

## COMPETITION COMMITTEE

### EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

Contribution from Peru<sup>1</sup>

#### I. Proactive and Reactive Detection Measures

1. *Please describe your current cartel detection policy: what are the cartel detection measures in place in your jurisdiction? Do you rely exclusively or mainly on either proactive or reactive detection tools? Or does your policy strike a balance between the two?*

In Peru, the Competition Act<sup>2</sup> provides following measures for cartel detection:

- *Ex officio* investigations: As a consequence of market assessment or information processing (such as reports, media and informal claims), the Technical Secretary<sup>3</sup> of Indecopi<sup>4</sup> may initiate investigations and exercise its powers to mandatory request for information, and to conduct dawn raids.
- *Ex parte* legal actions: As a consequence of a formal complaint (typically by an allegedly harmed competitor) the Technical Secretary may start proceedings and exercise the same investigation powers mentioned above. The Competition Commission<sup>5</sup> of Indecopi decides whether an infringement occurred or not.
- Leniency applications: Being the first to bring decisive information and collaborate with the authority in prosecuting a cartel are the main conditions for obtaining total clemency. Subsequent applicants could apply for a fine reduction bringing relevant and different information.

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<sup>2</sup> Legislative Decree 1034, published on June 25, 2008.

<sup>3</sup> The Technical Secretary of the Defence of Free Competition Commission of Indecopi acts as the prosecutor of anticompetitive behaviour, having broad power to investigate, request and gather information about market conditions and agents, to initiate administrative sanctioning proceedings and to issue recommendations to the Competition Commission for the imposition of fines and corrective measures for the commission of anticompetitive practices. The Technical Secretary can also elaborate reports on market conditions and recommend the adoption of guidelines regarding proceedings and competition enforcement.

<sup>4</sup> Indecopi is the acronym of Instituto de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Spanish for National Institute for the Defence of Competition and Protection of Intellectual Property), an independent public body created in 1992 for the supervision of the sound development of free markets. It is necessary to mention that the competition authority for the telecommunication markets is the Organismo Supervisor de Inversión Privada en Telecomunicaciones – Osiptel [Spanish for Supervisory Agency of Private Investment in Telecommunications].

<sup>5</sup> The Competition Commission is the first instance decision-making body for competition infringements. It has the power to impose fines up to 12% of defendant's gross revenue and up to USD 130 000 (approx.) to the defendant's directives, corrective measures (behaviour remedies), approve guidelines and recommend advocacy measures to the Presidency of Indecopi.

*Ex officio* investigations are regarded as proactive detection tools while *ex parte* legal actions and leniency applications are regarded as reactive detection tools. In the last years, the ratio of *ex officio* investigations has increased considerably while reactive detection tools have decreased. Accordingly, proactive detection tools are currently the foremost instrument to the Peruvian Competition Authority for detection and prosecution of cartels.

Notwithstanding the proactive trend to cartel detection, Indecopi is currently developing a leniency program that would enhance the market participants' awareness of such tool and could therefore increase the number of leniency applications, balancing the proactive and reactive approaches in the near future.

2. *Please describe the factors that influence the formulation of an optimal cartel detection policy. In what terms do you measure the effectiveness of an anti-cartel enforcement proactive and reactive detection tools? Is it possible to measure the costs and benefits of particular proactive or reactive detection measures? How do you measure the effect on deterrence of specific detection measures? What might convince you to divert more resources from reactive to proactive detection or vice versa?*

As the Peruvian Competition Authority, Indecopi believes that an optimal cartel detection policy must rely on the following general factors:

- a) Investigation powers: From the perspective of the competition authority, it is crucial to have the possibility to enforce the competition policy with strong investigation powers. The rigorous exercise of powers such as the possibility to conduct dawn raids and to require information *sub poena*, could be determinant of a positive outcome, though this should never mean a defenceless situation of the persons under investigation. Exercising well-designed investigation powers is also essential to encourage *ex parte* legal actions.

In addition, it is necessary to mention that sound investigation powers requires a high level of autonomy and independency from other public bodies, in order to keep the authority focused on the fulfil of its primary goals regarding the enhancement of market efficiency and the deter of anticompetitive behaviour.

- b) Opportunity cost: From the perspective of the persons and firms, an optimal cartel detection policy must make it clear that chances to profitably engage in cartel activities are very low (ideally, they should be zero). In other terms, such policy should deliver the message that the benefits resulting from cartels wouldn't offset the greater loses for conducting in that way, and so it's better for a firm to remain competitive. This factor is especially important to encourage leniency applications and commitments to cease an illegal behaviour.
- c) Competition culture: From the perspective of the society as a whole, an optimal cartel policy would build confidence in the free market system and the benefits from competition policy, and therefore would generate a kind of «competition conscience» that could manifest itself, for instance, in the promotion of the elimination of barriers that enable the existence of concentrated markets [likely

to permit cartel activities] and, equally important, the rejection of «cartelization culture» and denunciation –formal or informal– of the suspicious firm activities.

Though Indecopi has not measure the exact impact of our detection tools yet; it is aware that society and media are increasingly interested and informed about the different investigation activities developed by the competition authority in the recent years. However, it would be very helpful to learn from experiences abroad to design a proper system to measure the impact of its activities in the near future.

3. *Please describe your policy towards ex-officio cartel investigations. Is there an established framework or procedure for initiating ex-officio cartel investigations? Does your ex-officio enforcement represent an important part of your anti-cartel enforcement strategy? For example, do you prioritise (or not) ex-officio investigations over cases initiated otherwise? If so, why?*

Though there is not a legally established framework or procedure for initiating ex-officio cartel investigations, whenever it is needed the competition officers at Indecopi would gather to evaluate the situation and decide whether an immediate action –such as a dawn raid– would be needed or a less intrusive measure –such compulsory information request– should be more effective. Thereafter, investigation will take-off.

Additionally, Indecopi is developing a special group in charge of responding to situations that require prompt action from the competition authority, such as dawn raids.

Ex-officio enforcement indeed represents the most relevant part of current anti-cartel enforcement activities; it does not, however, reflects a previous prioritization process, but it is a result from the greater emphasis applied to proactive measures [which the competition authority controls to some degree] and the decreasing of the reactive tools [which generally the competition authority does not].

## **II. Cartel Screens**

1. *Please describe whether you have ever considered implementing cartel screens. Which screening approaches (structural/behavioural) and which screening methods have you considered? Which industries or markets have you considered as possible candidates for screening? What are the factors that influenced the decision to implement or the screens under consideration? Do you make public the details of your screening programme?*

Currently, the Office of the Chief Economist at Indecopi (Economic Research Management, ERM) is evaluating alternatives to design screening tools for early cartel detection. According to its Action Plan, the Office of the Chief Economist will conduct a series of consultations to update the international experience of peer competition authorities on the matter. A Brief Report will serve as a starting point for the task.

That Brief Report is expected to answer two basic questions: i) To what extent the international experience provides useful recommendations for an effective set up of such tools, and ii) what is the appropriate balance between the sophistication of a tool and the feasibility for its practical implementation and continuous update.

According to Abrantes-Metz and Bajari (2009)<sup>6</sup>, a good screening tool for cartel activity detection should have the following properties: i) it should minimize the number of type I and type II errors, ii) it should be easy to implement and handle, iii) it must be difficult to be fooled by most undertakings, and iv) it must be based on solid theoretical grounds. With those ideal characteristics in mind, the project will continue to develop the technical design and data requirements of a useful and practical tool.

2. *If you have experiences with the implementation of cartel screens, please discuss which approaches did you take and which methods did you employ. Were you able to initiate an enforcement action based on the result of a screening exercise? If so, please elaborate and provide details of the relevant cases. For which purposes were screens used (e.g. for justifying unannounced inspections, providing indirect proof of conspiracy, estimating damages, sifting through complaints, etc.)?*

Although, Indecopi does not use any tool for the detection of cartels at this moment, an alternative tool has been employed to the surveillance of markets, through the monitoring of the prices of some products which have strong impact on the average family budget. Thus, since May 2010, a bulletin on average prices to the retail and wholesale of the basic basket of consumption is published monthly.<sup>7</sup> The price information has a lag of one month and is taken from reports of prices published by the National Institute of Statistics and Informatics of Peru.

It is important to note that due to the aggregate nature of the information presented in the bulletin, the degree of inference from the data is very limited, so it is not possible to determine from this information the existence of collusive behaviour in the analyzed products markets, but it provides an alert about the behaviour of the average of prices of a product when it is located outside its range limit for more than three months in a row, then the need for a structural analysis of the market in demand can be assessed.

Information collected every month is edited to eliminate seasonality component and get a relative price (to a base year)<sup>8</sup> in order to make a follow-up of the statistical properties showing the analyzed time series. The statistical analysis is presented in a graphic format in which first shows the evolution of nominal and relative price of

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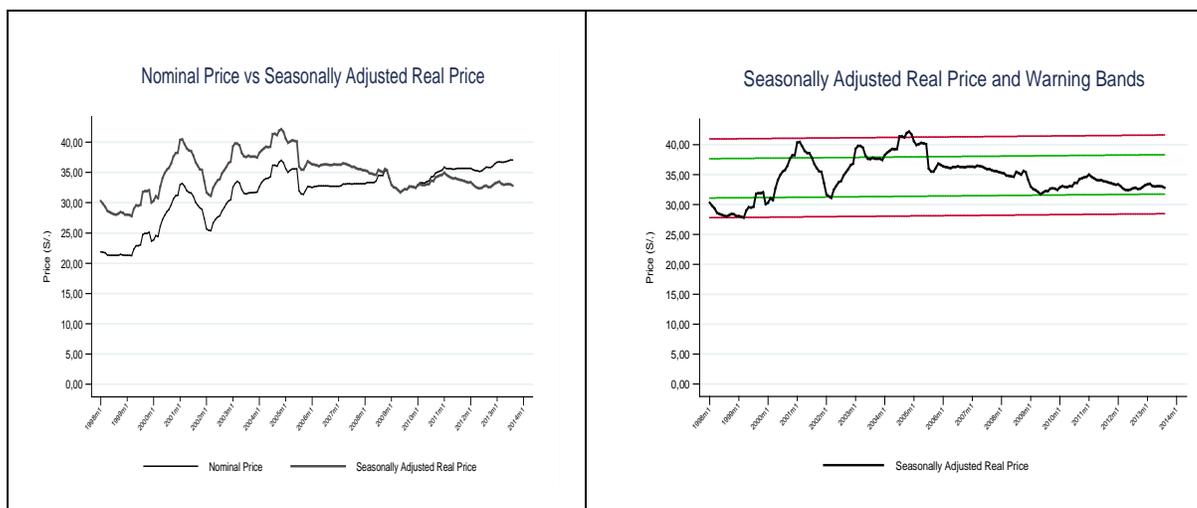
<sup>6</sup> Abrantes-Metz and Bajari (2009). Screens for Conspiracies and their Multiple Applications. Antitrust, Vol. 24, N°1, Fall 2009.

<sup>7</sup> The price information of products contained in the report presents two different levels of scope. The retail prices correspond to those observed in metropolitan Lima, and the wholesale prices correspond to those observed at the national level.

<sup>8</sup> The prices are adjusted according to the following procedure: 1) it is expressed in relative terms to a base year (December 2009) and 2) the seasonal component is removed from the price series, in case to present it.

each product, and then the price adjusted seasonally with regard to their standard deviations (see Chart 1)<sup>9</sup>.

Chart 1  
**Cylinder of Liquefied Petroleum Gas for Household Use (10 kg.)**



Source: INEI

Elaborated: Department of Economic Research of Indecopi

The products analysed monthly are the domestic LPG, bricks, cement, rice, milk, sugar, vegetable oil, wheat flour, diesel and gasoline (84 oct.), tuna, beer, among others. It is important to mention that this selection of prices is associated with the degree of vulnerability that these markets exhibit given the past experience of cases already identified or investigated by the Technical Secretary of the Defense of Free Competition Commission. Also the reported information is updated according to the detection of positive changes in the average price of products that emerge as outliers of the sampling distribution of them.

3. *If you don't have experiences with the implementation of cartel screens, is there a particular reason why? Have you considered applying screens in the past and decided not to? Why?*

In 2009, a working paper was elaborated by the ERM of Indecopi in order to identify economic variables and indicators to the monitoring of markets, the purpose of the study was identify, prioritize and analyze markets with a lack level of competition, that could suggest a market failure of some kind, and determine if further actions were needed it (pre-investigations, market studies, etc.).

In the development of the study, there were contacts with agencies like the Office of Fair Trading (OFT) of the United Kingdom and The Netherlands Competition Authority (NMa) in order to learn from their experience in the implementation of tools

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The standard deviations are used to generate two price bands. The first green line represents the first standard deviation in relation to the historical average price of each product and the second red line represents the second standard deviation in relation to the historical average price.

in the monitoring of markets. Technical problems presented significant constraints in both cases, data is too aggregated and heterogeneous, and also information availability issues are presented.

Finally, in spite of the international experiences, a set of indicators were proposed as a means to complement the traditional case-by-case (bottom up) approach to searching for problematic markets. The indicators were: i) structure measures (concentration, barriers to entry and market traceability); and, ii) performance measures (productivity, consumer satisfaction, profitability and prices). However, due to the significant doubt about the viability of using 'top down'<sup>10</sup> data as a starting point for identifying markets suitable for investigation, the proposed set of indicators could not be used in practice.

### III. Screens for procurement officials

1. *Do you have guidance for procurement officials to detect possible cases of collusion in public tenders? Do you provide training to public procurement officials on how to detect possible bid rigging conspiracies? What type of red flags have you identified to detect bid rigging cases?*

Indecopi has not yet issued official guidance for procurement officials to detect possible cases of collusion in public tenders, but is prone to learn from experiences abroad to design such a proper guidance in the near future.

In spite of this, Indecopi has taken some steps to establish an adequate degree of cooperation between the competition authority and the Peruvian public procurement authority (OSCE). In 2012 it developed a short training program aimed at introducing OSCE officials to basic concepts in antitrust topics and to make them aware of indications of possible anticompetitive behaviour. In the program, Indecopi considered as «red flags» following indications:

- Unusual bidding: For instance, firms submit bids impossible to be considered by the procurement official [for it exceeds the established upper limit or is definitely incompatible with the technical requirements]. Also, where the bidders have unusual formal and substantial similarities in the documents presented to the contracting entity that could lead to a possible coordination of bids. In these cases, investigation could lead to a *cover bidding* agreement. Possible *signalling* behaviour should be ruled out.
- Unusual patterns: For instance, a firm always wins procurement processes in a geographical area or to the same contracting body where other equally apt competitors exist. Also, where firms seem to «take turns» to win periodical processes on a regular basis. In these cases, investigation could lead to a bid rotation agreement.
- Historical inconsistencies: For instance, a firm stops from bidding in procurement processes whenever it has in the past, in the same geographical, technical or economic conditions, with no recognizable explanation. It also happens in the

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<sup>10</sup> A 'top down' approach involves analysing economy wide data sets.

opposite direction: where a firm starts bidding whenever it has not in the past, with no recognizable explanation. In these cases, investigation could lead to a market sharing agreement by means of *bid suppression*. However, the existence of an existing or a past cartel that the authority could have detected requires an *event analysis*.

- Others: Such a particularly strong rejection for some competitors and not to others, manifested in the opposition to the participation of such competitors, with no recognizable explanation. Also, where the contractor that won a bidding process subcontracts its duties with other competitors that participated in that process.

2. *How effective is your cooperation with public procurement bodies? Have you been able to launch successful investigations or enforcement procedures? Are the competition authority's interests always aligned with those of public procurement officials? Do the costs of your training or outreach programme justify the benefits?*

Although not under strong coordination and cooperation, the OSCE has regularly sent to Indecopi, information where the former suspects that indications exist about a possible cartel. Meanwhile, Indecopi has always analysed such information and has issued decisions whether it finds or not an anticompetitive behaviour. In addition to the fines imposed by Indecopi, OSCE has the power to punish the bidders in addition [for instance, by disabling them for public contracting] according to public procurement regulations. Another public entity that has taken a collaborative approach to the competition authority is the Social Security Administrator - Essalud.

Indeed, Essalud cooperated in an important bid rigging case detected by the Technical Secretary and penalized by the Competition Commission. Recently it has been confirmed by the Tribunal of Indecopi and is related to procurement processes to purchase medical oxygen for several hospitals in Peru. The Commission found that the three main producers of medical oxygen in Peru [whose joint markets shares where above 90%] have engaged in a bid rigging scheme by sharing the Peruvian market between them for five years. The fines imposed where close to the USD 7,6 million.<sup>11</sup>

Though Indecopi and OSCE share an interest for developing efficient markets for public procurement, further cooperation and inter-education would be needed to proper fulfil this goal. Apart from the 2012 training program mentioned before, no further capacity building programs have been developed yet. However, it is worth to mention that a recent agreement was signed between Indecopi and OSCE that will in the future strengthen the link and collaboration between the two agencies.

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<sup>11</sup> Please find the commented decision in the following link (in Spanish):  
[http://sistemas.indecopi.gob.pe/sdc\\_Jurisprudencia/documentos/1-93/2013/Re1167.pdf](http://sistemas.indecopi.gob.pe/sdc_Jurisprudencia/documentos/1-93/2013/Re1167.pdf)