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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Peru

-- 2021 --

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Peru

1. In Peru, and concerning antitrust matters, the year 2021 will be remembered for the entering into force of the Peruvian Pre-Merger Notification Act.
2. As expected, a certain level of uncertainty was shared by the main agents of the private sector (both law firms and companies) regarding how the Act was going to be enforced. Nevertheless, these doubts were countered by the issuance of the Regulations of the Act by the Executive Branch and the issuance of Guidelines and Forms, with the aim of providing greater assurance to economic agents and the general public about the application and scope of specific topics of the Act, such as the *ex officio* review set forth in article 6.4.
3. Additionally, with the promotion of the prior consultation mechanism, the companies involved in merger transactions received guidance from the competition agency on the application of the Law.
4. Certainly, 2021 involved greater activity on the part of the Peruvian Competition Agency for the benefit of the competitive process, compared to 2020. Indeed, the Commission decided important cases in relevant sectors of the economy such as the electrical sector, construction, school textbook printing services for students of public schools, as well as the entry into force of the merger law in all sectors of the economy.
5. Therefore, this report will mainly discuss the following topics: (i) explanations about certain legal provisions regarding the implementation of the Pre Merger Notification Act, (ii) soft law issued by the National Directorate for the Investigation and Promotion of Free Competition (hereinafter, the Directorate) during 2021, (iii) some developments about the main cases sanctioned by the Commission for the Defense of Free Competition (hereinafter, the Commission) and Indecopi's Tribunal for the Defense of Competition (hereinafter, the Tribunal) during said period, (iv) cases initiated by the Directorate, (v) main merger cases authorized in 2021; and, (vi) market studies issued during 2021.

1. Changes to Competition Law

1.1. Summary of new legal provisions regarding the implementation of the Pre-Merger Notification Act

6. The entry into force of the Pre-Merger Notification Act has been an objective of INDECOPI for many years, however, it has faced several difficulties regarding its approval by the Congress. It is important to mention that the OECD-IDB Peer Reviews of Competition Law and Policy recommended in 2018 the enactment of this Law.
7. Finally, in June 2021, the Act came into force and established the merger control regime applicable to all sectors of the Peruvian economy. It is important to mention, that, in previous years, Peru only had a merger control regime exclusively for the electricity sector.
8. The main characteristics of the new regime are the following:
 - The notification is mandatory and pre-merger. However, the Act allows the parties to conduct voluntary notifications of concentrations falling below the thresholds. The requirements for a mandatory notification are mainly three:

- The operation must be deemed as a concentration under the rules set forth in Article 5.
- The operation must have effects in Peru, including those transaction that are developed abroad but that link companies that operate in the country.
- The operation must concurrently meet or exceed two legal thresholds (an individual and a joint threshold).
- Regarding the thresholds, it is important to mention that a merger transaction is subject to the merger review process when the following thresholds are met concurrently:
 - Whenever the total sum of the value of sales or annual gross income or value of assets in the country of the undertakings involved in the merger transaction, that said undertakings have obtained during the fiscal year prior to that in which the transaction is notified, is equal to or more than one hundred and eighteen thousand (118,000) tax units (UIT) (approximately, more than 142 million USD).
 - Whenever the value of sales or annual gross income or value of assets in the country, obtained at least by two of the undertakings involved in the merger transaction during the fiscal year prior to that in which the transaction is notified, is equal to or more than eighteen thousand (18,000) tax units (UIT) each (approximately, more than 21 million USD)
- Additionally, the Act allows for Indecopi to act *ex officio* in cases where there is reasonable evidence to consider that the merger transaction may generate a dominant position or damage effective competition in a relevant market. It is important to mention that an *ex officio* review procedure of a merger transaction can be initiated up until one (1) year after its formal closing.

2. Soft Law

2.1. Notification Thresholds Calculation Guidelines:

9. In June 2021, the Commission published its Notification Thresholds Calculation Guidelines with the objective of providing clarity and legal certainty on when a transaction must be notified in accordance to the thresholds established in the Pre-Merger Notification Act.

10. These Guidelines fulfil an essential function in the implementation of the Act, providing transparency on the assessment of thresholds by Indecopi and facilitating the timely completion of notification duties by interested parties and their legal advisors. In addition, these Guidelines explain the elements that should be considered to conduct the notification thresholds calculation, including the identification of the involved undertakings, calculation parameters, special considerations for companies in the insurance markets and Pension Fund Administrators, among others.

3. Enforcement of Competition Law

3.1. Cases decided by the Commission (first administrative instance) and the Tribunal (second administrative instance) during 2021

3.1.1. The school textbooks cartel case

11. On May 5, 2021, the Commission sanctioned five of the most important companies related to the school textbook printing services market with approximately \$ 6,7 million, for entering into an agreement in which each company agreed to allocate the items of several tenders called by the Ministry of Education for the printing services of school textbooks. These textbooks corresponded to various courses at the kinder, elementary and high school levels, such as, for example, Mathematics, Communications, Science and Environment or Reading Comprehension. It is important to bear in mind that these textbooks were meant to be distributed among public schools throughout the country.

12. In addition to the fines imposed, the Commission ordered the sanctioned companies to implement an antitrust compliance program for a period of 3 years, based on the recommendations of Indecopi's Compliance Guidelines, published in March 2020.

13. On December 2021, the Tribunal upheld the Commission's decision. Although it reduced the fines imposed to two of the sanctioned companies, the antitrust compliance program was confirmed for all the sanctioned parties.

3.1.2. Abuse of dominant position in the electricity supply market in Peru's northern region

14. On July 9th, 2021, the Commission sanctioned an electricity supply company for abuse of dominant position, by unjustifiably applying unequal conditions to its customers to offer the same services (discriminatory treatment).

15. During the proceeding, it was observed that this company carries out the exclusive supply of electricity to regulated users in the northern region of Peru, which cause that the company had the power to exempt regulated users from certain requirements if they wanted to change their status to free users. Thus, the investigated company implemented a policy to exempt from the one-year notice period to those regulated users who changed their status to free users, as long as they commit to maintaining it as a supplier in the free market. However, it did require this period of one year to those who chose to contract with its competitor.

16. The Commission classified this infringement as serious and applied a fine of more than \$ 800,000, approximately. On March 3, 2022, the Tribunal upheld the Commission's decision, although reducing the fine imposed (up to approximately \$ 628,000).

3.1.3. Abuse of dominant position in the electricity supply market in Peru's southwestern region

17. On October 15th, 2021, the Commission sanctioned an electricity supply company for abuse of dominant position, by unjustifiably applying unequal conditions to its customers to offer the same services (discriminatory treatment).

18. Similar to the previously commented case, the sanctioned company carries out the exclusive supply of electricity to regulated users in the southwestern region of Peru, which cause that the company had the power to exempt regulated users from certain requirements if they wanted to change their status to free users. Thus, this company implemented a policy to exempt from the one-year notice period to those regulated users who changed their status

to free users, as long as they commit to maintaining it as a supplier in the free market. However, it did require this period of one year to those who chose to contract with its competitor.

19. The Commission classified this infraction as serious and applied a fine of more than \$ 1 million, approximately. This decision is under appeal before the second administrative instance of Indecopi.

3.1.4. The Construction Cartel Case

20. On November 15th, 2021, the Commission sanctioned 33 construction companies and 26 of their executives for having adopted a system of secret coordination (cartel) to distribute several tenders called by the Ministry of Transport and Communications, and other State entities, for the execution of road works at the national level for 15 years, between November 2002 and December 2016.

21. During that period, the sanctioned companies agreed to distribute among themselves 112 public contracting processes for the construction, improvement, rehabilitation, and maintenance of highways in the country. The total sum of the amounts awarded to these companies was greater than \$ 3 497,96 million.

22. For this reason, the Commission decided to sanction those responsible with the largest fines ever imposed. The total of the fines adds up to more than \$ 700 million dollars for both the companies and their executives.

23. In addition, the Commission ordered the cartelized companies to implement an antitrust compliance program for a period of five years, with the aim of ensuring that they comply with these regulations and reduce the risks of repeating this type of infraction.

24. This decision is currently under appeal before the Tribunal.

3.2. Cases initiated by the Directorate against anticompetitive practices

3.2.1. The Cement Case

25. On June 1st, 2021, the Directorate initiated an administrative sanctioning procedure against a company dedicated to the manufacture and sale of cement in Peru's southern region, for an alleged abuse of its dominant position. The investigation also includes a related company that provides transportation services and belongs to the same economic group; as well as against nine executives of these companies who allegedly participated in the planning and execution of the investigated conduct.

26. According to the investigation, the investigated company could have implemented an anti-competitive policy to prevent or hinder the access or permanence of competitors, for reasons other than economic efficiency, in the cement market in Arequipa, Cusco, Madre de Dios, Moquegua, Puno and Tacna, from August 2014 to April 2019.

3.2.2. No poach case in the construction sector

27. On December 28th, 2021, the Directorate initiated an administrative sanctioning procedure against six of the most representative companies in the construction sector in Peru, for allegedly having entered into a no poach agreement related to qualified personnel, from 2011 to 2017.

28. According to the evidence gathered by the Directorate through statements and emails, between 2011 and 2017 the investigated companies might have implemented a 'non-aggression pact', which involved an active commitment not to contact or hire said

personnel who had any employment relationship with the other companies in the agreement, and even former employees. This practice was carried out through the personnel in charge of recruitment and selection of their human resources areas. This is the first no poach case that has been investigated by Indecopi and is related to the Directorate and the Commission efforts to enforce the Competition Law in new markets, as specified in the **Guidelines about anticompetitive agreements among companies in labor markets, published in June 2020.**

3.2.3. Alleged abuse of dominant position in the electricity supply market

29. On December 28th, 2021, the Directorate initiated an administrative sanctioning procedure against an electricity supply company which allegedly abused its dominant position by applying unequal conditions (discriminatory treatment) to its customers to offer the same services.

30. During the preliminary investigation, it was observed that this company carries out the exclusive supply of electricity to regulated users in the mid-southern region of Peru, which might cause that the company could have the power to exempt regulated users from certain requirements if they wanted to change their status to free users. Thus, the investigated company might have implemented a policy to exempt from the one-year notice period to those regulated users who changed their status to free users, as long as they commit to maintaining it as a supplier in the free market. However, it did require this period of one year to those who chose to contract with its competitor.

4. Mergers and Acquisitions

31. Since June 2021 to December 2021, Indecopi received 4 merger notifications. Furthermore, until the date of issue of the present report, Indecopi has received 10 merger notifications, of which 3 are currently being analyzed.

32. One of the currently analyzed merger transactions is being reviewed under the second phase process, which is an additional phase of the merger review procedure aimed at furthering the investigation of a merger transaction when it raises serious competition concerns.

33. The merger transactions analyzed by Indecopi can be resumed in the following chart:

Table 1.

Market	Type of merger notification	Date of submission of the merger transaction notification	Status of the transaction
Cold storage and telecommunications	Simplified	October 7 th , 2021	Approved in the first phase of the procedure
Construction	Ordinary	October 21 st , 2021	Approved in the first phase of the procedure
Maritime transport and clinical laboratories services	Simplified	December 23 rd , 2021	Approved in the first phase of the procedure
Services for the mining industries	Ordinary	December 30 th , 2021	Approved in the first phase of the procedure
Pharmaceutical products	Ordinary	January 21 st , 2022	Currently in second phase evaluation
Financial services and food industry	Simplified	January 24 th , 2022	Approved in the first phase of the procedure
Financial services	Simplified	January 25 th , 2022	Approved in the first phase of the procedure
Mining	Ordinary	January 31 st , 2022	Approved in the first phase of the procedure
Retail	Ordinary	March 15 th , 2022	Currently being evaluated in the first phase of the procedure
Real State	Ordinary	April 8 th , 2022	Currently being evaluated in the first phase of the procedure

Note:
Source:

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1. RESOURCES OF THE COMPETITION AUTHORITY

During 2021, the budget of the Commission for the Defense of Free Competition and the Directorate was \$ 3,327,203.47, approximately. As for the number of employees, the Commission and the Directorate have 46 officials (including the Commissioners, who work part time). As for the Tribunal staff, it has 14 officials, with 3 members of the Tribunal who work part time.

2. MARKET STUDIES ON COMPETITION POLICY ISSUES

- On August 12th, 2021, the Commission approved the "Market Report on Improvements to the Procedure for the Sanitary Registration of Medicines", elaborated by the Directorate. In this document, it was identified that at the level of the process of the sanitary registration of medicines in Peru, there is an important bottleneck due to the excessive duration of the

authorization procedures (on average they last two years), a situation that limits the timely entry of medicines, especially those included in the National Request for Essential Medicines, which includes medicines considered to be of public necessity. The same situation was observed in the cases of applications for the sanitary registration of medicines that were previously evaluated and registered in High Sanitary Surveillance Countries (HSSC) and that can be reviewed more expeditiously.

Therefore, this situation has led to an impact on the supply of drug suppliers and with it, less competitive pressure in the domestic market. Among the recommendations proposed to improve the sanitary registration procedure and, with it, the conditions of access and supply of medicines in Peru, it was proposed:

- 1) To strengthen the technical staff of Digemid (General Directorate of Medicines, Supply and Drugs) to ensure compliance with the evaluation deadlines for sanitary registration applications and Certificates of Good Manufacturing Practices (GMP),
- 2) To establish an expedited registry for medicines from countries with HSSC,
- 3) To promote the signing of mutual recognition agreements with reference countries in Latin-American to reduce the evaluation of registry among these countries, and
- 4) To evaluate the simplification of the requirements for biosimilar products and promote the authorization of private laboratories to carry out equivalence studies.

The objective of the recommendations presented to the Ministry of Health and Digemid, are to address the problems identified in the access of medicines to the Peruvian market and increase the diversity of medicines to contribute to competition. and price reduction. Recommendations that were adopted by Digemid, who has been implementing them from 2021 to date.

- Also on August 12th, 2021, the Commission decided to approve the "Report on the Retail Marketing of Medicines in Clinics Market", elaborated by the Directorate. In the context of the national emergency due to the COVID-19 pandemic, several complaints and journalistic reports were registered against the high prices of medicines that are sold in clinic pharmacies. In view of this situation, Indecopi analyzed the main characteristics of the retail marketing of medicines in the private sector, as well as the price formation mechanisms for medicines therein.

During the analysis, a significant difference between the price of medicines in a private drugstore and the price in pharmacy's clinics was found. Furthermore, it was found that consumers who receive emergency care and hospitalizations in clinics can only buy their medicines in their pharmacies, due to the protocols implemented by the latter. Hence, this situation causes that patients end up buying drugs at higher prices at the clinic's pharmacies. The price's difference is due to the way that the clinics set their prices based on references that are established in their contracts with health insurance companies.

Thus, the Commission recommended the Health Ministry to provide relevant information to clinics and health insurance companies on the different methodologies and price references used in other countries to improve their contracts. Likewise, the Commission recommended to establish a procedure to authorize the use of medicines purchased in private drugstore in patients care at clinics without neglecting the safety requirements for these medicines and to promote that health insurance companies finance the purchase of medicines in private drugstores.

- On August 19th, 2021, the Commission decided to approve the "Market Study of Card Payment Services in Peru", elaborated by the Directorate, in which the conditions of competition were evaluated in order to conclude with the issuance of recommendations to improve the efficiency of the market for the benefit of consumers.

In the study were founded elements that could generate problems in terms of the competition in card payment services. Among these elements, the existence of ownership relationships between several agents involved in card payment services was found. These relationships could affect the agents' incentives to contract with others and could generate potential transfers of information between competing agents.

Thus, the Commission recommended that agents of this market should establish procedures that guarantee similar treatment to those that do not belong to their businesses groups. Additionally, the Commission recommended Visa to establish a procedure to create a "Chinese wall" that prevents access and use of information to which it would have access due to its relationship with an acquirer. Likewise, the Commission recommended the Central Reserve Bank of Peru to collect and publish information that allows monitoring the behavior on card payment services.

These recommendations seek to promote greater competition among agents in the market, as well as allow the entry of new competitors, generating lower costs for the access to card payment services, favoring medium and small businesses.

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