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OF COMPETITION LAW
AND POLICY: PERU**



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Foreword

The OECD has been active in promoting competition policy in countries across Latin America and the Caribbean (LAC) for many years. The partnership between the OECD and the Inter-American Development Bank (IDB) has advanced these efforts. The annual Latin American and Caribbean Competition Forum (LACCF) is the cornerstone of this collaboration on competition matters. It is a unique forum, which brings together senior officials from countries in the region, to promote and support the identification and dissemination of best practices in competition law and policy. Sixteen meetings have been held to date.

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Peer reviews are a core element of the OECD's activities. They are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all. There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process. They are also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

The OECD and the IDB therefore include peer reviews as a regular part of the joint Latin American Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted at the LACCF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted at the OECD's Competition Committee. The Forum reviewed El Salvador in 2008, Colombia in 2009, Panama in 2010 and Honduras in 2011. A follow-up of the nine peer reviews was conducted in 2012 as part of the 10th Anniversary of the LAACF. In 2014, Costa Rica became the 10th country to have its competition regime peer reviewed. At this forum, Peru becomes the latest country to have its

system peer-reviewed. The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this successful partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms, which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Peru for volunteering to be peer reviewed at the sixteenth LACCF meeting held in Argentina on 18-19 September 2018. We would like to thank Eduardo Frade, the author of the report, and Pedro Caro de Sousa of the OECD Secretariat. We would also like to thank the lead examiners, Paulo Burnier Brazil; Nelson Guzmán Mendoza El Salvador; and Alejandro Faya Mexico. We are grateful to Esteban Greco and his team at Argentina's National Commission for the Defence of Competition for hosting the LACCF and the many competition officials whose written and oral submissions to the Forum contributed to its success. We and the author would also like to specifically thank Ivo Gagliuffi, Javier Coronado and Jesus Espinoza Lozada from Indecopi for their valuable input, availability to answer queries, and support in facilitating interviews Lynn Robertson of OECD, for overseeing the peer review and planning the discussion at the LACCF, together with Erica Agostinho and Angelique Servin for assisting in both of these activities.

This report was undertaken at the request of the Peruvian government. We want to thank the Government of Peru for volunteering to be peer reviewed, and to all the participants who were kind enough to accept to participate in the meetings that took place during the fact-finding mission and that were held in Lima from 28 May to 1 June 2018.

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Executive summary

Peru has a competition regime that is active and in line with internationally recognised standards and practices, with the exception of merger control. A number of recent reforms are evidence of the ambitious efforts by Indecopi and the Peruvian Government to improve the effectiveness of competition enforcement and to make markets work better. Competition law applies to all economic sectors and to all conducts that might have anticompetitive effects in Peru. Peru prohibits hard-core cartels without requiring an assessment of their effect on competition, horizontal and vertical agreements when they have anticompetitive effects, and abuses of a dominant position. In effect, the basic pillars of competition law in Peru are in line with good international best practices, with one exception: the absence of a merger control regime.

Peru has two competition agencies: Osiptel, which is competent in all matters concerning the telecommunications sector, and the Institute for the Defence of Competition and Intellectual Property (Indecopi) for all other sectors of the economy. This institutional configuration is not uncommon in Latin America, but it creates risks of divergence in the application of competition law. In the case of Osiptel, it also leads to risks of competition enforcement being either consumed by Osiptel's regulatory function or used to advance regulatory goals, which are compounded by the absence of personnel in Osiptel's Technical Secretariat who are devoted exclusively to competition matters. Failure to address these risks is likely to lead to concerns regarding Osiptel's preference for solving problems by resorting to its regulatory powers – particularly in the light of the limited competition enforcement undertaken by Osiptel.

Indecopi is a well-regarded enforcement agency both domestically and internationally. It benefits from the support and respect of virtually all major stakeholders in Peru, both public and private. Indecopi's structure is uncommon as it comprises a deliberative branch which resolves disputes and takes decisions regarding numerous market regulation matters beyond competition law – including IP, unfair competition and consumer protection, amongst others - and an administrative branch, which provides support to the deliberative branch without being involved in law enforcement. Such a structure seems to work well as

regards competition law and policy, particularly since the relevant bodies within Indecopi that deal with competition matters – namely the Technical Secretariat, the Competition Commission and the Tribunal – act, for all practical purposes, as a fully autonomous and independent competition authority. Such an institutional set up allows for the reaping of synergies between related areas of regulation.

Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. This institutional arrangement is expected to provide a safeguard against political and public pressures, and particularly those that might arise from individual Ministries responsible for individual economic sectors. When coupled with the institutional set up of Indecopi, which ensures the technical and autonomous nature of the decisions taken by the different resolute bodies, this creates multi-layered protections against interference and the politicisation of decisions adopted by the functional branch of Indecopi. In practice, the influence of the Executive Branch or Parliament in defining the agenda of Indecopi has been marginal: the autonomy of the Commission to decide what to investigate and how to handle competition proceedings is widely acknowledged by all observers. Despite this, the legal framework poses a number of risks to the autonomy and independence of Indecopi and its decision-making.

One apparent side effect of the concern with maintaining the autonomy and independence of the decision-making bodies is that Indecopi has not engaged in strategic planning or in prioritising competition concerns in the past. There is an absence of integrated thought and strategy on how competition law and policy can fit with other Indecopi activities and roles in order to reap the benefits of synergies from multiple competences. Indecopi is currently developing a national competition plan. This is a worthwhile development, and one that should be undertaken to identify enforcement priorities and ways in which Indecopi can harness its multiple regulatory functions to promote competition in Peru.

Indecopi benefits from a stable and autonomous source of funding. Its budget has remained relatively stable over the years, and is broadly protected from political interference. Furthermore, Indecopi is a large and well-resourced organisation, with 1 700 employees. Nonetheless, Indecopi's competition bodies have little more than 50 people – if one includes the part-time commissioners and members of the Tribunal. Even as the staff of Indecopi's competition bodies has increased, it is consensual among observers that the Competition Branch is understaffed and would benefit from a larger number of employees, which are an absolute need if Indecopi is granted merger review duties in the future. Concerns with staff levels are compounded by the fact that average salaries paid to Indecopi employees are unattractive and unable to retain personnel in the long term.

Discrepancies between public and private sector salaries are common around the world. Nonetheless, the personnel of competition agencies are normally highly qualified, and are normally paid more than civil servants. The existence of a civil service pay-cap that applies to Indecopi and other regulators – but not to comparable specialist bodies, such as the Central Bank or the Financial Regulator – creates a larger discrepancy between public and private sector salaries in competition related activities than would otherwise be the case, and poses significant problems in terms of retention of qualified staff.

Concerns about staffing of the competition branch of Indecopi go together with complaints about the length of competition proceedings, and about the Competition Commission, whose members work part-time for very little pay, being overly dependent on the Technical Secretariat. This alleged dependence is said to lead to a blurring of the distinction between investigative and decision-making roles. A recent rule setting out a maximum time limit for investigations, which if exceeded leads to proceedings being terminated, adds to concerns regarding the length of proceedings. Investigations risk being rushed or not closed on time given this trifecta of the complexity of competition proceedings, staffing limitations and hard deadlines regarding the duration of an investigation creates risks of investigations being rushed or not being closed on time. This trifecta can mean that the Commission's focus is not on the most serious infringements but those that are easier to prove; and could result in an overall decline in the quality of Indecopi's enforcement in the future.

Despite the challenges that we just identified, the efforts of Indecopi's leadership to strengthen its enforcement tools and the admirable commitment of Indecopi's staff have led to increased competition enforcement with significant positive results. Enforcement has focused mainly on prosecuting cartels. Nonetheless, it is noticeable that enforcement against bid rigging in Peru is very scarce, and that there is a lack of co-ordination between Indecopi and the relevant public procurement bodies. Given the impact of bid rigging on the public purse and taxpayers, and how common bid rigging practices are around the world, it is important that Indecopi pursues a more aggressive enforcement against bid rigging, and that co-ordination between competition and public procurement authorities increases.

In any event, the focus on competition enforcement against cartels has led to some unquestionable successes. It is undoubted that cartels should be one, if not the main, focus of competition enforcement. Nonetheless, enforcement should also be directed at other horizontal and vertical anticompetitive agreements and at abuses of a dominant position – particularly when, as is the case in Peru, there is no merger control regime. The adoption of a merger control

regime should be a priority for Peru, since in its absence competitors can circumvent the prohibition against anticompetitive agreements by merging – with effects potentially similar to those of a cartel immune from antitrust scrutiny. Furthermore, mergers may lead to the creation of economic agents with market power. In the absence of merger control, enforcement of prohibitions against abusive behaviour by those companies with significant market power becomes more relevant. Despite these circumstances that would seem to justify enhanced enforcement against anticompetitive practices other than hard-core cartels, enforcement against vertical agreements by companies with market power and against abuses of market power has been close to non-existent.

As regards the sanctioning of competition infringements, Peru's rules on the amount and calculation of fines are broadly in line with international practice. Peru does diverge from international practice in placing great reliance when calculating the amount of a fine on the illicit benefit that the offender is supposed to have obtained as a result of its anticompetitive conduct. Internationally, it is considered to be extremely challenging to calculate illicit benefit accurately. Such an approach to setting the amount of a fine increases the cost of proceedings and of successful judicial challenges. As such, most jurisdictions often rely on a simple proxy like amount of sales or turnover in the relevant market.

Recent legal reforms have sought to promote the adoption of settlement and commitment procedures. Notwithstanding the increase in number of settlement and commitment procedures since then, proceedings seem to lack predictability and certainty. Observers claim that it would be possible to encourage more settlements and commitments, in a way that would benefit competition enforcement and rationalize administrative resources, by increasing the transparency and predictability of settlement and commitment procedures. As regards settlements, in particular – since commitments will not often be appropriate for cartels – care should be taken to ensure that such measures are not so favourable to infringing parties as to risk undermining their incentives to apply for leniency.

Concerning advocacy, Indecopi has played an important role in ensuring that Peruvian society and relevant stakeholders become increasingly aware of competition law and policy, and in promoting a competition culture. Its School is a particularly impressive example of how agencies can engage in outreach to promote competition law, create awareness of the importance of competition, and engage with relevant stakeholders – public and private, national and foreign. The School provides an example of competition advocacy that could be imitated elsewhere. Furthermore, one of Indecopi's competences is the removal of bureaucratic barriers, and one of its branches is exclusively devoted to this. The

recommendations of Indecopi as regards regulatory barriers are binding on all public entities, which must remove such barriers if Indecopi so requires. The identification and removal of bureaucratic barriers is an activity that is likely to promote competition and remove barriers to market entry.

Indecopi could add to this impressive assortment of competition advocacy initiatives. It has the power to pursue market studies, which are widely recognised as an important tool to open markets to competition. However, the limited number of staff available to the Competition Commission limits both the number of advocacy studies that it can prioritise and pursue in any given year, as well as the number of analysts that the Commission can assign to these activities. Indecopi has produced a relatively limited amount of competition-related guidance. Indecopi is currently working on additional guidelines and bringing them to the attention of relevant stakeholders. This activity should continue to be pursued. Indecopi's review of bureaucratic barriers focuses on their illegality or unreasonableness; it would be good if this competence could be used in such a way as to identify regulations that, while lawful and reasonable, nonetheless unnecessarily restrict competition. Lastly, it seems that Indecopi does not provide opinions on primary legislation unless asked to do so; it is advisable for Indecopi to have the opportunity to comment on pieces of legislation without being asked to do so, particularly when it considers that they are particularly detrimental to competition.

Lastly, Peru – and particularly Indecopi – is aware of the benefits of international co-operation. Indecopi is active in international fora, it has a number of agreements with competition authorities in other countries, has exchanged personnel and experience with these authorities, and it has, at a high level, cooperated in investigations with neighbouring countries. Peru can take further steps in expanding and deepening its co-operation with other countries on competition matters. Up to now, there have been no joint investigations between Indecopi and other agencies for the detection of anticompetitive conducts, and even exchange of information between competition agencies is limited due to Peruvian legal restrictions concerning the possibility of exchanging information regarding ongoing proceedings. These are just some of the areas in which deeper co-operation would be to the benefit of competition enforcement in Latin America. In light of the above, and while acknowledging the undoubted virtues and quality of Peru's competition law and policy as well as the admirable commitment of Indecopi's leadership and staff, a number of recommendations are made below in order to further improve it. It is noted that a number of these recommendations are the same that were made at the time of the last competition and policy peer review of Peru in 2004.

1. Context and foundations

1.1. Historical context

1.1.1. Context

An analysis of the challenges involved in introducing competition law and policy to Peru must begin with the country's recent political and economic history, which in turn must be understood in terms of Peru's size and its striking diversity in matters such as topography, ethnicity, language, wealth, and custom. Located on the west coast of South America, Peru is in geographic terms the third largest country in South America and the 20th largest country in the world (by way of comparison, it is slightly larger than South Africa; almost twice as large as Chile; and slightly smaller than France, Germany, and Spain combined). Peru's northernmost point sits on the equator, bordering Ecuador and Columbia. From that point, Peru extends southwest to include mild coastal plains, and southeast to include part of the largely impenetrable Amazon basin. These two areas are divided by the Andes mountain range, whose tropical foothills give way to frigid peaks of up to nearly 7 000 meters (OECD, 2004, p. 10_[1]).

Peru has about 30 million inhabitants, and is one of the five most populous countries in South America and 40 most populous countries in the world. Peru is considered by the OECD's Development Assistance Committee to be a Upper Middle-Income Country, alongside twelve other Central and South American countries – Argentina, Belize, Brazil, Chile, Costa Rica, Ecuador, Jamaica, Panama, Peru, Surinam, Uruguay, and Venezuela.

Peru's political system and economic policies have witnessed large swings in orientation throughout the years. Like many countries in the region, Peru has a tradition of state participation in the economy. Beginning in 1963, Peru focused particularly on an "import substitution" model of economic development, including trade and exchange rate manipulation, and regulation of price and market entry. In the 1970's, Peru's military government also strengthened ties to the communist world (OECD, 2004, p. 11_[1]).

A new Constitution was adopted in 1979, and in 1980, the new democratically elected government began to seek closer relationships with its neighbours and other Western countries. After Alan Garcia was elected President in 1985, Peru reverted to nonalignment, economic populism, and "anti-imperialist" policies. Together with the growing violence of the Maoist-oriented "Communist Party of Peru – Shining Path" and a serious cholera epidemic, these

economic policies contributed to the virtual disintegration of the economy, the political party system, and the state.

The result was a presidential election in 1990 between two political novices, Alberto Fujimori and the novelist Mario Vargas Llosa – an election that Fujimori won. With no obligations to any traditional party, Fujimori was able to pursue a pragmatic approach to governing. He eliminated most subsidies, renegotiated the payment of debts, and succeeded in getting Congress to enact a new foreign investment law that eliminated most discrimination against foreigners. In addition, all direct quantitative restrictions on imports were lifted, and tariff rates were lowered substantially. These reforms led to substantial price increases, and Fujimori's popularity plummeted for a while, but by the end of 1991 annual inflation had fallen to "only" 139% and Peru began a period of sustained economic growth.

Despite his ability to obtain Congress' approval of some reforms and to enact others by Presidential decree, Fujimori regarded Congress as an obstacle both to economic reform and to effective action against the increasing intensity of Shining Path terrorism. Moreover, he considered that the 1979 Constitution contained some undemocratic elements and provide for continued economic planning and government participation in the marketplace. Therefore, with the support of the Armed Forces, Fujimori engaged in a "self-coup" on 5 April 1992, suspending the 1979 Constitution and dissolving Congress. The revised Constitution, approved in December 1993, contains a variety of democratic reforms and introduces a provision relating to competition policy. Article 61, Section 61 states:

'The state facilitates and oversees free competition. [It must] fight every practice that limits free competition and any abuse of dominant market or monopolistic positions. No laws can be enacted to authorize or establish monopolies.'

The Constitution also provides that the State may engage in economic activity only if (a) it is expressly authorised by law, (b) the private sector is unable to satisfy demand, and (c) the activity will serve the public interest and "national convenience." (This third requirement apparently means that the State should concentrate on essential functions, such as national security and justice). (OECD, 2004, p. 12_[1]).

In our 2015 Multi-dimensional Review of Peru, the OECD considered that:

"Since the beginning of the 21st century, Peru has experienced a period of extraordinary social and economic progress. Between 2000

and 2014, economic growth reached an annual average rate of 5.3%. During this period, Peru's expansion in GDP was second only to Panama in the Latin American and Caribbean region, and well above the regional average of 3.1%. A sound and stable macroeconomic framework has been one of the main drivers of this expansion, coupled with a period of relative political stability, which was changed in recent times. Favourable external conditions have also been key to this expansion, with high international commodity prices until some years ago and relatively easy access to international finances. On the social side, the combination of high economic growth with a stronger emphasis on social policies and redistributive programmes have been crucial for reducing poverty rates and inequality, as well as for increasing the overall well-being of Peruvians.” (OECD, 2015, pp. 27-28_[2])”

1.1.2. Historical foundations of competition law

It was in this context that Peru introduced competition policy in the early 1990's – as part of a general program of economic liberalisation triggered by the election of President Fujimori. The purpose of the Peruvian Competition Act is to prevent and to sanction anti-competitive behaviour, and to promote economic efficiency, to the benefit of consumers.¹ Such an objective is related to the competition authority's mandate and competences, which allow it to establish the existence of anti-competitive behaviours and to apply the corresponding sanctions.

Competition law and other aspects of this economic liberalisation program were adopted by Presidential decrees that Fujimori issued in 1991–92 as part of his initial push to lay the basis for a market economy.² One such decree created Indecopi (the Institute for the Defence of Competition and Intellectual Property) as an arbiter and promoter of market activity. Indecopi was given a broad mandate that included dispute resolution and law enforcement in the following fields: (a) competition law; (b) a “market access law” that bans government rules that impose unauthorised and unwarranted barriers to market entry; (c) an “advertising and unfair competition law” to protect firms from “dishonest” practices; (d) a consumer protection law that governs not only unfair or deceptive

¹ Please see article 1 of Legislative Decree 1034, available at: www.indecopi.gob.pe/documents/51771/196578/dl1034.pdf/66c0472e-46de-4eb3-b872-7369c5279583.

² Many of which were issued during a period when Congress had been dissolved.

practices, but almost all aspects of consumer activity; (e) antidumping and safeguard proceedings; (f) laws protecting copyrights, trademarks, and patents; (g) the establishment of voluntary and mandatory product standards and accreditation bodies; and (h) a “market exit law” that provides a quasi-judicial procedure for handling bankruptcies.

Indecopi reports partially to the Ministry of Industry, but it was conceived as an autonomous agency. Moreover, because the government wished to provide an alternative to Peru’s judiciary, which was considered slow, unpredictable and corrupt, Indecopi is not only competent to engage in law enforcement, but was also empowered to resolve private disputes (OECD, 2004, p. 13_[1])

In 2004, the OECD prepared a peer review of Competition Law and Policy in Peru. The peer review seems to have been a valuable tool for promoting reforms aimed at strengthening Indecopi. The OECD’s 2012 Follow-up to the Nine Peer Reviews of Competition Law and Policy in Latin American Countries notes that: “*the respondents state that the Recommendation on protecting the autonomy, credibility and technical capacity of the different areas of Indecopi made it possible to promote legislative changes to increase the transparency and objectivity of the processes for selecting and dismissing first- and second-instance decision makers, and establishing specific qualification requirements.*” (OECD, 2012, p. 30_[3])

In 2008, Peru enacted the Legislative Decree No 1033/2008 and the Legislative Decree No. 1034 (Peruvian Competition Act). As a result, Indecopi is now a specialised public body attached to the Presidency of the Council of Ministers with legal personality under internal public law. According to Legislative Decree No 1033/2008, Indecopi has functional, technical, economic, budget and administrative autonomy; its functions are to promote the free and efficient development of markets and to protect consumer rights. In addition, Indecopi has a duty to foster a culture of free and fair competition in the Peruvian economy and to safeguard intellectual property rights. Within Indecopi, there are several functional bodies responsible for competition enforcement, consumer protection and IP law enforcement, among others. Among these bodies, the Commission for the Defence of Free Competition (*Comisión de Defensa de la Libre Competencia*) is responsible for ensuring compliance with Legislative Decree No 1034 and Law No 26876 (Anti-Monopoly and Anti-Oligopoly in the Electricity Sector Act).³

³ Information based on the 2016 report from Peru to OECD regarding “Independence of Competition Authorities – From Design to Practice” and Indecopi’s official website

Amendments introduced in 2015 to the Peruvian Competition Law have allowed the Commission to improve its performance in dawn raids and to impose sanctions that are more effective. This reform introduced:

- Powers to sanction "facilitators": The original wording of the Peruvian Competition Act allows Indecopi to initiate proceedings against companies that belong to a cartel. With this amendment, Indecopi can now also initiate proceedings against those companies whose participation in the planning or execution of a cartel was decisive to its construction and execution, even though they did not belong to the collusive scheme as participants. For example, Indecopi can fine companies that facilitate the exchange of information between cartel members, that monitor compliance with cartel agreements or that help punish cartel defections. This provision is also applicable to public officials when they promote or facilitate cartels.
- Leniency: This amendment defines clearly the outline of Peru's leniency program – which was already in place before 2015 – such as the scope of the program, its requirements, stages, deadlines and the powers of Indecopi to manage it.
- Fines for obstruction: The maximum amount of fines for unjustified non-compliance with reporting requirements and for obstructing the procedures of the Technical Secretariat and the Commission for the Defence of Free Competition was increased significantly (up to USD 1,166,666, approximately).
- Corrective measures: The legal reform empowers Indecopi to impose corrective measures to repair the direct and immediate effects resulting from competition infringements.
- Class actions: The legal amendment gives Indecopi the possibility to sue on behalf of consumers for the reparation of damages caused by a cartel.
- Competition Advocacy: Indecopi is allowed to make recommendations to public authorities in order to eliminate obstacles to competition, or to introduce regulation that promotes economic efficiency. According to this amendment, entities to

([https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)64/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)64/en/pdf)
www.indecopi.gob.pe/web/indecopi_ingles/comisiones).

and

whom the recommendations are addressed must respond to Indecopi within a period of ninety (90) business days.

- Transparency: Considering the importance of transparency and public access to final decisions in competition procedures, a provision was introduced allowing Technical Reports of the Technical Secretariat and final decisions of the Commission for the Defence of Free Competition to be published once these documents have been released to the involved parties.

Presently, there are several draft legislative bills in the Peruvian Congress concerning the introduction of a merger control regime in Peru, in order to allow the competition assessment of concentrations between economic agents. Peru does not presently have a merger control regime, except regarding some transactions in the electric sector.

The adoption of the original Presidential decrees reflected a commitment to economic efficiency, and throughout the 1990's Peru's competition officials received strong Presidential support. On the other hand, as stated in the OECD's 2004 Peer Review: *"although the reforms were successful and sometimes popular, they did not reflect a broad consensus within the public or even among government officials. In the early 2000s, a reduction in Presidential support and a number of other events undermined competition policy and other aspects of economic reform."* (OECD, 2004, p. 10_[11])

Observers have reported significant advances in Indecopi's enforcement of the competition law over the last few years, mainly because of Indecopi staff's dedication and committed leadership, who, while maintaining autonomy, have been able to attract support from Peruvian administration and legislators, in order to push for improvements. In recent years, the efforts of the Competition Commission have primarily focused on investigating infringements of competition law, especially prosecuting cartels (although Peru's competition law also allows for enforcement against abuses of dominance), strengthening the leniency program, issuing guidelines and advocacy reports, and promoting economic studies.

2. Content and scope of competition law

2.1. Substantive scope of the competition law

According to Article 2 of the Peruvian Competition Act, competition law applies to natural or legal persons, business associations, autonomous properties or other companies – both public or private, state-owned or not, profitable or non-profitable – that are in the market for the supply or demand goods or services, or whose affiliates, associates or members perform such activities. It is also applicable to persons who administrate, manage or represent these entities, as long as they have participated in the planning, performing or execution of an offense.

No economic sector is exempt or excluded from the scope of competition law. The Peruvian Competition Act applies to all economic agents in all sectors. However, it should be noted that sectoral regulation prevails over competition law, which means that conducts that are a consequence of a legal regulation fall outside the scope of the competition law. In particular, this means that in public infrastructure sectors – e.g. telecom, public transportation, energy, and water and sewerage – the law that regulates the access to the provision of services on these sectors prevails.

Osiptel (the Supervisory Agency for Private Investment in Telecom) shares with Indecopi a role as National Competition Authority, but is restricted to the telecoms sector. Osiptel has the power to investigate, prosecute, and resolve competition cases in the telecommunications sector. As a result, Indecopi is the sole authority with competences to promote and enforce the Peruvian Competition Act in all economic sectors, including regulated sectors other than the telecommunications sector.

State-owned companies are also subject to competition law, and the Competition Commission has applied the Peruvian Competition Act to publicly owned enterprises in the past. For instance, in 2006 the Commission imposed a sanction of approximately USD 164,629 on “Petróleos del Perú – PETROPERÚ”, for an abuse of its dominant position in the liquefied petroleum gas storage market.

The Peruvian Competition Act covers the antitrust enforcement of the following conducts:⁴

⁴ The Spanish version of the law is available in:
www.indecopi.gob.pe/documents/51771/196578/dl1034.pdf/66c0472e-46de-4eb3-b872-

Article 10: Abuse of a dominant position

This Article prohibits abuses of a dominant position. It sets out that an abuse happens when an economic agent who holds a dominant position within a relevant market uses such a position to restrict inappropriately competition, in a way that would not have been possible without being in such a dominant position. In the following subsections, the Article presents a sample list of conducts that may produce exclusionary effects. It states that the abuse, in general, may come from conducts that prevent or restrict the entry or permanence of a current or potential competitor, due to reasons unrelated to greater economic efficiency. The Article also states that the sole and regular exercise of a dominant position without affecting actual or potential competitors does not amount to an abuse of a dominant position.

In order for an abuse to be identified, Indecopi must demonstrate that the relevant conduct has, or has the potential, to generate anticompetitive effects that would negatively affect consumer welfare.

Article 11: Horizontal collusive practices

This article sets forth that agreements, decisions, recommendations or concerted practices carried out by competitors, with the purpose or effect of restricting, preventing or distorting free competition are illegal. As in Article 10, it contains a sample list of conducts and practices that can be considered as collusive, e.g. to fix, directly or indirectly, prices or other business or service conditions.

A number of these practices – price-fixing, market sharing, output caps and agreements on public bids – are prohibited *per se*, unless ancillary to otherwise procompetitive agreements. Whether a restriction is ancillary will need to be demonstrated by reference to the effects of the agreement.

Article 12: Vertical practices

According to Article 12, vertical collusive practices may be prohibited when agreements, decisions, recommendations or concerted practices are carried out by economic agents operating in different levels of the production, distribution or commercialisation chain, with the aim to prejudice free competition. In order for a vertical collusive practice to be prohibited, it is required that: (a) at least one of the parties has a dominant position in the relevant

[7369c5279583](http://www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf). A free translation to English of this articles can be found in:
www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf

market in which it operates; (b) it is demonstrated that the relevant conduct has, or has the potential, to generate anticompetitive effects that would negatively impact on consumer welfare

Articles 43-44: Fines

Articles 43 and 44 list the fine amounts that the Competition Commission can impose to sanction anticompetitive practices. These amounts are based on the Applicable Tax Units (TU) as defined in Peru at the date of actual payment or coercive enforcement of the penalty.

Article 43 sets out a gradation of penalties according to the severity and offensiveness of the conduct, with penalties increasing with the seriousness of the competition infringement. Article 44 sets out the criteria to determine the severity of the offence. Minor offences are subject to a maximum penalty of 500 TU or up to 8% of the company's turnover during the previous year. Serious offences are subject to a maximum penalty of 1 000 TU or up to 10% of the company's turnover during the previous year. Very serious offences are subject to a minimum penalty of 1 000 TU not exceeding 12% of the company's turnover during the previous year.

In addition, Article 43 also sets out a number of fining limits based on the characteristics of the sanctioned entity. Professional or business associations, or economic agents who have started their operations after 1 January of the preceding fiscal year, cannot be fined over 1 000 TU. As regards individuals, a fine of 100 UT can be applied to each legal representative or person comprising the management or administrative bodies of an infringing company – this sanction is applied in addition, and without prejudice, to any penalty that the Competition Commission may impose on the infringing company.

The last subsection of Article 43 provides that the applicable fine can be reduced by 25% in cases that the violator pays the amount before the deadline to contest the Commission's decision.

2.2. Territorial scope of competition law

Article 4 of the Peruvian Competition Act sets out the territorial scope of Peru's competition law. It sets out that the Competition Act is enforceable to "conducts that produce or may produce anticompetitive effects in the whole or part of the national territory, even when such act has been started on abroad." Article 9 of Law 26876 – Antimonopoly and Antioligopoly Law of the Electrical Sector – similarly establishes that mergers that are carried out abroad, but that

involve companies that directly or indirectly perform activities of generation and/or transmission and/or distribution of electricity in the national territory of Peru, are included within its scope of application.

In sum, Indecopi may take legal actions against any conduct with effects in Peruvian territory, even if the conduct takes place abroad. However, Indecopi cannot prosecute conducts that produce effects outside the national territory, even if they take place inside the national territory.

3. Institutional setting

Two entities are responsible for competition enforcement in Peru: Indecopi and Osiptel. This section will focus on Indecopi, which has general powers of competition enforcement.

Osiptel is solely and exclusively responsible for competition enforcement in the telecommunications sector. A detailed discussion of Osiptel can be found at section 7.3 below.

3.1. Description of the overall system

Indecopi has a broad mandate that includes dispute resolution and law enforcement in the following fields: competition law; bureaucratic barriers elimination law; advertising and unfair competition law; consumer protection law; antidumping and safeguard proceedings; laws protecting copyrights, trademarks, and patents; and bankruptcy law. Such a broad mandate empowers Indecopi to regulate economic activities across the Peruvian economy, but, at the same time, it creates institutional complexity, requires a high level of co-ordination, and leads to the expenditure of significant resources in the context of Indecopi's operation.

Indecopi's institutional structure could be said to comprise external and internal dimensions. The external dimension refers to how Indecopi relates to other institutions, while the internal dimension refers to the internal structure of the various Indecopi departments.

The internal dimension is described in detail in 3.1.1 below. In short, there is a distinction between:

- an administrative branch, which ensures the smooth functioning of the various Indecopi departments, and includes Indecopi's Board; and

- a functional branch, which pursues the competences of Indecopi in the various areas of its mandate, and which includes the enforcement of competition law. The functional branch comprises nine quasi-jurisdictional bodies at first instance, and a Tribunal comprising five divisions at the second instance.

Executive Order 1033 states that each quasi-jurisdictional body of Indecopi and tribunal enjoys functional, technical, administrative, economic and financial autonomy. In other words, all such bodies are autonomous in the handling of cases, investigations and advocacy initiatives. It is worth mentioning that an Executive Order can only be modified or revoked by a specific law passed by Congress, which entails a legislative process. Since the legislative process takes time, consensus among political parties and public debate, Executive Order 1033 is, in this regard, reasonably stable.⁵

As regards the external dimension, Indecopi is attached to the Office of the Prime Minister. According to Executive Order 1033, Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. This institutional arrangement is expected to provide a safeguard against political and public pressures from individual Ministries responsible for certain economic sectors.

At the same time, there is permanent interaction between Indecopi and other entities, such as the Peruvian Congress. For example, Indecopi receives inquiries about its activities in relevant markets, opinions on draft bills related to modifying competition policies (leniency, criminal sanctions, etc.) or proposals that have an impact on competition in different markets (e.g., to regulate the price of medicines). There is no evidence that this interaction has compromised Indecopi's autonomy and independence.

The internal institutional design of Indecopi seeks to preserve the autonomy of its functional bodies vis-à-vis the administration, reinforcing the technical and autonomous nature of the decisions taken by the different functional bodies. This institutional design is coupled with safeguards regarding Indecopi's interactions with other public bodies, in order to create a multi-layered protection against interference and politicisation of decisions adopted by the functional

⁵ Exceptionally, an Executive Order may be modified by another Executive Order. It is an exception in that the executive power requires the approval of Congress to legislate in the specific matter which requires a plenary voting and majority consensus. The Executive Order then is subject to the control of Congress and could be revoked before it is effective.

branch of Indecopi. In practice, the influence of the Executive Branch or Congress in defining the agenda of Indecopi has been marginal. The autonomy of the Commission to decide what to investigate and how to handle the proceedings are widely acknowledged by all observers. In fact, in recent years the Executive Branch has endorsed Indecopi's efforts as regards competition enforcement and the elimination of bureaucratic barriers.

Despite the fact that the system has operated well thus far, we have identified a number of risks to the autonomy and independence of Indecopi's decision-making bodies. In the OECD's assessment, there are risks of external interference through the appointment of Indecopi's members and, less directly, through constraints on Indecopi's budget. The rules on appointment and dismissal of Indecopi's members will be discussed below under 3.1.2. Budgetary constraints – in particular, how Indecopi has its own resources but requires the approval of the Executive Branch to dispose of them – will be covered below under 3.2.4; however, current risks related to budgetary constraints are likely to prove limited given that Indecopi is fully self-funded at the moment. A large number of the stakeholders interviewed in Peru also agreed that there might be room for further guarantees of autonomy and independence.

3.1.1. Internal structure

As already noted above, Indecopi's mandate comprises a broad range of fields: competition law; bureaucratic barriers elimination law; advertising and unfair competition law; consumer protection law; antidumping and safeguard proceedings; laws protecting copyrights, trademarks, and patents; and bankruptcy law.

Indecopi's central headquarters, comprising all of its Commissions, is located in Metropolitan Lima. Regarding its functions on Consumer Protection, Bureaucratic Barriers, Unfair Competition and Intellectual Property, Indecopi also has branch offices in other parts of Metropolitan Lima and Peru.

Regarding its internal structure, Indecopi has two branches – a functional branch and an administrative branch. The functional branch comprises nine quasi-judicial bodies at first instance, and a Tribunal of five divisions at second instance. Indecopi's administrative branch comprises ten departments.

(i) The Functional Branch

The functional branch is devoted to law enforcement through Indecopi's administrative bodies. At first instance, the functional branch comprises nine administrative bodies, each called a "Commission". Each Commission is related

to a field falling within the mandate of Indecopi, and is served by a staff headed by a Technical Secretary. The Commissions are charged with the prosecution of cases and the adoption of decisions at first instance, including, where necessary, the imposition of penalties.

The second instance comprises a Tribunal. This Tribunal has five divisions, which are in charge of reviewing the appeals on competition, consumer protection, bureaucratic barriers, intellectual property and insolvency matters, respectively. The Competition Division hears appeals from the Commissions on Free Competition, Unfair Competition and Antidumping. The Consumer Protection Division handles appeals from the Consumer Protection Commission. The Intellectual Property Division handles appeals from the Trademark, Patent, and Copyright Offices. The Bankruptcy Proceedings Division handles appeals from the Commission for Bankruptcy Proceedings; and the Bureaucratic Barriers Division, recently created, handles appeals from the Bureaucratic Barriers Commission.

The Indecopi bodies that deal with competition are the **Technical Secretariat**, the **Commission for the Defence of Free Competition** (hereinafter called the Commission) and the **Competition Division of the Tribunal** (*Sala especializada en Defensa de la Competencia*).

1. The *Technical Secretariat* is the body with technical autonomy to initiate investigation proceedings and to propose sanctions to anti-competitive conducts. The Technical Secretariat also conducts market studies. The Technical Secretariat evaluates, investigates and prepares decision resolutions disposing of complaints that have been filed or proceedings that have been initiated *ex-officio*. The Technical Secretariat enjoys full autonomy in the adoption of its decisions and in how it prioritises its investigations and administrative proceedings.

The Technical Secretariat has a staff of 26 professionals between lawyers and economists⁶, headed by a Technical Secretary. It is organised in teams, three of them handling cases of specific

⁶ The proportion between lawyers and economists is almost fifty-fifty.

economic sectors⁷, and one of them carrying out advocacy studies and market surveillance.

2. The *Commission for the Defence of Free Competition* is a body with technical and operational autonomy in charge of deciding whether investigated conducts are anticompetitive and of applying the corresponding sanctions. It has the autonomy to decide on the cases filed by the Technical Secretariat and to impose administrative sanctions (fines), as well as to decide on the number and subjects of advocacy studies to be pursued by the Technical Secretariat.

The Commission is a collegiate body comprising four members. They are part-time officials. The position of commissioner is for a fixed five-year term, extendable once for an additional five years. The Commissioners might require assistance of Technical Secretariat, but they do not have assigned assistants..

3. At second instance, the *Competition Division of the Tribunal* decides on appeals from the Commission, and rules on requests for clarification, extensions and amendments. The Competition Division handles appeals from three Commissions – Free Competition, Unfair Competition and Dumping.

This is the functional body that hears, in the second and last administrative instance, appeals filed by parties against a ruling or resolution by the Competition Commission. All of these decisions may then be appealed before the judicial courts. Tribunal members are also part-time.

The Commission, and more specifically its Technical Secretariat, has the autonomy to determine the prioritisation of its own cases (on an ex officio basis) and enforcement activities that it considers necessary for strengthening its role as a national competition authority. The administrative branch of Indecopi has not intervened in the decisions adopted by the Commission, or any functional branch entity. On the contrary, the administrative branch appears to have limited itself to

⁷ The Commission has identified three areas of work: energy, maritime and ground transport, and manufacturing and services. The team specialised in energy also analyse the merger cases filed to the Commission.

promoting and disseminating the results of the investigations and studies carried out by the Technical Secretariat and the Commission.

It is worth mentioning that, according to Indecopi's internal sources, 65 cases were contested before the Tribunal between 2015 and 2018. Of these 65 cases, 57 were confirmed (87.7%), two were confirmed in part (3.1%), in two the matter was subtracted (3.1%),⁸ in one the appellant gave up (1.65%) and only three decisions by the Competition Commission were revoked and / or cancelled (4.75%).

(ii) The Administrative Branch

The second branch of Indecopi is an administrative one. The goal of the administrative branch is to provide support to the work of the functional branch.⁹ It focuses mainly on administrative tasks – such as the co-ordination of Indecopi's international activities and the development of public education programs, without taking direct part in the decision-making tasks of the bodies of the functional branch. For instance, the administrative branch is charged with the supply of equipment (logistic department), personnel (human resources department), technical consultancy (economic studies department) and communication services (public communication department) required for the proper operation of the functional branch.

At the top of the administrative branch, one can find a Board of Directors comprising five directors. The Board is an administrative body, and oversees solely the administrative branch. The Board has decision-making powers regarding the administrative operation of Indecopi, but cannot take part or interfere in the enforcement activities or advocacy initiatives of the functional branch, regardless of whether such activities and initiatives are adopted by the Technical Secretariat, the Commissions or the Tribunal. On the other hand, the Board of Directors plays a role in the nomination of the Commissioners and the appointment of members of the Technical Secretariat, as will be discussed below. Beyond this, however, the Technical Secretariat, the Commissions and the Tribunal are autonomous and independent from the various departments that comprise the administrative branch, including the Board of Directors.

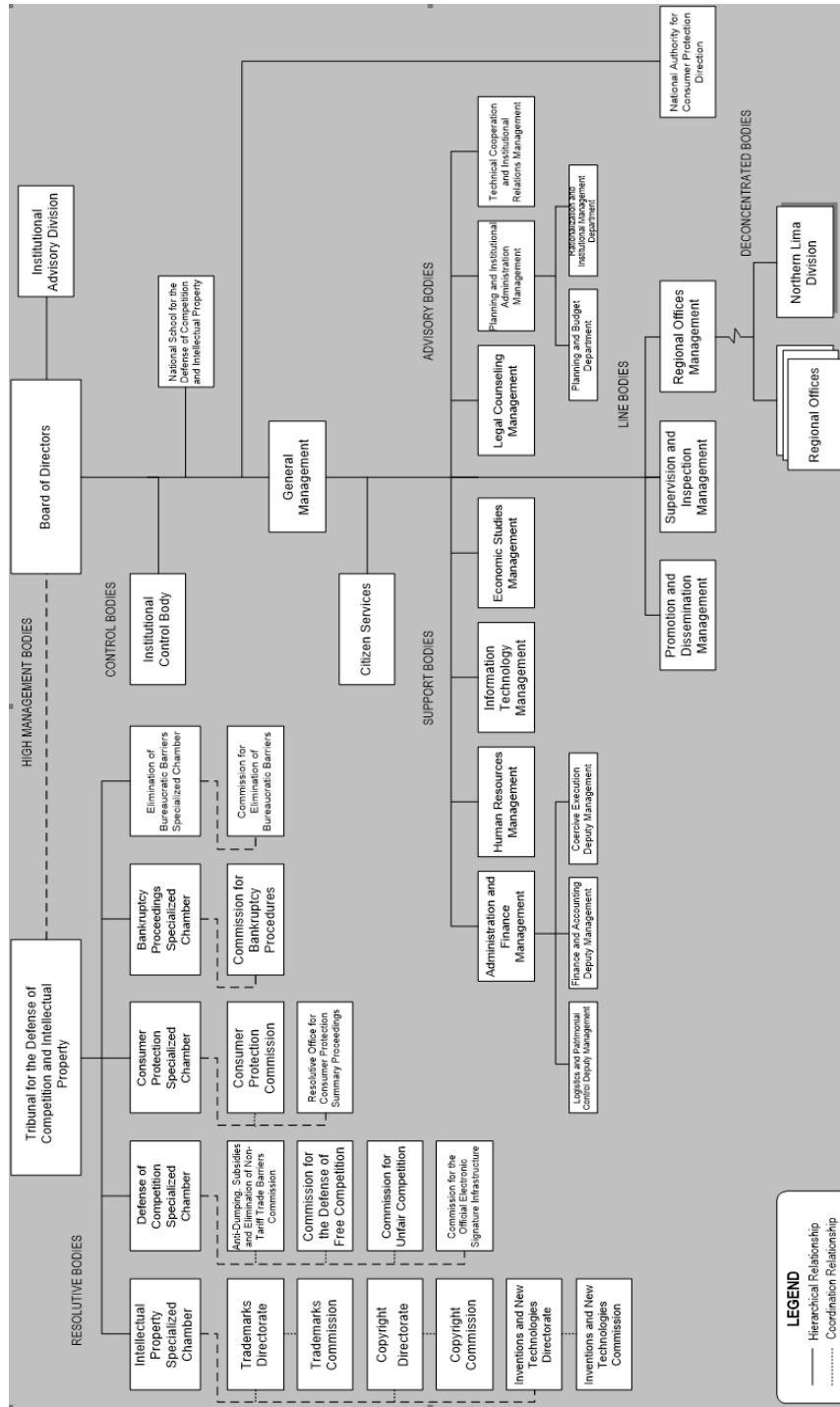
⁸ Subtraction occurs when an external event takes place that means that the matter is no longer justiciable (e.g. the appealing party dies during the second-instance procedure, or the examination of a confidentiality request becomes moot as a result of the underlying procedure being archived).

⁹ The administrative branch comprises ten departments and other sub-departments.

Additionally, Indecopi has an external board of five members to provide advice to the Board. According to Executive Order 1033, the Board has, as part of its duties, the function to plan and approve institutional policies regarding the administration, finances, image, communications, international relations, planning and budget of Indecopi.

Below the Board of Directors, the administrative branch of Indecopi comprises ten departments headed by a General Management section. The primary activity of these departments is to provide adequate support to the bodies comprising the functional branch. Arguably, the most important departments within the administrative branch are the Economic Studies Management department – which provides economic consulting when complex economic issues arise – and the Legal Counselling Management department – which handles the proceedings before the judicial courts when an appeal is filed against a decision from the functional branch. The appointment and removal of the managers of these departments, and of Indecopi's General Manager are part of the powers of the Board of Directors.

Figure 1. Indecopi Organisational Chart



Source: Indecopi

3.1.2. Appointments and dismissals

As already noted, a Board of Directors comprising five members is responsible for the management of Indecopi. Its members are appointed as follows: the Prime Minister appoints the Chairman and one other member of the Board; the Minister of Economy and Finance, the Minister of Foreign Trade and Tourism, and the Minister of Production respectively appoint the other three members. All members are appointed for a fixed five-year term with the option of an additional term.

This appointment mechanism seeks to ensure the independence of the Board and aims to resist the political or business capture of its members. However, there are doubts regarding the effectiveness of such a mechanism. Several observers have outlined that, although thus far there seems to be no evidence of interference, in theory it would be easy for political agents that directly appoint the members as per their sole choice to choose persons that could be influenced by those agents. In sum, the mechanism of checks and balances regarding these nominations is said to be misplaced, which could generate problems in the future. There appears to be a need for more formal controls.

One of the Board of Director's competences is to recommend the appointment of members of the specialised chambers (divisions) of Indecopi's Tribunal to the Prime Minister's Office. According to the Regulation of organisation and functions of Indecopi, the Board of Directors proposes to the Presidency of the Council of Ministers the appointment of members of Indecopi's Tribunal; however, the Board can delegate the selection task of candidates to the General Manager. This selection is in practice supported by the opinion of an Advisory Board. Members of the Tribunal also have to be approved by the President of the Council of Ministers of Peru. Each member is appointed for a fixed five-year term, renewable once.

The appointment procedure is as follows. The General Manager, on behalf of the Board, currently receives candidatures and proposals, and selects the candidates. It then makes suggestions to an Advisory Council, which renders an opinion on the appointments. According to the Executive Order 1033, the Advisory Council comprises seven recognised experts (e.g. lawyers, economists, businesspeople, academics, etc.) with outstanding knowledge of the functions of Indecopi. The appointment of its members is for a three years period. Once the Advisory Council's Opinion is obtained, the proposal is sent to the Board of Directors, who will then decide which candidates it will appoint for a five-year period and forward its decision for approval by the President of the Council of Ministers.

The Board is also competent to appoint the members of each of the Commissions, who are also appointed for five years' terms, renewable once. [The appointment of Commissioners follows the procedure set out above for the appointment of Tribunal members, with the exception that the endorsement of the Prime Minister is not required for the appointment of commissioners. As a result, the Board has discretion to appoint Commission members, which do not have to be approved by any external body.

Appointments to the Commissions and the Tribunal have to meet a number of objective criteria, such as (a) a minimum five years of expertise; (b) recognised integrity; (c) absence of conflicts of interest. The selection of members of the Board, Tribunal or Commission does not require a prior public procedure for the selection of candidates.

The rules regarding the dismissal of Commissioners and members of the Tribunal are similar to the rules governing the removal of members of the Board. Therefore, the dismissal of any member is triggered under the following circumstances: (a) voluntary resignation; (b) legal inability; (c) temporary inability; (d) unjustified absence to three consecutive meetings or five in a year; (e) decease; or (f) permanent incapacity. As for the Board's Chairman, dismissal is triggered only on serious grounds of misconduct, such as the negligent performance of his/her functions.

The Board also has the power to appoint the members of the Technical Secretary that provide support to the Commissions and Tribunals of the functional branch, as well as to appoint the Directors of the Intellectual Property Offices. In both cases, the Technical Secretaries and Directors have an indefinite mandate.

Furthermore, all appointments in the administrative branch are the ultimate responsibility of the Board. In particular, the Board appoints the General Manager – who manages General Management. The General Manager proposes the managers of all administrative departments, but the appointment of these managers is ultimately a matter for the Board. Managers have mandates of indefinite duration, and can be removed by the Board at will.

According to a number of observers, this system seems to work well in practice, but is lacking in terms of formal control. Among the risks that have been identified, but not fulfilled thus far are the politicisation of the Board and the decision-making bodies. A related expressed concern addressed the part-time, poorly remunerated role of commissioners and Tribunal members which could result in excessive deference to the (full-time) Technical Secretariat, conflicts of

interests, and the attraction of candidates that are not as well qualified as they might otherwise be.

3.2. Indecopi's priorities, programmes and resources

3.2.1. Strategic plan

In 2017, Peru adopted a national policy on consumer protection. In order to provide predictability and transparency to their work, the Board of Directors suggested that both the Competition Commission and the Intellectual Property Offices also work on policies and strategies to be pursued in upcoming years. Multidisciplinary teams from the different commissions and offices are working on this national competition policy project. The documents are expected to be reviewed by an independent third-party and published next year. Current work on the elaboration of this national competition policy requested by the Board has already been taken into account in the prioritisation of the Competition Commission's work. This was done in order to align the Commission's work with already foreseen initiatives, and to contribute to strengthening of the Commission's power and mandate.

While not a formal requirement, Indecopi has decided that, as part of its elaboration, the final National Competition Policy proposal will be reviewed by an independent third party, such as an international technical organisation with expertise on the matter and knowledge of the Peruvian economy, such as the World Bank, UNCTAD or another international institution. This third-party review of the National Competition Policy of Indecopi is expected to improve Peruvian competition policy and to align it with international standards. In addition, a positive opinion from a respected and trustworthy entity is expected to sensitise stakeholders to the necessity of a National Competition Policy. It is important to note that the third-party opinion does not bind the Board of Indecopi or the Competition Commission.

A certain lack of strong strategic planning and prioritisation was observed within Peru's current frame of competition policy. The elaboration of a National Competition Policy is an important step in this regard.

3.2.2. Prioritisation

Each commission and office of the functional branch of Indecopi is autonomous in its decision-making regarding which cases to investigate and tasks to perform. The Competition Commission and its Technical Secretariat will, in

each case, set annually its plan of activities independently from the administrative branch of the Board of Directors.

As regards competition, the Commission and its respective Division prioritise the tasks and scope of its activities based on the cases ruled in the previous year. In general, the prioritisation of cases and enforcement activities of the Commission are established by both the Technical Secretariat and the Commissioners, who, again, decide autonomously and independently of the Board of Directors. According to Indecopi, this process of prioritisation is determined in part by the availability of resources (staff and budget), workload, ongoing proceedings, planned inspections and other variables.

As regards the Tribunal, its main task is to deal with appeals and requests on a wide range of matters. As such, the Tribunal cannot select or schedule its workload like the Commission.

Regarding the investigative functions of the Commission, it is the Technical Secretariat who sets the priorities, based on the identification of sensitive products or sectors that, due to their importance, may affect a critical mass of consumers nationwide or in a local region (e.g. public transport, petrol stations, health services, pharmacies). As regards advocacy, the Commission establishes the priorities based on complaints received from business, consumers, trade associations or other public entities.

The Commission prioritises its enforcement activities and selects its cases according to criteria such as: (a) the nature of the good or service and its significance for consumers; and (b) the harmful effects of the practice on the market. To open a file, the Commission may also consider if a case could affect mass consumption (OECD, 2012, p. 29_[3]). These criteria are not published.

Concerning the selection and prioritisation of market studies, the Commission chooses based on research of its initiative; information acquired in the course of its enforcement and advocacy work; and complaints received from business, consumers or trade associations. Prices that seem high in comparison to other geographic markets, supply shortages, insufficient entry, perceived low quality of goods or services, or a high level of consumer dissatisfaction are also factors that may lead to market studies.

While prioritisation criteria for both enforcement and market studies reflect concerns, as discussed below, related to the Commission's limited resources, the absence of prioritisation documents and orientations seem to also reflect a lack of reflection regarding the Commission's goals and priorities, and how they might fit with other Indecopi activities and roles.

Up to this date, the administrative branch of Indecopi has not intervened in the prioritisation or in the case selection adopted by the Commission. The practical independence and autonomy of the Commission and Technical Secretariat in these matters is further evidenced by how they have repeatedly decided not to look at sectors following requests from members of Congress, because they considered that such requests had no basis in terms of competition concerns.

Nonetheless, a number of observers have noted that, should it decide to do so, the Board could broadly direct the activity of the Technical Secretariat and the Commission, even if it is legally unable to interfere in the decision of individual cases. It was also remarked that the Board has not exercised its powers of direction, which seems to be a result of a choice by the Board to respect the technical autonomy of its Commissions and Technical Secretariat.

3.2.3. Performance assessment

Indecopi defined Key Performance Indicators ('KPIs') to measure its performance yearly. These indicators are related to, for example, the percentage of proceedings concluded and the number of final decisions rendered within the legal timeframe, the number of advocacy initiatives issued, as well as others. The KPIs are not public, but are available by request.

In the absence of a public strategic or annual plan that could provide a benchmark, this performance assessment exercise is limited to a description of the activity, and does not extend to an assessment of that activity against any pre-determined goals. This seems to reinforce the previously mentioned need to improve Indecopi's planning and prioritisation, and particularly the Competition Commission's activities.

3.2.4. Resources

(i) Budget

Indecopi's administrative departments for finance and planning are responsible for the annual formulation of Indecopi's budget, which is then reviewed and approved by the Board. As part of the process to develop the budget, the various bodies of the functional branch and the administrative departments are each required to report their projected budget requirements for the upcoming year. It is up to the Board to decide on budget allocation and to prioritise among the different budgetary items. Following agreement and approval by the Board, the Chairman of the Board of Directors submits the budget to the Ministry of Economic and Finance for its final approval.

Indecopi's budget has remained relatively stable over the years, with occasional variations. For example, Indecopi's expenses increased in 2014 because of investments in assets such as regional offices, renewal of personal computers, and the hiring of 150 employees to work on matters related to consumer protection and trademark registries in regional offices. On the other hand, expenses decreased in 2016 due to the transfer of metrology, accreditation and standardisation functions to the newly created National Quality Institute (INACAL). Although this process involved the transfer of assets and related staff, the total number of employees at Indecopi remained broadly the same, because some temporary positions were filled until the end of that year.

Indecopi's budget is entirely self-funded. Fines and anti-dumping duties account for about 50% and 20% of the institutional revenues, respectively. The remaining part comes of the budget mostly from fees paid by users. The last time the Public Treasury made a transfer to Indecopi was in 2013, when public funds financed 10.3% of Indecopi's budget.

(ii) Staff

The table below details the number of employees in every administrative and functional department of Indecopi at the end of 2017.

Table 1. Employees by administrative and functional department, 2017

Matter	Department	Employees	
Administrative Bodies	Advisory Bodies	Legal Counselling Management	24
		Planning and Institutional Administration Management	21
		Technical Cooperation and Institutional Relations Management	9
	Control Bodies	Institutional Control Body	8
	Deconcentrated Bodies	Northern Lima Division	33
		Regional Offices	323
	High Management Bodies	Boards of Directors	9
		General Management	7
	Line Bodies	Promotion and Dissemination Management	25
		Regional Offices Management	63
		Supervision and Inspection Management	21
	Support Bodies	Administration and Finance Management	4
		Coercive Execution Deputy Management	63
		Economic Studies Management	14
		Finance and Accounting Deputy Management	22
	Human Resources Management	35	
	Information Technology Information	41	

Matter	Department	Employees
Others Bodies	Logistics and Patrimonial Control Deputy Management	95
	Citizen Services	100
	National Authority for Consumer Protection Direction	15
	National School for the Defence of Competition and Intellectual Property	8
Bankruptcy Procedures	Bankruptcy Proceedings Specialized Chamber	21
	Commission for Bankruptcy Procedures	8
Consumer Protection	Consumer for Bankruptcy Procedures	40
	Consumer Protection Commission	110
	Consumer Protection Specialized Chamber	47
Defence of Competition	Resolutive Office for Consumer Protection Summary Proceedings	105
	Anti-Dumping, Subsidies and Elimination of Non-Tariff Trade Barriers Commission	27
	Commission for the Defence of Free Competition	30
	Commission for the Official Electronic Signature Infrastructure	4
Elimination of Bureaucratic Barriers	Commission for Unfair Competition	18
	Defence of Competition Specialized Chamber	31
	Commission for Elimination of Bureaucratic Barriers	31
Intellectual Property	Technical Secretariat for Elimination of Bureaucratic Barriers	9
	Copyright Commission	3
	Copyright Directorate	22
	Intellectual Property Specialized Chamber	42
	Inventions and New Technologies Commission	9
	Inventions and New Technologies Directorate	55
Trademarks Commission	2	
Trademarks Directorate	144	
Indecopi Total		1 698

Source: Indecopi

Indecopi has 1 700 employees between the functional and administrative branches, in a 60% to 40% proportion. Budget allocation is based on the expected results and expected impact on citizens of each body/office of Indecopi. The number of employees assigned to each office is based on the operational processes they perform, and the workload generated by citizen demand.

The following table describes the funding and human resources available to Indecopi's Competition branch:

Table 2. Institutional Budget INDECOPI and its Competition Branch, 2013 – 2017

Year	Competition Branch		All Indecopi	
	Person-years*	Budget expenditure**	Person-years	Budget expenditure
2017	58	7 940 311,00	1 698	145 222 256,00
2016	52	6 876 939,00	1 687	142 420 960,00
2015	51	7 916 284,53 ***	1 683	150 127 706,16
2014	47	6 536 453,00	1 649	134 277 429,67
2013	44	5 376 898,00	1 446	118 859 414,24

Note: * The number of employees includes those from the Commission for the Defence of Free Competition, and employees of the Specialized Chamber in Defence of Competition and Economic Studies Management that works on a full-time on competition issues.

** Budget reported for years 2016 and 2017 is under a formulated condition, while for years 2013 to 2015 is under an implemented contagion. Includes Commission for the Defence of Free Competition, Specialized Chamber in Defence of Competition and Economic Studies Management.

*** Higher expenses in 2015 are mainly explained for the acquisition of advisory and consultancy services, and payments for the publication of legal norms in the official Peruvian journal (El Peruano).

Source: Indecopi.

There are 58 employees working on competition activities at Indecopi. In more detail:

- Thirty employees are assigned to the Commission. This includes the Technical Secretariat (26) and its Commissioners (4);
- Twenty-four employees are assigned to the Tribunal's Specialized Chamber (Division) of Competition. This includes the technical staff (20) and members of the Chamber (4);
- Four employees belong to the Economic Studies Department, and are mainly senior economic analysts.

The four Commissioners work part-time, as well as all Tribunal members.

Given these figures, the number of employees devoted to competition enforcement in Indecopi is relatively low in both absolute and relative terms. For example, the 30 employees of the Competition Commission are a much lower number than the number of employees devoted to intellectual property (between trademark and patents > 200) and consumer protection (> 250) in the central headquarters alone. According to observers, this disparity is explained by the fact that consumer protection and intellectual property have legal duties that require a very large number of employees, such as receiving and responding to complaints

from consumers, and assessing patent requests. This also explain why all competition employees are based in Lima, while intellectual property and consumer protection staff are deployed in Indecopi branches throughout Peru. Nonetheless, it is consensual among observers that the Competition branch is understaffed and would benefit from a larger number of employees, which is an absolute need if Indecopi is granted merger review duties in the future.

At the same time, it must be noted that between 2013 and 2017 the total number of employees devoted to free competition matters increased:

Table 3. Employees of INDECOPI working on competition activities, 2014-2017

Employees	2013	2014	2015	2016
Economists	22	23	24	21
Lawyers	19	20	23	27
Support staff	3	4	4	4
Indecopi total	44	47	51	52

Note: Estimated quantities. Includes total of employees in the Commission for the Defence of Free Competition. In the case of the Specialized Chamber in Defence of Competition and Economic Studies Management, only professionals related to competition activities are included.

Source: Indecopi.

(iii) Remuneration

The table below provides a comparison of Indecopi salaries with those from other public entities.

Table 4. Comparison of INDECOPI salaries with other public entities

N	Category	Sector Regulator					
		Indecopi ¹	Ositran ²	Osiptel ³	Osinermin ⁴	Financial Regulator ⁵	Central Bank ⁶
1	President of the Board ⁷	USD 7 641	USD 4 771	USD 4 774	USD 8 563	USD 11 774	USD 12 722
2	General Manager ⁸	USD 4 771	USD 4 771	USD 4 774	USD 4 771	USD 9 419	USD 12 171
3	Technical Secretary ⁹	USD 4 434	USD 4 766	USD 4 774	USD 4 771	USD 7 034	USD 7 813
4	Counsellor ¹⁰	USD 4 128	USD 4 587	USD 4 447	USD 4 557	USD 5 352	USD 6 437
5	Team lead ¹¹	USD 2 829	USD 4 583	USD 3 759	USD 4 557	USD 4 495	USD 4 388

Note: For Indecopi, the information corresponds to the effective salary. For other entities, the information corresponds to the average between to minimum and maximum salary.

¹ For more information, available in Spanish: www.indecopi.gob.pe/informacion-de-personal-2017

² Ositran is the Peruvian Transport Regulator. For more information, available in Spanish: www.ositran.gob.pe/joomlatools-files/docman-files/RepositorioAPS/0/0/par/000001-TEMP/RESOLUCIONES/002PD2018.pdf

³ Osiptel is the Peruvian Telecommunication Regulator. For more information, available in Spanish: www.osiptel.gob.pe/repositorioaps/data/1/1/1/par/presupuesto-analitico-personal-pap-modificado-2017/Res055-2017-CD.pdf

⁴ Osinermin is the Peruvian Energy Regulator. For more information, available in Spanish: www.osinerg.gob.pe/newweb/pages/newTransparencia/341.htm

⁵ For more information, available in Spanish: www.sbs.gob.pe/transparencia/portal-de-transparencia/informacion-del-personal

⁶ For more information, available in Spanish: www.bcrp.gob.pe/transparencia/remuneraciones-y-personal.html

⁷ The equivalent of the President of Board for the Sector Regulators. The President for the Central Bank. And the highest category in this level for the Financial Regulator.

⁸ The equivalent of the General Manager for the Sector Regulators and the Central Bank. and the highest category in this level for the Financial Regulator.

⁹ The equivalent of the Area Manager for the Sector Regulators. The General for the Central Bank. And the highest category in this level for the Financial Regulator.

¹⁰ The equivalent of the Specialized Counselor or Vice Manager for the Sector Regulators. The Counselor for the Central Bank. And the highest category in this level for the Financial Regulator.

¹¹ The equivalent of the Chief Supervisory Officer or Coordinator for the Sector Regulators. Department Chief for the Central Bank. And the highest category in this level for the Financial Regulator.

An issue raised by many observers is that average salaries paid to Indecopi employees are unattractive and insufficient to retain personnel in the long term. Indecopi's salaries seem to be lower, in some categories, than other government entities, even if they are not significantly lower than those of other sectoral regulators. The salaries for Indecopi are below the Financial Regulator and Central Bank, but are similar to those offered at Ositran, Osiptel, and Osinergmin.

A problem common to the various sectoral regulators in Peru is that they are subject to a civil service pay cap. Such a cap seems to be unsuited given the expertise required by specialised regulators. Observers have also noted that salaries are, on average, lower than in the private sector. This is an issue that affects the public sector in general, and is common worldwide. However, the pay cap intensifies the discrepancy between public and private sector salaries, creating greater challenges in terms of staff retention and attraction.

(iv) Career path

In a number of specialised areas such as Intellectual Property, Consumer Protection, Unfair Competition, Dumping and Subsidies, among others, there is a career plan open to all professionals within Indecopi. Observers have noted that the turnover of personnel remains an issue, due to uncompetitive salaries and the structure of the career path within the agency. Nonetheless, Indecopi currently has Office Directors who started their career at Indecopi as trainees and have since been promoted to their current higher level positions.

3.3. Enforcement powers

3.3.1. Powers to investigate and terminate infringements under the law on competition

(i) Starting an investigation

The Peruvian Competition Authority can initiate proceedings for abuse of dominant position, horizontal collusive practices and vertical practices. It can do so *ex officio* or following a complaint. *Ex officio* investigations are an important part of competition enforcement, particularly regarding the prosecution of hard core cartels, as can be seen in Table 5.

Table 5. Origins of cartel investigations in Peru

	2011	2012	2013	2014	2015	2016
Total number of cartel cases detected through complaints from third parties	0	0	0	0	0	0
Total number of cartel cases detected through screening of data (e.g., analysis of economic data or firm behaviour)	0	0	0	0	0	0
Total number of cartel cases detected through monitoring of publicly available information	1	3	2	2	4	4
Total number of cartel cases detected as a result of private damages/class actions	0	0	0	0	0	0
Total number of cartel cases detected through other <i>ex officio</i> proactive methods: please specify which	0	0	0	0	0	0

Source: Indecopi, Response to Questionnaire on Hard-Core Cartels (2017).

According to Indecopi, when a complaint is filed before the Commission, the Technical Secretariat is entitled to determine whether such complaint should be admitted or not. In practice, the Technical Secretariat started 10 *ex officio* administrative proceedings from 2014 to 2016. However, it remains unclear whether these *ex officio* investigations arose from complaints or not; whether any complaints are made to the commission (unlikely as regards cartels); and whether this procedure has even been followed.

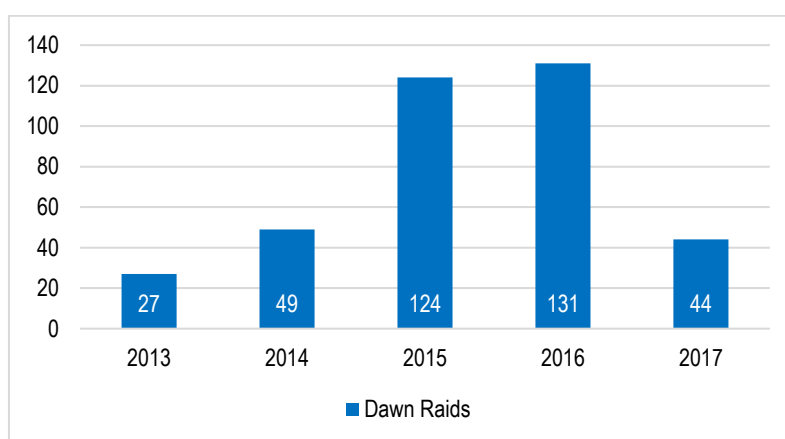
In order for a complaint to be accepted, there must be preliminary evidence, provided by the complainant or obtained by the Technical Secretariat through the exercise of its prosecutorial powers, of an anticompetitive conduct. If such criteria are not met, the Technical Secretariat can dismiss the complaint. The Technical Secretariat will initiate a procedure only when there is reasonable evidence to support an anticompetitive hypothesis. The Technical Secretariat must adequately explain why it has decided to dismiss a complaint. The Technical Secretariat's decision dismissing a private party's complaint can be appealed both to Indecopi's functional bodies and, later, before the Judiciary.

(ii) Dawn raids

Article 15 of the Peruvian Competition Act entitles the Technical Secretary to carry out inspections, with or without previous notification, at an individual's or companies' sites. Copies of physical files, magnetic or electronic, as well as of any other documents, pictures or videos deemed relevant may be seized.

Indecopi has performed 375 dawn raids in the past five years regarding competition matters, as shown in Figure 2. The number of dawn raids has been increasing. In 2012, six dawn raids were performed, then 27 in 2013, and 49 in 2014. In 2015 and 2016, the number of dawn more than doubled.

Figure 2. Number of dawn raids carried out by the Competition Commission, 2013 – 2017



Source: Indecopi.

In 2014, the competition authority performed 49 dawn raids related to the fuel, personal & family care and transportation markets. Between 2015 and 2016, Indecopi performed the largest number of dawn raids (124 dawn raids in 2015 and 131 dawn raids in 2016). Most of them (223) were related to the fuel market. The Commission imposed total fines of USD 29 580 688.29 in three related cases. The first of such cases was opened against four companies that trade Liquefied Petroleum Gas (LPG), for a nationwide agreement to fix prices. The other two cases were related to liquid fuels cartels in Chimbote and Chiclayo for an agreement to fix commercial conditions (promotions) in the commercialisation of gasohol (84.90 and 95 octanes) and diesel throughout gas stations in the cities.

In 2017, the competition authority performed 44 dawn raids. In contrast to 2015-2016, the Technical Secretariat performed dawn raids on markets with a reduced number of economic agents but great importance for consumers. Because these proceedings are still ongoing, the information regarding them is mostly confidential. Nonetheless, an example is the Haemodialysis case (Exp. 008-2012/CLC), where the Technical Secretariat initiated an administrative procedure in 2014 against 39 private haemodialysis centres for a price-fixing agreement to increase the value of haemodialysis services in public tenders issued by EsSalud, the Peruvian Social Security Service. The competition authority imposed total fines of USD 1 991 564.14 in 2016.

(iii) Leniency and settlements

Another important set of tools at Indecopi's disposal to start and to end investigations, as well as to gather evidence, are leniency and settlement provisions, which will be addressed in detail in sections 4.3 and 4.4 below.

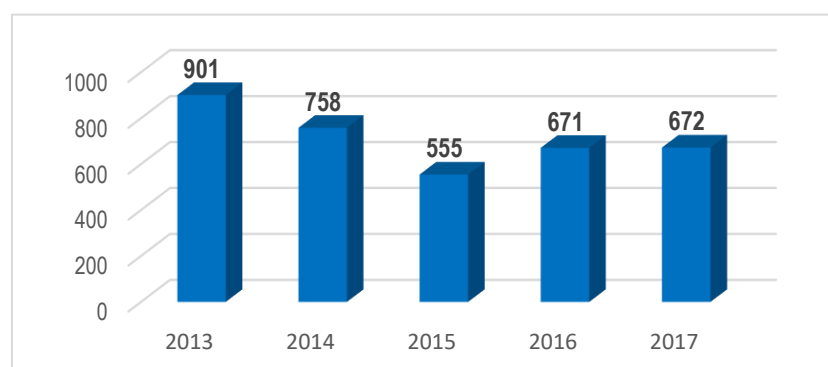
3.3.2. Procedure

The Peruvian Competition Law sets deadlines for investigations, in particular for administrative proceedings. The total deadline in the first administrative instance is approximately 13 months. There are also established periods for each specific phase. Parties have 30 working days to file their response to the charges. A period of evidence evaluation is open for no more than seven months. The period for the elaboration of the Report is open for 30 working days and, finally, the final decision needs to be rendered within a 30 working days period. Appeals from first instance decisions can be filed in 15 working days.

In addition to the deadline for the adoption of a decision at first instance, the Tribunal then has 120 working days to render its decision.

The figure and table below describe the average duration in calendar days of the proceedings from the beginning until the final decision of the Commission (first administrative instance), and then in the second instance (Tribunal).

Figure 3. Average duration (calendar days) of competition proceedings until Commission adopts a decision (2013-2017)



Source: Indecopi

Table 6. Average duration (calendar days) of competition proceedings before the second administrative instance - Tribunal for the Defence of Competition (2013-2018)

Issue	Number Of Files	Average Duration*** (Calendar Days)
Horizontals/Cartels	15	695
ADP**/Verticals	12	593
Others (confidentiality/sanctioning proceedings)	65	173
Total	92	313

* For infringements occurred during a proceeding (for refusal to submit information, for submitting wrong information, etc.)

** Abuse of a Dominant Position.

*** From the date the file enters to the Tribunal until the issuance date of the final resolution/decision.

During the last five years, some cases took longer to be decided by the Tribunal than the 120 working days provided by law. To address this situation, a specialised chamber devoted to the Elimination of Bureaucratic Barriers was created this year, which will deal with 75% of the cases that were traditionally dealt with the Tribunal's competition chamber. Furthermore, Indecopi has strengthened its competition branch and appointed a significant number of lawyers and economists to the Tribunal over the past two years. This new context is expected to substantially reduce the average length of competition cases before the Tribunal.

In more detail, the process occurs as follows:

(i) Preliminary investigation

A preliminary investigation is the first step of a sanctioning administrative proceeding. The Technical Secretariat collects evidence of an alleged infringement. At this point, the investigated parties do not have access to the collected information, and the review period deadlines do not yet start.

(ii) Indictment and preparation of technical report

The Peruvian Competition Act sets out that the Technical Secretariat of the Commission for the Defence of Free Competition must bring an indictment against the accused parties. Parties are informed about the initiation decision with the arraignment, which includes: (a) the identification of parties charged of the violation; (b) an explanation of the facts and reason for the proceeding, and the possible corresponding sanctions; (c) their right to file a defence and the term to its execution. At this point, parties access the proceeding, the formal investigation starts, and the deadline for the adoption of a decision at first administrative instance begins to run.

Parties must answer the charges within a period of thirty working days, with both arguments and evidence. After the defence, the Law establishes a trial period that cannot exceed seven months which aims to evaluate the evidence offered by the parties and assess the investigated conduct. During this period, the accused parties are allowed to make submissions before the Technical Secretariat, and the Technical Secretariat is allowed to gather additional evidence. Evidence gathered by the Technical Secretariat or offered by the parties include: documents, statements, testimonies, inspections and others.

(iii) Commission decision

The Technical Secretary issues a report describing the facts, the evidence, the infringement, the identity of the guilty parties and the proposed sanction. The report is sent both to the investigated parties and to the Commission, who then issues a decision on the alleged violation within 30 working days.

Before its decision, the Commission summons the accused parties to appear at an oral hearing no less than five working days in advance. The parties, along with their legal and economic counsellors, may present their arguments and evidence before the Commission. The aim is to clarify doubts that the Commission may have before issuing its decision. According to observers, the Commission usually only grants the parties a few minutes to present their

submissions (which has raised criticism by some). After their presentations, the Commission may also ask the parties further questions about the case.

(iv) Appeals

The Peruvian Competition Act states that the Commission's final decision is appealable by the sanctioned party before the Tribunal's Specialized Chamber in Defence of Competition (second administrative instance of Indecopi). When a case is appealed, the Competition Commission prepares the defence of its decision before the second instance of Indecopi.

A high percentage of the Commission's decisions are upheld at the second instance administrative Tribunal. For example, according to available information presented by Indecopi, in 2017, all decisions issued by the first instance were affirmed by the second instance. If the second instance upholds the Commission's decision and the sanctioned party appeals this decision before the Judiciary, the Legal Department of Indecopi is in charge of the defence of the infringement decision. The success rate of Indecopi before the Judiciary is also extremely high: 100%.

3.3.3. Sanctions

Indecopi does not have criminal enforcement powers. It can only impose administrative sanctions (fines) and cease-and-desist orders regarding the infringing conducts (corrective measures). Articles 43 and 44 of the Peruvian Competition Act establish both legal caps for fines and procedures to set them. The minimum fine is 500 UIT, or 8% of the companies' or its economic group's turnover in the year before the beginning of the proceeding. The maximum fine is 12% of the companies' or its economic group's turnover in the year before the proceeding. In addition to the penalty that, according to the Commission's discretion, shall be applied to the legal person that offended competition law, a fine of up to 100 UIT may also be applied to the legal representatives or to those persons comprising the management or administrative bodies, according to their responsibility for the offences committed. The presentation of false information, obstruction, and the destruction of the information, record or document required by the Technical Secretariat or the Commission can be sanctioned with a fine of up to USD1 million, approximately.

Article 44 establishes criteria to determine the severity of the infringement and the graduation of the fine. The Commission shall take into consideration: (a) the unlawful benefit expected from the anticompetitive conduct; (b) the possibility to detect the anticompetitive conduct; (c) the scope of the restriction

to competition; (d) the affected market's size; (e) the offender's market share; and (f) the duration of the restriction on competition.

The methodology for calculating a fine is defined by the Peruvian Competition Act. The fine should take into account the illicit benefit that the offender expected to obtain or actually obtained as a result of the anticompetitive conduct. According to Indecopi, in cartel cases such illicit benefit is determined from the difference between the "collusive price" and the price before the collusion ("competitive price"). If the price set by a cartel is 12 and the price before the cartel was 10, then the difference, 2, will be the basis for the calculation of the illicit benefit. This amount (2) is multiplied by the volume of sales of the company during the anticompetitive conduct. If the company traded 1 000 units, the illicit benefit will be 2 000. This amount (2 000) is then divided by the probability of detection of the sanctioned behaviour, as so considered by Indecopi. The probably of detection is established by reference to academic studies, mainly from the United States and Europe, and informal surveys of lawyers specialised in competition. According to Indecopi, the probability could be anywhere between 15% and 60%, which is up to objective circumstances involved, and could considerably increase the amount of the fine. A probability of 15% means that the fine will be multiplied by six. In this previous example, 2 000 will become 12 000.

Finally, Peruvian law contains aggravating or attenuating factors affecting the fine. Aggravating factors include, among others, recidivism or improper conduct by the investigated parties during the proceeding. Attenuating factors include co-operation and the recognition of the charges by the investigated parties.

Indecopi considers that the sanctions established by the Peruvian Competition Act have sufficient deterrence power, due to the level of fines imposed by the Commission. Furthermore, the level of sanctions has increased in the last years. Aggregate penalties for horizontal agreement cases amounted to USD 2 718 118 in 2014, USD 4 687 027 in 2016, and USD 46 011 382 in 2017, which reflects a significant increase in penalty amounts.

Tables 7 and Figure 4 illustrate the fines imposed by Indecopi over the last five years and per year.

Table 7. Competition penalties in infringement cases

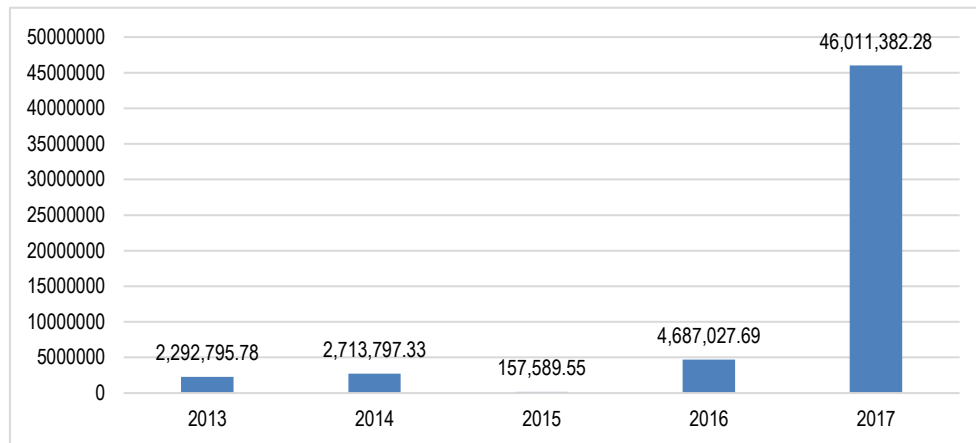
N°	Year	File number	Sanctioned Conduct	Fines USD
1	2013	003-2008/CLC	Vertical agreements in the cement sector	2 139 820.10
2	2013	014-2009/CLC	Horizontal agreements in the public transport market in Puno	152 975.68
3	2014	003-2010/CLC	Horizontal agreements in the public transport market in Puno	103 527.76
4	2014	004-2011/CLC	Horizontal agreements in the engineering consulting service market and general consultancy	2 541 806.02
5	2014	006-2012/CLC	Horizontal agreement in tourist services in Chachapoyas	635.45
6	2014	010-2012/CLC	Horizontal agreement in the public transport market in Puno	9 976.59
7	2014	012-2012/CLC	Horizontal agreement in the public transport market in Huaraz	57 851.51
8	2015	005-2011/CLC	Horizontal agreement in the public notary services	25 319.41
9	2015	003-2013/CLC	Horizontal agreement in the public transport market in Trujillo	1 132.35
10	2015	009-2013/CLC	Horizontal agreement in the market for selling bread in Piura	130 005.44
11	2015	002-2014/CLC	Horizontal agreement in the transport market in Maynas	1 132.35
12	2016	008-2012/CLC	Horizontal agreement in the supplied hemodialysis services in public procurements	1 991 564.14
13	2016	008-2010/CLC	Horizontal agreement in drugstore chains market	2 673 844.35
14	2016	013-2015/CLC	Horizontal agreement in the market for selling mango in Piura	21 619.20
15	2017	015-2015/CLC	Horizontal agreement in the public transport market in Islay	27 282.90
16	2017	017-2015/CLC	Horizontal agreement in the toilet paper and other products of tissue paper market	16 403 411.09
17	2017	011-2015/CLC	Horizontal agreement in the liquefied petroleum gas market to fix the price in its bulk and packaged presentations	22 889 913.56
18	2017	004-2014/CLC	Horizontal agreement in the liquefied petroleum gas for the use of vehicles in Chiclayo	3 002 054.70
19	2017	005-2014/CLC	Horizontal agreement in the liquefied petroleum gas for the use of vehicles in Chimbote	3 688 720.03

*Horizontal conducts include cartels and recommendations as well.

**The fines could have been modified by the second instance.

***This information includes discount for collaboration in Leniency Program proceeding.

Source: Indecopi

Figure 4. Competition penalties imposed per year

Source: Indecopi.

4. Application of competition law

As previously detailed on section 2.1 above, the Peruvian Competition Act (Legislative Decree 1034) covers the antitrust enforcement of the following conducts: horizontal collusive practices (Art. 11), vertical practices (Art. 11) and abuses of a dominant position (Art. 10). Fines are regulated in Article 43 and Article 44.¹⁰

Public enforcement of competition law is pursued exclusively through the Commission for the Defence of Competition and its Technical Secretariat. There is no possibility for private parties to file lawsuits and produce evidence in order to obtain a judgement regarding anticompetitive conducts without the involvement of public bodies. Public enforcement is reviewed in section 4.4 below.

¹⁰The Spanish version of the law is available in: www.indecopi.gob.pe/documents/51771/196578/dl1034.pdf/66c0472e-46de-4eb3-b872-7369c5279583. A free translation to English of this articles can be found in: www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf

4.1. Private enforcement

Once the administrative proceeding is concluded, any party who has suffered damages as a consequence of conducts declared as anticompetitive by the Commission may bring a damage claim before the judiciary seeking redress. Public enforcement is a prerequisite for damage claims for antitrust infringement. Despite this provision in the Law, no private actions have been filed since 2008. As a result, in 2015, the Competition Act was amended to allow Indecopi itself to pursue a class action before civil courts on behalf of consumers harmed by an anticompetitive conduct once an administrative proceeding is concluded. Such power is at the discretion of the Board, and not the Competition Commission, and has not been used by Indecopi thus far.

The information about the administrative proceedings in competition cases is publicly available once the Commission's final decision has been issued. Parties can access information in order to prepare damage claims. Indecopi considers that all the information necessary to prove the occurrence of the infraction – for example, the difference between the cartelised price and the competitive price in cartel cases, the number of transactions affected, etc. – is contained in the public file of the administrative procedure. With regard to access to other possible evidence, disclosure must be ordered by the courts, according to the weighing of the rights involved in the case. Notwithstanding, confidentiality protects the information obtained under the leniency program and, therefore, plaintiffs cannot access such information, even after a final decision, unless the applicant itself decides to make such information available.

4.2. Leniency

4.2.1. Framework

Peru's leniency program was introduced in 2015, after a set of amendments and additions to the Peruvian Competition Act. The amendment also defines leniency features, such as the scope of the program, its requirements, stages and deadlines, and the powers of Indecopi to manage the program. In order to provide transparency and further legal certainty, in 2017 Indecopi published *Leniency Program Guidelines*. Furthermore, the Guidelines are seen as a tool to increase leniency incentives and strengthen Indecopi's infringement detection capabilities. These Guidelines also establish rules for the participants regarding the duration of the proceeding, among other specifications.

Under Indecopi's Leniency Program, the applicant agrees to provide truthful, full, continuing and complete co-operation to the competition authority.

Once the applicant provides information about a cartel, a conditional commitment is signed between the Technical Secretariat and the applicant. In this conditional commitment, conditions are stipulated which must be met in order for the applicant to secure a favourable decision from the Commission regarding leniency benefits, the most important being its duty to co-operate with the Technical Secretariat and the Commission throughout the sanctioning administrative proceeding. If the applicant does co-operate fully, in line with these conditions, the applicant is granted leniency unconditionally. In any event, the Commission for the Defence of Competition has the final word regarding a leniency application.

There are three types of leniency application under Peruvian law:

- Leniency type A (immunity from sanctions): Type A leniency will be granted to the first party that submits a leniency application in cases in which the Technical Secretariat has no previous evidence of the existence of the cartel.
- Leniency type B (reduction from 50 to 100%): Type B leniency will be granted to the first applicant in cases in which the authority already has some evidence of the anticompetitive conduct, as long as the application is submitted before the Technical Secretariat initiates an administrative proceeding.
- Leniency type C (reduction of up to 50%): Type C leniency will be granted to subsequent applicants that provide information with significant added value to the Technical Secretariat's investigation. Type C leniency is applicable even after the initiation of an administrative proceeding by the Technical Secretariat.

Once the leniency application is submitted, the Technical Secretariat will meet with the applicant to co-ordinate a schedule for submission of information. The applicant must provide all the relevant information it can obtain or already has in its power regarding the cartel, including details of the participation of the co-conspirators. The evidence provided by the applicant and the additional evidence obtained by the Technical Secretariat through its own investigation is then evaluated in order to establish if it is sufficient to start an administrative procedure or, when applicable, whether the information provides data with significant added value for the investigative activities of the Technical Secretariat.

When these evaluation concludes, the Technical Secretariat will contact the Applicant to set up a meeting within the following fifteen working days. At

the meeting, the Technical Secretariat will provide the Applicant with its conclusions and set out what conditional benefit will be granted as a result of the signing of the Conditional Agreement. The *Leniency Program Guidelines* also guarantee that, if an application is refused, the authority will return all documents provided and will eliminate any copies under its possession. The Guidelines state, however, that: “*The Technical Secretariat may carry out investigation activities in the market that was the subject of the rejected application and may use any information gathered in the exercise of its powers, including information obtained through other collaborators.*”¹¹

Once a result has been reached in the administrative proceeding (i.e. a decision sanctioning an infringement has been adopted), the Commission – not the Tribunal nor the Board of Directors – is responsible for ratifying the conditional benefit granted by the Technical Secretariat. When the sanctioning administrative proceeding is about to end and a decision from the Commission is soon to be issued, the Technical Secretariat releases a report in which it describes and assesses how the applicant has complied with the obligations laid down in the conditional commitment. If the Technical Secretariat states that the applicant has not complied with such obligations, the Commission may deny leniency to the applicant (or a reduction of the fine, in case of subsequent applicants). According to the amendments, this is the only scenario in which the Commission may not grant the applicant leniency. On the other hand, if the Technical Secretariat assesses that the applicant has successfully complied with its duty to co-operate, then the Commission will grant leniency to the applicant. According to Indecopi, in such a scenario the Commission cannot dispute the reasoning of the Technical Secretariat.

Indecopi also guarantees in its guidelines on leniency that it will not exercise its powers to start actions for recoupment on behalf of a class of victims for the first immunity applicant. However, observers have stated that this guarantee seems to apply only to the Commission, and not to the Board, which has powers to start damages claims. These same observers have suggested that the lack of a similar guarantee by the Board of Directors creates a certain amount of insecurity, although thus far the Board has never, in practice, used such powers. In any case, the information obtained under a leniency application is considered confidential as regards private parties. Therefore, private plaintiffs to a damage claim will not be able to access such information.

¹¹Please see the English version of the guidelines: www.indecopi.gob.pe/documents/51771/1981946/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi/f2f8506a-90d0-3657-56b2-b3e6799ec274 , p. 26.

4.2.2. Practical application

Article 20 of the Legislative Decree 701 (Peru's first Competition Law) allowed anyone who was charged with an anticompetitive conduct (either an abuse of dominance or a collusive practice) to be exempted from sanctions in exchange for information about the investigated conduct. However, no leniency applications were submitted during the time when such legislation was enforced (from 1991 to July 2008).

The first leniency application was received in 2012, and since then, the Technical Secretariat has received another 13 leniency applications: 4 in 2014, 2 in 2015, 4 in 2016 and 3 in 2017. To date, there has been only two public cases decided by the Commission involving leniency applications.

The first case is referred to as the 'toilet paper case', which is also discussed at section 4.4.1 (ii) below. The Commission found Kimberly Clark and Protisa (Productos Tissue del Perú S.A., a subsidiary of CMPC Tissue, a Chilean-based paper manufacturer company) liable for entering, from 2005 to 2014, into price-fixing agreements and other anticompetitive contractual conditions, regarding toilet paper and other tissue-paper products (e.g. paper towels, napkins, handkerchiefs and facials). As described by Indecopi, the evidence used in the case (mostly e-mails, electronic files, testimonies from employees, agendas and hotel bills) suggested that there was constant interaction between the employees of the two companies, including the CEOs, in which sensitive information regarding prices and other trading conditions, were shared. This was discovered due to applications for leniency submitted by both Kimberly Clark and Protisa in 2014. Kimberly Clark received immunity from the fine that was imposed by the Commission after the end of the administrative proceeding. Protisa was granted a reduction of 50% from the imposed fine.

The second public case arising from a leniency application was the 'Ro-Ro case (Roll-on, Roll-off carriers)'. The Commission was informed about an alleged international agreement between important shipping lines in the 'roll-on, roll-off' maritime transport market. The shipping lines allegedly entered into a client allocation cartel involving the transportation of automobiles and trucks that were shipped from Asia, Europe and the US to Peru, and lasted from 2001 to 2012, with possible effects until 2015. After leniency applications were submitted by CSAV (a Chilean based shipping line) and NYK, together with a set of materials and information, the Commission considered that the investigated parties had devised a system of client division under which neither of them would compete with the others as regards contracts that other carriers already had with major automobile manufacturers (such as Chrysler, Renault, Ford, Toyota or

Volkswagen). Due to its leniency application and collaboration, CSAV was granted full immunity by the Commission, and NYK received a reduction of 40% from the imposed fine.

(i) Recent decision by the Andean Community on leniency

In early 2018, the General Secretariat of the Andean Community – a regional entity that comprises Bolivia, Colombia, Ecuador and Peru – issued a decision fining Kimberly Clark and “Familia” for its participation in the “toilet paper cartel” described above.¹² The leniency submissions made in Colombia, Ecuador and Peru’s competition authorities originated cases in all of these countries. At the end of its analysis of the submission it had received, Ecuador decided not to start an investigation, but instead sent case materials to the Andean Community, including information provided by leniency applicant Kimberly Clark.

The sanction applied by the Andean Community caused reactions by Colombia SIC’s and also by Indecopi, which have appealed the Andean Community’s decision arguing, among other things, that it affects their leniency programs and anti-cartel policies. Numerous observers have displayed concerns regarding this situation, and its impact on the effectiveness of leniency programs in countries of the Andean Community.

4.3. Settlements and commitments

The Peruvian Competition Act allows investigated companies to enter into two types of agreements with Indecopi: settlements and commitments. Settlements occur when a party acknowledges the investigated infringement and can lead to a reduction of up to 15% of the fine. Commitments refer to the termination of administrative proceeding in exchange for remedies: the investigated party can offer an agreement related to the cessation of the investigated facts or the modification of conducts related to these facts.

Before the amendment of the Law in 2015, the purpose of agreements within the competition authority was solely to suspend the administrative proceedings, in exchange for remedies proposed by the applicant. The agreement was also not applicable if the anticompetitive conduct caused a serious impact on consumer welfare. The 2015 amendments redefined these procedures in order to allow: (a) the early termination of the administrative proceeding and (b) agreements even in case of serious impacts on consumer welfare.

¹²Resolucion 2006, of May 28, 2018

4.3.1. Legal framework

The legal framework for settlements and commitments is as follows:

- *Settlements*: According to Article 26-A of the Peruvian Competition Act, introduced in 2015, an investigated company may, within the period to answer the charges it received after the initiation of a proceeding, recognise the investigated infringement in order to get a reduction of up to 15% of the fine to be imposed. The main features of a settlement are: (a) recognition of the infringement; (b) an early conclusion of the proceeding; and (c) a reduction in the imposed fine.
- *Commitments*: According to Article 25 of the Competition Act, parties may propose to collaborate with the investigation or to modify aspects related to the conduct under investigations. The Technical Secretariat assesses the proposal and, if the proposal is considered satisfactory, recommends the suspension of the administrative procedure to the Commission and suggests measures suitable to ensure the fulfilment of the commitment. The Commission then decides whether the proposal is approved or denied. Such decision is not appealable, due to its discretionary nature.

These agreements are called Commitments, or Agreements of Cessation. It is not a condition of a commitment to rectify the situation in the market (*medidas reparatorias*). However, the law requires that Indecopi declare the party guilty of the infringement that requires the adoption of a commitment. The process is unregulated as to what proposals should be offered, and how they should be negotiated.

Despite progress in recent years in the implementation of settlement and commitment agreements foreseen in Peru's competition law, some observers have criticised the absence of detailed regulation regarding how settlement and commitment procedures should proceed. Observers have also expressed the view that the uncertainty that exists under the current system for potential application may preclude companies from applying to settle or commit.

4.3.2. Practical implementation

The modification in the settlement and commitment procedures as a result of 2015 law reform has resulted in an increase in the number of applications. Twenty-four commitments have been processed in the last five years, eight of which have been approved:

Table 8. Commitments

N°	Year	File number	Decision	Corrective Measures
1	2013	001-2013/CLC-CC	Approved	Even though the settlement was approved, there were not penalties imposed
2	2014	002-2013/CLC-CC	Approved	Even though the settlement was approved, there were not penalties imposed
3	2015	001-2015/CLC-CC	Denied	N.A.
4	2015	002-2015/CLC-CC	Denied	N.A.
5	2015	003-2015/CLC-CC	Denied	N.A.
6	2015	004-2015/CLC-CC	Denied	N.A.
7	2015	005-2015/CLC-CC	Denied	N.A.
8	2015	006-2015/CLC-CC	Denied	N.A.
9	2015	007-2015/CLC-CC	Denied	N.A.
10	2015	001-2014/CLC-CC	Approved	Even though the settlement was approved, there were not penalties imposed
11	2015	007-2013/CLC-CC	Approved	Even though the settlement was approved, there were not penalties imposed
12	2016	017-2015/CLC-CC	Approved	3,526.80*
13	2017	001-2017/CLC-CC	Approved	2,400,000
14	2017	005-2017/CLC-CC	Denied	N.A.
15	2017	006-2017/CLC-CC	Denied	N.A.
16	2017	007-2017/CLC-CC	Approved	52,830*
17	2017	008-2017/CLC-CC	Denied	N.A.
18	2017	009-2017/CLC-CC	Denied	N.A.
19	2017	010-2017/CLC-CC	Denied	N.A.
20	2017	011-2017/CLC-CC	Denied	N.A.
21	2017	012-2017/CLC-CC	Denied	N.A.
22	2017	013-2017/CLC-CC	Denied	N.A.
23	2017	014-2017/CLC-CC	Denied	N.A.
24	2017	016-2016/CLC-CC	Approved	Even though the settlement was approved, there were not penalties imposed

*Corrective measures from managers of the investigated undertakings

Source: Indecopi.

Regarding settlements, Indecopi has signed the following:

- 2015: the first instance reduced the fines for one person (Bread case in Piura).
- 2016: the second instance reduced the fines for another person (Bread case in Piura).
- 2017: the first instance reduced the fines for a company (Chimbote case).
- 2017: the first instance reduced the fines for five persons (Toilet paper case).

Notwithstanding the increase in number of settlement and commitment procedures, observers have claimed that further incentives could be provided in order to encourage more settlements in a way that is beneficial both for parties and, in particular, for competition enforcement and the rationalisation of administrative resources. Measures could range from further regulation in order to increase the transparency and predictability of settlement and commitment procedures, and the adoption of more attractive rules that do not undermine leniency incentives.

4.4. Competition enforcement

There has been active competition enforcement over the last few years, as reflected in the table below.

Table 9. Statistics of administrative procedures in matters of Free Competition (2013 – 2017)¹³

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers
2017: Matters opened	4	1	4	2
• sanctions or orders sought	5	0	0	0
• orders or sanctions imposed	5	0	0	0
• total sanctions imposed USD	114,965,321			
2016: Matters opened	3	1	1	0
• sanctions or orders sought	3	0	0	0
• orders or sanctions imposed	3	0	0	0
• total sanctions imposed USD	4,687,027	0	0	0

¹³ “Matters opened” includes proceedings that began *ex officio* and following complaints filed by companies.

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers
2015: Matters opened	6	0	2	0
• sanctions or orders sought	4	0	0	0
• orders or sanctions imposed	4	0	0	0
• total sanctions imposed USD	158,755	0	0	0
2014: Matters opened	4	0	2	3
• sanctions or orders sought	5	0	0	0
• orders or sanctions imposed	5	0	0	0
• total sanctions imposed USD	2,718,118			
2013: Matters opened	4	0	1	0
• sanctions or orders sought	2	0	0	0
• orders or sanctions imposed	2	0	0	0
• total sanctions imposed USD	2,292,795	0	0	0

Source: Indecopi.

4.4.1. Anticompetitive horizontal agreements

(i) Legal framework

The Competition Act defines horizontal cartel behaviours as agreements, concerted practices, decisions and recommendations carried out between economic agents operating in the same market that have the object or effect of restricting, hindering or distorting free competition. As a rule, it is required that Indecopi analyses the effects of a conduct on competition, and finds it to have the effect of restricting, hindering or distorting free competition (i.e. to conduct a rule-of-reason assessment), in order to identify an infringement.

Nonetheless, the Act also sets out that hard-core cartels are evaluated under a *per se* rule, i.e. to establish the existence of an infringement, it is enough to evidence the existence of a conduct absolutely prohibited by the competition act. *Per se* prohibitions are an exception to the requirement of an effects-based analysis and, according to Article 11.2 of the Competition Act, are applicable only to four types of agreements between competitors:

- Price fixing;
- Limiting production or sales;
- Dividing customers, suppliers, markets or geographical areas;
- Agree on bids or on abstaining to bid in public bids, tenders or other forms of public procurements or auctions.

Article 11.2 of the Peruvian Competition Act also sets forth that these *per se* prohibited agreements among competitors will be prohibited only if they are inter-brand agreements that are not ancillary to a different and main agreement. Therefore, agreements that restrict competition to some extent but that are ancillary to lawful agreements will be subject to an effects analysis, where an evaluation concerning its necessity and efficiency justifications will be pursued.

(ii) Practical application

While some cartel cases have been brought because of leniency applications, *ex officio* investigations are also an important part of the prosecution of hard-core cartels, as seen below.

Table 10. Sources of awareness of cartel activity

	2011	2012	2013	2014	2015	2016
Total number of cartel cases detected through complaints from third parties	0	0	0	0	0	0
Total number of cartel cases detected through screening of data (e.g., analysis of economic data or firm behaviour)	0	0	0	0	0	0
Total number of cartel cases detected through monitoring of publicly available information	1	3	2	2	4	4
Total number of cartel cases detected as a result of private damages/class actions	0	0	0	0	0	0
Total number of cartel cases detected through other <i>ex officio</i> proactive methods: please specify which	0	0	0	0	0	0

Source: Indecopi, Response to Questionnaire on Hard-Core Cartels (2017).

The Commission pursued the following horizontal agreement cases over the last 10 years. The fines pertain to the last decision issued, whether on first or second instance:

Table 11. Horizontal agreement cases: Fines issued

Year	Result	Case Number	Fines (USD)
2008	Non successful case	012-2008/CLC	N.A.
		009-2004/CLC	N.A.
2009	Successful case	004-2004/CLC	181 817.02
	Non successful case	006-2006/CLC	N.A.
2010	Non successful case	015-2008/CLC	N.A.
		001-2009/CLC	251 896.19
		009-2005/CLC	
2011	Non successful case	002-2008/CLC	7 203 589.74
		007-2009/CLC	76,410.26
		002-2011/CLC	N.A.
2012	Successful case	014-2008/CLC	26 922.75
	Non successful case	008-2009/CLC	918 836.91
2013	Successful case	003-2011/CLC	N.A.
	Non successful case	002-2009/CLC	44 228.18
2014	Non successful case	003-2012/CLC	N.A.
		014-2009/CLC	152 975.68
		011-2012/CLC	N.A.
2015	Non successful case	003-2010/CLC	103 527.76
		004-2011/CLC	2 541 806.02
		006-2012/CLC	635.45
		010-2012/CLC	9 976.59
		012-2012/CLC	57 851.51
		007-2013/CLC	N.A.
2016	Successful case	001-2014/CLC	N.A.
		005-2011/CLC	25 319.41
		003-2013/CLC	1 132.35
		009-2013/CLC	130 005.44
		002-2014/CLC	1 132.35
2017	Non successful case	008-2012/CLC	1 991 564.14
		008-2010/CLC	2 673 844.35
		013-2015/CLC	21 619.20
2017	Successful case	0010-2013/CLC	N.A.
		0014-2015/CLC	N.A.
		015-2015/CLC	27 282.90
		017-2015/CLC	85 357 350.69
		011-2015/CLC	22 889 913.56
2017	Non successful case	004-2014/CLC	3 002 054.70
		005-2014/CLC	3 688 720.03

Source: Indecopi.

Examples of cases include:

Drugstore chains case

In 2016, the Commission decided to sanction five drugstore chains for colluding to fix their retail prices on 36 medicines and related products at a national level. During the period under analysis, the infringing companies controlled 72% of retail sales of medicines and related products through their drugstore chains. The fines imposed by the Commission at first instance amounted to USD 2.6 million approximately. The second instance of Indecopi has recently upheld the Commission decision.

Haemodialysis private services case

In 2016, the Commission fined 34 companies that supplied haemodialysis services to patients of EsSalud (Peruvian National Health Institution), after arguing that such companies colluded to manipulate prices in five public procurement processes carried out by EsSalud between 2010 and 2012. The investigated companies co-ordinated the amount of their bids to increase the referential value, in order to receive higher payments. The Commission imposed a total fine of approximately USD 2 million. The second instance of Indecopi has recently upheld the Commission decision.

Toilet paper case

In 2017, the Commission decided on administrative proceeding against Kimberly Clark Peru, Tissue Products of Peru and several natural persons for collusive practices – mainly fixing prices and commercial conditions – in the commercialisation of toilet paper and other tissue paper products. Kimberly Clark and Protisa allegedly imposed on their customers (distributors, wholesalers, supermarkets, etc.) price increases, in some cases of over 20%. The cartel also caused, according to Indecopi, increases in retail prices. According to the authority's empirical analysis, the affected market reached USD 1 572 191 698.40, approximately, and USD 55 590 623.31 in overcharges. The Commission imposed fines on the investigated party, before granting leniency benefits. The sanctions imposed by Indecopi amounted to USD 52 495 356.88 for Kimberly Clark, and USD 31 862 823.85 for Protisa, approximately. Additionally, a number of natural persons were sanctioned according to their degree of participation. The sum of the sanctions imposed on the natural persons amounted USD 346 590.83, approximately.

However, the case started with a Leniency Agreement with Kimberly Clark. As a result, Kimberly Clark was granted full immunity and thus was exonerated from paying any fine. In this particular case, given that Kimberly Clark waived its right to keep confidential that it was a leniency applicant collaborator, Indecopi was able to communicate its leniency application and the benefit received to the general public.¹⁴

Liquefied petroleum gas case

According to Indecopi's investigations, a cartel operating in the LPG packaged market took place in Peru from 2008 to 2011. The Technical Secretariat detected the infringement by monitoring the market and also conducting several dawn raids. The Secretariat seized over 3.8 million emails. After analysis, the Technical Secretariat considered that it had detected secret price fixing agreements for the sale of liquefied petroleum gas (LPG) to distributors and wholesalers. The cartelists received fines of over USD 22 million.

(iii) Bid rigging

The Peruvian Competition Act allows Indecopi to sanction bid rigging practices, as has occurred in such cases as the haemodialysis private services case. Nonetheless, it is noticeable – as it arises from the information collected and observers' comments – that enforcement against bid rigging in Peru is still, in general, very scarce.

There is limited interaction between Indecopi and the Government Procurement Supervising Agency (OSCE). In the past, both the Competition Commission and the Economic Studies Management department of Indecopi have requested information regarding public purchases of medicines, postal services and asset insurances with a view to detect potential collusive activities. Furthermore, Indecopi has been preparing to provide training on how to detect bid rigging to public procurement authorities. In 2016, as a preliminary step towards the development of future training and co-ordination activities with OSCE, the Economic Studies Management department of Indecopi formulated a document describing the state of government purchases in Peru. Indecopi has also reviewed the criteria used for the detection of possible collusive practices in these

¹⁴ As a rule the granting of immunity is confidential because the Peruvian Competition Law obliges the authority to protect the Leniency applicant's identity, unless the applicant decides to waive this right.

processes, based on relevant guidelines provided by the OECD and other international experience.

This level of co-ordination of activities in the enforcement of competition rules against bid rigging is limited from a comparative perspective. There seems to be no coherent approach to address bid rigging, co-ordination between responsible public officials seems to be minor, and it became clear during the OECD's fact-finding mission that OSCE seemed to be almost unaware of Indecopi's work. The detection of collusive behaviour in public procurement, as well as its prevention, is clearly not on OSCE's radar. General awareness of anticompetitive practices related to public procurement, as well as its harmful effects, also seems to be notably low.

Furthermore, Peruvian law does not speak with one voice regarding the consequences of bid rigging. On the one hand, the Peruvian Competition Act states that, if a company is convicted of having engaged in bid rigging, the OSCE must register the offenders in a blacklist that forbids public procurement cartelists from participating in other tenders. On the other hand, the public procurement act that governs OSCE's activities does not provide for any such inclusion of cartelists into a blacklist. This divergence has led Indecopi to propose an amendment to Article 50 of the public procurement law, in order to ensure that this law provides the mechanisms for the creation and operation of a blacklist of companies – and their economic groups – that have been convicted of bid rigging and are thus prohibited from participating in public tenders.

4.4.2. Vertical agreements

(i) Legal framework

The Peruvian Competition Act requires an effects analysis (i.e. it applies the rule of reason) for the assessment of vertical agreements. This means that, to establish that a vertical agreement infringes competition law, Indecopi must prove both the existence of a relevant conduct and its negative effects on competition.

Article 12.3 of the Peruvian Competition Act specifies that a vertical restraint requires that at least one of the parties involved in the conduct has, prior to the exercise of the practice, a dominant position in the relevant market, which is uncommon by comparison to other competition legislations. Article 7, in its turn, defines the concept of dominant position. According to the law, an economic agent has a dominant position in a relevant market when it has the possibility to restrict, affect or distort substantially the conditions of supply or demand in said market, without its competitors, suppliers or customers being able, in that

moment or in the immediate future, to counteract this possibility, due to factors such as: a significant market shares in the relevant market; the characteristics of the supply and demand of the goods or services; the technological development or services involved; the access of competitors to sources of financing and supply as well as to distribution networks; the existence of legal, economic or strategic barriers to entry; and the existence of suppliers, customers or competitors and the power of negotiation that they have.

(ii) Practical enforcement

There are very few cases of vertical agreements in Peru.

Table 12. Vertical agreements cases

Year	Result	Case Number	Fines (USD)
2008	Successful case	003-2003/CLC	2,304,867.71
2011	Non successful case	007-2007/CLC	N.A.
2012	Non successful case	002-2012/CLC	N.A.
2013	Successful case	003-2008/CLC	2,139,820.10
2017	Non successful case	001-2016/CLC	N.A.
2008 - 2017	Total Fines		4,444,687.81

Source: Indecopi.

Only two decisions have been adopted in recent years:

Cement case

As a result of a dawn raid, the Technical Secretariat obtained evidence of a vertical agreement, entered into by a quasi-monopolist cement company (dominant in the central region of Peru) and three distributors, to obstruct the entrance of a new competitor into the cement market by closing its access to the distribution channel. The obstruction was implemented through refusals to deal and to grant commercial benefits to all distributors selling the competitor's cement. In 2013, the Commission imposed total fines of over USD 2 million on the companies and members of their boards who were involved in the infringement. The second instance of Indecopi has recently upheld the Commission's decision.

Clorox bleach case

In 2008, the Commission fined Clorox del Perú and Quimpac for agreeing to an exclusive distribution contract to sell sodium hypochlorite. The contract

between both companies established that Quimpac would distribute this product – which is the main input to produce bleach – exclusively to Clorox. As consequence, Clorox’s competitors did not have access to a necessary input. Indecopi considered that the contract would exclude Clorox’s competitors from the market, and that consumers would have been negatively affected by this. The second instance confirmed the Commission’s decision. Fines imposed totalled USD 200 000.

4.4.3. Abuse of a dominant position

(i) Legal framework

The Peruvian Competition Act prohibits unilateral conduct when an economic agent, being in a dominant position within the relevant market, uses such position to limit competition inappropriately, obtaining benefits that would not have been available if such a dominant position did not exist, to the detriment of real or potential competitors, whether direct or indirect. Establishing that an abuse of a dominant position occurred requires Indecopi to pursue an effects analysis (i.e. a rule of reason assessment) which reviews the pro- and anti-competitive effects of the investigated conduct and what the final balance is in this respect. Companies may justify their behaviour by reference to efficiencies created by the relevant conduct.

In most cases of dominance filed before the Competition Authority, the investigated company had an important position in the investigated market and was able to impose high prices due to its position. According to Indecopi, such pricing practices are “exploitative practices” related to the mere exercise of dominance power, which are not prohibited by Peru’s Competition Act under Article 10(5). In the light of this, Indecopi sanctions only exclusionary practices by a dominant company that are related to a reduction of competition in the market.

It follows that, to establish an abuse of a dominant position in Peru, Indecopi must prove the existence of a dominant position, and that the dominant company engaged in a conduct with exclusionary effects on the competition.

(ii) Practical enforcement

Unlike in cases of collusion, Indecopi seems to not start abuse of dominant investigations *ex officio*. Instead, it investigates such cases only when complaints meeting a minimum legal standard are brought. In most cases, complaints are declared inadmissible.

In effect, it seems that the Commission has not sanctioned an abuse of a dominant position since 2007. That year, the Commission sanctioned Transandino Railroad for abuse of a dominant position with a fine of USD 191 167. Transandino engaged in an unjustified refusal to rent rolling and tractive materials to its competitors. Earlier, in 2006, the Commission sanctioned “Petróleos del Perú – PETROPERÚ” for abuse of a dominant position for the establishment of unequal conditions for equivalent services in the liquefied petroleum gas storage market.

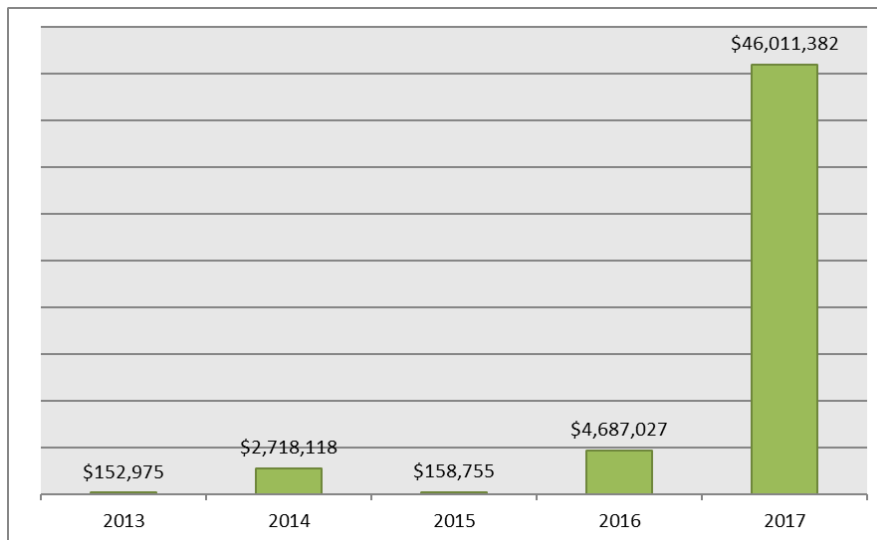
It is noticeable that abuses of dominance cases are very rare in Indecopi’s practice, which is clearly focused on cartel behaviour. Although one could allege that unilateral anticompetitive conducts are harder to prove and less detrimental than cartels, it is reasonable to question whether Indecopi’s criteria to start such investigations are too stringent. Despite it being rational and reasonable to focus enforcement activities on cartels, anticompetitive unilateral conducts must also be prevented by competition authorities. This becomes even more important in regimes that do not have merger control, as is currently the case in Peru.

4.4.4. Sanctions

(i) Horizontal agreements

The amount of fines imposed for horizontal agreements has been relatively steady, with a large increase in 2017, as is apparent from Figure 5. It is important to note that the increase of fines in 2017 was, mainly, due to the toilet paper case (USD 16 403 411) and the Liquefied Petroleum Gas case (USD 22 889 913).

Figure 5. Fines imposed in proceedings for horizontal agreements, 2013 – 2017



Notes: Fines are imposed by the first administrative instance and could be modified by the second administrative instance.

Fines include discounts for legal collaboration.

Source: Indecopi

In addition to fines, the Commission can also impose remedies to restore the competitive process. For example, in the toilet paper and in the drugstore chain cases, the Commission imposed on the sanctioned parties an obligation to implement a compliance program. The programs included: (a) the designation of a consultancy company to be in charge of identifying risk areas in competition matters within the company, (b) the preparation of competition courses addressed to the companies' employees, and (c) the designation of an independent compliance officer to be in charge of the compliance program.

(ii) Vertical agreements

As previously mentioned, there have been few cases of vertical agreements sanctioned in Peru. In addition to imposing fines, the Commission ordered legal corrective measures to restore the competitive process. These measures consisted

of: (a) cease-and-desist orders, (b) obligations to enter into contracts, in certain circumstances; and (c) non-discrimination and non-exclusion obligations.¹⁵

4.4.5. *Third-party rights*

Private parties may participate in administrative proceedings related to competition enforcement in numerous ways. Most obviously, the Peruvian Competition Act allows third parties to file a complaint before the Commission. However, the Technical Secretariat is entitled to determine whether such a complaint is accepted or not. If it is, the complainant can only intervene in the administrative proceeding as a collaborator of the Technical Secretariat, which retains the prerogative of conducting the proceeding as it deems appropriate.

Secondly, according to Article 21(5) of the Peruvian Competition Act:

“...once the complaint is admitted for procedure, if the Technical Secretariat deems appropriate, it shall publish a brief note on its subject matter, in order that anyone with legitimate interest may appear to the procedure or simply provide useful information for the investigation. Such note shall be published in the webpage of Indecopi, in the Official Newspaper El Peruano and in one of the most widely circulated newspaper in the national territory”¹⁶

When defendants answer the charges after the decision of initiation of a procedure, other parties with legitimate interest may attend to the proceeding, expressing their arguments and providing relevant evidence. Third parties with a legitimate interest who have attended to the procedure can also appeal to the Tribunal from the Commission's final decision.

Furthermore, third parties with a legitimate interest who have appeared at the procedure can access the file and get copies of the proceedings, if the Commission has not declared the confidentiality of such information.¹⁷ Third

¹⁵ For instance, in the Clorox bleach case the Commission imposed an obligation on the dominant company not to enter into exclusivity relationships that could amount to vertical restrictions to competition, as well as other behaviours that could have a discriminatory effect.

¹⁶ Free translation to English available in:
www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf.

¹⁷ Art. 31 of the Peruvian Competition Act. Free translation to English available in:
www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf.

parties may also, together with the defendants, require the Commission to “declare the reservation of the information considered confidential, whether it is a commercial or industrial secret, information affecting personal or family privacy, whose disclosure could harm the owner and, in general, the one provided as such in the Law of Transparency and Access to Public Information.”¹⁸ The Peruvian Competition Act sets out the following criteria to determine the confidentiality of the information: (a) the information regarding a determined subject is considered reserved or private; (b) the information has a commercial, effective or potential value; and c) those who have access to said information must have the will and conscious interest to keep it confidential, adopting the necessary measures to maintain said information confidential.

4.4.6. Judicial review

All decisions rendered by administrative bodies (such as Indecopi) can be appealed to the judiciary through a special administrative procedure, “proceso contencioso administrativo”. If the second instance Tribunal upholds the Commission’s decision and the sanctioned party appeals this decision, the Legal Department of Indecopi is in charge of defending the decision before the Judiciary.

The structure of administrative appeals is as follows. First, a single judge reviews an administrative decision. From this decision a further appeal can be made to a collegiate tribunal. Finally, this decision may, in turn, be appealed to the Supreme Court. Courts can quash, amend and overrule administrative decisions. The Judiciary has full jurisdiction to review all facts and law – except the Supreme Court, which can only deal with legal matters relating to judicial decisions.

In this context, this means that a court can quash a decision and refer it back to Indecopi; a court may also replace Indecopi’s decision. According to Indecopi, between 2010 and 2018, 100% of judicial decisions have been favourable to Indecopi as regards competition infringements. This is an extremely high percentage by any standard, and an unusual one from a comparative perspective.

¹⁸ Art. 32 of the Peruvian Competition Act. Free translation to English available in: www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf.

4.5. Mergers

4.5.1. Legal framework

Peru does not have a merger control regime in place. Currently, the Peruvian Congress is discussing several bills that intend to establish a premerger notification system for all sectors in the Peruvian economy.

There is one exception regarding the current situation of absence of merger control. According to Article 1 of Law 26876, vertical or horizontal mergers that take place in the markets of generation, transmission or distribution of electricity are subject to a premerger notification system. The following mergers must be notified to the Commission: (a) horizontal concentrations that involve companies that have a market share of 15% or higher; and (b) vertical concentrations that involve companies that each have a market share of 5% or more in any of the markets involved.

Once the notification is filed, the Technical Secretariat shall within five working days verify all information submitted and, if necessary, request required missing documents. Within the following ten working days, the Technical Secretariat may request additional data or documents deemed necessary for the evaluation of the merger. The Applicant must submit the additional required information in a maximum of ten working days. Within the next twenty working days, the Technical Secretariat must issue an opinion to the Commission regarding the notified merger.

After the opinion is issued, the Commission must issue within ten working days a decision either: (a) declaring the merger notification inadmissible for not falling within the scope of the merger control law; (b) expanding the period for the evaluation of the notification for thirty working days to pursue an in-depth analysis, after which the Commission must issue its decision; and (c) authorising the merger. Once the Commission issues its decision, the applicant may file an appeal.

The analysis of mergers focuses on the evaluation of its possible effects on competition within the relevant markets. In the framework of the evaluation of merger notifications, an opinion is sought from the main entities related to the electricity market, including the Ministry of Energy and Mines, which is the governing body of the electricity market, OSINERGMIN (Supervisory Agency for Investment in Energy and Mining) which is the sector regulator. These opinions are not binding on Indecopi.

No bodies within the government have the power to veto, change or influence the decisions issued by Indecopi's Commissions. Nonetheless, a

decision made by the Commission regarding a merger or anticompetitive conduct could be appealed before the Specialized Chamber in Defence of Competition, of Indecopi's Tribunal. As other administrative decisions, parties may appeal to the Judiciary from the Tribunal's decision.

4.5.2. Fines for completing mergers without approvals and defective notifications

The Commission may impose fines on the parties for an amount not greater than 500 UTs (USD 638 000) when: (a) they fail to notify a merger before implementing the transaction; (b) they provide fraudulent information; or (c) they fail to provide information requested within the legal deadlines. Furthermore, the Commission may impose fines for an amount not greater than 10% of the sales or gross income received by the companies involved, if the merger is completed: (a) after notification but before the decision of the Commission; (b) after being prohibited by the authority; or, (c) not complying with the conditions established by the Commission in its final decision.

4.5.3. Practical application of merger control

According to the Peruvian Merger Act, the maximum length of time of the proceeding from the initial notification to the final decision is 130 working days. The Commission processed 17 notifications from 2001 to 2017. The average duration of the reviews has been 70 working days, as is apparent from the table below:

Table 13. Number of merger operations analysed in the electricity sector, 2001 - 2017

Year	Number of notifications	Average duration (working day)
2001	2	89
2002	3	60.3
2005	2	101.5
2006	2	56
2009	2	57
2011	1	50
2014	3	65
2017	2	81

Source: Indecopi.

Indecopi has never blocked a merger. It has, however, imposed remedies. In 2006, the Commission authorised a merger subject to the condition that the undertakings involved in the merger should not exercise, individually, its voting rights concerning a decision in the Electricity Committee, because this conduct could benefit them to the prejudice of their competitors. This decision was evaluated by the second instance, which ended up overruling the remedy imposed by the Commission.

In 2010, the Commission fined Enel USD 1 285 714 for having completed a merger after submitting its merger notification but before the decision of the Commission. The second instance of Indecopi upheld the decision but reduced the fine to USD 133 333.

5. Advocacy and promotion of a competition culture

Peruvian society knows more about competition than it did ten years ago. Indecopi seems to have had an important role in this development, mainly due to active role that the Commission has had in important cases in markets that directly affect consumers. Examples of this are the drugstore case and the toilet paper case described previously. Businesspersons also seem to have become more aware of their obligations under the Peruvian Competition Act, as evidenced by the increase in leniency applications and settlement requests over the last years.

Nonetheless, and in addition to competition enforcement, there is a variety of tools available to competition authorities who want to promote competition and competition culture. The tools deployed in Peru to this end will be the subject of this section.

5.1. Market studies (*Advocacias*)

5.1.1. *Legal framework*

Indecopi has made use of reports recommending measures to promote or introduce competition in different sectors as its main advocacy initiative. The legal framework for market studies is set forth in Article 14(2) of the Peruvian Competition Act. According to this disposition, the Commission is empowered to recommend the implementation of measures that promote free competition to any entity of the Public Administration. The term ‘Public Administration’ is understood broadly, and comprises: (a) entities that are part of the Executive branch, such as the Office of the Prime Minister and the Ministries; (b) the National Congress; (c) the Judiciary; and (d) regional and local governments.

Therefore, all of these entities can be addressees of the Commission's recommendations.

Following the OECD's guidance on market studies,¹⁹ in 2016 the Commission issued a set of "Market Studies Guidelines"²⁰, which established the process for pursuing such studies. According to these guidelines, the process of issuing a market study containing recommendations to public entities includes the following stages:²¹

- definition of the scope of the study;
- identification of all relevant stakeholders (private parties and public entities);
- launch of the study through press releases. The launch publicises the study's fundamentals, concerns, and scope, and makes an invitation for stakeholders to make submissions;
- information requests and research, including meetings, interviews and other works;
- preliminary conclusions, which may be shared with relevant stakeholders;
- publication of the market study and recommendations.

Public Administration bodies who are subject to the market study's recommendations subject are obligated to reply with their reactions to the Commission within 90 business days after the notification of the final market study or competition advocacy report. After the release of the market study, there is follow-up work done by the Commission, through formal written communications, in order to supervise how its recommendations are implemented.

According to Indecopi, members of Congress often make requests for specific market studies. However, the Commission is under no obligation to follow-up on these requests, and will decide to pursue market study according to its own internal criteria. In order to consider a request for a market study, that

¹⁹ www.oecd.org/daf/competition/market-studies-and-competition.htm.

²⁰ www.indecopi.gob.pe/documents/51771/197143/Mercado/a481bf82-3b85-4024-8945-9e3e05240b6c.

²¹ See Guia de Estudios de Mercado, Capitulo 4, available at www.indecopi.gob.pe/documents/51771/197143/Mercado/a481bf82-3b85-4024-8945-9e3e05240b6c.

request should at least identify the problem, its source, and how the intervention of the Competition Commission may help to solve the problem.

It should be noted that Indecopi has, alongside the Competition Commission, a Commission – with an associated Technical Secretariat – for the Elimination of Bureaucratic Barriers. While these barriers are legally defined in such a way that do not extend to all anticompetitive measures, work on the elimination of bureaucratic barriers can be an important competition advocacy tool which could benefit from greater interaction and co-operation between the relevant Commissions (for Competition and for the Elimination of Bureaucratic Barriers) and respective Technical Secretariats.

5.1.2. Practical application

According to Indecopi, the Competition Commission possesses only one analyst that is involved in advocacy studies. This analyst dedicates 40% of their time to develop activities related to market studies and advocacy and 60% to case handling. Currently, 3 to 4 members between the Technical Secretariat and Economic Studies Department are partially involved with these tasks.²²

The limited number of staff available to the Competition Commission restricts the number of advocacy studies that can be prioritised and developed in a year, as well as the number of analysts that can be assigned to these activities. Despite these limitations, the Commission has produced five market studies (*advocacias*) since 2014. Additional market studies planned for the near future include: (a) a study into the license plates market; and (b), a study on the payment system sector, in co-operation with the Central Reserve Bank of Peru.

The five market studies (*advocacias*) pursued since 2014 are:

1. "Advocacy of competition in the practical driving test service market in the Lima Region"

This study looked at the regulatory framework for the practical driving test that must be taken by individuals in order for them to obtain drivers licenses in Lima. The study (*Advocacia*) issued the following main recommendations:

²² The Economic Studies Department participates frequently in the development of market studies defined by the Commission. Its personnel are also partially involved in the development of these studies, since this Department provide economic consulting to all the quasi-jurisdictional bodies of Indecopi nationwide.

- Either the market should be opened via the adoption of a non-discriminatory process that allows access to of any agent, or, if the market is not fully opened, access to the market should through a tender open to all agents. This recommendation has been partially accepted, as the market is not open for all agents, but the authorisation of an Evaluation Center has to go through a tender process.
- The Transport Ministry should establish parameters for how driving tests are implemented. This ministry should also pursue a supervisory role in this regard. This recommendation was accepted.

2. "Competition Law for the Notarial Services Market in Peru"

Notaries guarantee the authentication of documents, among other functions. A number of legal regulations apply to the provision of notarial services, such as rules setting the number of notaries or on the structure and organisation of notaries' businesses. In Indecopi's view, these regulations created barriers to entry into the notary services market and provided market power to the established agents. Following a market study (*advocacias*), the following recommendations were issued:

- To modify the criteria for the minimum number of notary offices, by taking into account the demand of notary services per region in order to open the market. This recommendation was accepted.
- To change the conformation of the "Qualifying Jury"²³ – which decides the entrance of new notaries into the market – by removing notaries from it. This recommendation has been partially accepted. The conformation of the Qualifying Jury was modified, and the number of notaries participating on Qualifying Juries has been reduced.

3. "Advocacy on the Public Tender Competition 001-2012-MML-IMPL"

Public Tender 001-2012-MML-IMPL issued by the Metropolitan Municipality of Lima granted an exclusive right to provide urban

²³ The Qualifying Jury comprises the president and a member of the bar of providers Notary services, and the president and a member of the Bar association.

passenger transport services to certain companies, divided into route packages. In Indecopi's view, some of the characteristics of the bidding design could reduce competition. The market study (*Advocacia*) recommended that the bidding process avoided rules that facilitated the exchange of information between competitors. This recommendation was accepted.

4. "Advocacy of competition in the market of regular health insurance in the private sector"

In Peru, regular health insurance in the private sector is provided by Private Health Providers (EPS). Indecopi identified barriers to entry into this market. In particular, there was an asymmetric information problem as affiliates could not identify a correct EPS for their necessities. This created costs for affiliates when deciding to move to another EPS (switching costs). The market study (*advocacia*) recommended the implementation of measures for better evaluation of health plans by the National Health Superintendence, which has been carrying out work tables in which EPS plans are compared for later dissemination to health professionals. In particular, the market study recommended the implementation of a table elaborated by the National Health Superintendence which would be available to affiliates, in order to allow affiliates to compare the services offered by the EPS. Indecopi later concluded that this recommendation had been accepted.

5. "Advocacy of competition in the tourist transport service market access to the Inka City of Machupicchu"

The Inca city of Machu Picchu is the main tourist attraction in Peru. Access from the city of Aguas Calientes is provided by the buses of Consettur Machupicchu SAC, the only company that provides this service under the terms of a concession contract. The market study recommended the adoption of an open process to select the transport service for the route Aguas Calientes - Puente Ruinas - Inca City of Machu Picchu. This recommendation was accepted by the Provincial Municipality of Urubamba, which is in charge of granting concessions in the mentioned route.

The pursuit of market studies by Indecopi, particularly considering the limited staff devoted to such activities, is valuable, and its *ex post* assessment of the implementation of its recommendations is laudable. Nonetheless, it is clear that there is further room to develop competition advocacy in Peru beyond current efforts.

5.2. Guidelines

In the past few years, the Commission has issued several guidelines. These guidelines provide detail on matters of competition policy, and serve to promote awareness of competition law – particularly through participation of academia, competition lawyers and other stakeholders in their elaboration. These guidelines include:

- Leniency Guidelines, which established clearer rules, as well as provided more predictability for applicants regarding the leniency program and its procedures. After the publication of the Guidelines, there has been an increase in the number of applications submitted.
- Guidelines on the interpretation of specific aspects of the Peruvian Competition Act. The document refers to specific aspects related to the scope of application of the Act and interpretative criteria related to the evaluation of anticompetitive conducts.
- Confidentiality Guidelines that were released to give parties certainty in the criteria used by the Commission to declare specific information as confidential. For example, as a result parties ceased to require that information already registered in public sources be deemed confidential, and nowadays companies use a template attached to the guidelines in order to sustain their confidentiality applications.
- With the support of OECD and competition agencies from Chile, Colombia, Costa Rica, Mexico and Panama, the Commission issued a Guidance of Market Studies²⁴ that describes the specific features of market studies, clarifies how markets are selected and prioritised, and describes the different phases of a market study.
- Indecopi has also recently released: (a) Public Procurement Guidelines, in order to raise awareness to bid rigging, and encourage prevention, detection and sanction; and (b) Business Association Guidelines enlightening different sectors about the importance of the Competition Law

²⁴ www.indecopi.gob.pe/documents/51771/197143/Mercado/a481bf82-3b85-4024-8945-9e3e05240b6c.

5.3. Training and outreach

Indecopi engages in a number of training and outreach activities regarding competition law. This takes very forms. For example, the market studies (*advocacias*) described in the section above always include outreach to the affected stakeholders, requiring them to engage with Indecopi, and reply to its questions. These market studies have a particular impact on public bodies, since they may obligate them to adopt specific measures to promote competition.

Another example of outreach concerns the interaction between Indecopi's Competition Commission and Economic Studies Management department with the Government Procurement Supervising Agency (OSCE) described in section 4.4.1 (iii) above. Yet another example can be found in Indecopi's Regional Technical Secretary for the Elimination of Bureaucratic Barriers (SRB), which dedicates 90% of its staff to full-time to advocacy activities with potential pro-competitive effects in different districts outside the capital (training public servants, sending orientation letters, monitoring results, among others).

Lastly, and most importantly, Indecopi has a School of Competition which provides important advocacy and training activities. The tables below describe competition training activities provided by the school in the past years:

Table 14. School of Indecopi – Number competition training activities 2013 - 2018

N.	Year	Number of activities
1	2013	7
2	2014	5
3	2015	9
4	2016	7
5	2017	14
6	2018	7
TOTAL		49

Source: Indecopi

Table 15. School of Indecopi – Competition training activities 2013-2018

Academic activity	Year	Target audience	Number of participants
Seminario Taller Macro-Regional para Oris "Mecanismos de Investigación en Carteles" (COMPAL)	2013	Internal	29
Seminario Taller Macro-Regional para Oris "Mecanismos de Investigación en Carteles" (COMPAL)	2013	Internal	20
Conferencia Internacional "Fundamentos y Límites de Derecho de la Competencia Experiencia Europea	2013	Internal	39
Curso Especializado: "Técnicas de Detección e Investigación de Conductas Anticompetitivas	2013	Internal	20
Taller "La Valoración de la Prueba en Casos de Competencia"	2013	Internal	14
II Seminario-Taller sobre el papel del Poder Judicial en la Aplicación del Derecho de Competencia-Compal Jueces - "La valoración de la Prueba en casos de competencia en sede judicial" COMPAL	2013	Internal	27
III Seminario - Taller sobre el papel del Poder Judicial en la aplicación del Derecho de Competencia-La determinación de las multas o sanciones y las medidas compensatorias en casos de competencia – COMPAL	2013	External	19
Curso especializado en Libre Competencia	2014	External	27
Conferencia Martes educativo "Libre Competencia: temas básicos para entender las conductas anticompetitivas y el procedimiento"	2014	External	44
Cátedra "La Libre Competencia en el Perú". Puno.	2014	External	70
Cátedra "La Libre Competencia en el Perú". Piura.	2014	External	69
Cátedra "La Libre Competencia en el Perú". Lambayeque.	2014	External	63
Curso Taller Internacional: Aspectos fundamentales en Defensa de la Competencia y Regulación	2015	External	18
Cátedra "La Libre Competencia en el Perú"	2015	External	56
Conferencia Martes educativo" Libre Competencia: temas básicos para entender las conductas anticompetitivas y el procedimiento"	2015	External	30
Curso Básico "ABC del Indecopi" Módulo II	2015	Internal	135
Conferencia "El Programa de Clemencia y la Detección de Cáteles"	2015	Internal	12
Conferencia"Aspectos jurídico privados de la prohibición de conductas restrictivas de la competencia en la Ley española 15/2007 de Defensa de la Competencia: un análisis comparativo con la Ley peruana de Represión de Conductas Anticompetitivas"	2015	Internal	17
Cátedra "La Importancia de la Competencia a nivel internacional desde la perspectiva de las Naciones Unidas"	2015	External	196

Academic activity	Year	Target audience	Number of participants
Curso Especializado de Libre competencia	2015	Internal	36
Escuela Indecopi -Compal / Primer Programa Especializada en Defensa de la Competencia con énfasis en Programas de Clemencia	2015	Foreign agencies' personnel	26
Conferencia "Anticompetitive effects of strategic alliances and joint ventures"	2016	Internos	28
Conferencia "Fortalecimiento de la ley de libre competencia"	2016	External	63
Conferencia "Cómo mejorar la transparencia en las relaciones entre la agencia de competencia y la comunidad empresarial"	2016	Internal	29
Libre Competencia	2016	External	58
Conversatorio Libre Competencia USMP	2016	External	257
Conferencia " La Regla Per se o de la Razón"	2016	External	27
Programa de Formacion INDECOPI - COMPAL en Abogacias de la competencia	2016	Foreign agencies' personnel	29
II Curso de Especialización en Defensa de la competencia Fase Virtual	2017	Internal and External	18
Mesa Redonda "Cuestiones Generales y Desafíos con Relación a la Observancia de la Competencia en Torno a las Plataformas Digitales"	2017	External	21
Conferencia Internacional "Programas de Clemencia y beneficios de la desarticulación de cárteles en la Defensa de la Competencia"	2017	Internal	113
Taller Internacional de Colusión	2017	Internal	30
Taller sobre el Programa de Clemencia	2017	Internal	20
Conferencia Internacional "Día de la Competencia de Perú"	2017	Internal	28
Taller Internacional sobre Abogacía de la Competencia	2017	Internal	125
Conversatorio Internacional: "Tendencias sobre Políticas de Competencia"	2017	Internal	0
Conversatorio Internacional: "Tendencias sobre Políticas de Competencia".	2017	Internal	49
Derecho de la competencia (SGH)	2017	Internal	21
III Curso de Especialización en Defensa de la competencia -	2017	Internal and External	28
Conferencia Internacional "Eficiencia sobre las Prácticas de Clemencia"	2017	Internal	8
Conferencia Internacional: "El Rol de la Economía en la convergencia global entre los sistemas de Derecho de Libre Competencia"	2017	Internal and External	24
Curso Virtual de Libre Competencia	2017	Internal	55
Conferencia: "La determinación de mercados relevantes en materia de Competencia en general (Réplica Escuela Indecopi Compal - II 2017)	2018	Internal	10

Academic activity	Year	Target audience	Number of participants
Conferencia: "Aplicación de herramientas para la investigación de cárteles. A la luz de la experiencia española" (Réplica Escuela Indecopi Compal - II 2017)	2018	Internal	8
Conferencia: "Programa de Clemencia en el Perú" (Réplica Escuela Indecopi Compal - II 2017)	2018	Internal	5
Conferencia: "El programa de Clemencia: Alcances y beneficios (Réplica Escuela Indecopi Compal - II 2017)	2018	External	20
Conferencia "Programa de Clemencia"	2018	Internal	15
Conferencia Internacional "Criminalización de los cárteles: Experiencia comparada y desafíos"	2018	External	103
Conferencia " Persecución de cárteles y Programa de clemencia"	2018	Internal	10

Source: Indecopi

5.4. Review of regulatory instruments

5.4.1. *Ex-ante*

Article 61 of the Peruvian Constitution establishes that the State must promote and survey free competition. In theory, therefore, all normative proposals should bear in mind the impact on competition. Additionally, multi-sector regulations must be discussed before a Vice-Ministerial Co-ordinating Council that checks coherence across policy portfolios and its respective public policies.

When it comes to reviewing regulatory proposals (*ex-ante* analysis), Indecopi may be required by the Executive Branch to elaborate opinions that might be included in the justification of the bill, including arguments on: (a) the necessity of the regulation; (b) explanations about why it would not be arbitrary; (c) the proportionality of the law; and (d) cost-benefit analysis. As a result, Indecopi may intervene in law-making processes by providing opinions as a specialised technical body on topics related to its functions (e.g. competition, consumer protection, and intellectual property). The Office of the Prime Minister is the official channel through which Indecopi receives requests to review regulatory proposals and provides answers to those requests. As regards Congressional bills, Indecopi together with the General Directorate of International Economy, Competition and Productivity of the Ministry of Economy and Finance usually set out the position of the Executive Power.

In practice, Indecopi's opinion is regularly considered in the development of different legislative proposals or regulatory amendments, but it is not binding.

In 2017, the Competition Commission issued eight reports regarding legislative proposals that could affect -positively or negatively- the competitive development of various sectors. From January to May 2018, for instance, the Commission dealt with six bills.

Beyond the Competition Commission, Indecopi's Commission for Elimination of Bureaucratic Barriers has the power to review administrative regulations (secondary legislation), even if its mandate does not extend to the review any bills or statutes (primary legislation). Nonetheless, the Commission for Elimination of Bureaucratic Barriers may issue opinions on Congress bills when asked by the Executive branch to do so, in line with what was just described above.

Indecopi is not involved in defining or reforming regulatory frameworks or privatisation measures. The privatisation agency (PROINVERSIÓN) has not regularly consulted with Indecopi. Nonetheless, Indecopi has used sector studies to make recommendations on economic reforms (OECD, 2012, p. 27_[3]).

Lastly, it should be noted that Indecopi has made recommendations particularly on infrastructure projects. In addition, the transport regulator (OSITRAN) is required to consult Indecopi on competitive conditions in the market if it wishes to set rates in concession contracts, and any other service not included in the original concession (OECD, 2012, p. 27_[3]).

5.4.2. *Ex-post*

The Competition Commission does not have past experience in challenging regulations or directives issued by another entity of the Executive Branch that might be contrary to the Peruvian Competition Act.

However, Indecopi is competent to engage in the *ex-post* review of regulations of secondary legislation issued by any other public entities such as municipalities and ministries (secondary legislation, such as decrees, municipal ordinances, agreements and resolutions) as regards their illegality or unreasonableness. Indecopi is mandated through its power to order the removal of any illegal or unreasonable regulatory burden by means of an administrative resolution, which can be enforced through the imposition of fines of up to USD 25 000 for non-compliance.

Indecopi pursues its regulatory control role mainly through the Commission for Elimination of Bureaucratic Barriers (CEBB) and Indecopi's Regional Commissions around the country (in 12 cities outside of Lima, the capital). Specifically, the CEBB, the Regional Technical Secretariat of

Elimination of Bureaucratic Barriers (SRB), Indecopi's Regional Offices and the respective Division of the Tribunal of Indecopi (the second instance) are in charge of the elimination of bureaucratic barriers. The CEBB comprises the Commission for Elimination of Bureaucratic Barriers (*per se*) and its Technical Secretariat. The Commission issues final decisions following administrative proceedings regarding whether bureaucratic barriers evaluated are illegal or unreasonable, while the Technical Secretary is the competent body to perform all kinds of preventive activities, investigations, inspections or supervisory actions, as well as to initiate, process and instruct administrative proceedings. The CEBB has about 10 experts in administrative law. Since 2008, CEBB's legal powers have been progressively delegated to the Indecopi's 12 Regional Commissions in order to allow for the review of regulations issued by local and regional governments. Currently, CEBB's headquarters can only review regulations emanating from the Executive Branch (Ministries and regulatory agencies), as well as from the local governments of Lima (the capital and the province) and Callao. In 2017, Indecopi's Board also created the Regional Technical Secretary for Elimination of Bureaucratic Barriers (SRB), which is in charge of strengthening the performance and technical capacities of the 12 Indecopi Regional Commissions.

As we saw above, the recommendations of Indecopi as regards regulatory barriers are binding on all public entities. In theory, CEBB's recommendations to eliminate bureaucratic barriers contribute indirectly to reducing competition costs and market barriers. In this sense, the CEBB pursues some of the objectives of Indecopi as regards competition law. Indecopi has been able to obtain the voluntary elimination of bureaucratic barriers imposed by public entities on private parties in strategic sectors of the Peruvian economy, such as telecommunications, infrastructure of public utilities, construction and retail (such as licenses of operation and outdoor advertising). In 2017, for example, Indecopi has reported the voluntary elimination of 3 812 bureaucratic barriers by public entities, which would represent costs estimated at approximately USD 131 million.²⁵

Nonetheless, it is noticeable that competition has not been among the main goals of CEBB's policies, mainly because it is not included expressly within its competences. The CEBB's goal is, instead, to remove unreasonable and illegal

²⁵ Observatorio de Mercados Gerencia de Estudios Económicos 'Midiendo el ahorro económico de los agentes económicos por la eliminación de barreras burocráticas en el Perú durante el 2017' Año 12, N° 36, Mayo 2018, available at www.indecopi.gob.pe/documents/20182/2375854/20180528_Observatorio_de_barreras_burocr%C3%A1ticas_2017.pdf/0dd47685-ea0d-11fd-462c-1db6ecbc2e6b.

bureaucratic barriers. The CEBB and Indecopi's Regional Offices have the authority to evaluate and identify illegal and unreasonable bureaucratic barriers arising from regulations included secondary legislation, such as decrees, municipal ordinances, agreements and resolutions. To establish that a regulatory act is illegal, Indecopi must verify the legal power of the entity that issued the norm, as well as whether the formalities for creating the relevant norm were followed. In this sense, such analysis is not focused on the competitive impact of the relevant norm.

6. Unfair competition and consumer protection / Indecopi's non-competition duties

6.1. Unfair competition

In Peru, Legislative Decree 1044 – the Unfair Competition Act – contains a set of rules that punish business conducts that undermine the adequate functioning of the competitive process. In short, the Unfair Competition Act sanctions acts which are contrary to the requirements of good entrepreneurial faith (such as acts of deception, denigration, undue comparison, corporate sabotage, among others).

Within Indecopi, different bodies deal with free competition and with unfair competition. These bodies are independent and autonomous. The Commission on Unfair Competition (CUC) at first instance, and the Specialized Chamber in Defence of Competition - the second and last instance at Indecopi - are the administrative bodies in charge of enforcing the Unfair Competition Act. These bodies of Indecopi have exclusive competence to sanction acts of unfair competition. The CUC can declare the existence of an act of unfair competition, and it can impose the corresponding sanctions – i.e. a warning or a fine, depending on the seriousness of the conduct. In addition, the CUC may issue corrective measures to restore fair competition in the market. Such measures may consist of: orders to cease pursuing the infringing conduct, confiscation and/or destruction of products, rectification of misleading, incorrect or false information, among others. If the natural persons or legal entities obliged to carry out a corrective measure ordered by the CUC fail to do so, a coercive fine equivalent to 25% of the imposed fine against unfair competition conduct may be imposed.

As of March 2018, 32 investigation procedures had been initiated after complaints, and 34 had been initiated *ex officio*.

6.2. Consumer protection

Indecopi is also in charge of consumer protection under the terms of the Consumer Protection and Defence Code (Law 29571). In effect, Indecopi is Peru's National Consumer Protection Authority, and as such it:

- implements the National Consumer Protection Policy and the National Consumer Protection Plan;
- proposes laws and regulations on consumer affairs;
- prepares and implements the necessary actions to bolster consumer protection and their rights' defence mechanisms;
- implements conflict avoidance and conflict resolution mechanisms in consumer relations;
- implements the consumer information and orientation system nationwide;
- co-ordinates the implementation of the information system on legislation, case law, and other relevant actions and decisions involving consumer relations;
- co-ordinates the implementation of the warning and early action system for hazardous goods and services identified in the market;
- drafts and submits the annual report on the state of consumer protection in Peru, as well as the indicators contained therein;
- co-ordinates and presides over the National Integrated Consumer Protection System;
- issues directives for the operation of the National Consumer Protection System, respecting the technical/statutory, functional, administrative, economic, and constitutional autonomy of its members, as applicable.

Indecopi's activities are aligned with the National Consumer Protection and Defence Policy, and are implemented through the National Consumer Protection Plan, applicable over the 2017-2020 period. Indecopi's Board of Directors is working on developing a similar policy for competition policy.

6.3. Competitive neutrality

In both competition and unfair competition matters, state-owned enterprises receive the same legal treatment as private companies. As previously mentioned, Indecopi has in the past sanctioned state-owned enterprises for infringements of the Peruvian Competition Act.

Article 14.3 of the Unfair Competition Act establishes that business activities carried out by a public entity or state enterprise in violation of Article 60 of the Peruvian Constitution shall constitute an act of unfair competition. The aforementioned constitutional provision establishes that the state may only subsidiarily engage in business activities, directly or indirectly, for reasons of high public interest or manifest national convenience. Such activities are, in any event, only allowed if authorised by law. Therefore, state business activities that do not comply with this set of rules are subject to sanctions and corrective measures on the part of Indecopi. For example, Indecopi sanctioned a municipality for offering a bus terminal service without a law issued by Congress that authorised it to carry out such business activity. Likewise, the Peruvian Air Force and the Ministry of Defence were sanctioned for providing training services for civil pilots and civil aviation personnel through a state-owned civil aviation school in violation of Article 60 of the Constitution.

7. Sectoral regimes

Osiptel, the Supervisory Agency for Private Investment in Telecom, shares with Indecopi its role as National Competition Authority, although restricted to the telecommunications sector. The Telecommunications Competition Law and the Telecommunications Unfair Competition Law, and related procedural rules, are broadly similar to the general Competition Law and Unfair Competition Law enforced by Indecopi.

Osiptel has the power to investigate, prosecute and decide competition cases, filed either by a plaintiff or on an *ex-officio* basis, in this sector. Osiptel also carries advocacy studies in the telecommunications sector. Indecopi, through the Commission for the Defence of Free Competition, is the only authority in charge of enforcing the Competition Act in all economic sectors of the Peruvian economy, including regulated sectors other than telecommunications.

In Peru, competition laws are supplementary – or ‘subsidiary’ - to sectoral regulation. Consequently, in any market where there is sectoral regulation – e.g.

water and sanitation, transport, energy or telecommunications – competition rules can only be applied when a particular situation or market is not already subject to sectoral regulation. Indecopi may start administrative proceedings against regulated firms – regardless of whether they are privately or state-owned – only regarding business conduct falling outside the scope of regulated conduct.

In the last five years, Indecopi has pursued an important number of antitrust cases in regulated markets, prosecuting cartels in the energy, maritime transport, and public ground transportation sectors. For instance, in 2017, the Commission adopted the following measures against cartels in regulated sectors: (a) the Commission imposed fines for USD 27 282.90 for a horizontal agreement in the public transport market in Islay (Arequipa, a Peruvian region); (b) the Commission imposed fines of USD 22 889 913.56 in the liquefied petroleum gas (LPG) market for a horizontal agreement to fix the price of LPG gas in bulk and packaged presentations; (c) the Commission imposed fines of USD 3 002 054.70 and USD 3 688 720.03 in two cases in the market for LPG gas for the use of vehicles in Chiclayo and Chicbote (two Peruvian regions).

Indecopi has the power to apply the Competition Act in regulated sectors, with the exception of the telecommunications sector where Osiptel enforces the law. However, only in energy sector regulation (Law No. 26734) it is clearly stated that Indecopi is competent, as a member of the Supervisor System of Investment in Energy, to ensure free competition in the electricity and hydrocarbons subsectors by enforcing the Competition Act and its amendments. In the other two regulated sectors, water and sanitation, and transport infrastructure, there is no specific provision in the regulatory framework relating to the enforcement of competition law. Indecopi can bring enforcement actions for the infringement of competition law regarding business conduct of regulated firms that falls outside the scope of regulated conduct.

7.1. Relationship with sector regulators

The Law on Access to Public Infrastructure gives sectoral regulators exclusive jurisdiction over all access issues concerning public infrastructure. Regulators include: (a) in the transportation sector, OSITRAN (Supervisory Agency for Investment in Transport Infrastructure of Public Use); (b) in the telecommunications sector, Osiptel (Supervisory Agency for Private Investment in Telecom); (c) in the energy sector, OSINERGMIN (Supervisory Agency for Investment in Energy and Mining); and (d) in the water and sewerage sector, SUNASS (National Superintendence of Sanitation Services). These agencies are

all administratively independent, meaning that – as Indecopi – they report to the Office of the Prime Minister rather than to their sectoral Ministry.

All of these sectoral regulators are charged partially with promoting competition in their sectors. Nonetheless, their ability to do so is limited by the fact that Ministries retain the power to issue licenses or grant concessions and make other critical decisions.

The Competition Commission co-ordinates with each regulatory agency. Indecopi and all the regulatory agencies have agreements to facilitate the exchange of information. For instance, in the proceedings of merger control in the electricity sector, the Commission typically requires reports from the regulatory agency in the energy sector (OSINERGMIN) regarding market shares, operation, coverage and investment deployed by the regulated firms that have decided to merge. In the transportation sector, the Commission provides support to the regulator of public transportation infrastructure (OSITRAN) when this regulator sets port tariffs. In addition, OSITRAN is required to consult Indecopi on the competitive conditions in the market if it wishes to set rates in concession contracts, and any other service not included in the original concession (OECD, 2012, p. 29^[31]).

As already mentioned, the regulatory agency in the telecommunications sector (Osiptel) is also the competition authority for this sector. Osiptel's regulatory responsibilities include, resolving interconnection issues, setting quality standards and establishing maximum tariffs when no effective competition exists. Osiptel also monitors telecommunications markets to identify potential anticompetitive infringements. Osiptel has investigative and sanctioning powers, and carries out market studies and advocacy initiatives as well.

Osiptel has issued formal guidelines explaining its approach to competition and unfair competition enforcement. The competition guidelines cover some of the same subjects as those covered by decisions issued by Indecopi's Competition Division of the Tribunal, but they also explain the criteria by which Osiptel defines markets and assesses whether a firm is dominant.

7.2. Co-operation agreements and MOUs

Indecopi has co-operation agreements and MOUs with a number of regulatory and enforcement bodies in Peru, with a view to strengthen co-operation and the effectiveness of its activities. These agreements are listed in the table below.

Table 16. Agreements signed by INDECOPI with other regulatory agencies and public bodies

Institution	Name Of The Agreement	Objective	From	Until
EXTERIOR COMMERCE PERUVIAN SOCIETY (COMEX PERU)	Agreement on Technical Co-operation between COMEX PERU and Indecopi	To strengthen co-operation ties between Indecopi and COMEX PERU, in favour of the citizenry, economic agents and public entities, to have mechanisms enhancing and spreading awareness on Indecopi's labour regarding the defence of competition.	11/12/2017	11/12/2020
SUPERVISORY BODY OF PRIVATE INVESTMENT ON TELECOMMUNICATIONS (Osiptel)	Interinstitutional Cooperation Agreement between Osiptel and Indecopi	To spread awareness among providers of their obligation to produce complete and adequate information on the goods or services they offer. Also, to spread among consumers a message encouraging them to take a more active position on the defence of their rights.	15/03/1996	Undefined
SUPERVISORY BODY OF PRIVATE INVESTMENT ON INFRASTRUCTURE FOR PUBLIC TRANSPORTATION (OSITRAN)	Interinstitutional Cooperation Agreement between OSITRAN and Indecopi	To promote mechanisms of co-operation between OSITRAN and Indecopi to implement proper procedures to APM Terminals requests for the provision of special services. To respect at all times OSITRAN and Indecopi competences, which are included in their respective laws of creation and on other related norms.	16/06/2014	16/06/2016(subject to automatic renewal)
SUPERVISORY BODY OF PRIVATE INVESTMENT ON ENERGY AND MINING ACTIVITY (OSINERGMIN)	Framework agreement of Interinstitutional Cooperation between OSINERGMIN and Indecopi	To provide for timely and agile exchange and access to information generated by each entity. Also, to allow taking joint actions of diffusion and supervision, considering the agencies' respective competences at a national level. If it is required, other specific agreements could be signed on matters of mutual interest.	20/11/2017	20/11/2019(subject to two-years automatic renewal)

Institution	Name Of The Agreement	Objective	From	Until
NATIONAL SUPERINTENDENCE OF SANITATION SERVICES (SUNASS)	Interinstitutional Cooperation Agreement between SUNASS and Indecopi	To spread awareness among providers of their obligation to produce complete and adequate information on the goods or services they offer. Also, to spread among consumers a message encouraging them to take a more active position on the defence of their rights.	15/03/1996	Undefined
NATIONAL SUPERINTENDENCE OF TAX ADMINISTRATION (SUNAT)	Interinstitutional Cooperation Agreement between SUNAT and Indecopi	<p>To implement jointly orientation and diffusion campaigns on matters of their competences.</p> <p>To take joint actions that help on adequate compliance with their supervision duties.</p> <p>To have jointly operative inspections when there is suspicion of intellectual property rights infringement.</p> <p>To coordinate bilateral working groups, at the request of one member of the agreement, for the elaboration of rules and procedures, among other things.</p>	18/08/2004	Undefined
SUPERINTENDENCE OF LAND TRANSPORTATION OF PASSENGERS, CARGO AND GOODS (SUTRAN)	Framework Agreement of Interinstitutional Cooperation between SUTRAN and Indecopi	<p>To promote co-operation between both institutions in order to strengthen and improve compliance within the scope of the responsibilities assigned to each entity.</p> <p>To promote the efficiency of their actions regarding the protection of the final users of services related to the transportation of passengers, cargo and goods at both national and international level, inasmuch that such responsibility has been trusted to both entities.</p>	30/11/2016	30/11/2018

Institution	Name Of The Agreement	Objective	From	Until
Regulatory Bodies of Public Services: Osiptel, OSINERGMIN, OSITRAN and SUNASS	Framework agreement of Interinstitutional Cooperation among Indecopi and the following Public Bodies: Osiptel, OSINERGMIN, OSITRAN and SUNASS	To establish adequate interinstitutional co-operation between Indecopi, as the National Authority on Consumer Protection, and the Regulatory Bodies on Public Services: Osiptel, OSINERGMIN, SUNASS, and OSITRAN, as members of the National Council for Consumer Protection, which will help to the development and functioning of the National Integrated System on Consumer Protection.	02/05/2013	02/05/2014 (subject to automatic renewal)

Source: Indecopi

7.3. Osiptel – Competition enforcement in the telecommunications sector

As mentioned above, Osiptel is the only regulator that shares with Indecopi the role of competition authority in Peru. Osiptel's role is limited to the telecommunications sector, where Osiptel has an active role as a competition authority with tasks that include researching, detecting and sanctioning anti-competitive and unfair behaviours. The Telecommunications Competition Law and the Telecommunications Unfair Competition Law, and related procedural rules, are broadly similar to the competition and unfair competition rules that fall under the competence of Indecopi.

7.3.1. Institutional framework

Osiptel is a decentralised public entity responsible for regulating and supervising the telecommunications market. It is an independent body, attached to the Prime Minister's Cabinet. The agency is both an economic regulator and a competition agency for telecommunication markets. Thus, it promotes competition in the telecommunication markets (via *ex-ante* measures) and is also responsible for developing and applying competition law in these markets (via *ex-post* measures).

The structure of Osiptel is similar to that of Indecopi, particularly regarding the existence of bodies with exclusive competence to deal with competition and the separation between investigation and decision-making powers.

The competition enforcement activities of Osiptel are autonomous from its regulatory activities. The Technical Secretariat of Osiptel handles both regulation and competition. The Technical Secretariat has no division between its employees to attend controversies, antitrust and unfair competition matters: all of them work in every case. The Permanent Collegiate Bodies and the Tribunal, however, deal solely with competition matters.

The main function of the Technical Secretariat entrusted with competition enforcement is to investigate and prosecute anticompetitive behaviour, promoting economic efficiency and consumer welfare. However, it is the Permanent Collegiate Bodies – and, in second instance, the Dispute Resolution Court – that sanctions anticompetitive or unfair behaviour, and impose complementary or corrective measures directed to protect the competition process.

7.3.2. Resources

According to Art. 2 of Law N° 27332 (Regulatory Agencies Framework Law), Osiptel has administrative, functional, economic and financial autonomy. Within Osiptel, two departments are in charge of competition policy: (i) the Regulatory and Competition Policy Department (*ex ante* measures) and the Technical Secretariat (*ex post* measures).

Osiptel's budget is funded by fees paid by regulated firms, in amounts corresponding to 0.05% of the gross income from their provision of telecommunication public services. Osiptel's budget is described in the table below.

Table 17. Osiptel's budget

	Budget expenditure – Technical Secretariat	Budget expenditure- Regulatory and Policy Department
2017	USD 412,604	USD 314,245
2016	USD 413,706	USD 293,687
2015	USD 434,304	USD 282,570

Source: Osiptel

The assignation of staff to competition matters is described below:

Table 18. Osiptel: Staff assigned to competition matters'

Number or persons	Profession
Regulatory and Competition Policy department - Competition team	
05 Economists	1 deputy manager 1 chief of team 3 senior analysts
1 Lawyer	1 legal specialist
Technical Secretariat team	
05 Lawyers	Lawyers 4 lawyers that assist the first administrative instance : – 1 Technical Secretary of the Collegiate Bodies – 2 Legal Specialists – 1 Legal Analyst 1 lawyer that assist the second administrative instance : – 1 Technical Secretary of the Dispute Resolution Court.
02 Economists	Economists 1 economist that assists the first administrative instance and helps with the investigation process. – 1 Economic Specialist 1 economist that assists the second administrative instance and helps with the investigation process. – 1 Economic Analyst

Source: Osiptel.

7.3.3. Procedure

Competition investigations are usually initiated *ex officio* or because of complaints by affected firms about a conduct that may affect competition. Despite being empowered by law to receive leniency requests, currently Osiptel does not operate a leniency program. Osiptel is planning to develop and publish a leniency program guideline for telecommunications markets by the end of this year.

Concerned parties are informed about the investigation once it is opened. As the body in charge of investigating and prosecuting anticompetitive behaviour, the Technical Secretariat has the power to ask telecommunication operators and other firms for information related to the investigation undertaken. Osiptel may apply sanctions to telecommunication operators and other firms that either fail to provide the required information or that provide incomplete

information. Executive Order N° 1034 further grants Osiptel the power to carry out inspections, enter premises and seize documents. Inspections may or may not be announced. In the last five years, however, only one unannounced inspection has taken place.²⁶

The Technical Secretariat does not have a standard procedure for conducting investigations. Each action taken will depend upon the elements of the case since each one has its own features. However, Osiptel informed the OECD that it is planning to elaborate guidelines on the investigation of antitrust behaviour or unfair acts in the telecommunications market.

The Permanent Collegiate Bodies and the Dispute Resolution Court can order the protection of confidential information by means of a resolution declaring the confidentiality of the information submitted during an investigation or administrative procedure. In this case, a resolution declaring the confidentiality of the information is approved. OSIPTEL has its own regulation regarding the protection of confidential information submitted during an investigation or administrative procedure (Resolution 178-2012-CD/OSIPTEL).²⁷

After its investigation, the Technical Secretariat prepares a technical report for the Permanent Collegiate Bodies, which decides if a sanctioning administrative procedure should be initiated. These Bodies follow a set of guidelines published by Osiptel on how antitrust rules will be applied.²⁸ Parties may appeal the decisions or resolutions taken by the Permanent Collegiate Bodies to the Dispute Resolution Court, which provides a second and last administrative instance. The Court's decision may then be appealed to the judicial courts.

7.3.4. Articulation between Osiptel, Indecopi and other relevant authorities

Indecopi's and Osiptel's competences are delimited according to which market is affected by the conducts under analysis. When behaviour relates to the

²⁶ Osiptel has never asked for assistance from courts in order to obtain a judicial authorisation to proceed in case of refusal to enter private premises, or a judicial authorisation to copy private correspondence contained in electronic or physical files.

²⁷ www.osiptel.gob.pe/Archivos/ResolucionAltaDireccion/ConsejoDirectivo/Res178-2012-CD.pdf

²⁸ www.osiptel.gob.pe/repositorioaps/data/1/1/1/PAR/077-2016-cd-osiptel/Resolucion006-2016-TSC-Osiptel.pdf

telecommunications market, Osiptel is the authority in charge; business conduct in any other economic sector will fall under the purview of Indecopi.

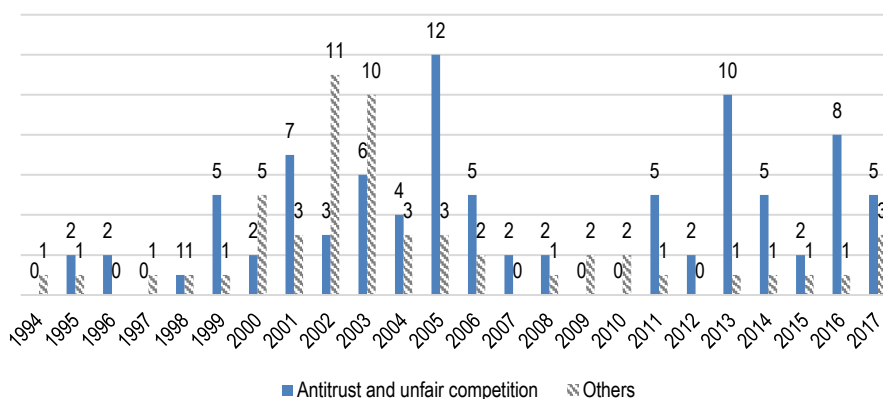
Indecopi and Osiptel co-ordinate their activities in order to avoid divergence between their criteria and decisions. To ensure consistency with Indecopi's approach, and in view of its expertise, Osiptel asks Indecopi for a technical report regarding its analysis of the relevant anticompetitive behaviour in every antitrust or unfair competition case. While this allows Indecopi's approach and expertise to be taken into account in competition cases in the telecommunications sector, this co-ordination seems to occur informally.

As regards the promotion of competition in the market, Osiptel also interacts with the Ministry of Transport and Communications (MTC), which is in charge of issuing the General Regulatory Framework of the telecommunication sector (e.g. licensing and spectrum management). In particular, Osiptel may recommend the MTC to change general telecommunication rules that may improve competition and may present reports to the Ministry related to national legislation and spectrum management in the industry. In this case, Osiptel's opinions are not binding; as a result, spectrum transferences have been approved even when Osiptel had issued a negative opinion regarding its effects on competition.

7.3.5. Competition enforcement in practice

From 1994 until 2017, Osiptel has started 90 disputes for Antitrust and Unfair competition matters (62%), and 55 disputes (38%) on matters such as disagreements on the conditions of interconnection and access to infrastructure set in bilateral contracts. A detailed breakdown per year can be found in the figure below.

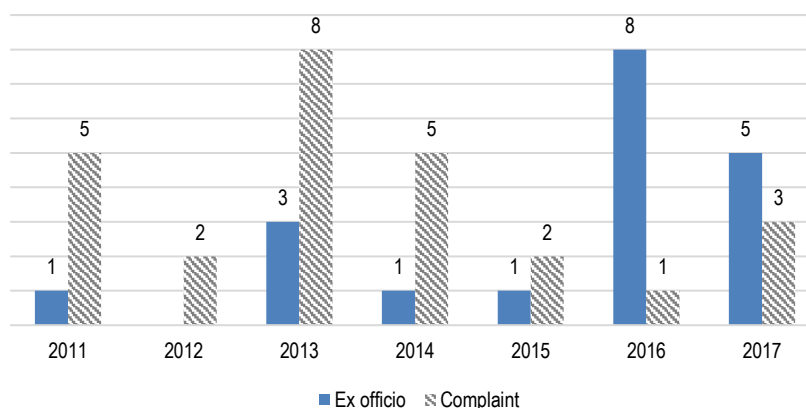
Figure 6. Number of cases initiated by Osiptel per year



Source: Osiptel.

Until 2006, companies brought significant amounts of complaints for anticompetitive behaviours. The number of complaints has since diminished. This has led to an increase in *ex officio* investigations in recent years. Among the most relevant antitrust cases analysed by Osiptel are cases relating to tied sales, exclusivity contracts, price squeeze, and collusive agreements in the internet, Pay-TV and mobile markets.

Figure 7. Number of cases initiated per year, ex officio vs. complaints



Source: Osiptel.

As the Table 19 makes clear, Osiptel has focused mainly on abuses of dominant position - unlike Indecopi, which focuses on anticompetitive horizontal agreements.

Table 19. Osiptel competition investigations by topic (2013-2017)

Investigations	Horizontal agreements	Abuse of dominance
2017	1	
2016	1	2
2015		3
2014		1
2013		1

Source: Osiptel.

The number of competition enforcement actions taken by Osiptel has historically been limited, and no decisions have been adopted at least since 2013, with the exception of unfair competition. In 2013, two cases were opened, both regarding margin squeeze in the mobile market. One of them was dismissed at first instance²⁹, while the other was sanctioned at first instance but dismissed at second instance³⁰. Between 2013 and 2015, there were a number of investigations on possible abuses of dominance positions in the cable television market related to the bundling of cable television services with internet and fixed telephony services. However, it was ultimately found that there was not enough evidence to bring these cases before the Permanent Collegiate Bodies. In 2015, two investigations were opened regarding potential abuses of dominance – one in the mobile telephony market, and the other in two regional internet markets. Once more, it was found that there was not enough evidence to bring a case before the Permanent Collegiate Bodies. In 2016, an investigation was opened regarding horizontal agreements in the cable television market in Iquitos, which was also closed for lack of evidence. That year the Technical Secretariat also started two investigations on abuse of dominance which are still pending – in the internet market and in the mobile telephone market. Finally, in 2017 one investigations was opened regarding horizontal agreements in the mobile market, which is still pending.

²⁹ www.osiptel.gob.pe/articulo/exp009-2013-cc

³⁰ www.osiptel.gob.pe/articulo/exp010-2013-cco-st-lc

(i) Horizontal agreements

As already mentioned, investigations into collusive conducts in telecommunication markets are uncommon in Peru. So far, Osiptel has not sanctioned any collusive agreements, although some investigations have taken place.

(ii) Vertical agreements

The only vertical practice investigated and sanctioned by Osiptel has been exclusivity agreements. According to the experience of Osiptel, exclusivity agreements can be investigated either as an abuse of dominant position or as a vertical agreement. A case related to an exclusivity agreement will be treated as an abuse of dominant position case when it concerns a unilateral decision of the economic agent with a dominant position, e.g. when the agreement only benefits the dominant firm and implies submission, acceptance or tolerance on the part of the other firms involved. Exclusive agreements will be treated as a vertical concerted practice when the agreement reflects multilateral decisions that benefit all parties involved in the agreement.³¹ On July 2018, OSIPTEL started a vertical collusive agreement case.³²

(iii) Abuses of dominant position

Most of the competition cases reviewed by Osiptel concern abuses of a dominant position. This reflects the fact that, in telecommunication markets, problems related to access to certain infrastructures, which may be essential facilities or not, are common. Most of these problems are resolved by means of regulatory mechanisms.

In Peru, there is currently regulation regarding infrastructure sharing, which has become the main route for the analysis of these cases within Osiptel. In particular, if negotiations with a company that wants to access another's infrastructure fail, the firms involved can ask Osiptel to intervene and issue an

³¹ See: Resolution N ° 062-CCO-2000 of December 21, 2000, issued in the controversy Tele Cable S.A. against Telefónica of Peru S.A. A and Telefónica Multimedia S.A.C. (Exp. 006-99); and Resolution N ° 012 -2013-CCO/Osiptel of March 8, 2013 and Resolution N ° 007 -2013-TSC/Osiptel of July 2, 2013, both issued in the controversy initiated by Digital communications network S.A.C. contra Televisión San Martín S. A. C and others (EXP. 006-2011- BCC-ST/LC).

³² www.osiptel.gob.pe/noticia/np-inician-procedimiento-administrativo.

Access Mandate under the scope of the Infrastructure Sharing Regulation. Through such a Mandate, Osiptel determines the technical and economic conditions under which a company must grant access to the other.

Cases not falling within the scope of applicable regulations may be treated as abuses of a dominant position. The main abuse of dominance cases assessed by Osiptel were the following:

- Tele 2000 against Telefónica: unjustified refusal to deal and discrimination.³³
- AT&T against Telefónica: unjustified refusal to deal.³⁴
- By trade against Telefónica: tying.³⁵
- Tele Cable against Telefónica, Fox, Turner: exclusivity agreements.³⁶
- Nextel versus Telefónica Móviles: predatory pricing.³⁷

(iv) Remedies

In addition to penalties, Osiptel is empowered to impose remedies or corrective measures to re-establish the levels of competition and/or to repair damage to competition. For example, Osiptel has ordered firms to eliminate exclusivity clauses with exclusionary effects on the cable television market, to give access to certain infrastructures in cases of refusal to deal, and to remove a binding clause from an agreement.

(v) Merger control

In the telecommunications sector there is no merger control. However, mergers in the telecom market usually involve the transfer of spectrum and of

³³ www.osiptel.gob.pe/documentos/expediente-n-00295.

³⁴ www.osiptel.gob.pe/documentos/6425-expediente-n-0032001.

³⁵ www.osiptel.gob.pe/documentos/71983-expediente-n-0052011.

³⁶ www.osiptel.gob.pe/documentos/6141-expediente-n-0061999.

³⁷ www.osiptel.gob.pe/documentos/expediente-n-0012005.

concessions titles. This transfer has to be authorised by the MTC.³⁸ In these cases, the MTC asks Osiptel for a non-binding opinion regarding the possible effects that the market concentration may have on competition, prices and consumer welfare. However, the ultimate decision is taken by the MTC, which is the entity in charge of allocating spectrum and granting concession titles. In at least two cases, OSIPTEL categorically disagreed with spectrum transfers in the 2.5-2.6 MHZ band, ideal for the provision of advanced 4G mobile services, the operations; which were cleared by the MTC.

The main opinions issued by Osiptel upon MTC's requests on these matters are listed below.³⁹

Table 20. Osiptel opinions on transfer of spectrum and of concessions titles:

Economic Agents involved		Year	Opinion
Telefónica del Peru	BellSouth	2004	In favour, with conditions
America Móvil	Telmex	2011	In favour, with conditions
Telefónica del Peru	Telefónica Móviles, T. Multimedia, Star Global Com	2011, 2013 (New request)	In favour, with conditions
Americatel	Nextel	2013	In favour
Olo del Peru	TVS Wireless (Spectrum transfer)	2016	Disagree

Source: Osiptel.

³⁸ The content of the opinions issued by OSIPTEL for closed cases is public and can be found at the following links: for mergers: www.osiptel.gob.pe/documentos/fusiones; for mergers that involve the transfer of Spectrum (scarce resource): www.osiptel.gob.pe/documentos/transferencia-espectro.

³⁹ OSIPTEL's technical opinions sent to the MTC can be found in the following link: www.osiptel.gob.pe/documentos/transferencia-espectro.

8. International co-operation

8.1. International co-operation arrangements

Indecopi engages in international co-operation efforts in order to perform its activities more effectively, to raise the level of knowledge of its professionals, and to be present in international forums where it can display and learn from best practices. To date, Indecopi has signed 14 international agreements on competition issues with the following foreign agencies:

- The Authority for Consumer and Competition Protection of Panama.
- The Competition Authority of France.
- The Federal Economic Competition Commission of Mexico.
- The Administrative Council for Economic Defence of Brazil.
- The National Competition Commission of Argentina.
- The Federal Trade Commission and Department of Justice of the USA.
- The National Competition Commission of Dominican Republic.
- The National Economic Prosecutor of Chile.
- The National Institution for the Promotion of Competition of Nicaragua.
- The Superintendence of the Competition of El Salvador.
- The Superintendence of Industry and Commerce of Colombia.
- The Superintendence of Control of the Market Power of Ecuador.
- The National Authority for the Competition Defence of Turkey.

All these International Co-operation Agreements are documents signed between competition agencies to foster co-operation in competition matters. They do not contain binding dispositions for the States.

8.2. International co-operation in practice

The international co-operation agreements listed above have been used on occasion. For example, Indecopi prepared an internship program for officials

from Nicaragua (October 2015) and another for El Salvador (November 2015). These competition agencies also exchanged experiences with Indecopi in order to increase their knowledge and to share strategies for detecting and sanctioning anticompetitive conducts.

Co-operation has its limits, however. While it is theoretically possible for Indecopi to receive information from other competition agencies under international agreements or MoUs, there has yet to be any joint investigations between Indecopi and other agencies for the detection of anticompetitive conducts. Even exchange of information between competition agencies is limited due to Peruvian legal restrictions concerning the possibility of exchanging information regarding ongoing proceedings (i.e., only the investigated party or third parties with legal interest are entitled to know about the file procedure statement, to access it and to get copies of the proceeding).

As a result, all information exchanged between Indecopi and other competition agencies has thus far been on general topics. Nonetheless, even this high-level exchange of information has proven useful. An agreement signed with Chile ensured a useful for exchange of general information regarding the drugstore chains case, while the agreement signed with Colombia was useful for obtaining general information regarding the toilet paper case.

Increased co-operation might also be desirable for proceedings that involve foreign firms, which the Competition Commission has encountered difficulties. For example, the Commission has had difficulty in notifying arraignments abroad, as well as in obtaining information or requiring the performance of dawn raids outside Peru.

Indecopi is active in international competition forums, as is apparent from the table below:

Table 21. Indecopi's participation in international organisations (Competition) from 2012 to 2016

Participation in international organisations	2012	2013	2014	2015	2016	2017
OECD						
Number of articles and written materials submitted	7	9	6	6	3	4
Number of conferences attended	2	4	5	4	4	3
Number of speeches given	2	1	1	4	2	3
Number of participants sent	4	5	9	15	9	4

Participation in international organisations	2012	2013	2014	2015	2016	2017
ICN						
Number of articles and written materials submitted	N/A	N/A	N/A	N/A	N/A	N/A
Number of conferences attended	1	N/A	N/A	N/A	1	1
Number of speeches given	1	N/A	N/A	N/A	N/A	1
Number of participants sent	2	N/A	N/A	N/A	2	1
UNCTAD						
Number of articles and written materials submitted	1	N/A	1	N/A	1	N/A
Number of conferences attended	1	1	2	N/A	2	1
Number of speeches given	1	N/A	N/A	N/A	1	1
Number of participants sent	1	4	4	N/A	4	1

Source: Indecopi.

9. Conclusions and recommendations

Peru has a competition regime that is active and in line with internationally recognised standards and practices, with the exception of merger control. A number of recent reforms are evidence of the ambitious efforts by Indecopi and the Peruvian Government to improve the effectiveness of competition enforcement and to make markets work better. Competition law applies to all economic sectors and to all conducts that might have anticompetitive effects in Peru. Peru prohibits hard-core cartels without requiring an assessment of their effect on competition, horizontal and vertical agreements when they have anticompetitive effects, and abuses of a dominant position. In effect, the basic pillars of competition law in Peru are in line with good international best practices, with one exception: the absence of a merger control regime.

Peru has two competition agencies: Osiptel, which is competent in all matters concerning the telecommunications sector, and the Institute for the Defence of Competition and Intellectual Property (Indecopi) for all other sectors of the economy. This institutional configuration is not uncommon in Latin America, but it creates risks of divergence in the application of competition law. In the case of Osiptel, it also leads to risks of competition enforcement being either consumed by Osiptel's regulatory function or used to advance regulatory goals, which are compounded by all members of Osiptel's Technical Secretariat being competent for both regulatory and competition matters. Failure to address these risks is likely to lead to concern – particularly in the light of the limited competition enforcement undertaken by Osiptel – for a preference in solving problems by resorting to its regulatory powers.

Indecopi is a well-regarded enforcement agency both domestically and internationally. It benefits from the support and respect of virtually all major stakeholders in Peru, both public and private. Indecopi's structure is uncommon as it comprises a deliberative branch which resolves disputes and takes decisions regarding numerous market regulation matters beyond competition law – including IP, unfair competition and consumer protection, amongst others - and an administrative branch which provides support to the resolute branch without being involved in law enforcement. Such a structure seems to work well as regards competition law and policy, particularly since the relevant bodies within Indecopi that deal with competition matters – namely the Technical Secretariat, the Competition Commission and the Tribunal – act, for all practical purposes, as a fully autonomous and independent competition authority. Such an institutional set up allows for the reaping of synergies between related areas of regulation. This creates opportunities that could be further developed.

Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. This institutional arrangement is expected to provide a safeguard against political and public pressures, and particularly those that might arise from individual Ministries responsible for individual economic sectors. When coupled with the institutional set up of Indecopi, which ensures the technical and autonomous nature of the decisions taken by the different resolute bodies, this creates multi-layered protections against interference and the politicisation of decisions adopted by the functional branch of Indecopi. In practice, the influence of the Executive Branch or Parliament in defining the agenda of Indecopi has been marginal: the autonomy of the Commission to decide what to investigate and how to handle competition proceedings is widely acknowledged by all observers. Despite this, the legal framework poses a number of risks to the autonomy and independence of Indecopi and its decision-making. Peru should minimise such risks.

One apparent side effect of the concern with maintaining the autonomy and independence of the decision-making bodies is that Indecopi has not engaged in strategic planning or in prioritising competition concerns in the past. There is an absence of integrated thought and strategy on how competition law and policy can fit with other Indecopi activities and roles in order to reap the benefits of synergies from multiple competences. Indecopi is currently developing a national competition plan. This is a worthwhile development, and one that should be undertaken to identify enforcement priorities and ways in which Indecopi can harness its multiple regulatory functions to promote competition in Peru.

Indecopi benefits from a stable and autonomous source of funding. Its budget has remained relatively stable over the years, and is broadly protected

from political interference. Furthermore, Indecopi is a large and well-resourced organisation, with 1700 employees. Nonetheless, Indecopi's competition bodies have little more than 50 people – if one includes the part-time commissioners and members of the Tribunal. Even as the staff of Indecopi's competition bodies has increased, it is consensual among observers that the Competition Branch is understaffed and would benefit from a larger number of employees, which are an absolute need if Indecopi is granted merger review duties in the future. Concerns with staff levels are compounded by the fact that average salaries paid to Indecopi employees are unattractive and unable to retain personnel in the long term. Discrepancies between public and private sector salaries are common around the world. Nonetheless, the personnel of competition agencies are normally highly qualified, and are normally paid more than civil servants. The existence of a civil service pay-cap that applies to Indecopi and other regulators – but not to comparable specialist bodies, such as the Central Bank or the Financial Regulator – creates a larger discrepancy between public and private sector salaries in competition related activities than would otherwise be the case, and poses significant problems in terms of retention of qualified staff.

Concerns about staffing of the competition branch of Indecopi go together with complaints about the length of competition proceedings, and about the Competition Commission, whose members work part-time for very little pay, being overly dependent on the Technical Secretariat. This alleged dependence is said to lead to a blurring of the distinction between investigative and decision-making roles. A recent rule setting out a maximum time-limit for investigations, which if exceeded leads to proceedings being terminated, adds to concerns regarding the length of proceedings. Investigations risk being rushed or not closed on time given this trifecta of the complexity of competition proceedings, staffing limitations and hard deadlines regarding the duration of an investigation creates risks of investigations being rushed or not being closed on time. This trifecta can mean that the Commission's focus is not on the most serious infringements but those that are easier to prove; and could result in an overall decline in the quality of Indecopi's enforcement in the future.

Despite the challenges that we just identified, Indecopi's leadership's efforts to strengthen its enforcement tools and the admirable commitment of Indecopi's staff have led to increased competition enforcement with significant positive results. Enforcement has focused mainly on prosecuting cartels. Nonetheless, it is noticeable that enforcement against bid-rigging in Peru is very scarce, and that there is a lack of co-ordination between Indecopi and the relevant public procurement bodies. Given the impact of bid-rigging on the public purse and tax payers, and how common bid-rigging practices are around the world, it is important that

Indecopi pursues more aggressive enforcement against bid-rigging, and that coordination between competition and public procurement authorities increases.

In any event, the focus on competition enforcement against cartels has led to some unquestionable successes. It is undoubted that cartels should be one, if not the main focus of competition enforcement. Nonetheless, enforcement should also be directed at other horizontal and vertical anticompetitive agreements and at abuses of a dominant position – particularly when, as is the case in Peru, there is no merger control regime. The adoption of a merger control regime should be a priority for Peru, since in its absence competitors can circumvent the prohibition against anticompetitive agreements by merging – with effects potentially similar to those of a cartel immune from antitrust scrutiny. Furthermore, mergers may lead to the creation of economic agents with market power. In the absence of merger control, enforcement of prohibitions against abusive behaviour by those companies with significant market power becomes more relevant. Despite these circumstances that would seem to justify enhanced enforcement against anticompetitive practices other than hard-core cartels, enforcement against vertical agreements by companies with market power and against abuses of market power has been close to non-existent.

As regards the sanctioning of competition infringements, Peru's rules on the amount and calculation of fines are broadly in line with international practice. Peru does diverge from international practice in placing great reliance when calculating the amount of a fine on the illicit benefit that the offender is supposed to have obtained as a result of its anticompetitive conduct. Internationally, it is considered to be extremely challenging to calculate illicit benefit accurately. Such an approach to setting the amount of a fine increases the cost of proceedings and of successful judicial challenges. As such, most jurisdictions often rely on a simple proxy like amount of sales or turnover in the relevant market.

Recent legal reforms have sought to promote the adoption of settlement and commitment procedures. Notwithstanding the increase in number of settlement and commitment procedures since then, proceedings seem to lack predictability and certainty. Observers claim that it would be possible to encourage more settlements and commitments, in a way that would benefit competition enforcement and rationalize administrative resources, by increasing the transparency and predictability of settlement and commitment procedures. As regards settlements in particular – since commitments will not often be appropriate for cartels – care should be taken to ensure that such measures are not so favourable to infringing parties as to risk undermining their incentives to apply for leniency.

Concerning advocacy, Indecopi has played an important role in ensuring that Peruvian society and relevant stakeholders become increasingly aware of competition law and policy, and in promoting a competition culture. Its School is a particularly impressive example of how agencies can engage in outreach to promote competition law, create awareness of the importance of competition, and engage with relevant stakeholders – public and private, national and foreign. The School provides an example of competition advocacy that could be imitated elsewhere. Furthermore, one of Indecopi’s competences is the removal of bureaucratic barriers, and one of its branches is exclusively devoted to this. The recommendations of Indecopi as regards regulatory barriers are binding on all public entities, which must remove such barriers if Indecopi so requires. The identification and removal of bureaucratic barriers is an activity that is likely to promote competition and remove barriers to market entry.

Indecopi could add to this impressive assortment of competition advocacy initiatives. It has the power to pursue market studies, which are widely recognised as an important tool to open markets to competition. However, the limited number of staff available to the Competition Commission limits both the number of advocacy studies that it can prioritise and pursue in any given year, as well as the number of analysts that the Commission can assign to these activities. Indecopi has produced a relatively limited amount of competition-related guidance. Indecopi is currently working on additional guidelines and bringing them to the attention of relevant stakeholders. This activity should continue to be pursued., Indecopi’s review of bureaucratic barriers focuses on their illegality or unreasonableness; it would be good if this competence could be used in such a way as to identify regulations that, while lawful and reasonable, nonetheless unnecessarily restrict competition. Lastly, it seems that Indecopi does not provide opinions on primary legislation unless asked to do so; it is advisable for Indecopi to have the opportunity to comment on pieces of legislation without being asked to do so, particularly when it considers that they are particularly detrimental to competition.

Lastly, Peru – and particularly Indecopi – is aware of the benefits of international co-operation. Indecopi is active in international fora, it has a number of agreements with competition authorities in other countries, has exchanged personnel and experience with these authorities, and it has, at a high level, cooperated in investigations with neighbouring countries. Peru can take further steps in expanding and deepening its co-operation with other countries on competition matters. Up to now, there have been no joint investigations between Indecopi and other agencies for the detection of anticompetitive conducts, and even exchange of information between competition agencies is limited due to Peruvian

legal restrictions concerning the possibility of exchanging information regarding ongoing proceedings. These are just some of the areas in which deeper co-operation would be to the benefit of competition enforcement in Latin America.

In light of the above, and while acknowledging the undoubted virtues and quality of Peru's competition law and policy as well as the admirable commitment of Indecopi's leadership and staff, a number of recommendations are made below in order to further improve it. It is noted that a number of these recommendations are the same that were made at the time of the last competition and policy peer review of Peru in 2004. In other words, a number of the issues that this Report identified are longstanding.

9.1. Institutional and administrative issues

9.1.1. Enhance Indecopi's independence and autonomy

Section 7.3 of the 2012 OECD Council Recommendation on Regulatory Policy and Governance recommends that the establishment of "independent regulatory agencies" should be considered where the agency's decisions "can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality." As noted above, Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. Indecopi seems to have been immune from political pressures to this day, and the competition bodies enjoy full autonomy regarding what cases to investigate and how to decide them.

Despite this, the legal framework poses a number of risks to the autonomy and independence of Indecopi and of its decision-making bodies. It is recommended that Peru adopt measures to minimise such risks. These Recommendations were already made at the time of the latest Peru peer review in 2004, which recommended that Peru '*protect the real and perceived autonomy, credibility, and technical competence of Indecopi's quasi-judicial bodies by enacting legislation to revise the process for selecting and removing first and second instance decision-makers.* (OECD, 2004, pp. 65-66_[1])'. The recommendations made then are still valid today, and it is noteworthy that they were not implemented.

The current regime seems to work well in practice as regards the appointment of Indecopi's board, of members of the Tribunal and of the relevant Commission – but, as was noted at the time of the 2004 Peer review, this was not always the case (OECD, 2004, p. 65_[1]). The adoption of formal mechanisms to ensure its autonomy and independence are a standard way to ensure the proper

operation of an autonomous administrative body such as Indecopi. Such formal mechanisms will become more important should Indecopi take on powers which are more likely to elicit attempts to direct or control its decisions, as is the case with merger control. In the light of this, it is recommended that:

- Appointment to all positions in Indecopi should be the subject of an open procedure that sets out transparent criteria for the selection of people for each position. These criteria should seek to ensure that the appointees meet relevant standards of technical expertise and competence, as well as relevant standards of impartiality and good character.
- To avoid the risk of politicisation, or appearance thereof, appointments of board members and senior management and decision-making positions should reflect a wider consensus than that which may result from the appointment by members of the government of the day. In other countries in the region this is achieved by subjecting the appointment of personnel at the level of the Board, Tribunal member and commissioner to approval, or no-opposition, on the part of a qualified majority approval; and/or appointment or no opposition by a constitutionally autonomous body.
- To minimise the risk of politicisation, consideration should be given to the appointment of members of the Board, Commissions and Tribunals in a staggered fashion, in such a way as to ensure that not all members of any of these bodies has been appointed by a single government / legislature / presidential administration. This procedure has the added benefit of ensuring that Indecopi is able to preserve acquired expertise and institutional memory.
- Even though there is no indication of political interference to this day, it is recommended that the Technical Staff and Commissioners have their positions legally reinforced to ensure their formal autonomy and independence. In particular, they should be protected from the possibility of being moved internally as a result of an administrative decision by the Board, which is politically appointed.

9.1.2. Devote adequate resources to competition-related activities

(i) Adequately staff the competition bodies

Sufficient financial and human resources are key to the effective enforcement of competition rules. As has just been noted, Indecopi's competition body seems currently to be understaffed and underfunded. Indecopi's caseload has increased significantly in the past years and cases are becoming increasingly complex. It was commonly observed that the available staff is already overstretched, even though enforcement is limited to hard-core practices.

This seems to be a longstanding problem. Already in 2004, the last OECD Peru competition law and policy peer review noted that *'in 2003 the Free Competition Commission and Market Access Commission received only a combined 8 percent of the money and 7.5 percent of the personnel that were allocated to Indecopi's commissions and offices. Moreover, the Economic Policy Department views the Free Competition Commission as being particularly understaffed. Finally, Peru devotes fewer resources to these missions than other developing countries with comparable and even smaller GDP levels.'* It thus recommended that *'Indecopi should allocate more funding to core competition work, even if this means cutting back on other useful work, because core competition cases generally have a more substantial market impact. (OECD, 2004, p. 66_[1])'*.

It is recommended that Indecopi increase its human resources and allocate a suitable proportion of its budget to competition. Such increases, in substantial amounts, are essential if merger control is added to Indecopi's competences, in which case added economic expertise will be required. It may thus be advisable to recruit additional economists, particularly economists with qualifications in industrial organisation economics.

(ii) Appoint full-time decision-makers

It is recommended that consideration be given to appointing full-time decision-makers at the Competition Commission and Tribunal. The current part-time appointment system not only creates a risk of conflicts of interest, but also to delays in issuing decisions and to a perception of lack of due-process as a result of commissioners being thought to rely, for understandable reasons, on the (full-time) Technical Staff.

Following this recommendation would require the allocation of greater resources to the competition bodies of Indecopi. It would also, we understand, require a wider-rethink of how Indecopi's deliberative bodies operate, since it

would be unreasonable to reform Indecopi's decision-making structure as regards competition alone, but not other areas of Indecopi's competence (e.g. consumer law, unfair competition, etc.). We encourage reflection on the topic. We also note that it may not be required that all decision-makers are appointed full-time: it may be that the appointment of a limited number of full-time decision-makers, supported by a number of part-time appointees, would go some way towards solving this issue.

(iii) Ensure that staff compensation is competitive

Staff compensation levels need to be addressed to ensure that Indecopi is able to recruit and retain the best people. It is true that disparities between the private and public sector are common around the world, with competition experts receiving more in the private sector. Nonetheless, competition experts are highly specialised and have the expectation of significantly higher earnings elsewhere in Peru, including in some other public bodies.

While recognising the political sensitivity of the topic, salaries and working conditions for Indecopi's competition division need to be competitive compared to regulators that deal with complex economic issues, courts and, to a lesser sector, with private practice as well. We understand that this may involve removing Indecopi – and particularly its competition experts – from a pay-cap that applies to the civil service in general.

(iv) Avoid relying on fines as a source of funding

Indecopi is fully-self funded, which is undeniably a good thing. Fines and anti-dumping duties account for about 50% and 20% of institutional revenues. The remaining part of the budget comes mostly from fees paid by users. Fines imposed by Indecopi in competition cases are collected but cannot be used by the authority unless the relevant amount has been budgeted. However, those amounts not used can be put in reserve and deployed in subsequent budgets.

The use of fines to fund Indecopi may be problematic, even though a small number of other agencies around the world follow similar practices. A first problem is that adopting such a funding mechanism creates a perception of conflict of interest and may lead to challenges to Indecopi's impartiality, regardless of how much merit such arguments might have. A second and arguably more important concern is that funding through fines may lead to Indecopi being unable to predict its own budget with reasonable certainty. In turn, this may impact Indecopi's ability to engage in long-term planning and to ultimately implement any long-term strategy. As already noted in the context of the 2004

competition law and policy peer review of Peru: *‘this highly unusual system undermines efficient administration difficult and is certain to create domestic and international concern about the integrity of Indecopi’s decisions’*. This review thus recommended that: *‘Peru should eliminate or substantially reduce Indecopi’s reliance on fines as a source of revenue’*. (OECD, 2004, p. 66_[1])’

Possible solutions to a budgetary reduction arising from not relying on fines to fund Indecopi include:

To reduce the related risks of dependence on a single source of funding, agencies may be funded by a combination of different sources, such as a mix of general revenues, fees or fines (OECD, 2016, pp. 14-16_[2]). This is currently the case with Indecopi, and we recommend that this practice continue to be followed.

To rely on an increased, separate budget allocation in the overall State budget which Indecopi – and, in particular, its competition division – would have budgetary autonomy to spend.⁴⁰

One possible problem with this solution is that a government can cut or increase the budget allocation to an agency’s budget depending on how much that agency toes the government’s line. Even when governments do not engage in such activities, the possibility of doing so creates incentives for the agency to conform its behaviour to the Government’s express or expected preferences.

A potential solution for this is for competition authorities’ budgets to be allocated on a pluri-annual basis. Pluri-annual budget allocations are less contingent on short-term political considerations and can therefore make it more difficult to influence the agency (OECD, 2016, pp. 14-16_[2]).

To allow Indecopi to fund itself partially through user fees that are unrelated to the outcome of Indecopi’s decisions, such as fees charged for merger control filings or procurement appeals. The charging of merger control fees are particularly appropriate, since the mere fact that Indecopi controls mergers is likely to expose it to increased pressure to decide cases in certain ways, including from the government. However, and since the amounts of funding flowing from these charges fluctuate with time, it is advisable that Indecopi does not excessively rely on these sources of funding.

⁴⁰ For more information on the budgetary autonomy and on sources for funding for a competition authority, please refer to (OECD, 2016_[2]), in particular sections 3.1 and 3.2.3.

9.1.3. Reform the institutional framework applicable to competition law and policy, with a view to improve the effectiveness of Indecopi's activities

There seems to be room for improving the way that Indecopi's competition bodies operate and reach their decisions. Such improvements include:

(i) Enhance existing levels of specialisation within Indecopi

The investigation and processing of cartels, mergers and abusive practices are very different activities, and it is common for competition agencies to have separate teams to deal with each area of competition enforcement. The accumulation of knowledge by staff on specific economic sectors also tends to be valuable, and often leads to the creation of teams – either autonomous, or that overlap with teams responsible for cartels, abuses and mergers – that specialise on certain areas of the economy.

The competition Technical Secretariat is organised in teams, three of them handling cases of specific economic sectors, and one of them carrying out advocacy studies and market surveillance. This is laudable, but Indecopi should assess whether it would benefit from the creation of internal teams that could specialise according to the different types of competition enforcement. This is particularly advisable if Indecopi becomes responsible for merger control.

(ii) Streamline decision-making processes

A number of observers suggested, in order to increase the efficiency of Indecopi's decision-making, and to ensure a clear distinction between investigation and decision-making, to move from Indecopi's tripartite staff organisation (Technical Secretariat, Commission and Tribunal) to one where:

- a single administrative decision is adopted before it can be subject to judicial appeal – i.e. to have a single administrative decision-making body, instead of the current model whereby an initial decision is adopted by the Commission, which can then be appealed to the Tribunal, and can only then be subject to judicial review.
- There is a clearer separation between the body responsible for the investigation (i.e. the Technical Secretariat) and the body that decides on the investigated matter.

While we understand that this may require a wider rethink on how Indecopi's resolute branch operates, with knock-on effects in areas other than competition law, there are a number of reasons that support such an approach across the board. First, it is a common approach internationally. Two, it may facilitate the appointment of full-term decision-makers, since their number will be reduced with the elimination of one decision-making body. This may compensate for the reduction in control over the content and quality of a decision that may result from the abolition of one administrative instance. Three, it may promote due-process and the perception that decisions are independent from the investigation, particularly if the decision-maker is appointed full-time with the sole responsibility of taking decisions, and is supported by its own staff (as occurs presently with the Tribunal). Lastly, given the observed rates of confirmation of appeals from the Commission to the Tribunal, it is unclear what value-added there is from the existence of two administrative decision-making bodies – to which should be added that removing one administrative instance will reduce the amount of time until a decision is adopted, and hence the length of the proceeding.

A last reason for adopting such a structure relates to specifically to competition enforcement and to merger control in particular. Merger control requires speedy and timely analysis. If Indecopi is to be granted merger control powers, then its current set up will likely need to be rethought in any event. For time sensitive matters, it would seem that a system involving a single analysing team and a single administrative decision-making body would be better suited than the current institutional set up.

(iii) Take advantage of synergies arising from Indecopi's multiple areas of competence

Indecopi's resolute branch has competence over numerous market regulation areas going beyond competition law, including IP, unfair competition and consumer protection, among others. The bodies that deal with each particular area of law are completely autonomous and independent from one another. As regards the adoption of administrative decisions, such complete autonomy and independence should be maintained.

Nonetheless, there are possibilities to leverage the various skills and competences that Indecopi possesses to further promote and enhance competition law and policy. It is to be remarked that Indecopi's administrative branch does exactly this. It enjoys economies of scale to leverage Indecopi's administrative services to the benefit of all bodies of the resolute branch. Numerous observers have noted that Indecopi could try to make better use of these synergies also as regards the activities pursued by the resolute branch.

Various avenues are open to reaping such synergies, from enhancing internal mobility within Indecopi's resolute branch, setting up joint-teams, implementing mechanisms whereby divisions other than those competent for a proceeding are able or required to comment on draft decisions in light of their expertise, among others. Examples of activities that could benefit from such initiatives include cases where competition enforcement contain elements of IP, consumer protection and unfair competition – as is increasingly common in the context of the digital economy. Furthermore, creating synergies could result in opportunities to build on the work of the Commission on Removal of Regulatory Barriers to identify and potentially remove regulatory barriers that, while neither unlawful nor unreasonable, are nonetheless unnecessarily restrictive of competition.

(iv) Develop a plan of activities and develop prioritisation criteria

Plans of activities and the setting of priorities are important tools to ensure that a competition agency optimises its resources by adopting activities susceptible to maximise consumer welfare through the application of competition law tools to those sectors and situations where public action will provide the highest return for the deployment of public resources. The identification of such areas and situations requires a careful assessment of Peru's economy, of its strengths and weaknesses, and of which Indecopi's various tools are better suited to promote competition and eliminate anticompetitive behaviours. Public planning and prioritisation efforts also send important signals to economic agents and public authorities, warning them that increased attention will be devoted to them, laying the groundwork for compliance with Indecopi's orders or recommendations and, importantly, incentivising them to act in ways that promote competition even in the absence of a specific Indecopi intervention.

As noted above, one consequence of attempts to ensure the autonomy and independence of its decision-making bodies is that Indecopi has not, in the past, engaged in strategic planning or prioritisation as regards its competition-related activities. These same reasons help explain why there has not been integrated thought on how competition law and policy might fit with other Indecopi activities and roles in a way that reaps all synergies from Indecopi's multiple competences.

This seems to be changing. Indecopi is currently developing a national competition plan. This is a worthwhile development, and one that should be undertaken with a view to identifying enforcement priorities and ways in which Indecopi's multiple regulatory functions can be harnessed to promote competition in Peru.

It is recommended that this national competition policy be adopted, with inputs from relevant stakeholders. The foreseen possibility of such a policy being subject to an assessment from an independent and well-respected third-party before it is published reflects best-practices in this regard.

It is also recommended that such an initiative becomes a starting point to the adoption of thought-through and transparent prioritization policy – e.g. regarding which sectors to target and through which means. It is also recommended that such policies be prepared transparently with the input from relevant stakeholders, and that they published and made available to all.

(v) Ensure that competition policy is coherently enforced across the whole economy, including the telecommunications sector

As noted above, the existence of two competition agencies in Peru creates risks of divergence in the application of competition law. When one of the competition agencies is a sector regulator, as is the case with Osiptel, this also raises the possibility of competition cases being captured or consumed by the agency's regulatory focus.

As regards the first concern, Indecopi and Osiptel co-ordinate their activities in order to avoid divergence between the criteria they use to apply the law and the content of their decisions. In order to ensure consistency with Indecopi's approach, and in view of its expertise, Osiptel asks Indecopi for a technical report regarding its analysis of the relevant anticompetitive behaviour in every antitrust or unfair competition case. While this allows Indecopi's approach and expertise to be taken into account in competition cases in the telecommunications sector, this co-ordination seems to occur on the basis of informal mechanisms.

It is recommended that Indecopi and Osiptel continue, and if possible further develop their current levels of contact and co-ordination in competition matters. Indecopi may benefit from Osiptel's expertise in telecommunications – particularly as such expertise may be transferable to competition activities in other regulated sectors – and Osiptel may benefit from Indecopi's experience in competition matters. It is further recommended that the mechanisms for co-operation between Indecopi and Osiptel be formalised, i.e. enshrined in law, particularly to ensure coherence in decision-making practice and that competition procedures are subject similar procedural rules. These efforts should seek to ensure that similar procedural mechanisms are in place for all competition enforcement procedures. For example, Osiptel does not have leniency powers. It

should be given such powers, and adopt a leniency procedure similar to that deployed by Indecopi.

As regards the second concern, Osiptel's competition enforcement activity has been limited, in a sector which around the world has been the subject of numerous enforcement actions. While the grant of competition enforcement powers to a sector regulator may be justified when the sector is being liberalised, such justifications may disappear as liberalisation becomes embedded and market competition a natural characteristic of the sector.

As such, it is recommended that Peru study whether it is justified to keep competition enforcement powers with Osiptel as regards telecommunications, or whether all competition enforcement powers should be concentrated in Indecopi, if necessary in tandem with a mechanism for co-operation and consultation with sectoral regulators. In any event, as long as Osiptel remains in charge of competition matters in the telecommunications sector, it is recommended that the competition bodies within that agency become more active, including as regards its participation in international competition fora and organisations, and that members of the Technical Secretariat be allocated exclusively to competition matters.

9.2. Merger control

9.2.1. Adopt a merger control review

Peru does not have a merger control regime in place, except as regards transactions in the markets for generation, transmission or distribution of electricity that meet some market share thresholds. Already in 2004, one of the main recommendations of the last peer review of Peru's competition law and policy was that '*The Free Competition Law should be amended to provide for merger control*' (OECD, 2004, pp. 69-70^[11]).

Peru is an outlier at the international level, where the overwhelming majority of competition regimes includes mechanisms to assess the competitive effects of mergers. More than a hundred jurisdictions have merger control regimes as part of their competition laws – this includes OECD member countries except Luxembourg, which is in any event subject to the EU merger control regime. All these jurisdictions recognise that competition problems of a structural nature can result from certain merger transactions, and that a merger control tool can thus help crystallise market structures that can lead to significant anti-competitive effects that are difficult to tackle effectively with other tools. For this reason, most jurisdictions have a mandatory prior notification system in place,

according to which transactions that meet certain minimum thresholds may only be completed after clearance has been granted by the respective competition authority. Underlying prior notification systems is an assumption that it is much easier to prevent than to fix a competition problem from a structural transaction

In short, effective merger review is an important component of a competition regime, as it can help to prevent consumer harm from anticompetitive transactions which likely would reduce competition among rival firms and/or foreclose competitors. As such, it is recommended that Peru adopt a merger control regime.

Currently, the Peruvian Congress is discussing several bills that intend to establish a premerger notification system for all sectors in the Peruvian economy. It is essential that the merger control regime that Peru adopts be in with international best practices such as the ones reflected in the 2005 OECD Recommendation on Merger Review.

Best practices seek to ensure that merger review is effective, efficient, and timely. These practices mean;

- Merger control bodies should have the necessary powers to efficiently and effectively review mergers in a timely fashion;
- Review mechanisms are used only those mergers which have the potential to impact competition in the jurisdiction to be reviewed;
- Information requirements and costs imposed on merging parties are to be reasonable and proportionate;
- Merger control procedures are to be clear and transparent, respect due process and ensure the protection of confidential business information; and,
- Merger control bodies co-operate with each other in transnational mergers and avoid adopting remedies inconsistent with those adopted in other jurisdictions.

It is suggested that Peru may want to pay particular attention to the following elements of any merger control regime it may decide to adopt:

- A merger control regime will add significant responsibilities and workload to a competition agency. Since the adoption of a merger control regime will add to existing enforcement activities, merger control bodies will have to be provided with the necessary

additional resources and powers to adequately fulfil this additional role.

This concern is linked with the recommendations regarding resources made above. Indecopi's competition body is currently underfunded and understaffed. In order to be able to deal with long and complex – yet time-limited – merger control review processes, Indecopi will have to significantly reinforce the resources of its competition bodies, while simultaneously building up their expertise.

- It is important that the competition agency is also granted sufficient powers to be able to effectively assess a merger. This requires the agency to have the powers to obtain sufficient information to assess the competitive effects of a merger. This power can be complemented by the ability to impose sanctions for failure to provide information and for the provision of incomplete or misleading information.
- Setting the correct jurisdictional thresholds is an essential and extremely challenging element of any successful merger control regime, whose importance is sometimes overlooked. Jurisdictional thresholds set a balance between identifying potentially anticompetitive transactions and minimising the costs inherent to a merger control regime.
 - An important threshold in this regard is the definition of a merger transaction, which seeks to identify those transactions that are a durable combination of previously independent assets and that have a reasonable likelihood of creating lasting anti-competitive effects. This concept is not easy to define, and Peru should take extreme care when drafting provisions identifying those transactions that are subject to merger control.
 - The most common expression of the balance between preventing anticompetitive mergers and minimising enforcement costs is usually found in merger control thresholds. Best international practice requires merger control thresholds to be clear and objective, so that companies and merger control agency alike can easily assess them. Examples of clear and objective merger control thresholds are turnover, assets or transaction value. Market shares are difficult to

estimate accurately, so they are perceived as not being objective or clear.

This runs against the current notification regime applicable to transactions in the electric market, which is based on market shares. Simple size and volume measures, or turnover thresholds, may be preferable, especially where data relevant to market definition may be scarce.

An alternative to setting out merger control thresholds in primary law is to authorise Indecopi to establish or amend such thresholds. This would permit Indecopi to set these thresholds in such a way as to better balance identifying anticompetitive transactions with the costs of merger control, and to adjust those thresholds over time on the basis of acquired experience.

Another best international practice involves setting merger control thresholds in such a way as to ensure that a transaction has a sufficient link to Peru. Such a link is not established merely by reference to whether a merging company is present in the country. Instead, the focus is on the potential of the merger to have anticompetitive effects in Peru – which is thought to happen mainly if at least two of the merging entities and/or the target company have substantial activity in Peru. As such, merger control turnover thresholds based solely on the aggregate turnover or assets of the merging parties do not follow best international practices.

- The most common merger control model across the world is the pre-merger notification system, under which a merger cannot be implemented until it has been authorised by the competition agency. This prohibition to implement a merger is known as a standstill obligation. The advantage of this system is that the emergence of an anti-competitive market structure is prevented, which is more effective than fixing the issue afterwards.

A number of safeguards to ensure the effectiveness of the standstill obligation should be put in place. This includes: (i) setting out that all notifiable mergers are null and void until such time as authorisation is obtained; (ii) granting Indecopi the power to investigate whether a merger was implemented before notification and/or authorisation was granted; (iii) granting Indecopi the power to both unwind anticompetitive mergers and impose interim measures guaranteeing minimum interference in the acquired business by the acquiring party until the merger is authorised; (iv) imposing deterrent sanctions on those parties that implement a transaction without notifying it or before the merger is authorised; (iv) setting out those exceptional circumstances in which the standstill period may not apply.

At the same time, it is crucial for the functioning of a pre-merger notification system – and the international reputation of a competition authority – that adequate review periods and deadlines are set, after which the standstill period will automatically end and the parties will be able to implement the merger even if authorisation has not been granted. These periods and deadlines should be short, in order to reflect business realities and not unduly constrain the vast majority of notified mergers that are pro-competitive and will be cleared without conditions. Reviewing mergers within such tight timeframes can be facilitated by the adoption of simplified merger notification mechanisms for those mergers which are less likely to pose competitive problems; the creation of a second, longer investigation stage which will apply when Indecopi identifies a merger that might pose competition problems. The existence of tight timeframes to review mergers also lends strength to the recommendations made above to add to the competition division's resources and powers.

A last implication of adopting a merger control regime, which merits mention is that any such regime is likely to lead to increased political and business pressure over Indecopi. This is thus an additional reason to adopt measures to enhance Indecopi's independence and autonomy, in line with what was recommended above.

9.3. Competition enforcement

9.3.1. Pursue competition enforcement against all types of anticompetitive conduct

Indecopi has been undoubtedly active as regards competition enforcement, but the focus has been almost exclusively devoted to hard-core cartels. While prioritising cartels is an understandable – and even recommended – course of action, it should not lead to other types of anticompetitive conduct being ignored. This is particularly the case when, in the absence of a merger control regime, the only means to act against market power is through competition enforcement against certain vertical practices and, more importantly, against abuses of a dominant position.

This issue can be partially addressed through the adoption of a merger control regime, as recommended above. However, it is also recommended that attention and resources be devoted to other types of competition enforcement.

To the extent that the narrow focus on cartel enforcement is a consequence of limited resources, this is another reason supporting our previous recommendation to assign additional resources to the competition activities of Indecopi. Inasmuch as it is the result of very strict criteria for the opening of

investigations against such conducts, it is recommended that Indecopi study how best to loosen such criteria in order to allow for greater enforcement efforts in meritorious cases.

9.3.2. Actively combat bid-rigging

While there have been a small number of cases (oxygen, haemodialysis), enforcement against bid-rigging in Peru is scarce and there is lack of co-ordination between Indecopi and the relevant public procurement bodies. This is perhaps one of the most pressing concerns identified in this peer review: there is a strong and urgent necessity for both Indecopi and public procurement bodies to target competition infractions related to collusion in public procurement.

Peru is strongly recommended to adopt a nation-wide policy against bid-rigging. Such a policy can include the following elements:

- Ensure that the Government Procurement Supervising Agency (OSCE) adopts effective actions for the prevention, detection and sanctioning of bid-rigging. At present, OSCE seems to be virtually unaware of the costs from collusive behaviour in public procurement, and of Indecopi's work in attempting to prevent such collusive behaviours. As such, it is recommended that OSCE devote time and resources to address bid-rigging, and that it improves its co-ordination with Indecopi at all levels.
- Indecopi should prioritise the combat against bid-rigging in the context of its competition policy planning or prioritisation.
- Indecopi should engage in wide-ranging efforts concerning the detection and prevention of bid-rigging across the whole public sector. These efforts include not only enforcement, but also advocacy, training and increased co-ordination with other public bodies.

Indecopi has recently released Guidelines for Competition in Public Procurement, which have the goal of assisting public procurement officers in preventing bid-rigging and promoting competition in this sector. It has also identified a number of rules that should be changed to achieve these goals. In addition to these laudable efforts, it is recommended that:

- Indecopi increase its efforts to reach out to public authorities. Particular efforts should be devoted to reach out – and, if

necessary, provide basic training – to public bodies and personnel that are in a position that enables them to detect signs of bid-rigging.

- Indecopi use its Guidelines as a basis to provide training to public tender officials and authorities on how to detect collusion in public procurement.
- Indecopi seek to promote and deepen co-operation with public tender bodies to detect and prevent bid-rigging. At present, co-operation seems to be restricted to the sharing of indicia of collusion – but even as regards this co-operation seems to be limited.
- Peru should work to promote public awareness of the consequences and negative impact of bid-rigging.
- Peru should develop a system of co-ordination between all relevant bodies that may be involved in the detection and prosecution of bid-rigging. These bodies include public entities involved in tenders, OSCE, prosecutors, controllers, and even the judiciary. Ideally, each competent authority would have teams devoted specifically to bid-rigging who could liaise with teams in other authorities.

Given the link between corruption and bid-rigging, Peru's authorities should exploit the opportunities this creates for joint-work between competition and anti-corruption relevant authorities.

- Peru should review its legislation to ensure that it deters bid-rigging and minimises collusion in public tenders. For example, the public procurement act should clearly provide for the black-listing companies convicted of bid-rigging in public tenders – as we understand is currently set forth in the Competition Act and was, until recent legal reforms, also set out in public procurement law. In addition, such a black list should be enforced actively.

9.3.3. Strengthen the leniency programme

Peru's leniency programme has taken off in recent years following legal reforms after years of abeyance. After years during which the leniency regime was inoperative, Peru's leniency programme has taken off in recent years following legal reforms. It is strongly recommended that these developments be

protected, in particular by preserving the integrity of the leniency programme and ensuring the confidentiality of information that the parties submit in the context of the leniency programme.

A first recommendation is that Osiptel adopt its own leniency programme, which should be aligned with Indecopi's leniency programme.

The need to protect and strengthen Peru's leniency regime extends not only to Peru's internal leniency procedures, but also to the impact that international agreements may have on Peru's leniency programme. In this context, there are concerns regarding recent developments related to Peru's participation in the *Comunidad Andina*.⁴¹ As described in more detail in the Report, the Andean Council for Competition and the General Secretariat of the Andean Community (SGCAN) decided, by means of Resolución 2006 of May 28 2018, to fine a number of cartellists that had applied for leniency with the Colombian, Ecuadorian and Peruvian competition authorities. Such a decision carries risks to the effectiveness of leniency programmes of countries belonging to the *Comunidad Andina*, including the risk of making leniency programmes – which are arguably the best tool available to competition authorities to detect cartels – completely inoperative. As such, it is unsurprising – but must nonetheless be commended – that Peru's Indecopi and Colombia's SIC appealed the decision.

It is also recommended that it be formally ensured that Indecopi will not bring private damages claims against leniency recipients – without prejudice to the possibility of private parties bringing damages claims against them. In 2015, the Competition Act was amended to allow Indecopi itself to pursue a class action before civil courts on behalf of consumers harmed by an anticompetitive conduct once an administrative proceeding is concluded. Such power is at the discretion of the Board of Directors, and not the Competition Commission, and Indecopi has yet to use it. The Competition Commission considers leniency applications and is precluded, by internal regulations, from recommending damages actions against leniency beneficiaries. However, the Board of Directors is, at least theoretically, still able to bring damages claims against leniency applicants. As such, it is recommended that it be formally ensured that the Board of Directors will not be able to bring private damages claims against leniency recipients whenever the Competition Commission confirms leniency.

⁴¹ Comprising Bolivia, Colombia, Ecuador, and Peru.

9.3.4. Strengthen settlement and commitment procedures

Recent years have seen strong developments in the adoption of settlement and commitment decisions in Peru. Such mechanisms have the potential to solve competition problems while minimising enforcement costs and ensuring compliance by the affected companies. Although these procedures are regulated in primary legislation, the actual procedure is largely unregulated and observers have noted that the opacity about the applicable procedure and potential outcomes that may detract companies from trying to settle or from negotiating commitments in the first place.

It is recommended that settlement and commitment procedures benefit from enhanced transparency and predictability. Measures to achieve this goal could include the adoption of regulation or guidelines on the details of settlement and commitment procedures.

9.3.5. Reinforce due process and transparency

Due process and transparency regarding how competition law is enforced are important elements of any competition law system. Competition enforcement in Peru meets international standards of transparency and due process. However, there are a number of areas where local practice can be improved. As such, it is recommended that:

- Indecopi issues more guidelines on substantive aspects of competition law enforcement (e.g. horizontal agreements, vertical agreements, market power, etc.), as well as on the calculation of penalties. The publication – and elaboration – of guidelines contributes to increase legal certainty, facilitates compliance and can also be used as an advocacy tool to promote competition.
- Indecopi ensure that decision-making is truly autonomous from the investigation of competition infringements. While there is a formal separation between the Technical Secretariat and the Commission, there was a widespread perception that, in practice, there might be a blurring of the roles of investigator and decision-maker as part-time commissioners may greatly rely on the Technical Secretariat prior to adopting a decision. Some of the recommendations on institutional matters elaborated above – in particular, those relating to full-time commissioners and the streamlining of enforcement procedures which would more clearly separate the investigative and decision-making roles – may be relevant for addressing these concerns.

- Indecopi publish its yearly self-assessment results. Indecopi relies on a number of indicators – such as the percentage of proceedings concluded and the number of final decisions rendered within the legal timeframe, among others – to measure its performance yearly. This assessment is not public, but is available by request. Indecopi should make such an assessment public.

If Indecopi is to adopt a public strategy or annual plan, this could in the future provide a benchmark for the assessment of Indecopi's performance, e.g. in the context of an annual activity report.

9.3.6. Judicial review

Current rates of approval of Indecopi decisions by the judicial courts are extremely high. In practice, this may have to do with quality of analysis and type of cases Indecopi has pursued. However, it is consensual that judicial review is limited to formal elements typical of administrative review, which can give rise to some concerns given that observers have expressed concerns about the internal controls of Indecopi as regards due process. Furthermore, the judicial review of merger control decisions will require more economic analysis, which would also be a likely consequence of a change in enforcement priorities by Indecopi towards effects-cases. As such, it is recommended that:

- Peru continue work on the capacitation of judges in competition matters;
- Peru consider creating specialised chambers in the competent courts to deal with matters of economic regulation (such as IP, competition law, and economic regulation more generally), in order to build up expertise within the judiciary on the topic.
- It is ensured that the specialised chambers that deal with competition and other economic regulation cases are available not only at the higher instances – such as the Supreme Court – but also in lower instances. Observers often cited the Chilean model.

9.3.7. Reform how pecuniary penalties are calculated

When calculating the amount of a fine, Peru places greater reliance than other countries on the illicit benefit that the offender obtained as a result of its anticompetitive conduct.

It is extremely challenging to calculate accurately the illicit benefit that a company derives from a competition infringement. It is considered that such an approach to setting fines' amounts increases the cost and complexity of

proceedings, and enhances the possibility of successful judicial challenges to otherwise valid infringement decisions. As such, most jurisdictions rely on proxies to the size of the infringing company or to the impact of the infringing conduct, e.g. the amount of sales or turnover of the company in the market where the infringement took place. This occurs even in jurisdictions where primary law identifies the harm caused or the benefit derived from an infringement as relevant to the calculation of a fine amount, such as the US and Australia.

It is recommended that Peru consider adopting a more streamlined approach to the setting of fines that relies on readily identifiable data and avoids having to engage in complex calculations regarding the profit derived by a company from its competition law infringement.

9.3.8. Promote private enforcement

There seems to be no private enforcement in Peru at the moment. While private enforcement should not be promoted at the expense of public enforcement, it can play an important complementary role. First, private enforcement can be used to narrow the “enforcement gap” created by the inability of public enforcement authorities to deal effectively with all cases due to resource constraints. Furthermore, private enforcement is perceived by some to be more effective than public enforcement at detecting and prosecuting certain competition infringements, e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics.

It is recommended that Peru works to promote private enforcement of competition law, while ensuring that this in no way negatively affects public enforcement. Peru should seek to identify a balance of public and private enforcement that ensures that private enforcement: (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and that could discourage socially beneficial conduct (OECD, 2015, p. 3^[1]).

9.4. Advocacy

9.4.1. Strengthen competition advocacy and promote a competition culture

Indecopi’s work in promoting competition and a competition culture in Peru has had impressive results. Peruvian society has become much more aware of competition law and policy, and of its importance, as a result of these efforts. It is recommended that Indecopi continue to advocate for competition and promote a competition culture.

An area where additional work can be undertaken concerns regulatory barriers. While the Commission on Removal of Regulatory Barriers has competence to remove regulatory barriers arising from secondary legislation on the basis of illegality and unreasonableness, this seems to suffer from a number of limitations:

- The work of this Commission does not go into the matter of reasonableness of the law in practice, even though the law mentions it. In any event, assessing the reasonableness of secondary legislation does not necessarily include an assessment of the impact on competition of such a rule, and does not seem to expressly involve the taking into account of competition-related considerations;
- The Commission on Removal of Regulatory Barriers does not have competence to look at primary legislation;
- Indecopi only reviews primary legislation when requested to do so by other bodies.

In the light of this, it is recommend that:

- Indecopi is empowered to comment on acts of primary legislation regarding their impact on areas of its competence. This would allow Indecopi to review legislation in light of its priorities. For example, such a rule would allow Indecopi to work on promoting competitive neutrality across the economy, e.g. reviewing legislation that grants subsidies and other forms of state aid.
- Peru pursue assessments of regulatory frameworks in line with OECD Recommendations on Competition Assessment, which calls for governments to establish institutional mechanisms for identifying existing or proposed public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives.⁴²

This OECD Recommendation extends to primary legislation but, as regards secondary legislation, this could be achieved by incorporating competition assessment criteria into the assessment of regulatory barriers by the Commission on Removal of Regulatory Barriers. This would require the identification of synergies between the Competition Commission and the Commission on Removal of Regulatory Barriers, in line with recommendations above.

- Indecopi should build on the work of the Commission on Removal of Regulatory Barriers to go beyond merely identifying

⁴² <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

and advocating the elimination of regulatory barriers. In addition to this, it may seek to assess whether regulations unduly restrict competition and use such assessment to pursue advocacy efforts.

Lastly, it has been noted that Indecopi's School is a particularly impressive example of how agencies can use outreach to promote competition law. Indecopi's media operations are also thought to be quite good. It is recommended that Indecopi build on its good work in this respect. This could be done by intensifying, publicising and diversifying the School's activities, e.g. by extending its operation to the provinces and by exploring opportunities to collaborate with local high education bodies.

9.4.2. Reinforce the capacity to pursue market studies

Indecopi has the power to pursue market studies – which are widely recognised as an important tool to open markets to competition – and has pursued a number of such studies in the past. Indecopi has also recently released Guidelines on market studies, in line with OECD recommendations. However, it was observed above how the limited number of staff available to the Competition Commission restricts the number of advocacy studies that can be prioritised and developed in any given year, and limits the number of analysts that can be assigned to these activities.

It is recommended that Indecopi reinforce its resources regarding competition advocacy activities, and particularly its market study activities, in line with the recommendations related to adequately resourcing the competition staff outlined above. It is also recommended that the topic of market studies be selected in line with a broader plan of activities and priorities of Indecopi's competition branch, in line with the recommendations on planning and prioritisation above.

9.4.3. Publish additional guidance on a variety of procedural and substantive competition matters

As noted above, the publication and elaboration of guidelines contributes to increased legal certainty, facilitates compliance and can also be used as a tool to promote competition. However, the amount of competition related guidance that Indecopi has produced is relatively limited by comparative standards. Already in 2004, the last peer review of competition law and policy in Peru noted that “*although many free competition cases have required the definition of product and geographic markets and the assessment of market power, there is no mandatory precedent concerning these important topics. (...) Given the importance of market definition and the assessment of market power, the Tribunal*

(or Indecopi) should issue guidelines on these issues' (OECD, 2004, pp. 68-69^[11]). While there are currently Guidelines on the interpretation of specific aspects of the Peruvian Competition Act, it is unclear whether they cover these fundamental matters of competition law in detail.

Indecopi is currently working on issuing additional guidelines and bringing them to the attention of relevant stakeholders. It is recommended that this work be pursued, and that attention be devoted to identifying additional areas where guidelines should be developed.

9.5. International co-operation

9.5.1. Expand the level and depth of international co-operation in competition matters

As noted above, Indecopi engages in international co-operation, but it is possible – and recommended – that current levels of international co-operation be both expanded and deepened.

In terms of scope, it is recommended that Peru continue to grow the number of countries and competition authorities with whom it cooperates, and that it continue to actively participate in international fora where it can exchange experiences and best practices.

It is also recommended that Peru work to deepen the level of co-operation with foreign competition authorities. Combatting international cartels requires in-depth co-operation and information exchange with international counterparts. Despite the high number of international cartels around the world, Indecopi has yet to undertake any joint investigations with other agencies for the detection of anticompetitive conducts up to the moment, and even exchange of information between competition agencies is limited due to Peruvian legal restrictions concerning the possibility of exchanging information regarding ongoing proceedings. Peru should seek to facilitate the exchange of information and enhance investigative co-operation with other competition agencies, in line with the OECD 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations⁴³ and the OECD 2014 Recommendation Concerning International Co-operation on Competition Investigations and Proceedings.⁴⁴

⁴³ Please refer to <http://www.oecd.org/daf/competition/cartels/35590548.pdf>.

⁴⁴ Please refer to: www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm.

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