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**COMPETITION COMMITTEE**

## Annual Report on Competition Policy Developments in Peru

-- 2020 --

This report is submitted by Peru to the Competition Committee FOR INFORMATION.

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## *Peru*

### Executive Summary

1. The health crisis derived from the COVID-19 pandemic and its impact on health and the Peruvian economy during 2020 have caused this year to be one of the most challenging for Indecopi as a competition agency, not only because they have required the Technical Secretariat of the Commission for the Defense of Free Competition and the Commission for the Defense of Free Competition to virtualize their activities to continue with the timely processing of investigations and proceedings. Due to this challenging context, the Commission has focused its activities on the health sector and other markets that were heavily impacted by the Covid-19 pandemic. For example, by developing an investigation in the medicinal oxygen market, the issuance of Informational Guidelines about anticompetitive agreements among companies in labor markets, among others, this initiatives aimed at counteracting the harmful effects of the pandemic in Peruvian markets for the consumer's welfare, especially the most vulnerable.
2. The 2020 has been a particularly important year for the defense and promotion of competition, due to the issuing of guidelines aimed at promoting and preserving competition, the enactment of the Premerger Review System Act and the continuous cartel enforcement activities.
3. In addition, Indecopi has continued to perform its activities as the Regional Competition Center (RCC). Since its designation by the OECD in 2019, Indecopi has continued to offer 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

#### *1.1.1. Law amending the Criminal Code and the Consumer Protection and Defense Code, with respect to hoarding, speculation and adulteration*

4. On August 29<sup>th</sup> 2020, the Peruvian Congress enacted the Law 31040 that modifies the Criminal Code and the Consumer Protection and Defense Code in the regulations applicable to anti-competitive behavior, hoarding, speculation and price adulteration of products.
5. The Law criminalizes the abuse of economic power, establishing that whoever abuses his dominant position in the market, or whoever participates in restrictive practices and agreements in the productive, commercial or service activity with the purpose of preventing, restricting or distorting free competition, will be punished with prison of not less than two nor more than six years, with one hundred eighty to three hundred sixty-five days-fine and disqualification. Regarding this Law, Indecopi is particularly concerned about some of its aspects that could affect the effectiveness of the competition regulation, such as the lack of extension of the leniency benefits in criminal proceedings to those who collaborate with the investigation of anticompetitive conducts.

### ***1.1.2. Premerger Review System Act***

6. On January 7<sup>th</sup> 2021, Law No. 31112, the Premerger Review System Act, was published in the State's Official Gazette "El Peruano", which establishes the prior control of merger operations in order to promote effective competition and economic efficiency in the markets for the welfare of consumers.
7. The Premerger Review System Act establishes the mandatory notification of mergers that cross the following thresholds:
  - a. The total sum of the value of sales or annual gross income or value of assets in the country of the companies involved in the merger has reached, during the year prior to that in which the operation is notified, a value equal to or greater than USD 150 million, approximately.
  - b. The value of sales or annual gross income or value of assets in the country of at least two of the companies involved in the merger have reached, during the year prior to that in which the operation is notified, a value equal to or greater than USD 23 million, approximately.
8. According to the Premerger Review System Act, the notification of mergers that have effects in Peru for prior authorization of Indecopi is mandatory, subject to the aforementioned thresholds. In addition, the Premerger Review System Act granted the Technical Secretariat of the Commission for the Defense of Free Competition the power to act ex officio in cases where there are reasonable indications to consider that the operation may generate a dominant position or affect effective competition in the relevant market.

## **2. Soft Law**

### **2.1. Guidelines on Competition Compliance Programs:**

9. On March 27<sup>th</sup> 2020, the Commission for the Defense of Free Competition approved the "Guidelines on Competition Compliance Programs"<sup>1</sup>, with the purpose of guiding companies on the most important elements to be taken into account when preparing their own compliance programs. In this line, the objective of these Guidelines is to promote an organizational culture of respect for competition and reduce the risk of companies engaging in anti-competitive behavior.
10. As is known, Compliance Programs are a set of internal measures that companies voluntarily adopt in order to prevent and minimize the risk of violating the law and their ethical commitments, derived from their own economic activities. Thus, these programs play a key role within an organization, as they aim to prevent the occurrence of infringements, detect and report in a timely manner the risks of non-compliance, avoid sanctions, improve their reputational image, among other benefits. Finally, it is important to note that the Guidelines provide the possibility for the competition authority to consider as a mitigating factor of the fine the fact that an infringing company has developed an effective compliance program prior to the occurrence of the infringement.

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<sup>1</sup> This document is Available in the following link: <https://bit.ly/2MdDfqO>

## 2.2. Dawn Raids Guidelines

11. On May 7<sup>th</sup> 2020, the Commission for the Defense of Free Competition approved its “Dawn Raids Guidelines”<sup>2</sup> which limits the scope of these investigation actions that allow the detection of anticompetitive conducts. As it is known, the Technical Secretariat of the Commission for the Defense of Free Competition is the authority in charge of investigating and detecting possible anticompetitive practices, for which the Competition Act confers it a series of investigative powers. Among these powers is the possibility of performing dawn raids to the premises of the companies under investigation, through which the inspectors may examine the documentation they find, as well as copy the books, physical or electronic files, that they consider adequate and request explanations of the employees of these companies.

12. National and international experience show that these raids are effective tools for detecting anticompetitive practices, especially cartels, since their immediate and surprise nature allows inspectors to have access to different evidence of such infractions.

13. Thus, the Guidelines describe the parameters for initiating these raids, the powers of the inspectors, and the rights and obligations of the companies or individuals involved in these investigations, as well as the end of the raid and the treatment to be given to the information obtained by the authority, among others. This seeks to ensure a balance between the rights of the inspected people and the effectiveness of the investigations of the Technical Secretariat, aimed at protecting competition in the markets, for the welfare of consumers.

## 2.3. Guidelines about anticompetitive agreements among companies in labor markets

14. On May 28<sup>th</sup>, 2020 the Commission for the Defense of Free Competition approved the "Guidelines about anticompetitive agreements among companies in labor markets"<sup>3</sup>, which aims to inform companies, employers and human resources areas on the importance of respecting competition in labor markets and to avoid the adoption of agreements regarding hiring or salary policies that could infringe the rules that protect competition.

15. To this end, and in line with the guidelines and experience of international authorities, these Guidelines describe the particularities of competition in labor markets, noting that, just as companies compete to offer goods or services to consumers in general, they also compete to hire or maintain employees. Under these premises, and without disregarding the limits or particularities derived from labor law, the Guidelines reaffirm that companies must also observe the rules contained in competition laws in the labor field. This is because competition generates multiple benefits for employees, such as allowing them to enjoy more and better job opportunities and working conditions. In fact, competition in the labor market can even motivate employees to perform their work in the best possible way, benefiting consumers, who could have access to better services, as well as companies, which would see a strengthened reputation and participation in the market.

16. The Guidelines contain a series of international examples and cases related to certain anticompetitive agreements that substantially restrict competition in the labor market, either through agreements between companies to avoid hiring employees or

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<sup>2</sup> This document is available in the following link: <https://bit.ly/3hRudhc>

<sup>3</sup> This document is Available in the following link: <https://bit.ly/3duAuww>

through the implementation of agreements to fix salaries or other employment benefits for their employees.

## 2.4. Medicinal Oxygen Market Report

17. On October 2020, in the context of the Covid-19 pandemic, as a result of the monitoring work that the Technical Secretariat carries out in all markets, a report<sup>4</sup> was prepared on the medicinal oxygen market containing recommendations addressed to the State entities to improve the conditions of competition in the market, in order to improve the supply of the product at the national level.

18. The report contains an analysis of the purchases of medicinal oxygen made by public entities, taking into account alternatives for the efficient use of public resources. An analysis was also made of the barriers to entry that companies face in obtaining the necessary authorization to enter in the market medicinal oxygen.

19. In particular, due to the shortage generated by the high level of demand, in order to avoid the shortage observed, the report recommends the articulation of public purchases of oxygen based on the pre-estimation of demand per hospital, which will allow public institutions to obtain better prices per m<sup>3</sup> of medicinal oxygen, by purchasing large quantities of the product. As an example, it can be observed that of all of the the public bids made between January 2018 and September 2020, the average price awarded per m<sup>3</sup> for processes requiring quantities of between 0 and 50 thousand m<sup>3</sup> was USD 2.53, while the average price awarded in processes requiring quantities of over 100 thousand m<sup>3</sup> was USD 0.65.

20. Likewise, the report recommends modifying the lower purity limit of 99% required in the Single National Essential Drug Formulary (PNUME), since the current limit could constitute a barrier to the entry of new agents into the market, which in general can safely produce medicinal oxygen with 93% purity. This recommendation was accepted by the Ministry of Health through the Ministerial Resolution 918-2020-MINSA in November 5<sup>th</sup>, 2020.

21. On the other hand, in order to increase the level of competition in the market, it was recommended that the entities in charge of granting authorizations for the transportation and commercialization of medicinal oxygen continue to make the efforts to speed up the necessary procedures to allow companies to import oxygen from other countries. As an example, the possibility of improving access to information on the requirements for importing this medicine for companies that do not currently participate in the market could be evaluated.

## 3. Enforcement of Competition Law

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

22. The Commission for the Defense of Free Competition has been an active competition authority during the Covid-19 pandemic. The Technical Secretariat has not only virtualized its activities to continue with the timely processing of investigations and procedures. In addition, it has focused its activities in health markets and other sectors that were heavily impacted by the Covid-19 pandemic, for example, through the issuance of a

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<sup>4</sup> This document is available in the following link: <https://bit.ly/39QTAPc>.

report in the medicinal oxygen market, the issuance of informational guidelines about anticompetitive agreements among companies in labor markets, among others. During 2020, the Technical Secretariat has continued its investigation and prosecution activities. On the same line, the Commission has continued its duties regarding the start and resolution of several sanctioning proceedings.

23. In addition, in order to promote collaboration agreements between companies to face the health and economic crisis derived from the Covid-19, the Technical Secretariat issued a press note explaining that collaboration agreements to ensure the supply of products and face the emergency are licit according to the Competition Act, insofar as they allow ensuring a more efficient production, distribution and commercialization of medicines, sanitary products, food and other essential goods for the benefit of consumers. Likewise, in order to guide economic agents in their collaboration initiatives, the Technical Secretariat established a virtual channel for consultation on collaborating agreements available to the general public, which is still in force today.

### *3.1.1. Description of significant cases*

#### *Cases from the first administrative instance*

##### *Public printing services market case*

24. During 2020, the Technical Secretariat of the Commission for the Defense of Free Competition carried out the proceeding regarding the sanctioning administrative proceeding against Industria Gráfica Cimagraf S.A.C., Metrocolor S.A., Corporación Gráfica Navarrete S.A. S.A.C., Metrocolor S.A., Corporación Gráfica Navarrete S.A., Quad/Graphics Perú S.A., and the related companies Empresa Editora El Comercio S.A. and Amauta Impresiones Comerciales S.A.C. for an alleged agreement to share the market in the acquisition procurements of school textbook printing services made by the Ministry of Education.

25. The alleged market-sharing agreement for school textbook printing services supposedly took place between between 2009 and 2016, in which eleven officials and ex-officials of the aforementioned companies were also under investigation.

26. The value of the educational material involved in the alleged anticompetitive practice would have been close to 585 million soles (approximately USD 152 million), corresponding to various items of twenty-three (23) selection procedures of the Ministry of Education and one (1) of the National Institute of Statistics and Informatics, which were carried out between 2009 and 2016.

##### *Construction companies case*

27. On January 2020, the Technical Secretariat of the Commission for the Defense of Free Competition decided to initiate a sanctioning administrative proceeding against 35 construction companies and 28 of their executives because they allegedly agreed not to compete in the market and to share 112 bids, called by the Ministry of Transport and Communications and other State entities at the national level for the construction, rehabilitation and maintenance of highways. The aforementioned tenders had an average referential value of USD 30,987,191.46. In total, they had an estimation of up to USD 3 billion.

28. The evidence supporting this decision consists mainly in documents, statements, files and e-mails obtained during the investigation carried out by the Technical Secretariat,

as well as information related to the proposals, characteristics and results of the contracting procedures analyzed.

#### Commercial printing services market case

29. On May 2020, the Commission for the Defense of Free Competition decided the sanctioning proceeding initiated against Quad/Graphics Perú S.A. (Quad Graphics) and the related companies Amauta Impresiones Comerciales S.A.C. (Amauta) and Empresa Editora El Comercio S.A for being involved in an agreement to share customers in the commercial printing services market, nationwide from 2011 to 2016.

30. The market in which the anticompetitive practice took place is the commercial printing services market for private clients. This service is generally contracted by companies from different sectors (for example, department stores or supermarkets) that advertise their products and services through catalogs, magazines, brochures, leaflets, triptychs, diptychs, advertising flyers, among others.

31. The evidence that supported the Commission's decision consists mainly in e-mails, electronic files and statements of officers and former officers of the investigated companies, as well as the economic analysis of the series of sales of the investigated companies to customers in the market.

32. The anticompetitive agreement between Quad Graphics and Amauta-El Comercio, determined by the Commission, consisted of each of them maintaining a specific group of customers without the other competing with better offers for such customers.

33. In relation to Quad Graphics, after verifying compliance with the requirements established in the Act, the Commission approved the "settlement agreement" reached between the company and the Technical Secretariat. As part of that commitment, the company assumed the payment of an estimated corrective measure on the fine that would have corresponded to USD 3 million, approximately.

#### Turkey market case

34. On December 2020, the Technical Secretariat of the Commission for the Defense of Free Competition decided to initiate a sanctioning proceeding against the companies Cencosud Retail Perú S.A. (owner of Wong and Metro), Makro Supermayorista S.A. (Makro), Supermercados Peruanos S.A. (Plaza Veá and Vivanda), and Hipermercados Tottus S.A. (Tottus) for allegedly agreeing to fix prices in the sale of turkey nationwide. According to the analysis of the Technical Secretariat, there are reasonable indications that Cencosud, Makro, Supermercados Peruanos and Tottus would have fixed the selling price of the turkey of the San Fernando brand from 2009 to 2016; while Cencosud, Supermercados Peruanos and Tottus, would have incurred in the same anticompetitive practice in the commercialization of turkey of the Redondos brand, from 2010 to 2015.

35. According to the evidence obtained by the Technical Secretariat, consisting in e-mails and economic information, the alleged agreement would have been executed based on the establishment of a "minimum suggested retail price" by the suppliers San Fernando and Redondos, during the campaigns of the year-end holidays, during the aforementioned periods.

36. Cencosud, Makro, Supermercados Peruanos and Tottus would have agreed to eliminate competition among themselves, avoiding setting prices independently and below the "minimum suggested retail price" established by San Fernando. Under the same logic, Cencosud, Supermercados Peruanos and Tottus would have agreed not to compete with each other with prices below the "minimum suggested retail price" of Redondos.



37. To achieve this alleged anticompetitive practice, the competitors Cencosud, Makro, Supermercados Peruanos and Tottus, would have counted with the participation of San Fernando and Redondos, resorting to them through claims or complaints, when any of the competitors established a price below the "minimum suggested retail price". In this way, San Fernando and Redondos would have fulfilled the role of facilitators of the agreement, having taken actions to ensure that Cencosud, Makro, Supermercados Peruanos and Tottus, respected the "suggested minimum retail price".

## 3.2. Mergers and acquisitions

### 3.2.1. Summary of significant cases

#### *Acquisition of Luz del Sur S.A.A and Inland Energy by China Three Gorges Corporation*

38. On March 27<sup>th</sup> 2020, the Commission for the Defense of Free Competition decided to authorize under conditions the acquisition of Luz del Sur S.A.A. and Inland Energy S.A.C. by the economic group China Three Gorges Corporation (CTG). The conditions established by the Commission seek to guarantee competition among the electricity generation companies for the supply of regulated users and, therefore, to avoid that the tariffs of the public electricity service of such users increase in the future, as a result of a lower competition.

39. In this way, Luz del Sur will not be able to obtain energy from its related companies without a bidding process administered by the Energy and Mining Investment Supervisory Agency (Osinermin) in accordance with the Law 28832 or, alternatively, through a transparent and competitive bidding process, which must be previously reported to Indecopi.

#### *Interconexión Eléctrica Isa Perú S.A.*

40. On August 6<sup>th</sup> 2020, the Commission authorized the notification submitted by Interconexión Eléctrica Isa Perú S.A. (Isa Perú) for prior approval of certain corporate acquisitions. As part of the analysis, the Commission evaluated the possible risks to the transmission markets and the markets for the provision of telecommunications services, in which the economic group Interconexión Eléctrica S.A. ESP (Grupo ISA) to which Isa Perú belongs participates, analyzing the risks of possible horizontal and vertical restrictions.

41. In this way, the Commission considered that the concentration operation would have a low probability of generating both horizontal and vertical restrictions in the transmission and telecommunications services markets. It also concluded that the transaction would not give the Isa Group a preponderant influence in the decision making of the Assembly or the Transmitters Subcommittee of the Economic Operation Committee of the National Interconnected System (COES).

### 3.2.2. Cases from the second administrative instance

42. Indecopi's Tribunal for the Defense of Competition (hereon, the Tribunal) has resolved 4 appeals in competition matter during 2020, among which the sanctions to the collusive practices in the following markets stand out: Liquid fuels for vehicle use in the city of Chimbote and International shipping of rolling cargo.

*Liquid fuels case in Chimbote*

43. On October 2020, the Tribunal upheld the CLC decision to sanction twenty-one (21) companies for infringing article 1 and 11.1.a) of Legislative Decree 1034, the Peruvian Competition Law.

44. According to the Tribunal's decision, these companies engaged in a horizontal collusive practice to increase the sale prices of liquid fuels for vehicle use during various periods between May 2012 to October 2014, in the city of Chimbote. In this case, there was an association of gas stations in the City that acted as a coordinator of the anticompetitive conducts through convening meetings between competitors, supervising the agreements adopted and establishing committees to spread the agreements among different companies.

45. The Tribunal based its decision on the joint analysis of daily prices series by each company and intern e-mails from the companies involved, this evidence demonstrated the coordinated behaviour of the companies to establish their prices jointly.

46. As a result, the Tribunal sanctioned the twenty-one (21) companies with a global fine equivalent to US\$ 2.3 million dollars<sup>5</sup>; the case included sanctions to some companies' executives who participated in the anticompetitive conduct as well. Finally, The Tribunal also upheld as a corrective measure the implementation of Compliance Programs for the companies sanctioned.

*Roll on Roll off car shipping case*

47. On December 2020<sup>6</sup>, the Tribunal upheld the Competition Commission's (hereon, CLC) decision to sanction the three main companies<sup>7</sup> in market for maritime transport of vehicles destined for Peru, due to their engagement in horizontal agreements to distribute clients for the international shipping of rolling cargo. This cartel operated between 2001 and 2012, and affected importing companies' contracts, which even had contractual validity until 2015.

48. The Tribunal's decision was based on the collaboration of two companies that availed themselves of the Clemency Program, recognized the infringement and provided decisive evidence to prove the cartel and the participation of the other investigated companies.

49. As a result, a total fine of US\$ 7.0 million dollars<sup>8</sup> was imposed and the Tribunal also upheld as a corrective measure the implementation of compliance programs to prevent future illegal conducts.

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<sup>5</sup> Considering the Peruvian Soles (S/) to US Dollars (US\$) average exchange rate from the Central Bank of Peru in March 2021.

<sup>6</sup> Decision 171-2020/SDC-INDECOPI.

<sup>7</sup> Only three of six companies investigated in the first administrative instance has appealed to the Tribunal.

<sup>8</sup> Considering the Peruvian Soles (S/) to US Dollars (US\$) average exchange rate from the Central Bank of Peru in March 2021.

## 4. Resources of the Competition Authority

### 4.1. Resources overall

#### 4.1.1. Annual budget

50. 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.

51. 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	2018	2019	2020
Commission and Technical Secretariat	3 374 901 PEN 1 001 454.30 USD	4 203 749.82 PEN 1 266 189.70 USD	4,160,384 PEN 1,139,831.23 USD
Tribunal (Competition branch)	3 332 442 PEN 988 855.19 USD	3 680 335.17 PEN 1 108 534.69 USD	2,904,585 PEN 795,776.71 USD
Economic Studies Management	2 141 131 PEN 635 350.44 USD	1 819 168.28 PEN 547 942.25 USD	1,908,800 PEN 522,958.90 USD
Indecopi Total	8 848 474 PEN 2 625 659.94 USD	9 703 253.27 PEN 2 922 666.65 USD	8,973,769 PEN 2,2458,566.85 USD

Note: PEN = Peruvian Nuevos Soles (local currency)

Source: INDECOPI

#### 4.1.2. Number of employees (person-years)

52. The following information is applicable to the employees of the Commission for the Defense of Free Competition and the Technical Secretariat. It also includes personnel that work part-time for the authority, such as the four Commissioners of the Commission for the Defense of Free Competition. It does not include employees from the Tribunal or the Economic Studies Department.

53. Considering that the Pre-Merger Review System Act in Peru has just been recently enacted and so the merger branch is currently under development, the number of employees here presented may increase in the following months of 2021.

**Table 2. Employees of Indecopi working on competition activities**

Employees	2020
Economists	18
Lawyers	23
Support staff	2
Technical Secretariat and Commission's Total	43

Source: INDECOPI

**4.2. Human resources****Table 3. Employees of Indecopi related to competition activities**

Employees	2020
Enforcement and Advocacy	34
Merger review and enforcement	5
Advocacy efforts	2
Indecopi Total	41

Source: INDECOPI