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

**ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT**

-- Note by Peru --

**16-18 June 2015**

*This document reproduces a written contribution from Peru submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm).*

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## PERU <sup>1</sup>

### 1. “Competitive neutrality” and the role of the State in the market

#### 1.1 *What does competitive neutrality mean to you?*

1. Competitive neutrality for us is related to the importance of promoting and encouraging a level playing field in markets where State-owned enterprises (SOEs) compete with private companies, and where both are subject to the same set of rules. Government should not provide any competitive advantage or disadvantage to any market participant; otherwise, it will distort the competitive process and will harm efficiency, the more so if the government enterprises are in principle less efficient than their private sector competitors.

#### 1.2 *Is competitive neutrality a useful or necessary goal for competition?*

2. Yes, when the government intervenes in the market favouring the performance of SOEs, it may distort the competitive process resulting in an inefficient allocation of the economic resources in the economy. Therefore, competitive neutrality turns out to be a necessary and useful tool to restore the competitive conditions in the market.

3. However, under certain circumstances, Governments favour SOEs in order to achieve important social goals that cannot be accomplished through the market, so implement competitive neutrality in those cases may challenge the achievement of the Government goals.

#### 1.3 *Is it an objective of your competition authority?*

4. The competitive neutrality principle is not specified in the Peruvian Competition Act<sup>2</sup> (Legislative Decree 1034). However, SOEs are subject to its scope just as private companies. Neither the Peruvian Act against Unfair Competition<sup>3</sup> (Legislative Decree 1044) has provided the accomplishment of competitive neutrality.

5. However, the Unfair Competition Commission<sup>4</sup> of Indecopi has the power to determine if a public business activity is engaging in a non-subsidiary role. The Peruvian Constitution (sec. 60) establishes that only expressly authorized by a statute, the State can engage in subsidiary entrepreneurial activity, when a high public interest or convenience justifies it.

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<sup>2</sup> In Spanish: Ley de Represión de Conductas Anticompetitivas.

<sup>3</sup> In Spanish: Ley de Represión de la Competencia Desleal.

<sup>4</sup> In Spanish: Comisión de Fiscalización de la Competencia Desleal.

**1.4 *What is the ultimate goal in promoting a level playing field or undistorted markets in your jurisdiction?***

6. As previously mentioned, Indecopi has not adopted the competitive neutrality principle yet.

**1.5 *Do you think that State-controlled or supported firms enjoy advantages or disadvantages (e.g. higher labour costs due to public status of their employees)?***

7. When governing bodies of public enterprises are appointed by the government in turn, these companies tend to respond to a more political agenda than a technical one. Therefore, without the technical capabilities nor sufficient independence to perform its functions, most of the State-owned enterprise have been characterized by making inefficient use of their economic resources or for provide poor services.

**1.6 *In which sectors do you find the highest degree of State intervention and influence?***

8. In the fuel sector, Petroperu has a very strong presence; its market share was 47.8% in 2014.<sup>5</sup> Due to this market share, the private refinery “La Pampilla” has had drawbacks to keep invariable his prices due to the presence of Petroperu as type of “regulator” in this market.

**1.7 *Is the State’s presence growing or decreasing in your economy?***

9. Since the nineties, the Peruvian government has been pursuing a minor presence in the economy, promoting the privatization of many of their SOEs. Currently, public-private partnership (PPP) has been the mean employed by the State, in order to provide the services or tasks that are the responsibility of the public sector under a clear agreement with the private sector on shared objectives for the supply of public services or public infrastructure.

**1.8 *What is the weight of SOEs, regulated companies and/or public services in your economy?***

10. In general, SOEs have lost relevance in the sectors they take part, but there are still exemptions like the fuel sector where Petroperu, the Peruvian national petrol company, remains as a bigger player in the provision of fuels. Similar circumstances can be seeing in the provision of water in Lima, where Sedapal, the State enterprise, is still the supplier of water services, task that accomplish with several limitations and budget restrictions.

**2. *Rules and tools to address competitive neutrality distortions available to competition authorities***

**2.1 *Rules/Tools***

**2.1.1 *What is the scope of your competition law vis-à-vis State activities in the market?***

11. The Peruvian Competition Act expressly establishes (sec. 2) that SOEs are subject to its scope just as private companies. It could be the case, however, that specific legislation could authorize some behaviour or otherwise establish concrete limitations to the application of the Competition Act for a specific public-owned enterprises (according to sec. 3, the Act does not apply to behaviour arising as a consequence of what is established in a legal provision).

12. Whilst the Peruvian Act against Unfair Competition, clearly states that the Unfair Competition Commission and the Competition Chamber of Indecopi are the bodies responsible for suppressing all acts or behaviours of unfair competition specified in the law, via the imposition of

<sup>5</sup> See: <http://www.equilibrium.com.pe/Petroperu.pdf>.

finances and the implementation of appropriate measures to reverse any market distortion and restore fair competition. Also, any firm or citizen can request the initiation of proceedings against public companies.

13. However, certain boundaries limit the scopes of the Unfair Competition and the Free Competition Commissions' interventions in this matter, for example when the government activity takes place in the exercise of any power of *ius imperium* (sovereign powers) or having the nature of social security benefits.

2.1.2 *Are there exemptions, exceptions, immunities or defences that may limit the scope of your intervention?*

14. Please refer to our previous answer.

2.1.3 *When a State-related distortion of competition amounts to an infringement of the competition law, what powers do you have?*

15. Unless there is in fact a specific legal provision that limits the application of the Competition Act to a State-owned enterprise, the Free Competition Commission<sup>6</sup> at Indecopi could find an infringement and impose: (a) fines up to 12% of company's previous year gross revenue; and (b) corrective measures, remedies aimed at restoring the competitive process in the affected market.

2.1.4 *Can you also rely on rules other than competition law? E.g. subsidy control or state aid laws, rules governing public services obligations, competitive neutrality frameworks?*

16. The Market Access Commission<sup>7</sup> at Indecopi does not enforce the Competition Act, but other legal provisions that give such Commission the power to facilitate the entrance of private companies when public authorities issue or enforce regulations (sub-statutory provisions<sup>8</sup>) that illegally or unreasonably restrict the entrance of mentioned companies to markets. In finding an illegal or unreasonable bureaucratic barrier, the Market Access Commission could a) disapply the regulation or administrative measure in benefit of the affected plaintiff, or b) in *ex-officio* cases, it could denounce the regulation under "Acción Popular" (a constitutional provision that permits the Judicial Power to repeal sub-statutory unconstitutional or illegal regulations).

17. Additionally, the Unfair Competition Commission at Indecopi has the power to declare that a State-owned enterprise is engaging in non-subsidiary business activity. The Peruvian Constitution (sec. 60) establishes that only expressly authorized by a statute, the State can engage in subsidiary entrepreneurial activity, and three conditions must be met:

- If the State business activity has been expressly authorized by law;
- Whether the subsidiary role of the State activity in certain market takes place due to the absence and potential of private initiative to meet the demand; and,
- If the aim of the State business activity is of high public interest or national convenience.

18. Therefore, the Commission has to define a relevant market and test if a private supplier can meet the demand instead of the public firm. And, if given the barriers to entry, new competitors may enter the market to meet this role.

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<sup>6</sup> In Spanish: Comisión de Defensa de la Libre Competencia.

<sup>7</sup> In Spanish: Comisión de Eliminación de Barreras Burocráticas.

<sup>8</sup> Particularly, regulations issued by local governments or bodies of the executive branch.

2.1.5 *What other, non-enforcement powers do you have to tackle anti-competitive State measures? E.g. market studies, advocacy powers, regulatory intervention, control over public procurement processes, subsidy grants and bailouts?*

19. The Free Competition Commission could recommend the President of Indecopi to engage in advocacy activities as a consequence of market studies (performed by its Technical Secretariat and the Economic Studies Management of Indecopi).

## 2.2 *Challenges*

2.2.1 *What challenges do you face when applying competition law to a State-influenced activity or entity?*

20. There has been no such a recent situation of application of the Competition Act to SOEs (or State influenced entities). However, resistance (arising from legal or political interests) could be an expected outcome in such cases.

2.2.2 *Is there any difference if the State-induced restriction of competition is at Federal/central level or at a local level?*

21. Not essentially, but it would be reasonable to expect that local governments restrictions to competitions would be more frequent, as they hardly take into account competition policy issues in their decisions.

2.2.3 *Have you encountered any undue State pressure or involvement when scrutinising the conduct of a State-influenced activity or entity?*

22. As there have not been cases of application of the Competition Act to State business activities in the last years, a specific answer cannot be provided. In some advocacy efforts, however, we have found some expected “normal” lack of special interest in competition policy by some authorities.

23. Finally, it noteworthy that during the proceedings brought by the Unfair Competition Commission for an alleged breach of section 60 of the Peruvian Constitution has never received any pressure from the State to be favoured in a statement.

2.2.4 *Is it easier or more difficult to enforce your powers when the State is involved in the creating the distortion of competition that you are investigating (e.g. when a ‘national champion’ is involved)? Does this impact your analysis and review process?*

24. As there have not been cases of application of the Competition Act to SOEs in the last years, we have not a specific answer. In advocacy activities, however, “normal” resistance or lack of special knowledge or interest in competition policy by some authorities is always expected.

2.2.5 *Have you faced any difficulty in enforcing your decisions (e.g. on remedies or on fines) when the State is involved?*

25. To the Competition Commission, a specific answer is not possible to provide due to the lack of cases in the last years. However, under the Fair Competition Commission experience, section 46 of the Peruvian Act against Unfair Competition specifies that final decisions issued by the Commission may be appealed by the administered, and while the appeal is being reviewed by the Second administrative instance, the statement issued by the First administrative instance remains under suspense; however, this does not represent any difficulties for the implementation of its decisions.

2.2.6 *Are other public authorities, such as sector regulators, entrusted with powers to address competitive neutrality distortions? Does this limit the scope of your action? How do you cooperate on competitive neutrality distortions (domestically and internationally)?*

26. To our knowledge, sector regulators do not assess competitive neutrality distortions.

### **3. Specific issues related to public and private competition enforcement**

**3.1** *What are the most common competition law violations occurring through State-influenced activities? Are they more frequent and likely in certain sectors? Why?*

27. Under the Competition Act, in the last years there have not been cases involving SOEs, but over a decade ago, refusals to deal were the most common competition infractions of SOEs.

28. Whilst under the Act against Unfair Competition, since 2008 there have been fourteen complaints, three were declared founded, and eleven are still pending. Six of the fourteen complaints were presented in the health sector and two in the transport and energy sectors, respectively.

**3.2** *Have you experienced any difficulty arising from substantive standards being ill-suited to act upon State interventions in the market place? Do the standard and burden of proof vary when the State is involved or when a public service is at stake? Does the State benefit from any presumption?*

29. We have not had cases of application of the Competition Act to State-owned companies in the last years. However, we do not expect to have a different evidentiary approach in such cases. Unless a specific legal provision provides otherwise, the State will not benefit from a special presumption (both State and private owned companies benefit from the general presumption of innocence).

**3.3** *What obstacles do you face when applying turnover-based rules (e.g. for calculating corporate fines, or for merger jurisdictional purposes) to the State as a market player? For example, if the maximum sanction is turnover-based, how is this computed when fining a State-owned company? Or what is the appropriate method for computing the “group turnover” in case of State-owned enterprises?*

30. We have not had cases of application of the Competition Act to SOEs in the last years. However, the Competition Act does not provide specific rules when determining fines to SOEs.

**3.4** *What obstacles do you face when applying control-based rules in establishing whether two or more State-controlled players are independent from each other? For example, are three State-controlled companies responding to different Ministries considered as a single economic entity when applying cartel rules? Or when calculating market shares in a merger control context?*

31. In a recent merger decision, Indecopi considered the State as a single economic group (and all SOEs as subsidiaries), in order to determine market shares and assess the impact of an operation under analysis (the operation did not involve a SOE). Please consider that, in Peru, a merger control system only exists for companies in the electricity sector.

**3.5** *Have you used competition law remedies to ensure competitive neutrality? Should remedies be far-reaching and aim at restoring competitive neutrality (e.g. imposing privatization or structural separation)?*

32. There have not been recent cases; however, we think that corrective measures and advocacy efforts will be more effective when dealing with SOEs.

**3.6** *What obstacles do you face in designing remedies when the government has already negotiated or 'sealed' the deal? Which remedies have proven effective or ineffective when applied to State-influenced entities? What obstacles do you face in designing effective remedies and in monitoring compliance in this context?*

33. As there have not been cases of application of the Competition Act to SOEs in the last years, we have not a specific answer.

**3.7** *To what extent is your fining policy suited to deter anti-competitive conduct by State-controlled companies? (Notably since corporate fine may simply consist in a money transfer from one public budget line to another.)*

34. Fines could be applicable (other than to companies) to the persons involved in the infringement, so the deterring effect is to some extent similar to that perceived by private parties. Also, despite there have not been recent cases, we think that corrective measures and advocacy efforts will be more effective when dealing with SOEs.

**3.8** *Is it more or less difficult for consumers to seek private recovery against a State-related entity? Where a State exemption, immunity or defence is successfully invoked, does it bar public enforcement only?*

35. There have not been yet cases of consumers asking and recovering damages as a consequence of anticompetitive behaviour. However, if such a case occur, is possible that consumers will find more difficulties in seeking effective recovery against SOEs (as a consequence, for the public-budget regulations applicable to all State bodies).