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COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Peru

-- 2022 --

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Peru

Executive Summary

1. Year 2022 has been a fruitful year for Peru concerning antitrust matters. In this regard, the Peruvian Competition Agency managed to comply with its duties regarding the prosecution, investigation and sanctioning of cartels and abuse of dominance practices, while also focusing on its first year as the agency in charge of the enforcement of the Peruvian Pre-Merger Notification Act (hereinafter, the Merger Act).
2. The Peruvian competition agency received 20 merger filings in 2022 and successfully carried out its merger analysis. In addition, with the objective of providing legal certainty to merging economic agents and the public in general, the Peruvian Competition Agency approved and published its *Guidelines on the definition and analysis of merger transactions*, with the objective of helping economic agents to identify which transactions qualify as a merger transaction and provide orientation on the analysis carried out by Peruvian Competition Agency to determine whether a merger transaction generates a significant restriction to competition. Furthermore, with the promotion of the prior consultation mechanism, the companies involved in merger transactions received guidance from the Peruvian Competition Agency on the application of the Law.
3. Certainly, 2022 involved greater activity for the Peruvian Competition Agency. In this regard, the Commission for the Defense of Free Competition (hereinafter, the Commission) decided on important cases in relevant sectors of the economy such as the poultry industry and the cement industry.
4. It is important to mention that during 2022, the Peruvian Competition Agency focused its activities in the development of advocacies and market studies. Furthermore, Indecopi carried out market studies in relevant sectors for the Peruvian consumers such as the milk market, the fuel market, acquisition of cement in public procurement market, the market for payment acceptance services for foreign merchants, among others.
5. Therefore, this report will mainly discuss the following topics: (i) some developments about the main cases initiated by the National Directorate for the Investigation and Promotion of Free Competition (hereinafter, the Directorate) and sanctioned by the Commission for the Defense of Free Competition (hereinafter, the Commission) and the Tribunal of Indecopi (second administrative instance), (ii) the implementation and enforcement of the Merger Act during its first year since its entry into force, (iii) soft law issued by the Directorate and approved by the Commission during 2022, (iv) the resources of the Directorate and the Commission; and, (v) the market studies issued during 2022.

1. Guidelines issued by the Commission: Guidelines on the definition and analysis of merger transactions

6. On December 2022, the Commission approved and published its Guidelines on the definition and analysis of merger transactions with the objective of providing clarity and legal certainty to merging economic agents on the relevant elements to take into consideration for the qualification and analysis of merger transactions.

7. These Guidelines fulfil an essential function in the implementation of the Merger Act by providing clear criteria to the economic agents on what transactions qualify as merger transactions and the analysis carried out by Indecopi to determine whether a merger transaction generates a significant restriction to competition.

2. Enforcement of competition laws and policies: Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1. Cases initiated by the Directorate against anticompetitive practices

2.1.1. Failure to provide information during an unannounced dawn raid

8. On May 9, 2022, the Directorate initiated an administrative sanctioning proceeding against CNO Sucursal Perú (CNO, formerly Constructora Norberto Odebrecht S.A. Sucursal Perú), for refusing without justification to provide information during a dawn raid conducted by the Directorate within its cartel investigation in the construction sector.

9. Indeed, since 2017 the Directorate initiated its investigation against the 'Construction Cartel', in which 33 construction companies and 26 of their executives were sanctioned for colluding to distribute several tenders for the execution of road works throughout the country. As part of this investigation, on July 11, 2017, the Directorate carried out several unannounced inspections at the facilities of the main construction companies in Peru, including CNO Sucursal Perú.

10. According to the investigation, despite having powers expressly recognized in the Peruvian Competition Act to carry out unannounced dawn raids, CNO refused to provide the information requested by the Directorate.

11. It is important to mention that on February, 2023, the Commission (the decision body) sanctioned CNO Sucursal Perú with 867 Tax Units (approximately, more than 4 million soles) for refusing without justification to provide information during a dawn raid conducted by the Directorate within its cartel investigation in the construction sector.

2.1.2. The Bottled water cartel case

12. On September 22, 2022, the Directorate initiated an administrative sanctioning proceeding against 8 companies and 7 natural persons that produce and distribute bottled water in the city of Puerto Maldonado in Peru, for coordinating, since February 2021, the increase of the retail price of the 20-liter water can. According to the investigation, the evidence obtained consisted mainly of WhatsApp conversations between the representatives of the companies under investigation.

13. It should be noted that the Madre de Dios region, where the Puerto Maldonado city is located, struggles with potable water supply. In fact, only 61.1 % of its population has access to this service, a figure below the national average (approximately, 68.4%).

2.1.3. Anticompetitive recommendation by a Real State Chamber

14. On December 27, 2022, the Directorate initiated an administrative sanctioning proceeding against the Chamber of Registered Real Estate Agents of Peru (hereinafter, the Chamber), for allegedly making anticompetitive recommendations to establish the percentages or commission amounts of the real estate agents' services in the market.

15. According to the investigation of the Directorate, the Chamber allegedly recommended its real state agents associates to fix their fees on the basis of certain

percentages or amounts, both for the sale and rental of property. Such recommendation was established in the Internal Regulation and Code of Conduct of the Chamber.

2.2. Cases sanctioned by the Commission against anticompetitive practices

2.2.1. The Turkey Cartel Case

16. On March 25, 2022, the Commission fined 4 supermarkets with approximately 4 million USD for fixing the sale prices of the whole turkey brand “San Fernando” throughout the country, from 2009 to 2016. It should be mentioned that each year, the Christmas turkey supply is close to 2 million units, and San Fernando turkey stays as the most consumed.

17. Likewise, the Commission fined San Fernando company approximately 700 000 USD for participating, during the 2015 and 2016 Christmas campaigns, as the cartel facilitator, since the evidence showed that San Fernando was in charge of communicating the fixed price to the supermarkets, transferring information and claims among them and seeking that every supermarket was complying with the agreement.

18. In addition to the fines imposed, the Commission ordered the sanctioned companies to implement a competition compliance program for a period of 3 years.

19. It is important to mention that since the 2015 amendment to the Competition Act that incorporated the hub and spoke figure, this constitutes the first time that the Commission sanctions a company for incurring in this conduct.

20. The turkey cartel case was appealed to the Tribunal of Indecopi (second administrative instance).

2.2.2. The Cement Case

21. On December 15, 2022, the Commission fined the companies Yura S.A. (Yura) and Racionalización Empresarial S.A. (Raciemsa) with more than 15 million USD, and 9 workers and former workers of Yura more than 313,000 USD for abusing its dominant position by preventing or hindering the access or permanence of competitors in the cement commercialization market, in the south region of Peru, between October 2014 and April 2019. It should be noted that in such region of the country, Yura has more than 90% of market share in the cement trading market.

22. According to the investigation, Yura prevented new competitors from selling other brands of cement by (i) sanctioning or threatening to restrict the sale of Yura cement to hardware stores that were selling cement from other competitors; (ii) changing the commercial conditions of the hardware stores to force them to sell only Yura cement; and, (iii) incorporating the hardware stores into an exclusive network that only distributes and sells Yura cement. Regarding Raciemsa, the investigation evidenced that it stopped scheduling transportation services to those carriers that transported cement brands from other competitors.

23. In addition to the fines, the Commission ordered the sanctioned companies to implement a competition compliance program for a period of 5 years.

24. The cement case was appealed to the Tribunal of Indecopi (second administrative instance).

2.3. Cases decided by the second administrative instance

2.3.1. Abuse of dominant position in the electricity supply market in Peru's northern and southwestern region

25. Indecopi's Tribunal for the Defense of Competition (hereinafter, the Tribunal) has resolved 21 appeals¹ in competition matters during 2022.

26. In a relevant case, the Tribunal upheld the Commission's decision to sanction the Regional Public Service Company of Electricity of the North S.A. (ENSA)² and Southwest Electric Society S.A. (SEAL)³. According to the Tribunal's decision, these companies engaged in abuse of dominant position in the electricity supply market in Peru's northern and southwestern regions.

27. In such cases, it was determined that these companies committed acts of abuse of a dominant position in the electricity supply market, consisting of: (i) exempting the one year's notice period to those regulated users who chose to change their condition (to free users) and contracted the energy supply with their company; and, on the contrary, demand compliance of the one year's notice period from those users who decided to contract with competing companies; and/or, (ii) not require the prior installation of the power measurement, protection and limitation equipment provided for in the respective sectorial regulations, to those regulated users who chose to change their status to free users and contracted the energy supply with their company; and, contrastively, require those users who decide to contract with their competitors to comply with these requirements.

28. As a result, the Tribunal sanctioned the two companies with a global fine equivalent to 1.8 million USD dollars.

3. Mergers and acquisitions

29. Since January 2022 to December 2022, Indecopi received 20 merger notifications. It is important to mention that in 2022, the merger cases that were approved in the first phase of the procedure were resolved in approximately 26 working days. The merger transactions analyzed by Indecopi can be resumed in the following chart:

¹ Confidentialities and incidents are also included.

² Decision 035-2022/SDC-INDECOPI.

³ Decision 094-2022/SDC-INDECOPI.

Table 1.

| Market | Type of merger notification | Date of submission of the merger transaction | Status of the transaction |
|--------------------------------------|-----------------------------|--|--|
| Pharmaceutical products | Ordinary | January 21st, 2022 | Approved under conditions in the second phase of the procedure |
| Financial services and food industry | Simplified | January 24th, 2022 | Approved in the first phase of the procedure |
| Financial services | Simplified | January 25th, 2022 | Approved in the first phase of the procedure |
| Mining | Ordinary | January 31st, 2022 | Approved in the first phase of the procedure |
| Retail | Ordinary | March 15th, 2022 | Approved in the first phase of the procedure |
| Real State | Ordinary | April 8th, 2022 | Approved in the first phase of the procedure |
| Hotel Services | Ordinary | May 4 th , 2022 | Approved in the first phase of the procedure |
| Processed and not processed foods | Ordinary | May 17 th , 2022 | Approved in the first phase of the procedure |
| Equipment for mining activity | Ordinary | July 1 st , 2022 | Approved in the first phase of the procedure |
| Energy | Simplified | July 14 th , 2022 | Approved in the first phase of the procedure |
| Energy | Ordinary | August 9 th , 2022 | Approved in the first phase of the procedure |
| Automotive Industry | Ordinary | September 1 st , 2022 | The merger notification was withdrawn by the merging parties |
| Mining | Ordinary | September 5 th , 2022 | Approved in the first phase of the procedure |
| Fossil fuel | Ordinary | September 28 th , 2022 | Approved in the first phase of the procedure |
| Energy | Simplified | September 30 th , 2022 | Approved in the first phase of the procedure |
| Automotive Industry | Ordinary | October 4 th , 2022 | Approved in the first phase of the procedure |
| Marine transport | Simplified | October 24 th , 2022 | Approved in the first phase of the procedure |
| Industrial | Ordinary | November 10 th , 2022 | Approved in the first phase of the procedure |
| Energy | Ordinary | November 17 th , 2022 | Approved in the first phase of the procedure |
| Energy | Ordinary | December 16 th , 2022 | Approved in the first phase of the procedure |

3.1. Relevant merger cases

30. On September 30th, 2022, the Commission authorized under conditions the acquisition of Hersil S.A. Laboratorios Industriales Farmaceuticos by Pharmaceutica Euroandina S.A.C. This case constituted the first merger transaction that was reviewed by the Commission under the phase 2 evaluation of the merger review process since the entry in force of the Merger Act on June 14th, 2021.

31. In this case, after the Phase 1 evaluation, the Commission identified serious concerns about possible significant restrictive effects on competition in five markets where the undertakings involved participated. Therefore, it initiated a Phase 2 evaluation, where it ruled out concerns in two of the five markets and imposed conditions in three other markets. The main condition constituted the licensing of certain brands marketed by Hersil to a third party in order to maintain the competitive conditions in the markets. Currently, the competition agency is supervising the compliance of the conditions.

4. Resources of the Competition Authority

32. During 2022, the budget of the Commission and the Directorate was 10 263 353 soles (approximately, 2,691,321 USD). As for the number of employees, the Commission and the Directorate have 46 officials (including the three Commissioners, who work part time). Of the 43 officials that work for the Directorate. 10 employees work in merger control matters and 30 employees work in both cartels and abuse of dominance cases.

33. Regarding the Tribunal, its budget during 2022 was 3,251,265.92 soles (approximately, 865 158.57 USD). As for the number of employees, the Tribunal has 15 officials who work in competition matters.

5. Summaries of or references to new reports and studies on competition policy issues

5.1. Market study on the payment acceptance services for foreign merchants

34. On August, 2022, the Commission approved the publication of the Report on the market for payment acceptance services to foreign merchants. This document contains an analysis of the payment acceptance schemes of the card networks for transactions with a card-not-present in business not domiciled in Peru, considered as cross-border transactions. As well as the mechanism used by payment facilitators to accept these payments as domestic transactions and the new charges designed by card networks to allow payment facilitators to accept payments from businesses not domiciled in Peru.

35. The report was issued with the objective of promoting adequate competition conditions in the market for payment acceptance services for foreign merchants and promoting a framework of understanding between card brands and national actors in the card payment system, as means to continue working on the development of payment services, financial inclusion, and the well-functioning of the market.

36. For this reason, two recommendations were made to VISA, Mastercard, acquirers and payment facilitators so that, on the one hand, the card networks could reassess the reasonableness of the proposed costs of their programs given the level of risk faced; and on the other hand, that all agents commit to strengthen the security standards of these transactions to mitigate any risk to the payment ecosystem that may impact consumers.

5.2. Market study on the acquisition of cement through public procurement processes

37. On September 2022, the Directorate published its Report on the acquisition of cement through public procurement processes with the objective to analyze the conditions or requirements in the public procurement processes for the purchase of cement from various local and regional governments that were capable of limiting competition.

38. In this regard, the Report made the following recommendations to the Agency Supervisor of the State Contracts (OSCE):

- Investigate the cause of certain requirements made through public procurement processes and verify whether these preferences and irregularities have been maintained or replicated in a period subsequent to the one analyzed (2018-2020).
- Monitor that future requirements made by contracting entities do not lead to additional requirements or demands.
- Issue guidelines, directives or instructions to contracting entities to encourage procuring entities to exclude any unjustified preferences from their bases.

5.3. Market study in the liquid fuels and liquefied petroleum gas (LPG) sector

39. On December 19th, 2022, the Directorate announced the pursuit of a market study in the liquid fuels and liquefied petroleum gas (LPG) sector, with the purpose of identifying the factors that may undermine competition in the production, import and wholesale of fuels, and proposing recommendations to improve competition in this market.

40. The main final products of the industry are Diesel fuel (46% of fuel consumption), liquified petroleum gas (LPG) (24% of fuel consumption) and gasolines/gasohol (20% of fuel consumption). These products are relevant for transportation and industrial activities, and directly for the public that make use of them in their households. For example, LPG is the most important fuel used in households for the purpose of cooking (76% of households at the national level).

41. Additionally, the activities of production/import, storage and wholesale commercialization are highly concentrated, and their relevance reflect on the weight that they have in the price for the final consumer (above 85% for liquid fuels and LPG). So, how well these markets perform has main incidence on the prices that are seen by the final consumer, as well as on the competition dynamics on the retail segment.

42. The market study seeks to identify the factor that would explain the observed high concentration, as well as the incidence of the vertical relationships on the competition. Furthermore, this market study seeks to provide certain recommendations to public and private entities in order to implement solutions to eliminate the competition obstacles that firms may be confronting.

5.4. Preliminary Report of the market study on the milk market in Peru

43. On November 25th, 2022, the Commission approved the Directorate's Preliminary Report of the Market Study Report on the Dairy Sector in Peru. This document analyzed the existing competitive conditions along the dairy and dairy derivatives production chain.

44. In the primary link of the production of raw milk, it was found that in Peru, small-scale production prevails (85.89% of the total), with associativity being an unusual organizational form of production. It was observed that the main buyers of raw milk are three industrial companies, which collect about 48% of total production, while 42% of national production is destined for small-scale processing plants, which have a regional presence and are, for the most part, informal.

45. In the secondary link, it was identified that the most consumed dairy products are evaporated milk and yoghurt, the consumption of the former being atypical in the world and explained by the ease with which it can be transported and refrigerated. It was also observed that the State, through its social programs, mainly purchases industrial milks,

from the brands of the main industrial companies, although they do not participate directly in the bidding processes.

46. As a result, a total of sixteen recommendations were issued with the aim of promoting competition in this sector. The main recommendations are the following:

1. Improving transparency in the evaluation of the quality of raw milk, which determines the price of the raw material. Specifically, it was suggested that guidelines be drawn up for taking milk samples, procedures for resolving discrepancies in the results of the evaluation and for cases of suspension of collection, among others.
2. Improvement in the supply of quality raw milk, that will allow for greater competition in the collection of raw milk. Specifically, strategies were suggested for technical assistance to small farmers, publication of reports on key variables in the sector, transparency of raw milk supply conditions between industrial companies and farmers, among others.
3. Development of alternative dairy consumption patterns, which increase the supply and entry of producers. Specifically, interventions were suggested for the facilitation of artisanal producers' access to markets, dissemination campaigns on the benefits of dairy products and the promotion of participation of dairy products from artisanal plants in public tendering processes, among others.
4. Improvement of regulatory and/or economic aspects that facilitate the entry or expansion of other actors. Specifically, the socialization of sanitary regulations for the production of artisanal dairy products, promotion of the associativity of livestock farmers, among others, was suggested.

47. The Preliminary Report was subject to public consultation and comments until January 6th, 2023. The final version of this Report is expected to be approved on the second quarter of 2023.

5.5. Draft of the Guidelines to Identify Unusual Consortia in Public Procurement

48. On September 1, 2022, the Commission approved the publication of the Draft Version of the “Guidelines to Identify Unusual Consortia in Public Procurement under the Peruvian Competition Act”. Through this document, government officials and procurement bodies will be able to identify certain joint bidding patterns that could cover anticompetitive conducts within a public procurement process.

49. This document is also aimed at those companies that participate through consortia in public procurement processes, so that they are clear about the actions that may be contrary to the competition law when presenting a joint bid.