

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Peru****4 June 2019**

This document reproduces a written contribution from Peru submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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## Peru<sup>1</sup>

### 1. Legal framework and standard of review

#### 1.1. Historical background of Competition Law in Peru

1. The first Peruvian competition law was approved on 1991 through the Legislative Decree 701. This law typified abuse of dominance and collusive practices as administrative infringements. It also provided power of inspection and sanction of anticompetitive conducts in a sole entity called the “Multi-sectorial Commission of Free Competition”.
2. This entity never started its functions due to the delay in the approval of the provisions that ruled its organization and structure. In 1992, the National Institute of Defense of Competition and Intellectual Property Protection (Indecopi, by its acronym in Spanish) replaced this Commission. Indecopi, as a public entity, concentrated the application of laws that ruled fair competition, antitrust, elimination of bureaucratic barriers, defense of international commerce, bankruptcy, consumer protection and intellectual property.
3. In 2008, 15 years after the law entered into force, the Legislative Decree 701 was replaced by the Legislative Decree 1034 -the current competition law-.
4. Since its origin, the institutional design of Indecopi contemplates the intervention of two administrative instances in the investigation and sanction of anticompetitive conducts<sup>2</sup> (art. 13 of the Legislative Decree 1034) and merger control<sup>3</sup> (art. 8 of the Law 26876): The Competition Commission, as the first administrative instance; and the Competition Division of the Tribunal of Indecopi (Tribunal), as the second and final administrative instance.

#### 1.2. Institutional design of Indecopi for the application of Competition Law

##### 1.2.1. The Technical Secretariat and the Commission

5. The first instance is composed by the Technical Secretariat and the Commission. Both have technical autonomy in the execution of their power, so it can assure the autonomy of their decisions.

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<sup>1</sup> This document was prepared by Carlos Mamani Moya, senior legal analyst of the Technical Secretariat of the Competition Division of the Tribunal of Indecopi; and, Pedro Chirinos Terrones, legal analyst of the Technical Secretariat of the Competition Division of the Tribunal of Indecopi.

<sup>2</sup> Peru has two competition agencies: Supervisor Organism of Public Investment in Telecommunications (Osiptel by its acronym in Spanish), which is competent in all matters concerning the telecommunications sector, and Indecopi for all other sectors of the economy.

<sup>3</sup> Peruvian legal system only has merger control in the electricity market. However, the National Parliament is evaluating a full-market merger control.

6. The Technical Secretariat is the body with technical autonomy to perform investigative acts of possible anticompetitive conducts<sup>4</sup>, initiate the administrative proceeding and issue a final report of the infringement investigated.

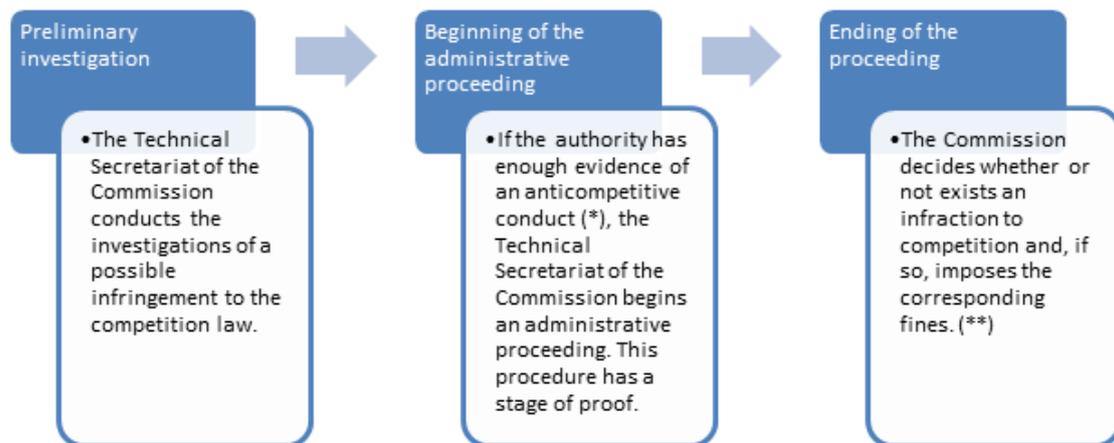
7. The Technical Secretariat investigates possible infringement to competition law. Once the authority has enough evidence of a possible infringements, it has the power to formalize the accusation to the investigated, who will exercise his defense in the parameters of an administrative proceeding. At last, the Technical Secretariat prepares the final report of the investigation, which will be analyzed by the Commission when issuing its final decision.

8. The Commission is a body with technical and functional autonomy in charge to decide whether investigated conducts qualifies as an infringement to competition law and apply the corresponding sanctions (fines)<sup>5</sup>. The Commission also knows and approves, as a sole instance, the commitments and settlements requested by the parties investigated.

9. The final decision of the Commission ends the first instance of the procedure. If this decision is not appealed, it enters into force and can be executed. In consequence, Indecopi can require the sanctioned parties to pay the fines imposed.

10. The institutional design explained can be structured as it follows:

**Figure 1. General investigation and sanction of the infringements to the competition law**



Notes:

(\*) These evidences can be obtained as a result of the preliminary investigations or through a complaint.

(\*\*) The procedure can also end with the approval of a commitment.

### 1.2.2. The Competition Division of the Tribunal

11. The second instance of Indecopi in charge of the application of the competition law is the Tribunal. This instance decides on appeals of the decisions issued by the Commission or its Technical Secretariat.

<sup>4</sup> The article 15.3 of the Legislative Decree 1034 establishes that the Technical Secretariat should have a judicial approval before accessing the establishment of the business or copying private communications, in cases where the investigated deny the access or the copy of the information.

<sup>5</sup> The Commission also has autonomy to decide the number and subjects of advocacy studies to be pursued by the Technical Secretariat

12. The Competition Division of the Tribunal not only handles appeals related to competition cases, but evaluates appeals filed against decisions of three Commissions of Indecopi: (i) Free Competition, (ii) Unfair Competition and (iii) Anti-Dumping, Subsidies and Elimination of Non-Tariff Trade Barriers.

13. The Tribunal is the functional body that hears, in the second and last administrative instance, appeals filed by parties against a decision rendered by the Competition Commission or its Technical Secretariat. The decision of the Tribunal could then be appealed before the judicial courts. In fact, the review by the Tribunal of Indecopi is a mandatory step before judicial review, according to art. 148 of Peruvian National Constitution and art. 20 Consolidated Text of the Law 27584.

14. Not all the decisions of the Technical Secretariat and the Commission in competition cases can be appealed before the Tribunal. The competition law (art. 34 of the Legislative Decree 1034) indicates that only the following decisions can be appealed:

- The decision that impedes the parties to continue the procedure.
- The decision that can threaten the defendant's right of defense.
- The final decision of the Commission.

15. The approval of commitments is a discretionary decision that cannot be reviewed by the Tribunal (art. 25.5 of the Legislative Decree 1034), therefore, it is not appealable.

16. The settlement -and its consequent fine reduction- are also decisions that are not appealable. In one hand, the investigated has no interest on appealing the settlement and the reduction of the fine, because it is a favorable decision. On the other hand, third parties are not legitimated to appeal the settlement, because the competition law only habilitates them (in case they are the complainants) to appeal the final decision of the Commission when it exculpates the investigated agents (art. 38.2 of the Legislative Decree 1034).

17. Another ruling that is appealable is the decision held by the Commission in an enforcement procedure, as the imposing of a coercive fine.

18. In the case of mergers and acquisitions, the current regulation (which only contemplates mergers in the electricity market) provides that the resolutions of the Commission can be appealed before the Tribunal.

19. The Tribunal reviews the legality of the appealed decision on the basis of the arguments of the appellant. These arguments are frequently referred to the legality of the decision, the analysis of the evidence and the possible defects during the procedure.

20. The resolution of the Tribunal can uphold or modify the decision rendered by the Commission or its Technical Secretariat. It can also declare the nullity of the decision and, in consequence, order the first instance to emit a new decision or, in case that the Tribunal has the necessary elements, it can directly emit the referred new decision.

21. In summary, the institutional design of the competition law system in Peru has adopted the integrated or administrative model, where the competition authority has the power to investigate possible violations of the competition law, as well as to decide if such violations took place<sup>6</sup>.

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<sup>6</sup> OCDE (2016). The Resolution of Competition Cases by Specialised and Generalist Courts, page 38.

### 1.3. The judicial review in competition cases

#### 1.3.1. Decisions subject to review

22. The decision rendered by the Tribunal of Indecopi cannot be questioned in the administrative procedure, so it can only be challenged in a judicial process.

23. It is important to reiterate that the decisions issued by the Technical Secretariat and the Commission must be questioned before the Tribunal of Indecopi (internal control) as a previous step for questioning later in the judicial process (external control).

24. Therefore, the procedural acts or the final decision of the Competition Commission may be challenged in a judicial process, as long as they have been previously questioned before the Tribunal of Indecopi.

#### 1.3.2. Legal framework for judicial review

25. Until 2001, the judicial review of administrative decisions, including competition cases, were ruled in accordance with the provisions for litigation in private law. The Code of Civil Procedure established that, in case of verifying a defect of validity, the judge could only declare the nullity or ineffectiveness of the administrative decision.

26. This context changed in 2001 with the approval of Law 27584. This law established that the judge is not only empowered to declare the nullity or ineffectiveness of the administrative decision, but also may order additional measures to reestablish the rights and interests of the party that has been affected.

27. This legal framework also establishes the judicial procedure to be following to challenge the administrative decision of the Tribunal of Indecopi: As a rule, the decisions of the Tribunal could be challenged in the judicial procedure called “proceso contencioso administrativo” (here in after PCA). Exceptionally, when the decision of the Tribunal affects fundamental rights, it may be questioned in a constitutional process called “amparo”.

28. The lawsuit in both procedures may be brought by the losing party in the administrative proceeding, *e.g.* the economic agent who was found responsible for an anti-competitive practice. The deadline for filing the lawsuit in the PCA is three months counted from the notification of the decision of the Tribunal, while in the case of “amparo” is sixty working days counted from that event or the decision that would damage the fundamental rights (*e.g.* the decision to execute the sanction imposed).

#### 1.3.3. Structure of judicial instances in the PCA

29. The structure of the judicial instances in the PCA with jurisdiction to review administrative decisions, including competition cases, have been changed several times since the approval of Law 27584 in 2001<sup>7</sup>. However, until 2012 it was always in charge of courts with general jurisdiction to review administrative matters.

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<sup>7</sup> The original text of Law 27584 establishes that the judicial authority of first instance was a unipersonal court with general jurisdiction on administrative matters. It was modified in 2002, moving the first instance to a collegiate court, also with general jurisdiction on administrative issues. Then, in 2009, returned to a unipersonal court of first instance.

30. In 2012, the Judicial Power created the sub specialty in “*Market Cases*”, creating 4 unipersonal courts of first instance and a Court of appeal (collegiate tribunal), both exclusively for reviewing the disputes related to the cases known by Indecopi in the PCA<sup>8</sup>.

31. According to the Administrative Resolution N° 206-2012-CE-PJ, which created the referred jurisdictional bodies, the cases related to Indecopi matters were among the subjects with highest incidence in the PCA. Then, the Judicial Power needed to adopt measures to provide a more agile procedure and avoid its delay<sup>9</sup>.

32. In 2016, the competence of these sub specialty was extended to review regulatory issues (energy, infrastructure, sanitation and telecommunications) and even the review of public procurement<sup>10</sup>.

33. Hence, the jurisdictional bodies responsible for reviewing competition cases in first and second instance in the PCA are partially specialized in Competition Law, as they are also competent to review the decisions of Indecopi in other matters<sup>11</sup> and regulatory issues.

34. The Supreme Court of Justice intervenes in reviewing competition cases as a court of cassation through the Chamber of Constitutional and Social Law, which is a court with general jurisdiction that can review a greater extent of disputes related to the branch of administrative and constitutional law.

35. To sum up, the structure of judicial review is as follows: First, the unipersonal court reviews the decision of Indecopi and renders a sentence. That sentence can be challenged before the Court of appeal. Finally, the sentence of the Court of appeal may be questioned before the Supreme Court, which intervenes as a court of cassation and is the highest judicial instance in the PCA.

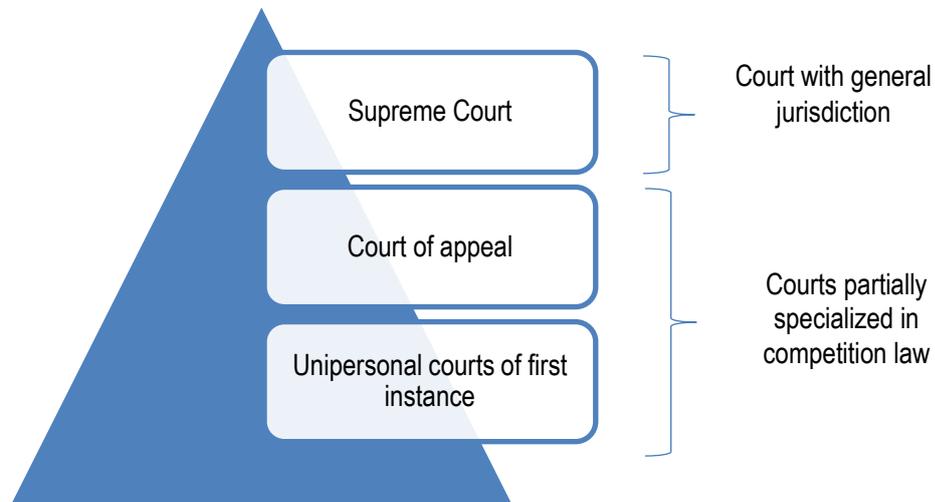
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<sup>8</sup> The Judicial Power also created a unipersonal court of first instance for the constitutional process where the decisions of Indecopi are challenged.

<sup>9</sup> The text of the Administrative Resolution N° 206-2012-CE-PJ is available in: <https://busquedas.elperuano.pe/normaslegales/crean-diversos-organos-jurisdiccionales-en-la-corte-superior-resolucion-administrativa-n-206-2012-ce-pj-859501-1/>

<sup>10</sup> Modification approved by the Executive Council of the Judicial Power through Administrative Resolution N° 159-2016-CE-PJ, whose text is available in: <https://busquedas.elperuano.pe/normaslegales/modifican-denominacion-y-amplian-competencia-funcional-de-di-resolucion-administrativa-no-159-2016-ce-pj-1399277-3/>

<sup>11</sup> Indecopi concentrated the application of laws that ruled fair competition, antitrust, elimination of bureaucratic barriers, defense of international commerce, bankruptcy, consumer protection and intellectual property.

**Figure 2. Structure of judicial instances**

#### 1.3.4. The scope of judicial review

36. Regarding the scope of judicial review, the art. 1 Consolidated Text of Law 27584 establishes that the purpose of the PCA is the legal control by the Judicial Power of the decisions rendered by administrative bodies (such as Indecopi) and the effective protection of the rights and interests of the citizens.

37. The Supreme Court of Justice, the highest judicial instance, has stated in repeated sentences that the PCA is a process of *"full jurisdiction where an effective control of the legality of administrative decisions can be carried out and provide adequate protection of the rights and interests of the parties."*<sup>12</sup>

38. The sentences of lower judicial instances analyzing competition cases also lead us to conclude the PCA consists in a review of legality. For instance, in the sentence issued by the Court of appeal<sup>13</sup> in the *Medicinal Oxygen* case, the judicial authority dismissed several arguments raised by one of the plaintiffs because such arguments had not been raised during the administrative proceeding *"reason why they cannot be subject of analysis in a review process such as this one"*<sup>14</sup>.

39. Another example is the judicial review of the *Vehicle Insurance* case, where the unipersonal court of first instance<sup>15</sup> verified that the decision of the Tribunal of Indecopi

<sup>12</sup> Extracted from the thirteenth numeral of the Cassation N° 20491-2016 LIMA of September 11<sup>th</sup>, 2018 issued by the First Transitional Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic. A similar criterion is set forth in the eighth numeral of the Cassation N° 19311-2015 HUAURA of January 17<sup>th</sup>, 2017, also issued by the First Transitional Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic.

<sup>13</sup> Second judicial instance in the PCA.

<sup>14</sup> Sentence issued on January 4<sup>th</sup>, 2017 in Judicial Case N° 7766-2013 by the Fifth Administrative Contentious Chamber Sub-specialized on Market Issues of Lima. This case is pending of review by the Supreme Court of Justice.

<sup>15</sup> First judicial instance in the PCA.

had been issued respecting the applicable procedural rules and ruling on each of the arguments raised by the plaintiffs, elements that accredited its legality<sup>16</sup>.

40. Thereby, the role of the judicial authority in competition cases could be defined as the control the legality of the decisions adopted by the Tribunal and the protection of the rights of citizens who may have been adversely affected by such decisions.

41. The judicial authorities does not proceed as a competition authority because it does not re-analyze, from its own discretion, the documentary and economic evidence collected during the administrative procedure, but rather its action consists to review what have been acted in such procedure: (i) verifying that the decision of Indecopi does not contravene or ignore rules established in the Legislative Decree 1034; (ii) evaluating that the decision of Indecopi has analyzed the defense arguments raised by investigated parties; and, (iii) reviewing that the administrative proceeding has respected the rights and guarantees of the investigated parties.

42. Hence, the art. 27 Consolidated text of Law 27584 establishes that the probative activity is restricted to the evidence collected in the administrative file, unless there are new facts relevant for the resolution of the dispute.

43. Then, the judicial authorities have full jurisdiction to review the evidence collected in administrative file and the law applicable to the decision of Indecopi, except the Supreme Court, which can only deal with legal matters relating to judicial decisions, due to it intervenes as a cassation instance<sup>17</sup>.

44. It must be remarked that if the judicial authority verifies a defect in the validity of the decision of Indecopi, would not only declare the nullity of such decision but, assuming its role as guarantor of the rights and interests of the citizens, can arrange the necessary measures to restore the consequences of the decision declared null (art. 41 Consolidated text of Law 27584).

45. The review of fines in competition cases is subject to the same standard of judicial review. It is also important to point out that anti-competitive practices are not criminalized in Peru.

46. The challenge of procedural acts performed by the Technical Secretariat of the Commission (like requests for information or dawn raids) is not common, mainly due to not all of them are appealed before the Tribunal of Indecopi and, from those, a fewer number are challenged before the judicial authorities.

47. An example of the judicial challenge of a procedural act can be found in the Judicial Case N° 1177-2018. In this case, a company investigated for an alleged collusive practice questioned before the Tribunal of Indecopi a procedural act carried out by the Technical Secretariat of the Commission (the copying of its correspondence during a dawn raid) arguing that it harmed its right to secrecy of communications. After the Tribunal of Indecopi dismissed the claim, the company brought a lawsuit questioning that decision.

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<sup>16</sup> Sentence issued on October 24<sup>th</sup>, 2016 in the accumulated Judicial Cases N° 1505-2015 and 1250-2015, by the Twenty-fifth Administrative Contentious Court Sub-specialized on Market Issues of Lima. This sentence was later confirmed by the Court of appeal. Its revision by the Supreme Court of Justice is currently pending.

<sup>17</sup> OECD (2018), OECD-IDB Peer Reviews of Competition Law and Policy: Peru, page 70.

The lawsuit was admitted by the unipersonal court of first instance in a constitutional procedure, which is still in process.

## 2. Court's access to competition expertise

48. Indecopi cooperates actively with the Judicial Power to help make judicial processes more agile and transparent. For example, in 2017 both entities subscribed an agreement so that the administrative files required by the judicial organs can be sent electronically in order to make the procedure more agile. This agreement also includes the participation of professionals from Indecopi and the Judicial Power in academic activities that can be carried out by both institutions<sup>18</sup>.

49. It should be noted that the Competition Commission, nor the Tribunal of Indecopi, have interactions with the judicial authority in the context of the judicial review of a particular case. In fact, the defense of Indecopi before the courts is assumed by the Legal Affairs Department of Indecopi.

50. Courts do not usually request for external advice for the analysis of competition cases. However, if they appreciate that the assessment of the facts at issue requires special knowledge (e.g. complex economic evidence) have the power to ask the parties or the experts of the Judicial Power for a professional report in the matter<sup>19</sup>.

51. Since its implementation in 2012, the specialized jurisdiction has allowed judges to render a more detailed analysis of competition cases, evaluating not only procedural aspects but especially substantive matters<sup>20</sup>.

52. For instance, in the *Cement* case, the unipersonal court of first instance agreed with the competition authority that not only the anti-competitive conducts (in that case vertical restraints) that caused real effects in the market should be sanctioned, but also those that could have potential effects<sup>21</sup>.

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<sup>18</sup> Information extracted from the website of Indecopi: [https://www.indecopi.gob.pe/en/inicio/-/asset\\_publisher/ZxXrtRdgbv1r/content/el-indecopi-suscribe-importante-convenio-con-el-poder-judicial-para-facilitar-el-envio-de-expedientes?inheritRedirect=false](https://www.indecopi.gob.pe/en/inicio/-/asset_publisher/ZxXrtRdgbv1r/content/el-indecopi-suscribe-importante-convenio-con-el-poder-judicial-para-facilitar-el-envio-de-expedientes?inheritRedirect=false)

<sup>19</sup> Art. 262 of the Code of Civil Procedure.

<sup>20</sup> OCDE (2017), *Judicial Perspectives on Competition Law: Contribution from Peru*, page 4.

<sup>21</sup> Sentence rendered on March 28<sup>th</sup>, 2017 by Twenty-fifth Administrative Contentious Court Sub-specialized on Market Issues of Lima, Judicial Case 2873-2015. Numeral 26: *"It will be enough that the anti-competitive behavior has generated a danger or potential for a result on the competition and welfare of the consumers, to consider that the infringement has been configured, without the competition authority having the need to verify the consummation of any effect or negative result in the market."*

This sentence was upheld by the Court of appeal and is still pending of review by the Supreme Court of Justice.

53. Another example can be found in the *Medicinal Oxygen* case, where the Court of appeal concluded that there is no legal obstacle for using circumstantial evidence to demonstrate the existence of a collusive practice<sup>22</sup>.

54. Both decisions are relevant for ongoing investigations related to collusive practice between competitors and vertical restraints.

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<sup>22</sup> Sentence issued on January 4<sup>th</sup>, 2017 in Judicial Case N° 7766-2013 by the Fifth Administrative Contentious Chamber Sub-specialized on Market Issues of Lima. This case is pending of review by the Supreme Court of Justice.