

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Perú

Mario Zúñiga (Universidad de Lima) · Saturday, February 10th, 2024

2023 was certainly an eventful year for competition law and policy in Peru. Its Competition Agency, the [National Institute for the Defense of Competition and the Protection of Intellectual Property](#) (INDECOPI, after its Spanish acronym) was not immune from the instability of Peruvian politics. Two months after the failed *coup d'état* perpetrated by Pedro Castillo, the new administration, led by Dina Boluarte, appointed a new President of the Board of INDECOPI. Despite these changes, INDECOPI, and particularly its Commission for the Defense of Free Competition (the “Commission”), and the National Directorate of Investigation and Promotion of Free Competition (which acts as prosecutor in anticompetitive behavior cases and provides support to the Commission, the “Directorate”), have managed to have a productive year and to advocate for positive policy reforms.

It was particularly important that Congress enacted [Act No. 31775](#) which modifies the Peruvian Criminal Code (the “Criminal Code”) by establishing that only “hard-core” cartels face potential criminal prosecution. The previous language of Article 232 of the Criminal Code was overinclusive, including every type of anticompetitive agreement and even abuse of dominance. The Act also establishes that any subject benefiting from administrative immunity by the competition agency is also exempt from criminal responsibility, which is very important for preserving the attractiveness of the leniency program.

Merger Control

2023 has witnessed the continuous consolidation of Merger Control in Perú. [Act No. 31112](#) came into force roughly two years and a half ago; and even in the face of a surge of cases, the agency has managed to issue all decision cases within the legal time limit (30 business days). Since its implementation in mid-2021, the Commission has revised more than 40 cases, more of 20 of which were in 2023 alone. Two important transactions are currently under Phase 2 revision: the acquisition of Enel distribution assets by the Chinese electrical sector giant China Southern Power Grid International (HK) Co., and the acquisition of Agroaurora S.A.C., by Agrícola del Chira S.A. (part of Grupo Gloria).

In January 2023, the Commission published the [Guidelines for the assessment and analysis of merger operations](#), providing much needed guidance on the broad legal and economic criteria that

the Commission will follow in its analyses, such as when it would consider that a given merger falls outside the scope of the law and when the operation entails a risk of anticompetitive harm. The Guidelines do not deal with every aspect of the merger control procedure (such as remedies), so it is likely that INDECOPI will issue an updated version once the case law is more developed.

Enforcement of anti-competitive conducts

2023 was also the year that confirmed “the return of monopolization” to INDECOPI, after the Commission imposed a S/ 60 million (approximately US\$ 17 million) fine on quasi monopolist cement-maker, [Yura](#). For more than a decade, due to a (sensible, I think) prioritization of resources to investigate and prosecute cartels, the Commission had not had any abuse of dominance cases. In 2018, [the OECD-IBD peer review recommended](#) that “enforcement should also be directed at other horizontal and vertical anticompetitive agreements and at abuses of a dominant position”. The Directorate obviously did get the memo, and since then at least seven cases abuse of dominance have been brought, five of which resulting on infringement decisions. In this case, Yura, with a 100% market share in some cities, had implemented iron-clad exclusivity contracts and various sanction mechanisms to force hard-ware stores and even cargo truckers to sell and distribute only its own cement brand.

In March 2023, the Directorate launched another abuse of dominance case and later issued a preliminary injunction against [Visa](#), after E-Banx complained that Visa’s new rules for the processing of online shopping payments had an exclusionary effect on international payment collectors. The Commission had already issued in 2021 a [Report in the Credit Card Payment Services](#) which identifies certain hurdles related to the entry of potential competitors in the market, and a specific [Report on the market for payment acceptance services to foreign merchants](#), which mapped identifying potential harms to competition arising from restrictions imposed by payment networks on the acceptance of card payments with foreign merchants.

In September 2023 the Commission also published the final version of its [Market Report on the FinTech Sector](#), where it identifies some regulatory and strategic barriers to entry, and proposes some regulatory measures, Open Banking among them. This specific proposal does include a warning against possible misuse of personal information, but lacks a similar warning regarding the possible “free riding” impact of such regulation.

Prosecution of cartels was not neglected, to be sure. In May, in what was the first “no-poach agreement” case in Peru, the Commission announced it was fining six construction companies with S/ 5,77 million (approximately US\$ 1,6 million) for entering a “non-aggression agreement” that barred the companies from hiring and even reaching employees from their competitors, including former employees.

Regarding the investigate tools of the competition agency, it is worth to mention that in February a fine of S/ 4,291,650.00 (approximately US\$ 1,160,000.00) was imposed to [CNO S.A. Sucursal Perú](#) (CNO, part of the Odebrecht Group) for refusing to file information requested by the Directorate on a cartel investigation. INDECOPI’s Competition Tribunal (the second administrative instance for Antitrust cases, the “Tribunal”) confirmed the fine later in 2023.

The Tribunal also ratified a fine imposed by the Commission on a pharmaceutical company for the unjustified refusal to provide relevant information when investigating anticompetitive practices in

[this market](#). This case was particularly important since it was found that one of the managers destroyed the information requested by the Commission (38 emails) that was decisive in defining the anticompetitive practice analyzed. As a result, the Commission fined both the company and the Manager personally.

Finally, a recent decision of the Tribunal annulled a decision of the Commission from April 2022 that imposed a fine of S/ 17.24 million (approximately US\$ 4.65 million) against supermarkets Cencosud Retail Peru, Hipermercados Tottus, Makro Supermayorista and Supe. The Commission found that the four supermarkets had formed a “hub-and-spoke” cartel to fix the price of turkey with San Fernando acting as facilitator. The Tribunal had a different approach to the case, considering that the facts of the case presented not a cartel, but rather several concurrent resale price maintenance (RPM) agreements imposed by San Fernando to each supermarket. The Tribunal held that such agreements could be (potentially) anticompetitive but should be analyzed under the legal standard applicable to vertical agreements (i.e., the “rule of reason”).

What’s coming in 2024?

After publishing in 2022 a [Guidelines for Joint Ventures in Public Procurement](#) draft and receiving comments in 2023, a final version of said guidelines will probably see the light early in 2024; providing guidance to protect competition in public tenders without affecting the potential pro-consumer effects of joint biddings.

[M&A experts](#) expect more mergers in 2024, which means more merger notifications. With two transactions into Phase 2 with a pending decision, it is possible that we will see the first blocked merger and a subsequent appeal to the Tribunal. The long-standing Chief of the Directorate, Jesus Espinoza, and a handful of other experts left the Directorate in 2023, and INDECOPI is also facing some budget constraints due to the overall fiscal situation of the Peruvian State. It will therefore likely be challenging; so, to keep up with the current pace of merger enforcement.

To make sure you do not miss out on regular updates from the [Kluwer Competition Law Blog](#), please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer** survey showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

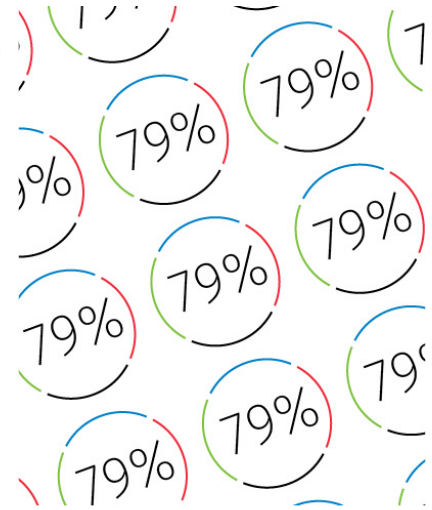
Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Saturday, February 10th, 2024 at 11:05 am and is filed under [Competition Law 2023, Peru](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.