

## Characteristics of the Peruvian Competition Law

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In 1990, Peru began a transition towards a free market economy. A year later, the Competition Law is put into force in order to promote adequate competition policies in our country. The National Institute of Defense of Competition and Protection of the Intellectual Property – INDECOPI is also created and among its multiple areas, the Free Competition Commission is created.

In 1993, a new Political Constitution is approved, which has one of its articles dedicated to the promotion of free competition in the country:

**Article 61o.-** The State promotes and oversees free competition. It is against all practice that limits it and against the abuse of dominant or monopoly positions. No law or arrangement can authorize or establish monopolies. (...)

The Constitution of a country establishes the course of the country; it sets the bases for its political, economic and social development, and a global framework for the activities of individuals, companies and the State itself. In that sense, the mere existence of an article in the constitution that promotes competition guarantees that all market agents consider those principles and facilitate the work of the competition authority.

If the Constitution says YES to competition, the country also says YES to competition. The Constitution allows controlling actual or future regulations that can violate competition principles. For example, last month the Peruvian Constitutional Court declared a decree of the Secretary of Transportation as unconstitutional because it set minimum fees for cargo and passenger transportation all over the country, a clear violation of the free competition article in the constitution. This procedure is being conducted in INDECOPI in order to establish infractions to the competition law.

In this context, the purpose of the Peruvian Competition Law is to prohibit, sanction and eliminate conducts that limit, restrict or distort free competition in the production, distribution or commercialization of goods and services, in order to promote a better assignation of resources, efficient markets and an overall welfare of consumers.

How can we accomplish these objectives?

The competition authority in Peru, INDECOPI, through its Free Competition Commission and Competition Tribunal, enforces competition law and promote its diffusion.

The Peruvian Competition Law is applied to all economic sectors except telecommunications. In 1996, the Peruvian Telecommunications Regulator was appointed to fulfill this task. In this sense, the law can be applied even to the banking, energy, transportation and sanitation sectors, even when those sectors have a regulator of its own. It is also applied to individuals or companies, private or state owned.

This wide field of action allows INDECOPI to act on all economic sectors and oversee the respect of competition principles in the market.

In order to oversee the market, the Peruvian Competition Law has established some conducts as anticompetitive, mainly those that involve a position of abuse of dominant position or collusive practices.

Specifically on collusive practices, the Peruvian Competition Law prohibits the following actions:

- a) Price-fixing;
- b) Horizontal territorial or customer division;
- c) Market share agreements;
- d) Competitors colluding on quality of products, when it doesn't correspond to national or international technical regulations and can affect the consumer;
- e) Price discrimination. Discounts and bonuses don't constitute a restriction of free competition as they correspond to generally accepted commercial practices and they are granted for different compensatory circumstances such as advanced payment, quantity, volume or other applied in all cases;
- f) Tying arrangements;
- g) Concerted refusals to deal;
- h) Output reduction agreements.

As for the abuse of dominant positions, some activities specifically forbidden are:

- a) Unjustified refusal to deal;
- b) Price discrimination;
- c) Tying agreements.

Nevertheless, these are not the only activities that are prohibited. The law allows sanctioning equivalent practices.

As for the control of mergers, Peru only regulates the electric sector, requiring companies in this sector to previously notify INDECOPI in order obtain authorization when a merger involves companies that own a market share equal or greater to 15% of any of the involved markets in the cases of horizontal concentration or 5% in the case of vertical concentration. All other market sectors have absolute freedom to merge.

However, as a result of the law reform process the possibility of including the control of mergers in all sectors is being seriously evaluated, but with the usual budget problems and the usual fear to neglect the control of activities, as we can observe in some other countries.

As for the procedure itself, in Peru it can be initiated by individuals or companies or "*ex officio*" by the Free Competition Commission. A first investigation stage and a hearings stage exist.

The competition authority has different faculties in order to fulfill its objectives in both stages. These faculties respect the constitutional rights of the parties, specially the right to adequate procedure and defense, and provide INDECOPI legitimacy and transparency, important elements for the defense of our decisions before the judiciary power.

INDECOPI can:

- a) Demand individuals or companies to show all kind of documents, including accounting and society books, payment checks, commercial letters and magnetic registers, including, in this case, the required software; and can demand information about the organization, businesses, shareholders and the property structure of the companies.
- b) Immobilize for no more than 2 days but extendable to 4 days, books, archives, documents, letters and registers of the individual or company under investigation, and have a copy of the mentioned documents. On some circumstances, said documents could be withdrawn from the facility for up to six business days, with a judiciary order to proceed. The withdrawal request has to be motivated and resolved in twenty-four (24) hours by a judge, without a notification to the other part.
- c) Summon and interrogate the individuals under investigation or their representatives, employees, officers, consultants and third parties.
- d) Inspect, with or without notification, the books, registers, documentation and goods in the individuals' or companies' facilities, in order to verify the development of productive processes and interrogate the people they find there. Copies of physical and magnetic files could be retrieved, and also some other pertinent documentation, even photographs and film recordings, if necessary. The use of public force could be used if required. If unlocking is necessary, in case of closed facilities, a judiciary authorization would be necessary, which has to be obtained in no more than 24 hours.
- e) In case individuals or companies deliver false information to INDECOPI, destroy, hide or alter any book, register or document required by INDECOPI or refuse without justification to those information requirements, or refuse to appear in court or, by means of violence or threats, obstruct the functions of INDECOPI, they will be sanctioned with a fine not lower than a thousand dollars or higher than fifty thousand dollars, which does not consider any corresponding penal responsibility. This fine would be doubled in case of relapse.

These faculties allow the competition authority to operates both efficient and effectively.

However, besides these faculties, once an accused party is declared guilty, INDECOPI can assign fines for up to 10% of their sales or revenues corresponding to the previous tax year.

Besides the sanction imposed to the offender by INDECOPI, if it is the case of a company or organization, a fine of up to 100,000 dollars can be imposed on all its legal representatives or the individuals managing the company, according to their level of responsibility in the determined violation.

The criteria INDECOPI considers to determine the severity of the infraction and the application of the corresponding fines are the following:

The kind and scope of the restriction

- a) The dimension of the affected market.
- b) The market share of the company.
- c) The restrictive effect on the effective and potential competitors, on other parts of the economic process and on the consumers and users.

d) The duration of the restriction.

e) The relapse of forbidden activities.

In case of relapse, INDECOPI can double the fines, and keep doubling them successively and without limitation.

If INDECOPI considers it necessary, it can accuse the people responsible before the district attorney. The Peruvian Penal Code considers up to six years imprisonment for breaking the competition law.

Finally, any individual claiming damages because of the agreements, contracts or practices prohibited by the competition law can sue for damages.

This is an overall background of Peruvian policies and competition law that I hope can help us to promote competition between our economies.

Thank you very much.