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COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Peru

-- 2023 --

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

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Peru

Executive Summary

1. The National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) has continued to grow and improve its activities during 2023. With the economic resources that are given to the National Directorate for the Investigation and Promotion of Free Competition and the Commission for the Defense of Free Competition, both have managed to prioritize relevant cases and achieve important results in 2023.
2. Furthermore, Indecopi has managed to focus on its resources to enhance its competition promotion and protection duties. For example, in 2023, Indecopi increased its abuse of dominance cases and kept its focus on its cartel investigation and sanctioning cases.
3. On the other hand, on merger control matters, Indecopi successfully carried out its proceedings by having reviewed 23 merger filings during 2023. Additionally, Indecopi accomplished the goal of developing a fast and well-established communication channel that could solve the consultations of the economic agents, their lawyers or the citizens in general.
4. It is important to mention that Indecopi's reports, market studies and guidelines continue to make impact on competition in the Peruvian markets as well as having received international recognition. In this regard, Indecopi increased the number of its market studies, having analysed different markets like Market Study on Dairy in Perú, Public Procurement Market of Secretion's Aspiration Bags, Market Study on Fintech Sector in Peru, among others.
5. Finally, Indecopi has continued its duties as the OECD's Regional Competition Centre (RCC), fulfilling its duties of 4 workshops per year in person.
6. In view of the foregoing, Indecopi hopes to continue reaffirming its commitment to strengthen the effectiveness of the Competition Act and the Merger Review Act in different sectors of the economy, generating a culture of competition and contributing to the economic development and consumer welfare.

1. Enforcement of competition laws and policies

1.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

1.1.1. Sanctioning administrative proceedings

The printing of driver's license case

7. The Commission for the Defense of Free Competition of Indecopi (hereinafter, CLC) concluded an administrative sanctioning procedure after the investigated companies Polysistemas Corp. S.A.C. and Salmón Corp. S.A.C. decided to present a "commitment", through which they paid a penalty and implemented a compliance program with free competition regulations.

8. Between 2014 and 2020, the aforementioned companies engaged in a distribution of regions and clients, through which each one exclusively supplied the Directorates of Transport and Communications (DRTC), entities in charge of issuing driver's licenses since 2008. and, therefore, they call for tenders for the acquisition of printers and supplies for printing briefs

9. Thus, Salmón exclusively supplied the Directorates of Transportation and Communications (DRTC) on the country's coast; while Polysystems supplied the DRTCs in the center and east.

10. During the procedure, the companies and four workers, except Angelo David Torres Nima, applied for the cessation commitment, which concluded the procedure. In exchange, the offenders acknowledged the allegations against them and assumed certain measures that were approved by the Commission.

11. Finally, by Resolution 039-2023/CLC-INDECOPI dated March 17, 2023, Angelo David Torres Nima was fined with, approximately, US\$ 3,909.30. This sanction was confirmed by the Tribunal (the second administrative instance).

The electricity distribution case in Ica

12. After implementing a policy of discriminatory treatment among its clients, the company Electro Dunas S.A.A. was fined with more than US\$ 267,924 by the CLC.

13. According to the CLC, Electro Dunas had a dominant position in the electricity market and applied unequal conditions for regulated users who chose to change their status to free users. That is, it exempted those who committed to maintaining it as a supplier in the free market from the one-year notice period. On the contrary, it required compliance with this deadline for users who switched to the free user segment, but who chose to contract with Atria Energía or other competitors.

14. Likewise, it was verified that, during the investigated period from 2017 to 2020, the aforementioned conduct allowed Electro Dunas to increase its participation in the affected market, both in terms of the percentage of new users and the total contracted power. The CLC also concluded that the sanctioned company could not demonstrate that the policy adopted introduced efficiencies to the market for the benefit of consumers. This sanction is under evaluation before the Tribunal (the second administrative instance).

The first non-poach agreement case

15. Six companies in the construction sector and four of their executives received the amount of, approximately, US\$1 555, 256.06, for this infringement, as the first case on anti-competitive practices between companies in the labor market. Those involved agreed to a non-poach agreement, to not contact or hire personnel who maintained any employment relationship with that group of companies, even extending it to former workers.

16. According to the CLC, this non-poach agreement affected the labor mobility of personnel qualified as employees or professionals of the companies investigated, through limited options to change employers freely and access better salary conditions. This decision was not appeal.

The bottled water case in Puerto Maldonado

17. The CLC sanctioned, in the first administrative instance, three companies and four natural persons for arranging the price of sale to the public of bottled water in 20-liter

drums, in the city of Puerto Maldonado, Madre de Dios region, affecting consumers, with more than US\$ 52,008.35, approximately.

18. The agreement was made between April 1 and October 13, 2021 and was proven through communications between the competitors and the sales records provided by the investigated economic agents. The evidence analyzed by the CLC made it possible to prove how the sanctioned agents participated in the planning of the anticompetitive conduct, its implementation and the supervision mechanisms used to guarantee compliance with the agreement by the members of the cartel. One sanctioned party appealed this decision before the Tribunal (the second administrative instance).

1.1.2. Cases of obstruction of the competition authority's investigative tasks

Decision 020-2023/CLC-INDECOPI

19. The CLC decided to sanction Jobal Pharma E.I.R.L. and Shellah Shirley Baldárrago Arce with US\$ 234,077.628, approximately, for having obstructed the work of the authority in a dawn raid carried out to gather evidence of an anticompetitive conduct in the pharmaceutical products market.

20. In this case, the National Directorate of Investigation and Promotion of Free Competition required Jobal Pharma E.I.R.L. to exhibit and provide a copy of all information related to the pharmaceutical products sales market at the national level. Despite this, the company did not comply with the aforementioned requirement, nor presented any valid justification for not having exhibited and provided a copy of the requested information.

21. In addition, during the execution of the dawn raid, it was observed that the manager of this company had deleted information from his personal email. The aforementioned person had become aware that the authority would access its personal communications, which was decisive so that, in parallel to the actions of the authority, carry out actions aimed at deleting information from the personal email account of the manager, hindering the investigative functions of the authority. This sanction was confirmed by the Tribunal (the second administrative instance).

Decision 042-2023/CLC-INDECOPI

22. The CLC decided to impose US\$ 1,56, 778.98, approximately, to CNO S.A. Sucursal Peru, for unjustifiably refusing to provide information to the National Directorate of Investigation and Promotion of Free Competition in its investigation of anticompetitive practices in the construction sector.

23. Despite having faculties expressly recognized within the legal framework and having informed them about the rights and obligations that corresponded to them in a dawn raid, CNO stated that they would not provide any type of information, refusing to comply with the requirements formulated by the inspectors and obstructing the inspection visit ordered by the Directorate

24. Specifically, CNO Sucursal Peru argued that, due to a collaboration commitment with the Prosecutor's Office, it was unable to provide the information requested by the Directorate. However, the Prosecutor's Office communicated that such collaboration commitment did not prevent it from providing information when formally requested by a public entity in the exercise of its competences. This sanction was confirmed by the Tribunal (the second administrative instance).

1.1.3. Decided Cases by the Second Administrative Instance

25. Indecopi's Tribunal for the Defence of Free Competition (hereon, the Tribunal) has resolved 23 appeals¹ in competition matter during 2023.

26. Last year, the Tribunal upheld the Commission decisions to sanction a pharmaceutical company and its managing director². According to the Tribunal's decision, the aforementioned company and director infringed Article 46.7 of the Legislative Decree 1034, Law for the Repression of Anticompetitive Conduct, by having obstructed the work of the authority in an inspection procedure carried out with the purpose of investigating alleged anticompetitive conduct in the pharmaceutical market at a national level.

27. In that case, it was determined that:

28. The company did not comply with the requirement made by the first instance during the inspection procedure, nor did it present any valid justification for not having exhibited and provided a copy of the requested information.

29. During a subsequent inspection visit, the managing director deleted information from her personal email account, so the authority did not access any information.

30. As a result, the Tribunal sanctioned the company and its managing director with a global fine equivalent to US\$ 231,944.30³.

1.2. Mergers and acquisitions

1.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws

31. Since January 2023 to December 2023, Indecopi received 23 merger notifications. It is important to mention that in 2023, the merger cases that were approved in the first phase of the procedure were resolved in approximately 28 business days. The merger transactions analyzed by Indecopi can be resumed in the following chart:

1.2.2. Summary of significant cases

32. On January 23rd, 2024, the Commission authorized under conditions the acquisition of Enel Distribución Perú S.A.A. and Enel X Perú S.A.C by China Southern Power Grid International (HK) Co., Limited. This case constituted the second 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.

33. In this case, after the Phase 1 evaluation, the Commission identified serious concerns about possible significant restrictive effects on competition in six markets where the undertakings involved participated. Therefore, it initiated a Phase 2 evaluation, where it ruled out concerns in five of the six markets and imposed conditions in one market. The main condition requires Enel Distribución Perú S.A.A. to run an auction that guarantees competitive conditions in case it aims to acquire energy for its regulated costumers from China Southern Power Grid International (HK) Co., Limited parent electric power generating companies.

¹ Confidentialities and incidents are also included.

² Decision 0148-2023/SDC-INDECOPI.

³ Considering the Peruvian Soles (S/) to US Dollars (US\$) average exchange rate from the Central Bank of Peru (BCRP).

Table 1.1

Market	Type of merger notification	Date of submission of the merger transaction	Status of the transaction
Food industry	Simplified	February 1 st , 2023	Approved in the first phase of the procedure
Energy	Ordinary	February 6 th , 2023	Approved in the first phase of the procedure
Industrial	Ordinary	March 17 th , 2023	Approved in the first phase of the procedure
Energy	Ordinary	April 21 st , 2023	Approved under conditions in the second phase of the procedure
Energy	Ordinary	April 21 st , 2023	The merger notification was withdrawn by the merging parties
Mining	Ordinary	May 19 th , 2023	Approved in the first phase of the procedure
Mining	Ordinary	June 13 th , 2023	Approved in the first phase of the procedure
Energy	Ordinary	June 26 th , 2023	The merger notification was withdrawn by the merging parties
Energy	Ordinary	June 28 th , 2023	Approved in the first phase of the procedure
Agriculture and food industry	Ordinary	July 21 st , 2023	Second phase of the procedure
Mining machinery	Ordinary	July 24 th , 2023	Approved in the first phase of the procedure
Energy	Ordinary	August 8 th , 2023	Approved in the first phase of the procedure
Agriculture	Ordinary	September 5 th , 2023	Approved in the first phase of the procedure
Energy	Simplified	September 11, 2023	Approved in the first phase of the procedure
Telecommunications	Ordinary	September 28 th , 2023	Second phase of the procedure
Chemical products	Ordinary	November 10 th , 2023	Second phase of the procedure
Logistics	Simplified	November 22 nd , 2023	Approved in the first phase of the procedure
Energy	Ordinary	December 1 st , 2023	Approved in the first phase of the procedure
Energy	Ordinary	December 11 th , 2023	Approved in the first phase of the procedure
Energy	Ordinary	December 14 th , 2023	Approved in the first phase of the procedure
Energy	Ordinary	December 21 st , 2023	Approved in the first phase of the procedure
Health	Ordinary	December 29 th , 2023	Approved in the first phase of the procedure
Real estate	Ordinary	December 29 th , 2023	Approved in the first phase of the procedure

2. Resources of competition authorities

2.1. Resources overall (current numbers and change over previous year):

2.1.1. Annual budget (in your currency and USD):

34. The Commission for the Defense of Free Competition and the National Directorate for the Investigation and Promotion of Free Competition's budget for 2023 was S/. 8 084 520. (US\$ 2 179 115.9).

35. The Tribunal's budget for 2023 was S/. 3,195,727.35 (US\$ 853, 531.58)

2.1.2. Number of employees (person-years), including the first and the second instance:

- Economists: 27
- Lawyers: 23
- Other professionals⁴: 1

⁴ Degree in Systems Engineering

- Support staff: 4
- All staff combined: 55

2.2. Human resources (person-years), including the first and the second instance:

- Enforcement against anticompetitive practices: 27
- Merger review and enforcement: 18
- Advocacy efforts: 4

2.3. Period covered by the above information: 2023

3. Summaries of or references to new reports, studies and guidelines on competition policy issues

3.1. Market Study on Fintech

36. In September 2023, the Competition Commission of Indecopi (hereinafter the Commission) published the final report of the Market Study on the Fintech Sector in Peru, focusing on the analysis of competition conditions in currency exchange, loans, factoring, and digital payments/wallets, which are the most demanded services in Peru. As a result of this analysis, certain limitations to competition were identified, prompting the Commission to offer recommendations aimed at promoting the entry and expansion of competitors and the development of innovative digital models.

37. One of the primary issues was related to transparency in the analysis conducted by certain banking entities regarding the opening of bank accounts for currency exchange Fintechs, in an environment where banks began to introduce digital currency exchange services similar to those offered by Fintech companies. Denial of bank account opening to Fintechs due to anti-money laundering and counter-terrorism financing (AML/CFT) risks, albeit in practice involving denial to all Fintechs. Thus, the Commission recommended that financial entities adhere to the recommendations of the Financial Action Task Force (FATF) regarding AML/CFT risk assessment employing a risk-based approach. Additionally, it recommended evaluating the publication of information requirements for opening bank accounts. In the same vein, it recommended that the Fintech Association of Peru promote an AML/CFT prevention guide for the reference of its members.

38. Another limitation to competition was linked to the absence of an Open Finance model in the country. Therefore, the Commission recommended that the Superintendence of Banking and the Central Bank establish a framework for coordination and participation among various public and private actors as part of the agenda for the implementation of Open Banking or Open Finance in Peru.

39. Furthermore, concerns were raised regarding certain regulatory aspects that could create differential treatment between Fintech companies and their competitors, such as access to the Electronic Clearing House (ECH) and the application of the General Sales Tax (IGV) on credit activities. In this regard, the Commission recommended that the Central Bank evaluate whether Fintech companies could indirectly access the ECH through Electronic Money Issuing Companies (EMIC), and that the Ministry of Economy and Finance (MEF) assess the relevance and timing of regulatory modifications to extend the non-application of IGV, which currently applies to banking entities, to other entities such as Fintech companies providing credit services.

3.2. Market report on public procurement of secretion's aspiration bags

40. This market report analyzed a set of public tenders for the purchase of secretion's aspiration bags, medical devices used in the collection of secretions from the respiratory system, blood, fluids, and other liquids released during surgical procedures. Information reported by the Government Procurement Supervisory Authority (OSCE) between 2015 and 2022 was analyzed to determine factors, patterns or condition that would have negatively impacted concurrence and competition.

3.2.1. *The mains findings of the market report were:*

- The establishment of technical requirements that affected both the concurrence and competition in public tender for secretion's aspiration bags.
- Market inquiries conducted before the public tenders recorded deficiencies related to ensuring the existence of a plurality of bidders.
- Specific characteristics related to: (i) the material of the medical device, (ii) the type of packaging, (iii) the assembly of the lid, (iv) the valve or anti-reflux device, (v) the carrying handle, (vi) the anti-foaming device, and (vii) the sampling orifice; being potentially unjustified, could generate additional costs to contracting entities.

3.2.2. *In this regard, Indecopi made the following recommendations:*

- Contracting entities should correctly verify potential bidders participating in the market study stage. In particular, the review of quotations at this stage should be more thorough to ensure their validity.
- OSCE need to increase its efforts to strengthen the capacities of the institutions involved in the application of public procurement regulations. Particularly, in relation to the development of market studies and the determination of bidder plurality, activities that showed deficiencies in some of the evaluated tenders.
- The Ministry of Health (MINSa) and the Central Office of Public Procurement – (Perú Compras) should carry out the necessary activities to conclude the process of homologation of technical requirements for the public procurement of secretion's aspiration bags. An exhaustive evaluation of the potential plurality of bidders that would comply with the technical specifications proposed in the pre-published homologation form is needed.

3.3. Market Study on Dairy

41. The dairy sector production chain comprises two links: the primary, where farmers supply raw milk, and the secondary, where large, medium, and small producers offer industrial milk and dairy derivatives.

42. The primary link is characterized by small-scale production. In 2012, 452 thousand families dedicated to raw milk production were counted, with 85% being small producers. In contrast, three main large industrial companies were identified, followed by medium and small companies, which demand raw milk. In this context, the sector authority was recommended to work on a technical assistance strategy to support farmers in improving milk quality and production volumes. Additionally, considering that milk quality is a relevant factor in determining its price and that there are certain information asymmetries between companies and farmers regarding milk quality measurements, the sector authority

was suggested to develop a guide on the procedure for taking samples for laboratory analysis of milk quality.

43. In the secondary link, industrial milks such as evaporated milk and pasteurized milk, and dairy derivatives such as yogurt and cheese, are commercialized. It was observed that consumption is concentrated in evaporated milk and yogurt, which represent 72% and 79%, respectively, of each category. Likewise, it was observed that among dairy product buyers, the State stands out through its social programs. In this regard, the health sector authority was recommended to conduct awareness campaigns on the benefits of different dairy products to encourage domestic consumption. Additionally, social program managers were advised to gradually involve different dairy companies, including artisanal producers, as long as they meet the requirements set by their regulations.

3.4. Guidelines for the Classification and Analysis of Business Concentrations Transactions

44. Indecopi published its Guidelines on the definition and analysis of merger transactions with the objective of providing orientation and generating predictability to merging parties, law practitioners and the citizens in general, on how the Commission for the Defense of Free Competition of Indecopi carries out its merger review analysis.

45. The issuance of this document is important due to the recent implementation of the merger review regime in Perú in 2021, and the need to provide legal certainty and guidance to the economic agents on (i) the general aspects to be analyzed in order to determine whether a transaction qualifies as a merger and (ii) the elements to be considered for the assessment of the risks of the transaction.