

---

24 November 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**JUDICIAL PERSPECTIVES ON COMPETITION LAW**

**Contribution from Peru**

**-- Session II --**

**7-8 December 2017**

This contribution is submitted by Peru under Session II of the Global Forum on Competition to be held on 7-8 December 2017.

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: [lynn.robertson@oecd.org](mailto:lynn.robertson@oecd.org)].

**JT03423591**

## *Judicial Perspectives on Competition Law*

-- Peru<sup>1</sup> --

### **1. Evidentiary Matters in Competition Cases before Courts**

1. Indecopi is empowered by law to issue decisions on antitrust, cartels, bureaucratic barriers, international trade disputes, unfair competition, intellectual property and consumer protection. The judicial review of Indecopi's decisions on competition matters may comprise of both the soundness and legality of those decisions.<sup>2</sup> The courts may address, for example, formal aspects of the decisions and also substantial issues such as the treatment of evidence and its interpretation.

2. There are courts specialized in dispute resolution on matters related to cases in which Indecopi is being empowered to rule by law.<sup>3</sup> This, however, does not mean that those courts have specialized knowledge on specific issues related to the broad number of matters covered by Indecopi. This situation could bring about particularly problematic issues because judicial appeals could even question economic aspects of the decisions. For instance, the courts have addressed very specific economic case matters such as relevant market definition, the assessment of market effects of anticompetitive conducts and their economic magnitude.

3. Although judges in Peru have acquired certain knowledge about the economic aspects of competition cases, some judges have experienced difficulties to understand the basic assumptions and economic views supporting Indecopi's decisions. This situation creates two main general risks to the effective enforcement of competition law:

1. First, it is common that Courts of First Instance settle the cases resorting almost exclusively to economic arguments developed in administrative decisions. Higher courts could then overturn the judgment of the first instance due to lack of a properly reasoned analysis, requesting a new review.
2. Second, the complex and specialized economic analysis required to understand competition cases may delay critically the issuing of a judge decision. For instance, in the 1990s, the main cartel case identified and fined by Indecopi, the price agreement in the poultry market, lasted 13 years in the Judiciary. Recently,

---

<sup>1</sup> This document was prepared by Enrique Priori of the Legal Affairs Department of Indecopi with the support of Rodolfo Tupayachi from the Economic Studies Department. Comments from Jesus Espinoza from the Defence of Free Competition Commission and Javier Coronado CEO of Indecopi.

<sup>2</sup> The judiciary of Peru is a hierarchical system of courts, with the Supreme Court at the top, followed by the Superior Courts and Courts of First Instance. Although, since 2013, the first two instances count with courts and specialized chambers in the review of Indecopi's decisions in the areas of consumer protection, free competition, bureaucratic barriers, unfair competition, and intellectual property.

<sup>3</sup> The specialized courts of the Judicial Authority have jurisdiction over topics relating to Commercial Law. For instance, they make decisions over cases associated with disputes on tax, pensions, compulsory expropriation, competition, among others.

other cases that were appealed in 2013 are still pending of a final decision by the Supreme Court.<sup>4</sup>

4. As far as we understand, the Judiciary power or its specialized courts, do not apply rule of thumbs or case law based analysis to address economic aspects of competition cases. The Peruvian Code of Civil Procedures establishes the general standard of analysis applicable by the judicial authority. It requires that the courts must conduct a reasoned assessment of all the evidence obtained during the administrative procedure. It also establishes that the courts should base their reviews resorting only to the relevant economic evidence included in the administrative file.

5. The latter standard implies that the court has to evaluate the quality of the economic assessments presented by the parties. In the event that the courts of first instance fail to identify and evaluate the evidence presented by the parties in the administrative file, there is a high risk that Indecopi faces difficulties to defend its position before the courts of higher hierarchy. For instance, there have been situations in which the Courts of First Instance did not consider economic reports by third parties that would indicate that, based on the data and economic assumptions used by Indecopi, the conclusions adopted by the competent administrative bodies would be incorrect. Under this scenario, plaintiffs have questioned the First instance decision before the Supreme Court based on the argument that not all the evidence was considered, favouring Indecopi's arguments.

6. On the other hand, the Judiciary power does not appoint experts on a regular basis to help the courts to assess the economics of the cases under their review. However, as an institutional initiative, Indecopi has promoted regular specialized training for judges on the matters under its responsibility. More details on those initiatives will be given in the following section.

7. Finally, based on the experience of the last 25 years, the standards applied by the judiciary in reviewing of the decisions issued by Indecopi have been fairly stable regardless of the degree of specialization of the court. In general terms, the judicial reviews have been favourable to Indecopi.

## 2. Interactions between Courts and Competition Authorities

8. There are no interactions between the Competition Commission of Indecopi and the judicial authority, regarding a specific case brought about before the latter. The defence before the court is led by the Legal Affairs Department of Indecopi, not by the Competition Commission.

9. Indecopi, however, has sought to help the judiciary by providing training in the treatment of specific issues resorting to programmes aim at presenting the international experience and standards of proof. Indecopi promoted a cooperation agreement with both the Judicial Branch and the Public Prosecutor's Office<sup>5</sup> to develop activities of capacity

---

<sup>4</sup> We refer to two cases in which the decision of the Competition Tribunal of Indecopi was questioned by rejecting a settlement proposed by insurer firms, and the other by upholding the decision and fine of the Defence of Free Competition Commission of Indecopi in the medical oxygen cartel case.

<sup>5</sup> It is important to highlight the role of the Public Prosecutor's Office in the proceedings in which the economic soundness of Indecopi's decisions is questioned since, for judges, the public

building to judges, prosecutors, and its assistants, training them in developing basic analytical skills to examine the economic evidence and its limitations

10. The aim of those training activities is to secure a general understanding of the economic facts that govern a competition case, work on effective techniques for the presentation of complex economic evidence to be presented to the court in a way that is credible, simple and well-supported by the economic facts. In that view, Indecopi has been very cautious in respecting the independence of powers, being very clear that the knowledge transfer is based mostly on international experience and generally accepted standards. For instance, in 2013 Indecopi promoted a series of presentations by experts in order to train judges on the economic aspects of the design and estimation of fines.

11. Judges and prosecutors are prepared with real cases where they are explained the legal aspects of the law, and the economic aspects of the enforcement of the competition act in order to enhance its understanding and criteria for assessing the economic views presented by the authority, as well as the economic evidence obtained in the proceeding.

12. Further interaction or cooperation between Indecopi and the judiciary authority or the National Prosecutor is unusual, even for private disputes. Interactions based on cooperation are formalized in a transparent way and in most of the cases includes the participation of international experts and practitioners that are independent of the competition authority.

### 3. Experience and Lessons Regarding the Use of Specialised and Generalist Courts

13. Until 2013, the judicial proceedings related to Indecopi's competency areas<sup>6</sup>, including those related to Free Competition, were usually reviewed by judges and courts specialized in administrative matters. Then, the Judicial Branch installed the sub speciality in Market Cases, creating four courts of first instance and a specialized chamber within the Superior Court in order to review, exclusively, the disputes related to Indecopi's cases. However, at the Supreme Court level, the Chamber of Constitutional and Social Law, which is in charge of reviewing disputes of various matters, is responsible for issuing a final decision on the cases of Indecopi.

14. Previous experience litigating before a non-specialized court can be considered satisfactory, almost 95% of the decisions adopted by the Judicial Branch upheld Indecopi's decisions. Now, with the functioning of the Courts and a Superior Chamber specialized in Market Issues, the number of cases in which a decision of Indecopi is upholding has increased. In effect, the specialization has allowed judges to make a better and more detailed analysis not only of the procedural aspects but especially of the substantive matters.

---

prosecutor's opinion is just as relevant as the position presented by the parties involved in it. Thus, an adequate analysis of the economic evidence by the Public Prosecutor's Office in its decision may contribute to reaching a decision consistent with the law.

<sup>6</sup> Indecopi is the National Authority in matters of Free Competition, Unfair Competition, Bureaucratic Barriers, Insolvency Process, Consumer Protection, Dumping and Subsidies, and Intellectual Property.

15. For instance, in the case of Medical Oxygen, the Contentious-Administrative Chamber with a Sub Specialty in Market Cases in file No. 7766-2013 made a complete assessment of each of the arguments presented by the plaintiff that questioned the existence of anti-competitive behaviour in the development of public procurement processes in the health sector. Thus, the judges, based on the analysis of the existing economic evidence and the facts accredited in the administrative instance, confirmed Indecopi's decision in the second judicial instance.<sup>7</sup>

16. Likewise, in file No. 1250-2015 we can mention the decision issued by the same Chamber, in which, based on an evaluation of the economic evidence collected during the investigations carried out by the Competition Commission of Indecopi, it was decided that the only possible explanation for the conduct of the undertaking investigated was the existence of a collusive agreement aimed at increasing the premiums and the minimum deductibles in vehicle insurance market.

17. Although the lack of specialization in the Supreme Court has not prevented the court from making an adequate assessment of the cases that they have had to decide on Indecopi's cases, however, an obstacle evidenced has been the delay in the issuance of their decisions. There are proceedings in which decisions are issued one year after the oral hearing has been held, including cases in which the final decision was issued almost two years after the hearing was held. Therefore, the creation of a Special Chamber in the Supreme Court to review the cases of Indecopi could reduce these delays. However, the implementation of the same may require a considerable time, since it involves making an amendment to the Organic Law of the Judiciary since this norm does not include a Supreme Court specialized in these matters.

18. Finally, according to the law, during the administrative litigation proceeding the opinion of the Public Prosecutor's Office is regularly required, that involve an analysis of the evidence and elements subject of the appeal in the judicial process. The problem with this proceeding is that the Public Prosecutor's Office does not have prosecutors specializing in the areas of Indecopi matters, so there is a risk that they will present an analysis that does not adequately address the economic aspects of the case. Although the position of the Public Prosecutor's Office is not decisive in the process, for the judges the report issued by them is relevant. Therefore, if the prosecution does not develop a correct evaluation of the economic evidence, it may cause an incorrect assessment by the judicial authority. In response to this situation, a possible action, in coordination with the Public Prosecutor's Office, could be the creation of specialized prosecutor's offices on market cases, either as an autonomous speciality or as part of the specialized administrative litigation.

---

<sup>7</sup> Final decision is still expected by the Supreme Court.