

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

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**COMPETITION LAW AND STATE-OWNED ENTERPRISES – Contribution  
from Peru**

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More documentation related to this discussion can be found at: [oe.cd/csoes](http://oe.cd/csoes).

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## *Competition Law and State-Owned Enterprises*

### **- Contribution from Peru\* -**

#### **1. Introduction**

1. The Peruvian Antitrust Law is of general application and has no waivers for any sector, industry, market or geographical area. There are very few cases though in which the Commission for the Defense of Free Competition (CLC), have investigated antitrust law infringements by State-owned Enterprises (SOEs). Some of these cases have however involved large SOEs with significant strategic position in the markets.
2. Possibly the most well-known case in which the CLC investigated an SOE, was one on a dispute against Petroperu, an oil company with integrated operations in the various markets of fuel production and distribution. This firm was created by Legal Decree 17753 in 1969 and has remained since as a relevant player in the industry.
3. The firm was investigated by the CLC under claims of abuse of its dominant position for a negative to supply aircraft fuel. In its Decision N° 009-2010/CLC, the commission concluded that although Petroperu held a significant dominant position in the relevant market, there was no evidence of effective or potential significant competitive effects of its conduct.
4. This example depicts a real scenario of nondiscrimination in the application of investigative powers under the Peruvian Antitrust Law.
5. In the next two sections we briefly comment on other competition matters concerning SOEs, mainly related to the special unfair competition legal body that is currently in place in the country.

#### **2. State-owned Enterprises Activities under Unfair Competition Framework**

6. Peruvian Constitution proclaims the subsidiary principle of the productive activities of the State. It also protects explicitly nondiscriminatory treatment to private investments and activities regardless of its origin. The Constitution also adopts as a main driver of the Peruvian social and economic organization the principle of freedom of private entrepreneurship.
7. Consistent with that principle it limits the role of the economic activities of the State to markets or sectors where there is not enough private supply of goods and services.<sup>1</sup> In

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<sup>1</sup> El artículo 60 de la Constitución establece lo siguiente: “Artículo 60°.- El Estado reconoce el pluralismo económico. La economía nacional se sustenta en la coexistencia de diversas formas de propiedad y de empresa. Sólo autorizado por ley expresa, el Estado puede realizar subsidiariamente actividad empresarial, directa o indirecta, por razón de alto interés público o de manifiesta conveniencia nacional. La actividad empresarial, pública o no pública, recibe el mismo tratamiento legal.”

fact, the State, at its different levels and scopes of functions, can only engage in productive activities by an explicit mandate of the Law.

8. Legal Decree 1044 (DL 1044), Law of the Repression of Unfair Competition, prohibits and sanctions unfair competition such as untruthful commercial advertising. This normative framework also sanctions public entities that engage in economic activities that are incompatible with the subsidiary role of the State.<sup>2</sup>

9. Through the Commission for the Supervision of Unfair Competition (CFD), Indecopi prosecutes infringements to DL 1044 at a first administrative instance. CFD decisions can be challenged at Indecopi's Tribunal of appeals which constitutes a second administrative instance. Parties may also challenge Indecopi's final administrative ruling at judiciary courts.

10. According to Case Law produced under Indecopi's competences around DL 1044,<sup>3</sup> the CFD should address cases on the subsidiary role of the State applying a two-step standard. Firstly, it should be verified the existence of a Law mandate that allows the public entity to engage in entrepreneurial activities. Secondly, the CFD should analyze whether such activity may be reasonably regarded as subsidiary. The latter analysis entails verifying that consumers served by the State-Owned Enterprises (SOE) -or more generally State-owned economic activities- are either not served at all by alternative private firms or private supply is insufficient to cover their consumption needs.

11. In economic terms the subsidiary role of the State in productive activities is justified by a superior interest to provide a good or service. This role is more tangible when the provision of such goods or services produce positive externalities to general welfare, in which case private supply may be regarded as sub optimal from an efficiency point of view.

12. From a general public policy perspective SOE activities out of its subsidiary role may distort the market mechanism. Specifically, under the generally accepted assumption that such activities are not oriented by profit seeking, goods and services may be provided under cross subsidy mechanisms that could, for example, distort equilibrium prices. A consequence of that is that already established private providers, new private firms or potential private entrants, could suffer from unfair State competition that may reduce private incentives to continue or enter the market even if such private firms are efficient.

13. Recent cases brought by private firms before de CFD include complaints against public postal services and electric generation firms, whose activities were regarded by private agents to be incompatible with the subsidiary role of the State. Older cases include air passenger transportation services and more anecdotal cases regarding market economic activities by public universities or municipalities.

14. Regarding postal services, by its Decision N° 164-2017/CCD-INDECOPI, the CFD found no evidence to consider a complaint of a private provider of parcel and documents delivery services against SERPOST, a SOE devoted mainly to universal postal services.

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<sup>2</sup> El artículo 14.3 del DL 1044, dispone que La actividad empresarial desarrollada por una entidad pública o empresa estatal con infracción al artículo 60 de la Constitución Política del Perú configura un acto de violación de normas que será determinado por las autoridades que aplican la presente Ley. En este caso, no se requerirá acreditar la adquisición de una ventaja significativa por quien desarrolle actividad empresarial.”

<sup>3</sup> Resolución N° 3134-2010/SC1-INDECOPI en el que se establece el precedente basado en un caso de denuncia por violación del principio de subsidiariedad de la Universidad Nacional de Puno (UNAP).

The CFD applied a standard of analysis common in antitrust practice by first defining the relevant markets in which SERPOST operated.

15. After confirming the existence of a Law mandate, the CFD defined relevant markets for SERPOST's economic activities, much in the same spirit of the CLC, and concluded that there is not enough current and potential private supply that may justify challenging a subsidiary role of the State.

### **3. The National Fund for the Financing of the Entrepreneurial Activity of the State (FONAFE)**

16. SOEs are managed under a public corporate organization called FONAFE. This is a public organization under the umbrella of the Ministry of Economics and Finance (MEF). It was created to regulate and manage the State entrepreneurial activities.<sup>4</sup>

17. FONAFE's board of directors is formed by State ministries and has as its main roles:

- Act as holder of the State participation of the social capital of all SOE and manage the proceedings of their economic activities.
- Approve the overall budget of all SOE under the control of FONAFE, under the current budgetary legal framework.
- Approve general rules and standards of the SOE managing.
- Appoint the representatives of the state on the shareholders' general meetings

18. Among other key corporate aspects, FONAFE controls the financing and debt taking of SOE under its scope. Eventually, FONAFE may consider general policies of debt taking that; under the State warranty, may allow SOE to obtain lower financing costs than private firms under the same market conditions. Thus, from a general competition policy approach, FONAFE decisions may attract the interest of the antitrust authority for putting at risk a level playing field.

19. According to an updated report on the debt position of SOE, non-financial sector SOEs, represent only a 17% share over total public debt of SOE. By large the debt position of SOEs correspond to public funds such as COFIDE which act as second floor loaner.

20. Two-thirds of the outstanding debt of non-financial SOEs under the control of FONAFE is concentrated in the public provider of water and sewerage services of Lima (SEDPAL), which operates under a monopoly regime, justified by the existence of a natural monopoly. Under such scenario, competition in that market seems not to be efficient. The remaining share of public debt due to non-financial SOEs comes from state-owned public utilities mainly from the electricity industry concerning regional services.

21. A first conclusion drawn from the figures above is that competition concerns that may come from a more favorable access to financial resources from SOEs is limited. This is because the information suggests that outstanding debt of non-financial SOEs are mostly related to public utilities that provide services under natural monopoly or whose operations are focused at regional scope.

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<sup>4</sup> Creada por la Ley No. 27170, que fue promulgada en septiembre de 1999.

22. There is no evidence of direct public subsidies aim at covering operational costs of SOEs, even for those which seemingly comply with a subsidiary role in the market. There are, however some subsidies allocated to the operation of telecommunications projects that were designed to complement existing private backbone networks. These projects are part of the National Optical Backbone Network, which include one national transportation network and 21 regional transportation and access networks that focus their services to districts where there is very limited or no access to broadband services.<sup>5 6</sup>

23. The general picture leads us to conclude that there is no evidence of a systematic use of public financing of SOEs that could have significant impact over a level playing field in the markets. This situation could paradoxically bring future disputes regarding the economic activities of SOEs. The lack of sources of financing through debt issuing or bank loans, may push SOEs to explore opening new business lines in search of proceedings to finance their subsidiary activities. In that process, there might appear instances for disputes regarding the compatibility of those new activities with the terms of DL 1044.

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<sup>6</sup> Los proyectos regionales fueron encargados en su diseño al Fondo de Inversión en Telecomunicaciones (FITEL), el detalle puede consultarse en <  
<http://www.fitel.gob.pe/pg/proyectos-regionales.php>>