human resources data here presented does not differentiate by the type of enforcement (*ex ante* or *ex post*).

Table 3. Employees of Indecopi related to competition activities

Employees	2019
Enforcement and Advocacy	44
Market assessment	5
Indecopi Total	49

Source: INDECOPI

5. Other Alternatives

5.1. Competition Advocacy

33. In December 2019, the Competition Commission approved the “Report on the convenience of denouncing the Convention on a Code of Conduct for Liner Conferences (1974)”. The Convention was discussed under UNCTAD and approved with the goal of promoting the development of national flag lines and countering the power of conferences in relation to shippers and potential competitors. Though it cannot be asserted that the Convention expressly establishes, promotes or obliges Peru to recognize an immunity of shipping conferences against the Competition Act, it has created confusion and indetermination among shipping companies and users regarding their rights and obligations. Accordingly, the Report concludes that it is necessary to recommend to State to initiate the applicable procedure for Peru to formalize the denouncing of the Convention on a Code of Conduct for Liner Conferences (1974).

34. These recommendations have been formally notified to the Ministry of Foreign Affairs, the Ministry of International Trade and Tourism and the Ministry of Transport and Communications. In compliance with the Competition Act, these public bodies have a 90

business days term to answer the Advocacy report, explaining their opinion and the actions they would carry out accordingly.

5.2. The OECD Regional Centre for Competition in Latin America

35. Indecopi was proudly trusted by OECD to be its regional center for capacity building on antitrust matters in Latin America. The OECD Regional Centre for Competition in Latin America (RCC) is a joint venture between Indecopi and the OECD. The Centre expands the OECD's work on competition in Latin America through capacity-building and specific training to competition officials from the region. Two other competition centers also serve officials in Asia and Eastern Europe. The RCC based in Lima provides capacity building assistance and policy advice through workshops, seminars and training programs on Competition Law and Policy for officials in competition agencies, sector regulators, and other governmental bodies. It also works to connect different competition agencies and jurisdictions, promoting regional co-operation and enhancing their understanding of the importance of developing a sound competition policies.