

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Competition Enforcement Agencies Handbook 2019

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Competition Enforcement Agencies Handbook 2019

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CONTENTS

Albania.....	1	El Salvador.....	88
Algeria.....	5	Estonia.....	91
Argentina.....	8	European Union.....	94
Armenia.....	11	Andrzej Kmiecik and Andreas Reindl Van Bael & Bellis	
Australia.....	17	Faroe Islands.....	109
Austria.....	21	Fiji.....	110
Azerbaijan.....	24	Finland.....	111
Barbados.....	26	France.....	114
Belarus.....	28	Gambia.....	119
Belgium.....	29	Germany.....	121
Bosnia and Herzegovina.....	32	Greece.....	127
Botswana.....	34	Honduras.....	128
Brazil.....	38	Hong Kong.....	129
Bulgaria.....	42	Hungary.....	132
Canada.....	46	Iceland.....	138
Channel Islands.....	47	India.....	142
Chile.....	50	Indonesia.....	146
China.....	54	Ireland.....	149
Colombia.....	57	Israel.....	153
COMESA.....	63	D Ziv Abramovich Lapidot, Melchior, Abramovich & Co	
Costa Rica.....	66	Italy.....	162
Croatia.....	67	Jamaica.....	165
Cyprus.....	70	Japan.....	167
Czech Republic.....	73	Setsuko Yufu, Tatsuo Yamashima, Saori Hanada and Masayuki Matsuura Atsumi & Sakai	
Denmark.....	77	Jordan.....	176
Ecuador.....	80	Kazakhstan.....	178
EFTA.....	84	Kenya.....	179
Egypt.....	87	Korea.....	182

Kosovo	186	Serbia.....	280
Latvia	187	Seychelles	284
Lithuania	192	Singapore	287
Luxembourg.....	195	Slovakia	290
Macedonia	196	Slovenia	295
Malaysia	199	South Africa	298
Malta.....	201	<i>Maryanne Angumuthoo and Shakti Wood</i>	
Mauritius	203	Bowmans	
Mexico	207	Spain.....	306
Moldova.....	212	Sri Lanka	310
Mongolia	215	Swaziland	312
Montenegro	216	Sweden.....	315
Morocco	219	Switzerland	320
Namibia.....	220	Taiwan	325
Netherlands	221	Tanzania	328
New Zealand.....	224	Thailand.....	329
Nicaragua.....	228	Turkey	330
Norway	229	<i>Gönenç Gürkaynak and K Korhan Yıldırım</i>	
Panama	233	ELIG Gürkaynak Attorneys-at-Law	
Papua New Guinea	235	Ukraine	343
Peru	236	United Kingdom	348
Philippines	241	<i>Becket McGrath and Christine Graham</i>	
Poland	242	Cooley	
Portugal.....	248	United States.....	359
<i>Gonçalo Anastácio and Luís Seifert Guincho</i>		<i>David Meyer and Mary Kaiser</i>	
SRS Advogados		Morrison & Foerster LLP	
Romania	256	Uruguay	373
Russia	261	Uzbekistan	375
Saudi Arabia	279	Venezuela	376
		Vietnam	377
		Yemen.....	378
		Zambia.....	379

Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

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Questions and answers

How long is the head of agency's term of office?

The head of the agency's legal term of office is five years, extendable for another five years.

When is he or she due for reappointment?

At the end of the agency's legal term of office, the period could be extended for five more years.

Which posts within the organisation are political appointments?

The members of the board of the National Institute for the Defence of Competition and Protection of Intellectual Property (Indecopi), including the president, are chosen by political appointments. 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 years term with the option of an additional term.

This appointment mechanism seeks to ensure the independence of the Board and aims to guard against the political or business capture of its members. However, it is important to note that the positions are

politically independent and its autonomy is based in its financial and administrative independence.

What is the agency's annual budget?

Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. As mentioned, 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.

The budget for the Commission for the Defense of Free Competition (the Commission) 2019 is US\$ 1.2 million.

How many staff are employed by the agency?

The total staff employed by the agency is 30 people. This number includes six interns.

It is important to mention that the staff is divided into four groups. Each one is specialised in specific to sectors such as medicine, public transport, energy.

To whom does the head of the agency report?

Indecopi is attached to the Office of the Prime Minister but 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, among others) or proposals that have an impact on competition in different markets (for example, to regulate the price of medicines). However, there is no evidence that this interaction has compromised Indecopi's autonomy and independence.

Do any industry-specific regulators have competition powers?

Yes, the Supervisory Agency for Private Investment in Telecommunications (OSIPITEL) is responsible for regulating, supervising and enforcing competition regulations in the telecommunications public services market. OSIPITEL is attached to the Office of Prime Minister as well.

If so, how do these relate to your agency's role?

Indecopi and Osipitel coordinate 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, Osipitel asks Indecopi for a technical report regarding its analysis of the relevant anticompetitive behaviour in every antitrust competition case. This allows Indecopi's approach and expertise to be taken into account in competition cases in the telecommunications sector.

May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example.

There is no possibility of politicians overruling or disregarding authority's decisions. As mentioned, 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. 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. However, the decisions of Indecopi are subject to judicial review but only in procedural issues.

Does the law allow non-competition aims to be considered when taking decisions?

According to the article 1 of the Peruvian Competition Law, the purpose of this law is to promote the economic efficiency in the market for consumer welfare. In that sense, the law does not allow non-competition aims to be considered when taking decisions.

Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?

The Commission is charged with the adoption of decisions at first instance, including, where necessary, the imposition of penalties.

At second instance, the Competition Division of the Tribunal of Indecopi decides on appeals from the Commission, and rules on requests for clarification, extensions and amendments.

All decisions rendered by the second instance of Indecopi can be appealed to the judiciary through a special administrative procedure.

Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.

The Commission has never blocked a merger. It has, however, imposed remedies. For example, in 2006, the Commission authorised a merger subject on 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 US\$1.2 million 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 US\$133,333. It is

worth noting that the Commission has only powers to review mergers in the electricity sector.

Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.

Yes, the authority has imposed conditions in only one case. 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.

Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.

The Commission has not conducted a Phase II investigation. According to the Law 26876, the Peruvian Law for Electricity Sector Merger, a merger is subject to the following proceeding: once the notification is filed, the Technical Secretariat of the Defense of Free Competition Commission of Indecopi (the Technical Secretariat) shall within five working days verify all information submitted and, if necessary, request required missing documents. Within the following 10 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 10 working days. Within the next 20 working days, the Technical Secretariat must issue an opinion to the Commission regarding the notified merger. After this opinion, the Commission must issue within 10 working days a decision either:

- declaring the merger notification inadmissible for not falling within the scope of the merger control law;
- expanding the period for the evaluation of the notification for 30 working days to pursue an in-depth analysis, after which the Commission must issue its decision; or
- authorising the merger.

Once the Commission issues its decision, the applicant may file an appeal.

Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.

According to Legislative Decree 1034, Peruvian Antitrust Law, the Technical Secretariat has the power to initiate an investigation in order to gather evidence about the existence of anticompetitive behaviours that could affect, wholly or partially, the Peruvian market, even though if these behaviours take place overseas.

In that sense, in a case regarding to the maritime transport market, the Technical Secretariat pursued companies based outside Peru as a part of the proceeding initiated against 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 United States 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). The first administrative instance imposed more than US\$14.7 million. This case is in the second administrative instance.

Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?

Peru's leniency programme was introduced in 2015, after a set of amendments and additions to the Peruvian Competition Act. The amendments define leniency features, such as the scope of the programme, its requirements, stages and deadlines, and the powers of Indecopi to manage the programme. In order to provide transparency and further legal certainty, in 2017 Indecopi published Leniency Program Guidelines. 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 programme, the applicant agrees to provide truthful, full, continuing and complete cooperation 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 that 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 cooperate with the Technical Secretariat and the Commission throughout the sanctioning administrative proceeding. If the applicant does cooperate fully, in line with these conditions, the applicant is granted leniency unconditionally. In any event, the Commission has the final decision regarding a leniency application. There are three types of leniency application under Peruvian law:

- Leniency type A (100 per cent of immunity from sanctions) is applicable 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 per cent), applicable to the first applicant in cases where 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; and
- Leniency type C (reduction of up to 50 per cent), which is applicable to subsequent applicants that provide information with significant added value to the Technical Secretariat's investigation, even after the initiation of an administrative proceeding by the Technical Secretariat.

Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

No, there is no criminal enforcement track. It is worth noting that no criminal sanctions are applicable under the Competition Act. Only administrative sanctions are allowed in Peru.

Are there any plans to reform the competition law?

The Competition Act was amended twice. On 23 September 2015, Legislative Decree 1205 was published and approved a set of amendments and additions to the Legislative Decree 1034, the Peruvian Competition Act, among which we can highlight the following.

- The Peruvian Competition Act allows Indecopi to initiate procedures against companies that made up a cartel in addition with the amendment.

Indecopi can also initiate procedures against those whose participation in its planning or execution was decisive.

- The article about the exoneration penalty (leniency programme) has been modified. In this regard, according to other countries (Brazil, Mexico, Chile, the United States, the member states of the European Union, among others), leniency programmes have shown substantial efficacy by allowing the competition authorities to detect and collect evidence of the existence of cartels with effective collaboration of offenders in exchange for granting of benefits in the fines. In Peru, however, the lack of clarity in regulation has limited the success of this mechanism. With this amendment, several of the leniency programme's features were properly defined, such as the scope of the programme, its requirements, stages and deadlines, and the powers of the offices in Indecopi to manage this programme.
- The experience of the Technical Secretariat and the Commission has shown that economic agents believe that fines for noncompliance with reporting requirements or obstruction of the research activities are not sufficiently dissuasive (up to US\$61,000, approximately). In this regard, it is preferable and necessary that economic agents comply with the law instead of breaking it. So, with this amendment the fines have increased significantly (up to US\$1.2 million, approximately) for unjustified noncompliance with reporting requirements and obstructing the procedures of the Technical Secretariat and the Commission.
- Advocacies are recommendations issued by Indecopi to public authorities and its aim is to eliminate barriers or obstacles to the competitive development or to introduce regulation to promote economic efficiency. In recent years, these efforts have taken on special importance among the functions of the Technical Secretariat of the Defense of Free Competition Commission. Therefore, as per Organisation for Economic Co-operation and Development's recommendations, the amendment establish that the entities, whom the recommendations are addressed, must respond to Indecopi within a period of 90 working days.
- The mechanism on commitments to cease has been modified in order to establish a true system of early termination of the procedure. With this amendment, this mechanism is no longer limited to lesser anticompetitive behaviours as it was in the original law.

- The amendment gives Indecopi the possibility to sue on behalf of consumers for the reparation of damages caused by a cartel. This amendment aims to contribute to a competition system whose effects can be reflected on those affected, who would have had to wait for the final resolution of the judicial process to demand compensation for damages.

On 7 September 2018, Legislative Decree 1396 was published and approved a set of amendments and additions to the Legislative Decree 1034, the Peruvian Competition Act, among which we can highlight the following:

- a reward program was established in Peruvian legislation, in order to grant rewards or monetary compensation for people that provide relevant information to detect, investigate and sanction agreements between competitors;
- exceptionally, Indecopi may suspend the proceeding up to a period of 90 working days for reasons not attributable to Indecopi – for instance, in the case of delay in the delivery of information requested to the parties; and
- Indecopi may issue corrective measures to offenders to implement compliance programs.

When did the last review of the law occur?

As mentioned above, the last review occurred in September 2018.

Do you have a separate economics team? If so please give details.

No, there is no a separate economic team. In our office there are four groups or teams and each one of them is integrated by lawyers and economists.

Has the authority conducted a dawn raid?

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 taken. In that sense, Indecopi has performed 429 dawn raids in the past eight years regarding competition matters.

Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.

Yes, the Commission has imposed penalties on directors and workers of companies. For instance, in 2016,

after verifying that companies colluded to manipulate prices in five public procurements for supplying haemodialysis service convened by EsSalud between 2010 and 2012, the Commission decided to impose penalties to the representative of the investigated agents of more than US\$26,000 in 2016. It is important to note that sanctions can be as much as US\$116,000.

Another case is related to the *Vehicular Natural Gas* (VNG) case. In 2018, the Commission decided to sanction 63 companies and 30 natural persons for an agreement to fix prices and commercial conditions, by colluding in of increases of VNG, fuel sold in gas stations in Lima and Callao cities between 2011 and 2015. The imposed penalties to the representative were more than US\$516,000. It is important to note that sanctions can be as much as US\$141 million.

What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?

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

Without prejudice to the aforementioned, 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 pre-merger notification system. The following mergers must be notified to the Commission:

- horizontal concentrations that involve companies that have a market share of 15 per cent or higher; and
- vertical concentrations that involve companies that each have a market share of 5 per cent or more in any of the markets involved.

Are there any restrictions on minority investments that involve less than a majority stake in the business?

Yes, according to the Law 26876, authorisation by the Commission is not necessary if:

- the acquisition made involves less than 5 per cent of the total value of the assets of the acquiring company.
- the acquisition made involves less than 10 per cent of the shares with voting rights of another company.

However, on investments that involve more than a majority stake mentioned before, the Commission must authorise the investments.

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