Indecopi
INSTITUTO NACIONAL DE DEFENSA DE LA COMPETENCIA
Y DE LA PROTECCIÓN DE LA PROPIEDAD INTELECTUAL

Analysis of Indecopi's Functions in Light of the Ruling of its Dispute Settlement Bodies

Free Competition

INDECOPI'S TWENTIETH ANNIVERSARY COLLECTION

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CONTENTS

FOREWORD

Indecopi's contribution to the economic growth of Peru is rooted in its institutionalism, which serves as the foundations of, among other aspects, the technical decisions issued since its establishment. In this regard and in commemoration of the 20th anniversary of the institution, we believe it is important to share the essence of our job, through a number of publications describing the duties carried out by INDECOPI through each one of its decision-making bodies. Our purpose is to present, in an educational way, the work we have performed during these 20 years to fulfill our mandate aimed at consumer protection, intellectual property, defense of free and fair competition, and developing quality infrastructure in our country.

These books have been articulated following educational guidelines and techniques and the contents of each volume of the collection have been structured in a standard manner. Thus, we start with a theoretical framework which underpins the function entrusted to INDECOPI, developing fundamental concepts for each protected institution. Next, we describe the legislative and jurisprudential milestones achieved during the Institute's evolutionary process.

Finally, as could be expected, we have furthermore set aside space to reflect on the lessons learned and to think into the future by moving towards a more proactive Indecopi, anticipating and providing the answers that our society and market need.

At this moment, you have a copy of the book about Defense of Free Competition, in which Eduardo Quintana describes the important role that INDECOPI is playing and which included a study of the legislative evolution of Competition Law in Peru during these twenty years,

the major features determining behaviors criminalized by Legislative Decrees 701 and 1034, i.e. abuse of dominant position and horizontal/vertical cartel behaviors. The importance of integrating Competition Policy falls within the context of the economic growth of our country.

I take this opportunity to express our deepest gratitude to Eduardo Quintana and to the Technical Secretariat of the Commission for the Defense of Free Competition led by Miguel Angel Luque, and especially to David Fernández for his contribution with this work.

We hope you find this book useful and conveys, as intended, the extent of the work performed by Indecopi throughout these 20 years of technical and independent work serving the nation and the commitment of each one of the collaborators who created these pages, as part of the history we bring to you today.

Hebert Tassano Velaochaga
Chairman of the Board of Directors

INTRODUCTION

Free competition is the best mechanism to encourage the efficient allocation of resources in the market. This is due to the fact that, in order to earn consumers' preference, suppliers lower their prices and improve the quality of their products. As a result, consumers have more and better options to choose from. For this reason, the defense of free competition is one of the most important public policies for the economic growth of a country.

In the twenty year of Indecopi, Peru's Competition Policy has advanced significantly, reflecting the work of the Commission on Defense of Free Competition (CLC) and the Defense of Competition Specialized Chamber of the Tribunal (SALA) of Indecopi and the contribution of specialists, attorneys, and economists, who have provided academic insights after reviewing and critiquing the various elements of free competition.

Thus, for example, it is important to point out that, from its early years, CLC and SALA established important criteria for the analysis on the anticompetitive behaviors, among which are the per se rule recognition for the «hard core cartels» (a case against poultry companies), the use of indirect evidence (case against Rheem Peruana S.A. and Envases Metálicos S.A.), the liability of professional associations and colleges (case against the Chemical Pharmaceutical College of Peru), the rule of bare agreements and complementary agreements or «ancillary restraints doctrine» (case Civa), the definition of relevant market (case against Minsur), and the unjustified refusal to deal (case of the market of Santa Anita).

In recent years, CLC and SALA have consolidated their analysis, thereby solving large-scale cases within the framework of Legislative Degree 1034 (2008). Among the recent cases with highlighting: the Apeseg case (car insurance settlement), Backus (exclusivity contracts like abuse of dominant position), Medical oxygen (collusive tendering in health-care sector), Asetup (recommendation of passenger transportation prices), Carga Huaraz (settlement of prices and customer allocation in heavy cargo transportation market), and Cementos (concerted and unjustified refusal as a vertical cartel behavior).

In this context, the goal of this book is to perform a thorough review the development of policy and jurisprudence on Competition Law in Peru, and to explain the major features that define the behaviors criminalized under Legislative Decree 1034, i.e., abuse of dominant position and horizontal/vertical cartel behaviors.

In Chapter I, we present a general framework of the application of competition laws. First, we provide a description of the phenomenon of a competitive process and the conditions which maximize its efficient development across various markets, in addition to the concept of market power and the justifications for the existence of competition laws. Next, we offer an account of Competition Law, defining the areas of action and the most important concepts of this field, in light of jurisprudence and scholarly papers both national and comparing with international experience.

In Chapter II, we provide an account of the evolution of the Peruvian legal system on free competition. In particular, we analyze the most important aspects of Legislative Decree 701, the Law on the Elimination of Monopolistic, Controlling, and Restrictive Practices on Free Competition; and the current Legislative Decree 1034, Anti-competitive Behavior Suppression Law.

In Chapter III, we describe and analyze the most important assumptions on abuse of dominant position in light of CLC and SALA's jurisprudence. Emphasis has been placed on the claims regarding unjustified refusal to deal, discrimination, and abuse of legal processes. In addition, a section is dedicated to the discussion on exploitative effect conducts.

As can be observed, this book constitutes an exceptional opportunity to appreciate the importance and evolution of competition law and its implementation in Peru during these twenty years; and the way in which Competition Policy fits into Peru's economic growth.

Lastly, it is important to acknowledge the effort of Professor Eduardo Quintana, who, in concise and didactic language, addressed in this book a large number of issues related to the Peruvian Competition Law.

Miguel Ángel Luque Oyarce
Technical Secretary
Free Competition Commission 2

OBJECTIVES

The Free Competition volume aims at reviewing fundamental judicial–and economic–grounds of Competition Law, explaining doctrinal basis, and describing and commenting on a representative selection of the main decisions of Indecopi in this matter. Since the prohibition of anticompetitive behaviors is the subject that has produced the largest legal and jurisprudential development in Peru, more attention is given to this topic of Competition Law.

In this sense, we analyze how Indecopi has carried out its duty to protect the process of competitiveness, ensuring that companies and economic agents do not unlawfully restrict competition in the market. In particular, we evaluated and explained how Indecopi investigates and, when appropriate, sanctions unilateral behaviors of the most important companies in each economic sector, destined to illegally exclude competitors (acts of abuse of dominant position), such as coordinated strategies, through agreements, pacts, or contracts between competitors or economic agents to impede the flow of competitiveness (horizontal or vertical cartel behaviors.)

In the same way, in this volume we analyze how Indecopi has benefited from the experience gained in investigating and sanctioning anticompetitive practices, not only to define effective analysis and evidence methodologies to facilitate their effort, but also to enrich the normative development process which led to the new law on this matter in force since 2008. In this way, we assess the impact and contributions of Indecopi regarding the development of economic agents and the creation of new and more appropriate legal rules, which are a new starting point for its performance as an authority on the defense of free competition.

> The regulations on defense and protection of free competition seek to prevent companies from concentrating market power for reasons other than greater efficiency and from unlawfully using the market power they possess. In the same way, they seek to prevent market power from concentrating through mergers or acquisitions of companies as this generates a great risk for competitiveness and consumers' well-being.

Chapter 1

Theoretical Framework: Areas of Competition Law

In a market that functions under competitive conditions, the selling conditions (price, quantity, quality, and pre and post-sale services, etc.) can be determined as a result of the confluence of consumers and clients demand for products or services with the supply of goods from producers and traders. In other words, the economic agents interact in multiple deals and commercial negotiations, and through these they define the conditions for the sale of goods, without allowing producers, traders, or consumers to determine, in a unilateral fashion or by their own will. For this reason, it is often claimed that in a market where conditions of absolute competitiveness can be found, companies are "price-takers" due to the existing competition, each company must ensure that the conditions of their offer be sufficiently attractive for the buyers, who would otherwise have the option of buying from alternative suppliers[1].

The previous situation is known as "perfect competition" and it requires that the following conditions be present in the market, so that no single company can be able to determine the conditions of the offer:

- **Homogenous products.** All of the offered goods must possess identical features or remarkably similar, so that consumers can identify them as homogenous goods independently of who supplies them and they do not have any established preferences to any of those goods. Consequently, the situation between products of any supplier is completely possible.
- **A large number of suppliers and buyers.** Purchases and sales occur between a large number of suppliers and customer, thus the amounts involved in each transaction are very small to affect market conditions.
- **Perfect information.** All participants in the market must have complete and symmetric information concerning the features and quality of the products, quantities produced, prices invoiced, among others. With these, consumers will always have timely and sufficient information to make a decision concerning the appropriate purchases.
- **Absence of any significant entry barriers to the market.** The possibility of entry and exit of companies to the market should be free. In other words, there should be no major obstacles or costs that inhibit the decision of any company or investor to enter a certain economic activity and almost immediately withdraw from the market, if considered appropriate for its interests.

1 Sources about competitive markets and the effects of company behaviors can be found on the following: CARLTON, Dennis y PERLOFF, Geoffrey. (2000) *Modern Industrial Organization.* United States of America, Addison-Wesley, pp. 56-65. PEPALL, Lynne; RICHARDS, Danniel Jay, y NORMAN, George. (2006). *Organización Industrial: Teoría y Prácticas Contemporáneas.* México, Thomson, pp. 20-25. BLAIR, Roger y KASSERMAN, David. (2009). *Antitrust Economics.* New York, Oxford University Press, pp. 1-22.

Nevertheless, markets do not function in absolute competitiveness or in a perfect competition due to the fact that the conditions previously mentioned do not make themselves present concurrently or completely in any real market. The offered goods differentiate themselves through quality, brands, or other features. The number of sellers and buyers is not so large that their transactions do not have an impact in the supplying conditions. The information available tends to not be imperfect, asymmetric or costly, and the markets tend to present different levels of barriers for entry and exit. Because of this, various circumstances exist in which companies find themselves able to set conditions of sale in a unilateral or in a jointly fashion, without the competition being an element that disciplines their behavior. In these situations it is noted that the companies rely in an important market power that allows them to neutralize or overcome the possibility of competition.

The power of the market is usually defined as the capacity of a company to increase its prices above the prices of the competition (that is to say, the level that they would have if they confronted the effective competition of other companies in the market), without running the risk that a considerable amount of their customers transfer their needs to other companies that offer lower prices or better conditions. In plain economic terms, the power of the market is the capacity that companies have to set their prices above the marginal costs which would be the result of a perfect competition scenario. Nonetheless, under these conditions, every company has a certain degree of power in the market where the perfect competition does not exist. Because of this, it is important to identify how much power each company has over the market to evaluate if it can negatively impact the performance of the market or the competitive process[2].

The issue with the competition policy lies in situations where the companies boast a significant market power that allows them to affect competition and damage the dynamics of the market. This has been defined in legal terms as monopolist power, a dominant position or substantial power, –or significant pull- in the market[3].

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2 BISHOP, Simon y WALKER, Mike. (2010). *The Economics of EC Competition Law: Concepts, Application and Measurement.* Great Britain, Sweet & Maxwell – Thomson Reuters, pp. 52-53. GUNNAR, Niels; JENKINS, Helen y KAVANAGH, James. (2011) *Economics for Competition Lawyers.* Great Britain, Oxford University Press, pp. 118-119.

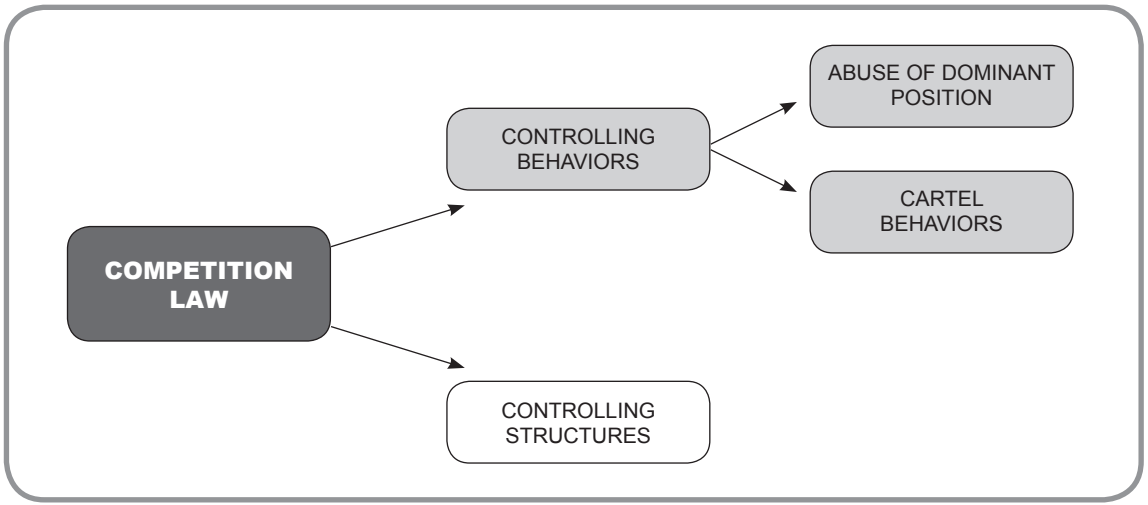
3 The term *poder monopólico* ("monopolic power") derives from the American antitrust legislation, whereas the concept of *posición de dominio* ("dominant position") was originally used on the competition acts of the European Community. Peruvian competition acts use the same terminology of the European Community. The terms *poder sustancial de mercado* or *peso significativo de mercado* (both translated as "substancial market power") are commonly used with the same connotation by agencies involved on regulated markets such as communications or electric energy (i.e., Office of Communications, British OFCOM, or the European Commission).

The companies can obtain that market power from various sources, some lawful while other are not. Among these typical sources of market power, one can find the following:

Economic Efficiency	• Motivates the company to earn the consumers' trust (for example, by producing a product at a lower cost than the competitors or to a similar cost but of a better quality) and to get the company to become the most-well-known or even the only one remaining on the market. This possibility of growth is the key incentive, so that the companies decide to compete with a view to becoming the most important in its respective market. This is a lawful source of market power.
Concentration of companies	• A company can absorb, join, or take control over its competitors, or can be integrated with its input suppliers or marketing channels, remaining in a better position than the competitors, as a result of transactions for acquiring shares or companies, mergers, joint-ventures, etc. (business clusters). This is also a legitimate way of acquiring market power, but usually undergoes an evaluation by the Agency.
Benefits as per Law	• Agency's legal standards or decisions can reduce the possibility for new companies to enter into the market, making their market entry more costly or preventing its absolute entry by granting exclusive operations rights. The legal framework can grant particular degrees of protection from competition. Again, this is a lawful way to earn market power.
Agent Behavior	• A company with market power can prolong this situation by invalidly preventing rivals from competing or by forcing them to compete on unequal terms. Also, two or more competitors can coordinate their behavior to achieve artificial market power that they would not otherwise obtain separately, thus avoiding the risks of competition and acting as a monopoly. These ways to maintain or gain market power are illegitimate.

The regulations on defense and free competition protection do not prohibit or sanction the existence of substantial power market or that of a dominant position. Rather, seeking to prevent companies to focus on market power for reasons other than an increased efficiency, or that market power emerges through mergers or companies' acquisitions, generating a serious risk for the competition and the well-being of the consumers. To this end, Competition Law has two typical implementation ways reflected on legal standards, which are known as "controlling behaviors" and "controlling structures". This work is focused on controlling behaviors, given that it's the one of greater legal and jurisprudential development in Peru.

Graph N° 1
Competition Law



1.1. Controlling Behaviors

Controlling behaviors are observed in regulations governing the prohibition of certain behaviors of economic agents in the market, which are deemed to invalidly constraint the competition to the detriment of the consumer, the competition process and, more generally, the market itself.

As a rule of thumb, controlling behaviors takes place after the forbidden behavior has been produced in the market. In other words, it works like an *ex post* assessment of the behaviors of the companies, identifying their compliance with the legal framework or otherwise.

Given this, the control of behaviors applies in cases where the market power is obtained by illegitimate means, as an outcome of the non-valid behaviors of the economic agents.

> The regulations for controlling behaviors seek to impede and, if necessary, to penalize those restrictive practices of the competition that are performed by firms and economic agents.

These antitrust practices can be of two different types, as follows:

1.1.1. Abuse of dominant Position or Monopoly

By means of these actions a firm that holds significant market power or dominant position takes unfair advantage of said power or position in the market to benefit from it and impede the entry of new competitors and to hinder the continuance of those that are already operating in the market. Usually, these are illicit acts of one single firm; i.e. unilateral acts to illegally exclude competitors from the market. The Peruvian law calls these "acts of abuse of dominant position".

a. Relevant market

For a firm to commit such acts of abuse of dominant position it must hold such position in the market. To determine whether a firm has a dominant position, or not, it is necessary to define whether it can impose the conditions of purchase or sale, regardless of the reaction of its customers, suppliers or competitors. A firm may act in such way when customers and suppliers in the market in question have real alternatives other than the dominant firm, to buy the required goods or to sell the goods produced by them, respectively. Also, the dominant firm may behave in such way if the firm does not deal with competitors or, if there are competitors which are not strong enough to compete.

The key question to determine whether a company holds a dominant status in the market is: Of which market are we talking about?

That is why the concept of relevant market is used for it allows the identification of the market scope in which the investigated economic agent operates. In simple terms, the fewer alternative suppliers there are for a customer or client to use, the greater the probability that the investigated agent holds a dominant position, the existence of such alternative suppliers depends on the market in question[4].

4 Read about the definition of the relevant market in, among others: BARRANTES, Roxana. (2012). "¿Algún Mercado es ajeno a un Economista? Notas sobre el Mercado Relevante pensando en las Telecomunicaciones". In: *Revista de Derecho Administrativo.* No.10. Lima, Tarea Asociación Gráfica Educativa, pp. 61-72. CAMESASCA, Peter and VAN DEN BERGH, Roger. (2002). "Achilles Uncovered: Revisiting the European Commision's 1997 Market Definition Notice". In: *The Antitrust Bulletin.* No. 47, Spring 2002. New York, Federal Legal Publications Inc.. COMISIÓN EUROPEA. (1997). *Comunicación de la Comisión Relativa a la Definición de Mercado de Referencia a Efectos de la Normativa Comunitaria en Materia de Competencia.* DEPARTMENT OF JUSTICE Y FEDERAL TRADE COMMISSION. (2010). *Horizontal Merger Guidelines.* United States of America. FIGARI, Hugo; GÓMEZ, Hugo and ZÚÑIGA, Mario. (2005) "Hacia una Metodología para la Definición del Mercado Relevante y la Determinación de la Existencia de Posición de Dominio". In: *Revista de la Competencia* y *la Propiedad Intelectual.* Lima, Indecopi, pp. 153-186. LANDES, William y POSNER, Richard. (2003). "El poder de mercado en los casos de Libre Competencia". In: *Ius et Veritas.* No. 26. Lima, Tarea Gráfica Educativa, pp. 136-172. RUIZ, Gonzalo. (2000). "Definición de Mercado Relevante y Políticas de Competencia". In: *Thémis.* No. 41. Lima, pp. 297-310. WERDEN, Gregory. (1990). "Four Suggestions on Market Delineation". In: *Economic Analysis Group Discussion Paper.* United States, U.S. Department of Justice - Antitrust Division.

The idea of defining a relevant market is to assess whether there are, or not, alternatives for the customer or client; or, in other words, if the customer or client is "captive" of its usual supplier. If the answer is yes, then one may conclude that such supplier has a dominant position.

The concept of relevant market is not equal to the concept of economic market in classical terms. The economic market, whether it is understood as the place where buyers and sellers do business or as the exchange mechanism through which such transactions are carried out, ends up being the confluence of the supply and demand of goods or products, individually or as a group. The relevant market is the area where the exercise of substantial market power affects the competition; i.e. when a firm may impose sales conditions – such as price increases or constraints to the production – because there are no other alternatives for the buyer, whether in terms of substitutes or additional suppliers.

The extent of the relevant market will depend upon how much chance is there for the buyer or consumer to purchase other goods in replacement of the one offered by its supplier and the location of other suppliers who can offer the same product or its substitutes. The less there are alternatives in terms of substitutes or additional suppliers, the smaller the relevant market is, and vice versa. Typically, a relevant market is defined by combining two dimensions: product and geography.

Below, the scopes of the relevant market concept used by the European Community and the United States are defined.

Chart N° 1
Scopes of the relevant market concept used by the European Community and the United States of America

European Community	United States of America
"The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face from the competition standpoint. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure".	*"Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. (…)*

European Community	United States of America
One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase". *"Geographic market (...) the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level".*[5]	*Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions."*[6]

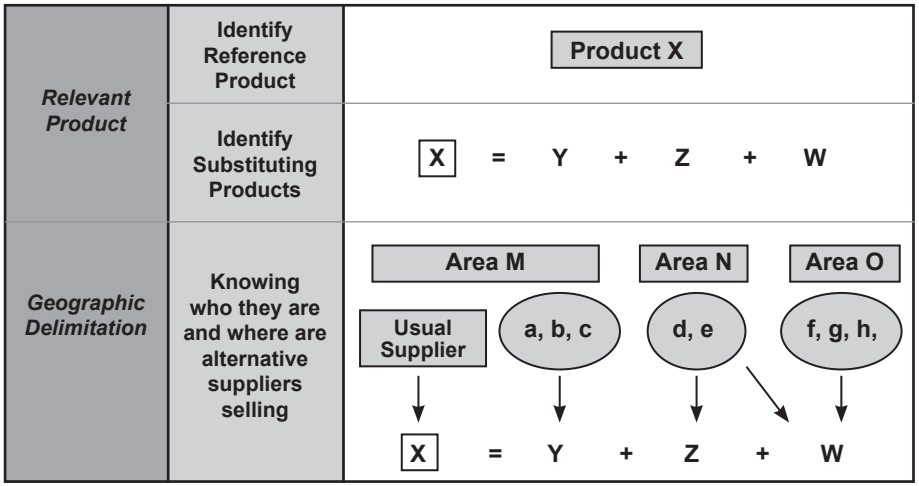
In Peru, the scope of the relevant market is specifically defined by the law in force, as follows:

> *"Article 6. - Relevant market*
>
> *6.1. The relevant market consists of the product market and geographic market.*
>
> *6.2. The relevant product market is, in general, any good or service subject matter of the investigated behavior and its substitutes. For the substitution analysis, the competition authority shall evaluate, among other factors, the preferences of the customers or clients; the features, uses and prices of potential substitutes, and the technological possibilities and the time required for the replacement.*
>
> *6.3. The relevant geographic market is the set of geographical areas where alternative sources of the relevant product supply are located. To determine supply alternatives, the competition authority shall assess, among other factors, transportation costs and existing trade barriers."*[7]

As can be seen, the scope of the relevant market as defined by Peruvian law largely covers the existing methodologies, in other words, it is a fairly general form of analysis. The important thing here is to follow according to the analysis stages' order – first analyzing the relevant product and then just move into the geographical scope, as explained in the following graph:

5 EUROPEAN COMMISSION. (1997). Op. Cit.
6 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION. (2010). Op. Cit. Free translation.
7 Legislative Decree 1034.

Graph N° 2
Steps to Relevant Market Definition



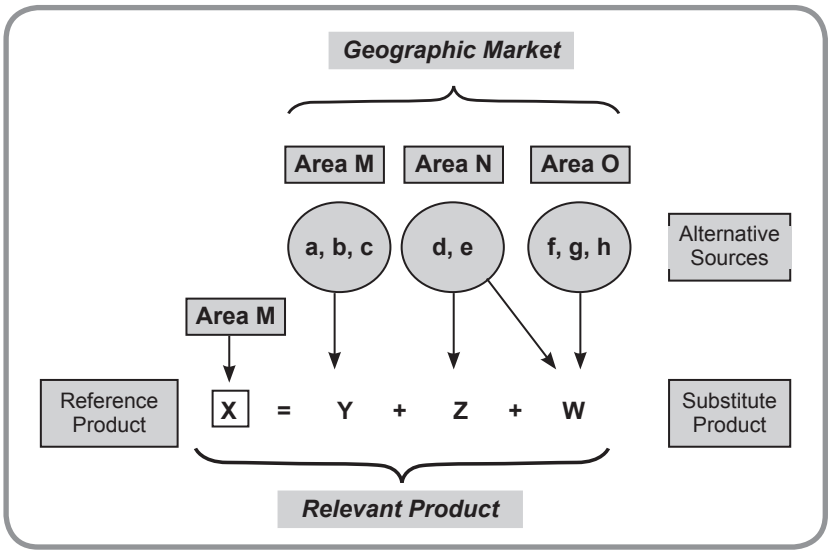
Therefore, the identification of a dominant position will require, in each particular case, the evaluation of the relevant market where the company being accused of committing abuse of dominant position operates.

For this, it is vital to first identify which are those goods required by a client or consumer who is alleging the existence of abuse of dominant position (in a particular procedure this means the identification of which is the good subject matter of the investigation). This involves defining the needs that the customer seeks to satisfy with the acquired good so as to identify, based on those needs, which may be those goods that can be alternatively purchased as a substitute of the product that is currently used to satisfy such needs. At this point it should be noted that the degree of substitution between the goods or services must be evaluated carefully, as some may be better substitutes than others due to the characteristics of the goods (quality, components, functions, etc...) the costs for obtaining them or their prices. Based on these aspects, some goods will be included as substitutes and others will be discarded. The goods identified (the good subject matter of the investigation plus its substitutes) are grouped and turned into the relevant product.

Then, the companies that can offer any of the goods that are considered relevant within the identified group must be identified, whether they are within the same geographic area as the buyer's local supplier, or elsewhere. What is important here is to identify whether the companies

that sell or can sell the relevant product to the purchaser are in real capacity to turn into alternative suppliers of the regular supplier. For this, it is important to take into account the different costs or the time involved for the transfer of goods offered by these suppliers, in order to identify whether the buyer will get these goods in conditions similar to those offered by the usual supplier. Thus, alternative suppliers will be included or excluded according to whether the buyer can acquire the goods offered by them in equivalent terms, or not. This is done is to identify the group of suppliers that can truly be considered as alternatives. Finally, the geographic market is defined considering the areas where these alternative suppliers are located.

Graph N° 3
Definition of the geographic market of alternative suppliers



In the chart above, the relevant market has been determined as areas M-N-O (geographic market) in which goods X-Y-Z-W (relevant product) are traded; depending on such relevant market one may only define the existence of a dominant position.

b. Dominant Position

To identify the existence of a dominant position in the relevant market already defined, there are several analysis tools that for methodological purposes can be divided into two groups. On one hand, the tools to evaluate the structure of the market and its participants at the

time of the complaint (actual competition); and on the other hand, tools for assessing market dynamics and potential newcomers (potential competition).[8]

The actual competition analysis seeks to identify which is the specific gravity of the defendant in the relevant market facing other participants, and also to know how competitive the market is in global terms. For this, two main tools are used: the assessment of the market share and the measurement of market concentration index.

In terms of market shares, all companies that have been identified as relevant market participants should be considered i.e., all suppliers alternative to the defendant. The market share allocation can be made by considering various calculation factors, such as the production installed capacity of each company, the units or volumes effectively produced or sold by the companies, the value of the sales income, etc.

The measurement typically used to calculate market shares is the number of units sold, i.e., how much can a company is able to place on the market, as this is an indicator of how much such products are accepted by customers. In some cases, it is recommended to use earned income as measurement because they turn out to be a better indicator of the level of customer loyalty towards the products of a company and, thus, of their potential ability to enforce the terms of sale. It is noted that revenues are better for measurement purposes, for example, when it comes to brand products the number of units sold does not always reflect the relevance of the mark.

It is important to note that market share is a strong indicator but should not be taken as the defining element of dominant position existence. In other words, if the defendant has recorded a high market share – for example 55% – this should be considered as indicative of its relevance in the market, but should not determine by itself the existence of a dominant position.

8 Read about the identification of dominant position in, among others : DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION (2010). Op. Cit. FERNÁNDEZ, Cani. (2006) "Cuota de Mercado y Poder de Mercado". In: MARTÍNEZ LAGE, Santiago and PETITBÒ JUAN, Amadeo. (Directores). (2006). *El Abuso de la Posición de Dominio.* Madrid, Marcial Pons, pp. 61-74. FIGARI, Hugo; GÓMEZ, Hugo y ZÚÑIGA, Mario. (2005). Op. Cit., pp. 153-186. GUTIÉRREZ, Inmaculada and PADILLA, Jorge. (2006). "Una Racionalización Económica del Concepto de Posición de Dominio". In: MARTÍNEZ LAGE, Santiago and PETITBÒ JUAN, Amadeo. (Directores). (2006). *El Abuso de la Posición de Dominio.* Madrid, Marcial Pons, pp. 15-31. LANDES, William and POSNER, Richard. (2003). Op. Cit, pp. 136-172. Chapters "Barreras a la entrada y estrategia competitiva" and "Empresas dominantes" de TARJIZÁN, Jorge and PAREDES, Ricardo. (2001). *Organización Industrial para la Estrategia Empresarial.* Santiago de Chile, Prentice Hall, pp. 73-92 and 247-257. Also read the Annex "Barriers to Entry" in: WORLD BANK – OECD. (1998). *A Framework for the Design and Implementation of Competition Law and Policy.* Washington, WORLD BANK – OECD, pp.101-123.

In addition to the above, the market share of the defendant should always be compared against the market share of other companies that are in the relevant market. If the defendant has a 45% share and the nearest competitor has 40%, the high share of the former does not necessarily gives the defendant the freedom to impose the terms of sale in the market because the latter is comparable and may discipline the behavior of the defendant.

Finally, it is advisable to carry out the market share assessment in the appropriate timing so as to take into account whether the market is stable and / or shows a constant high share of the defendant for several years.

On the other hand, the market concentration index is a tool to measure the conditions of the competition in the market as a whole and not to evaluate the relevance of defendant as happens with the market shares. In this case, the market is considered to be less competitive when there is a higher degree of concentration and vice versa.

Existing methodologies for measuring market concentration are varied[9], but the one that is mostly used is called Hirschman - Herfindahl Index (HHI). This index is based on the shares of the companies included in the relevant market and is represented by the sum of the squares of such shares[10].

The relationship between the HHI value and the degree of competition is set forth under the following terms:

Chart N° 2

Relationship between the HHI value and the degree of concentration

HHI Index	Degree of market concentration
Less than 1 500	Not concentrated
Between 1 500 and 2 500	Moderate concentration
Above a 2 500	Highly concentrated

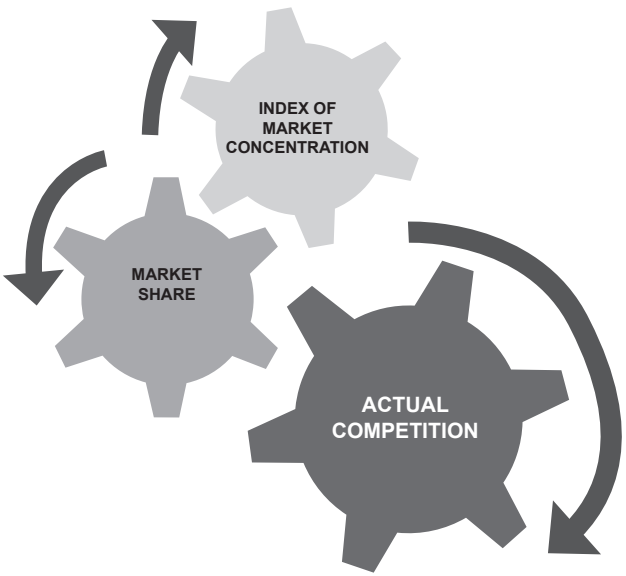
9 For example, the so called CR4 that was previously used considering the top four companies in the market, the "Dominance Index" created in Mexico, the entropy index, among others.

10 If there were five companies in the relevant market, each one with a 20% share, the HHI would be 2.000 (the addition of the 5 times 400). Evidently, the index is increased or reduced depending on the number of companies and the share each one has. If there were ten companies with a 10% share each, the IHH would be 1.000. In an extreme case, where there is just one company with a 100% share, the IHH would be 10.000.

As such, the competition conditions will be considered greater when the IHH indicates that it is not a concentrated market or, at least, when it is a moderately concentrated market, and it will be lower in highly concentrated markets.

If the actual competition analysis shows that a company has a considerable market share without the participation of other strong competitors in a highly concentrated market, one can consider that there is a higher probability of it holding a dominant position. However, the actual competition analysis should not be considered sufficient to conclude that the defendant holds a dominant position. Rather, it will be necessary to supplement it with the analysis of potential competition.

Graph N° 4
Competition Analysis



The purpose of analyzing potential competition is to determine how much chance is there for maintaining the market share distribution and the relevant market concentration degree in the future, under similar conditions, or for changing it significantly due to the possibility of new players in such market. It is understood that the conditions of the actual competition can be transformed with the new competition, which prevents the defendant – even when it has a high market share – from behaving improperly, if there is a significant possibility of changing the players of the relevant market.

> The potential competition analysis seeks to identify whether the behavior of the agents acting in the relevant market and, in particular, the behavior of the defendant will be disciplined by the competition risk that new competitors may bring along when entering into the market.

The entry of new market players depends on the costs and time involved or, in broader terms, the access conditions that may inhibit or prevent the decision of entry of new competitors. Such access conditions are analyzed as market entry barriers, which may have different backgrounds:

b.1. Legal

The government influences and / or determines the possibility of players entering into the market through legal or administrative decisions, whether intentionally or otherwise. Legal barriers may constraint the entry or continuation of players in the market in two ways:

- Explicit: By setting constraints to the entry of companies, such as special licenses or permits to operate involving requirements that are quite difficult or costly to fulfill. Otherwise, the government may ask for requirements that are not expensive but which take too much time to obtain, thus delaying its entry. Regulations affecting the use of certain goods may also restrict the entry; thus, area restrictions may prevent new firms from using the best locations, and the labor obligations may force firms to hire workers with accreditations which are not the ones needed. International trade restrictions are another classic example of such barriers that prevent the entry of foreign goods through tariffs or non-tariff measures.

- Implicit: By regulations adopted for reasons unrelated to market entry or competition but which, in the end, constraint the entry. For example, environmental protection regulations, even if the government imposes the same costs to all businesses, it can reduce the expected entry of businesses and turn it into a less attractive activity. Also, these rules may favor established companies facing potential interests seeking to enter into the market if, for example, they are forced to immediately fulfill the obligations set forth under such regulations, while granting longer terms to established firms (thereby generating an absolute advantage in costs).

b.2. Economic and structural

Characteristics specific to the economic activity involved in each relevant market determine whether it will more or less difficult to enter into the market. By rule of thumb, these are linked to necessary investments with a sunk cost nature specific of the economic activity to be performed, which cannot be recovered if the firm decides to leave the market immediately. The most extreme example of structural barrier is that of natural monopolies. Here, it is more efficient to have one only supplier in the market (i.e., what is natural is to have a monopoly) and the entry of new suppliers to compete with the already established is unprofitable[11]. Many economic activities have major investment components that are qualified as sunk costs, not only in terms of major infrastructure of specific use for the activity (rail infrastructure), but also of investments that are not always tangible (advertising costs, improving knowledge and research, etc.). Also, economic barriers are created when there are absolute advantages in derived costs; for example, access to very privileged resources that others do not enjoy.

b.3. Strategic

This type of barrier is originated from the behavior of firms already established in the market, and serve as a deterrent to potential newcomers. It can be seen in business strategies, for example: sales conditions fixed by firms, such as sales with prices below cost, sprawl of excessive production capacity compared to regular demand needs, policies on "hoarding marks", etc. Similarly, it may occur through contractual policies, such as holding numerous exclusive distribution relationships with points of sale, among others.

The assessment of market entry barriers for purposes of identifying a dominant position does not seeks to make an evaluative judgment on such barriers but rather determine whether these exist and how broad these are, in order to know if they make the market less competitive and, therefore, if there may be a company with a dominant position.

11 This happens, for example, in cases such as that of the water and sewage utility company where to have a second operator entering into the market, duplicating the entire infrastructure network already deployed is not efficient. The characteristics inherent to such activity and the investment involved make it impossible for new players to compete. In this case, the existing economic or structural barrier is so high that it absolutely protects the operator against the competition and, therefore, allows for such operator to hold a dominant position.

The existence of a company with a large share in a highly concentrated market can be played down if the analysis of market access barriers shows that these are low or reduced and, consequently, there is a considerable possibility of potential competition. Conversely, if the market is found to have high entry barriers, it would confirm the actual competition analysis and the dominant position of the company.

Finally, the assessment of the so called purchasing power is usually added to the dominant position analysis. In this aspect, the subject of analysis is if buyers have sufficient capabilities to offset the decisions of the defendant and that is why it is coined as purchasing power. In particular, it assesses whether the purchaser have the capability to concentrate the demand and negotiate jointly with the allegedly dominant supplier; whether – given its characteristics and power– the purchaser is in a position to vertically merge with a competitor of the defendant, and even whether the purchaser can acquire any of these competitors to replace the need to purchase from the allegedly dominant supplier.

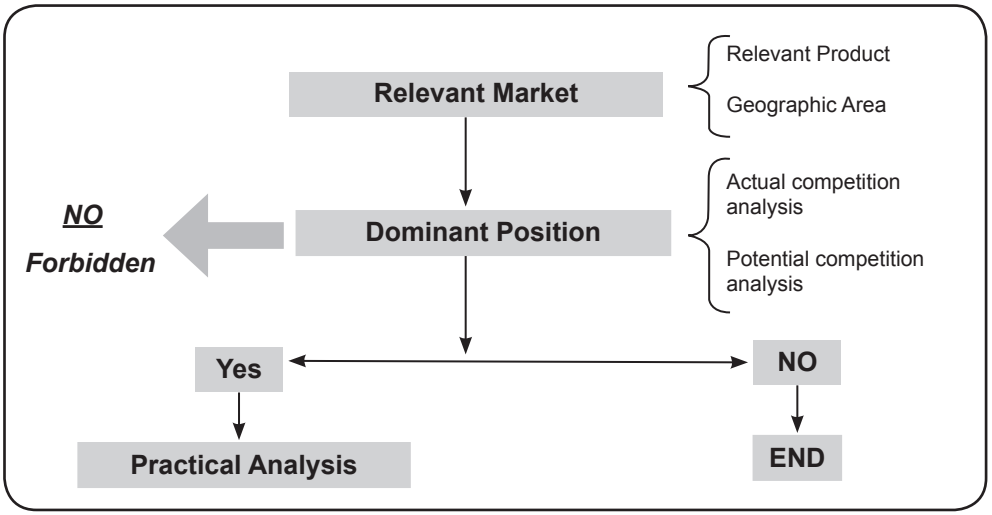
As can be observed in the following quotation, the definition of dominant position contained in the Peruvian law largely reflects the method of analysis described:

> *"Article 7. – Market dominant position*
> *7.1. Any economic agent enjoys a dominant position in a relevant market when it has the ability to constraint, affect or substantially distort the supply and demand conditions in said market preventing its competitors, suppliers or customers from offsetting – now or in the foreseeable future – such possibility, due to factors such as:*
> *a) Strong participation in the relevant market.*
> *b) The supply and demand characteristics of the goods or services.*
> *c) The technological development or services involved.*
> *d) The access of competitors to financing and supply sources, as well as distribution networks.*
> *e) The existence of legal, economic or strategic barriers to enter into the market.*
> *f) The existence of suppliers, customers or competitors and their negotiating power.*
>
> *7.2. The mere holding of a dominant position does not constitute an unlawful behavior."* [12]

An important point to note is that the law expressly provides that the existence of a dominant position is not unlawful; therefore it is necessary to identify an act of abuse of dominant position to breach the law.

12 Legislative Decree 1034.

Graph N° 5
Existence of Dominant Position



c. Abuse of dominant position

Regarding the acts of abuse of dominant position, without detriment to the detailed analysis that will be done later, here some important distinctions have to be made so as to understand the evolution that has had the interpretation of the type of abusive acts forbidden by the Peruvian law[13].

These acts of abuse of dominant position are classified into two big categories:

13 Read about the abuse of dominant position in, among others: ALFARO ÁGUILA-REAL, Jesús. (2006). "Delimitación de la Noción de Abuso de una Posición de Dominio". In: MARTÍNEZ LAGE, Santiago and PETITBÒ JUAN, Amadeo. (Directores). (2006). *El Abuso de la Posición de Dominio*. Madrid, Marcial Pons, pp. 193-226. BULLARD, Alfredo. (1997) "¿Dejar competir o no dejar competir? He ahí el dilema. Las prácticas predatorias y el abuso de posición de dominio". In: *Themis*. No. 36. Lima. Forma e Imagen, pp. 65-89. EUROPEAN COMMISSION – DIRECTORATE GENERAL OF COMPETITION. (2005). *Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.* Brussels. European Commission. QUINTANA, Eduardo and VILLARÁN, Lucía. (2008). "Sobre la prohibición de abuso de posición de dominio sin necesidad de probar relación de competencia". In: *Derecho & Sociedad*. No. 31. Lima, Editora y Comercializadora Cartolan, pp. 318-319. REY, GUAL, HEWITT, PERROT, POLO, SCHMIDT & STENBACKA. (2006). "Un Enfoque Económico del Artículo 82". En: MARTÍNEZ LAGE, Santiago and PETITBÒ JUAN, Amadeo. (Directores). (2006). *El Abuso de la Posición de Dominio*. Madrid, Marcial Pons, pp. 99-154.

- Exploitative abuse, and
- Exclusionary abuse.

On this subject Indecopi's Court has pointed out the following:

"19. An exclusionary practice is considered as one whose effects mainly impacts on the market structure, or that is aimed at strengthening the market power of a dominant position by putting in a disadvantageous position other competitors. For example, by refusing to hire or denying the access to key facilities. On the other hand, the exploitative abuse involves the exploitation or the exercise of market power, having a direct impact on the consumers or suppliers, for example by imposing 'excessive' prices (sales or purchase) or unreasonable conditions and terms."[14]

The Technical Secretariat of the Commission for the Defense of Free Competition of Indecopi states the following about each of the categories of abuse of dominant position:

"24. Exclusionary behaviors have the real or potential effect of harming the competition for the benefit of the dominant position and to the detriment of the current or potential, direct or indirect competitors. It is important to mention that these are conducts that can affect the dominant's competitors due to reasons different from having a greater economic efficiency. The exclusionary behaviors produce a direct impact on the competitive process and an indirect impact on the welfare of consumers, because by reducing the level of competition (direct effect), the options available for the consumers are also reduced (indirect effect). Exclusionary behaviors may be the refusal to make a deal, price discrimination, tied sales, predatory pricing, etc.

25. Exploitative behaviors consist of the direct exercise of market power by the dominant agent. By having such behavior, the economic agent that enjoys a dominant position imposes on his clients or suppliers certain conditions that allow him to gain better economic benefits (conditions different from those that he would have been able to impose otherwise). Exploitative conducts does not only affect the competitive process but could also energize it by encouraging the entry of new competitors attracted by the profits earned by the dominant agent. 'Excessive prices' and 'exploitative discrimination' are examples of exploitative conducts.[15]

14 Resolution 0708-2011/CS1-INDECOPI, dated March 16, 2011. Please note that the cited Resolution refers to the foot note of the following references: GOYDER, D.G. (2003). *EC Competition Law.* Great Britain, Oxford University Press, pp. 284-285. MOTTA, Massimo & DE STREEL, Alexandre. (2003). *Exploitative and Exclusionary Excesive Prices in EU Law.* In: *http://www.eui.eu/Personal/Motta/Papers/ExcessivePrices18122003.pdf. (Visited on September 23, 2012).*

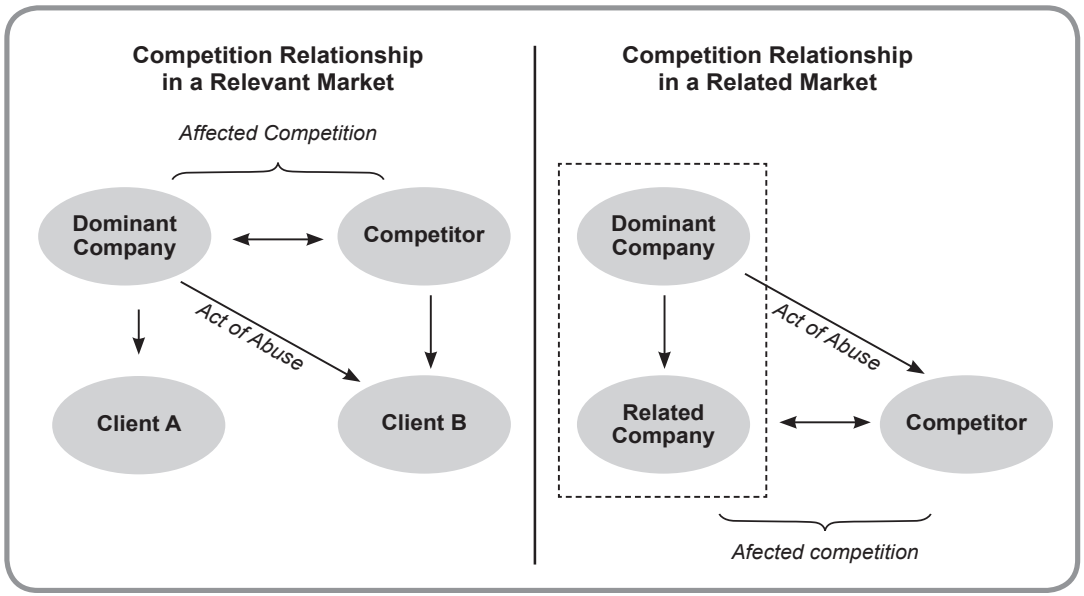
15 Resolution 005-2010/ST-CLC-INDECOPI, dated April 15, 2010.

In addition to the above, two types of exclusionary abuse must be distinguished depending on how its antitrust effects impacts on a direct or indirect competitor of the dominant firm or a company that is in disadvantage in front of its competitors but that does not compete with the dominant firm. In this case the distinction is between:

- Acts of exclusionary abuse with a competition relationship, and
- Acts of exclusionary abuse without a competition relationship or arbitraries.

The acts of abuse with a competition relationship mean that the behavior of the dominant company harms its competitors, whether in the same market where it operates or competitors of firms belonging to its same economic group that operates in related markets. In such way, the dominant company acts with the intention of excluding its direct competitors or indirect competitors in related markets because it has incentives to harm them as it will give to the dominant the benefit of reducing or eliminating the competition.[16]

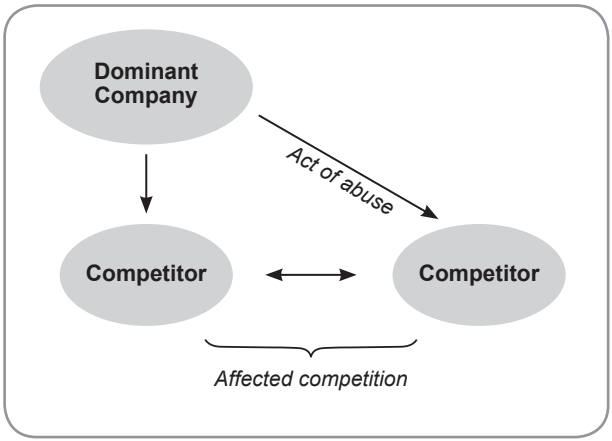
Graph N° 6
Competition Relationship in a Relevant Market and in a Related Market



16 QUINTANA, Eduardo and VILLARÁN, Lucía. (2008). Op.Cit., pp. 318-319.

The acts of exclusionary abuse without a competition relationship means that the dominant company limits the competition in related markets, affecting one or more firms in face of its competitors yet the dominant company does not compete, anyway, against the affected companies, not even through companies of its same economic group. In this case, the dominant company does not operate with the intention of limiting the competition because it does not gain any competitive benefits when affecting a company against its competitors. However, the dominant company can achieve other type of benefit through that behavior, such as an economic benefit. In this situation, restrictive effects on the competition can be generated because some competitors are in disadvantage in front of others as a consequence of the performance of the dominant company, but the latter does not have antitrust incentives, therefore these acts are also known as arbitrary abuse.

Graph N° 7
Antitrust Effect in a Related Market without a Competition Relationship



It should be pointed out that the cases of exclusionary abuse without a competition relationship are not equivalent to acts of exploitative abuse because in the former exclusionary effects do occur affecting the competition process.[17]

17 Idem.

1.1.2. Collusion practices

Collusion practices are behaviors coordinated between competing agents or agents that participate in different stages of the productive or commercialization processes and by such coordination they stop acting independently between them and start to act in collusion according to their agreement or covenants therefore causing an undue restriction on competition.

Unlike what happens in acts of abuse of dominant position which are –as a rule of thumb– unilateral acts, collusion practices always involve two or more agents. Also, these agents must necessarily be independent; they should have the capacity to take business and entrepreneurial decisions on their own account and risk, because this is the only way they can choose not to behave independently through a collusion act. That is why if companies are not independent – either because they belong to the same economic group or for some other reason – they cannot act with the freedom to decide and therefore they will not fulfill the basic premise to fall into illegal collusion practices.

Collusion practices are classified as horizontal or vertical depending on the type of agent that participates.

a. Collusion Practices between competitors

The horizontal collusion practices occur between two or more agents that compete between them, this means between companies that produce and/or sell goods that are alternative (for example, goods that have the same purpose but are from different brands). Therefore, it is pointed out that these practices involve companies that are at the same level of the productive or commercialization chain.[18]

18 Read about collusion Practices between competitors in: COMISIÓN EUROPEA. (2001). *Directrices sobre la Aplicabilidad del Artículo 81 del Tratado CE a los Acuerdos de Cooperación Horizontal.* FEDERAL TRADE COMMISSION AND US DEPARTMENT OF JUSTICE. (2000). *Antitrust Guidelines for Collaborations among Competitors.* GALÁN CORONA, Eduardo. (1977). *Acuerdos Restrictivos de la Competencia.* Madrid, Editorial Montecorvo. IVALDI, JULLIEN, REY et al. (2003). *The Economics of Tacit Collusion (Final Report for DG Competition, European Commission).* In: *http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf* (visited on September 23, 2012). MOTTA, Massimo. (2009). "Cartels in the European Union: Economics, Law, Practice". In: VIVES, Xavier. (Editor). Competition Policy in the EU, Fifty Years on from the Treaty of Rome. Great Britain., Oxford University Press, pp. 95-134. Phlips, Louis. (1995). *Competition Policy: A Game-Theoretic Perspective,* Glasgow, Cambridge University Press, pp. 1-20. QUINTANA, Eduardo. (2011b). "La idoneidad de los carteles y su prohibición absoluta o per se". In: *Diálogo con la Jurisprudencia.* No. 152. Lima, Imprenta Editorial El Buho, pp. 329-346. VELASCO, Luis. (2005). "Acuerdos, decisiones colectivas y prácticas concertadas". In: *Derecho Europeo de la Competencia: Antitrust e Intervenciones Públicas*. España, Lex Nova, pp. 55-101.

In this case, is about behaviors that result from the agreement between two or more competitors who individually do not have substantial market power, but through collusion they can have it artificially, and by stopping the competition against each other they behave as a monopoly.

> *For example, think about an agreement in which competitors stop fixing their price individually and start doing so together, or an agreement through which competitors assign to each other an area and promise not to interfere in each other's area.*

In such situations, the most serious outcome of collusion practices between competitors is the occurrence of effects similar to that of a monopoly, both in terms of profitability for the participants of the cartel, as well as in terms of detriment to consumers. When firms eliminate the competition risk to take advantage of the collusion, they can obtain undue benefits greater than the profits that could have been achieved in a competition situation (or as economists say, they can obtain monopolistic profits).[19]

When the only purpose of collusion practices is to affect the market supply conditions, generally harming effects such as the following occurs:

- Affect the buyer or consumer when allowing them to be charged with higher prices or by imposing less beneficial conditions than those which take precedence in a competitive market.
- Deprive the buyer or consumer of the possibility to choose between different options of price, quality and other sales conditions.
- Limit the incentives of efficiency and innovation of the companies participating in the collusion, because by eliminating the competition risk they also eliminate the desire to win over the rivals.

As these are practices by which competitors make a "fraud" to the market because they stop competing and start to artificially behave as a single agent in order to obtain invalid benefits, the legal treatment for these behaviors is often quite dramatic.

19 Should be taken into account for these effects that usually collusion do not seek to exclude competitors from the market – with the notable exception of boycotts – but rather to ensure the participation of the majority or all of the companies operating in the market , in order to effectively manipulate the formation of prices and other conditions of the offer.

The most popular methods of collusion practices between competitors are agreements and the so-called concerted practices or pacts[20]. Additionally, some legal frameworks also include decisions and recommendations within the modalities of collusion practices, like happens in the Peruvian law which we will review later.

Typically, the agreement is a meeting of the minds (through a contract, agreement, pact, etc.) by which competitors make a commitment to behave under a common action plan, in order to restrict the competition between them so as to avoid the risks that they may have to face if they have to fight in the market to win preference of the consumers. For the companies participating, the agreement can be done orally or in writing and could be binding effect or not. Therefore, its enforceability can occur through mechanisms acknowledged by the legal system or simply through supervision and private sanction measures.[21]

From that, it is inferred that a commitment that is only morally binding for companies – often called gentleman's agreement or pact (in which there is an "Honorable commitment of keeping one's word"[22]), could be classified as an illegal agreement[23]. Usually, the existence of such agreements is proven by direct evidence.

Concerted practices occur when competitors consciously act in a coordinated fashion in the market, and such form of action cannot be explained by the characteristics and conditions of the market, but rather by considering that there has been a connection or link between those involved. What is important in this type of behavior is to reliably demonstrate that the behaviors of the competitors do not respond to the natural conditions of the market, but

20 It should be noted that the terms "acuerdo" and "concertación" match the English definition of *"agreement"* or *"combination"*, and *"conspiracy"* or *"collusion"*; on this matter please read: KHEMANI, Shiam y SHAPIRO, Daniel. (1996). *Glosario de Términos Relativos a la Economía de las Organizaciones Industriales y a las Leyes sobre Competencia.* World Bank, pp. 2, 7-9 and 14.

21 Should be noted that if it clearly is an antitrust agreement it will be an illegal commitment and, therefore the enforceability of the agreement cannot be supported by mechanisms recognized by the legal system. That is, if competitors agreed to fix prices between them, replacing the functions of the market, then none of them will pretend to make this agreement enforceable before the Judiciary or any arbitration court.

22 The quoted phrase belongs to VELASCO, Luis Antonio. (2005). "Acuerdos, Decisiones Colectivas y Prácticas Concertadas". In: *Derecho Europeo de la Competencia: Antitrust e Intervenciones Públicas.* España, Lex Nova, p. 62.

23 Indecopi has a broad concept of what constitutes an agreement between competitors and has shown this in numerous decisions. As an example, it can be seen in Resolution 036-2004-INDECOPI/CLC, of June 23, 2004: *"51. The term "agreement" is not limited to binding agreements by law. It only suffices that one of the parties voluntarily commits to limit its freedom of action with regards to the other. Therefore, only a morally binding commitment can be an 'agreement'. There may be, in fact, agreements that do not intended to legally bind the parties, but that commits the word or the credibility of those who made the agreement. They are known as 'gentleman's agreements'."*

that there has been some type of coordination aimed at not to competing against each other. The existence of concerted practices must be demonstrated through indirect evidence since there is no direct prove or it may never be found (because offenders usually try to disappear it). Therefore, this is demonstrated by analyzing the behavior or coordinated action of the offenders in the market (usually called "parallelism") and other elements of judgment or findings that indirectly and through valid inferences, lead to the conclusion that there was a meeting of the minds between competitors (indirect evidence)[24].

The decisions are agreements adopted inside associations or trade unions of competing companies, which are binding for the members and it objective is to limit the competition between them. From Indecopi's point of view, such decisions have the following characteristics:

> *"54. The decision to associate can be adopted by the majority of the membership of any association or union (general assembly of associates, board of directors, committees, etc.) or may derive from an statement of a member of the organization (president, general manager, etc.).*
> *55. It is important to analyze the collusion decisions taken through unions belonging to an association. Because unions reach agreements depending on the quorum and majority, it will be sufficient for the agreement to be approved in a valid session (the quorum set forth in the bylaws) and by its majority to consider that it has been agreed by all members, even if some did not attend the meeting. Absent members are considered exempt of responsibility only if they timely informed their opposition to such agreement but did not execute it. The silence of the attendees means the tacit acceptance of the agreement adopted by the union if they carry out acts that reflect the agreement of collusion.*
> *(…)*
> *57. On that sequence of ideas, it is valid to affirm that what differentiates the agreement from the decision is that in the agreement all of them give their consent, while in the decision it may happen that the companies obliged to comply with it may not have even given their express consent, and can even oppose to it. In the last case, the*

24 Indecopi has issued several pronouncements recognizing these characteristics in the concerted practices, for example: Resolution 036-2004-INDECOPI/CLC, of June 23, 2004: "*66. In this regard, the concerted practice, although it does not contain all elements of the arrangement, evidences a coordination observed by the participants' behavior, which can lead to competition conditions not expected by market characteristics.*
(...) 68. A concerted practice must be tested properly, although it may suffice to proof assumptions. Indeed, the evidence of concerted practices is normally done by relying on presumptions and signs about their existence, based primarily on the fact that the behavior of firms in the market would be inexplicable if it would not be for some sort of agreement between them."

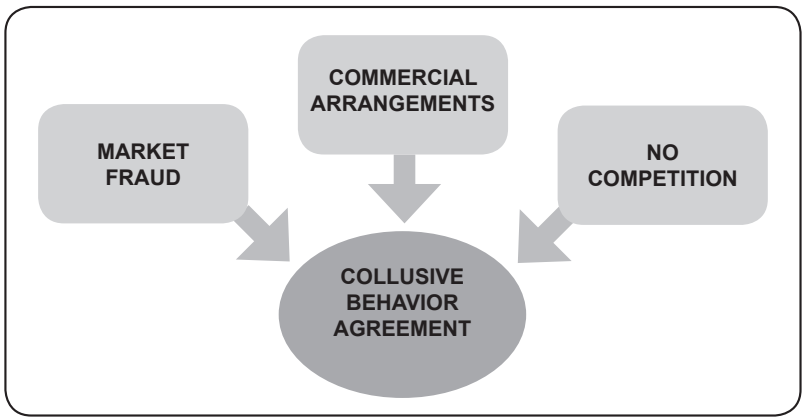
responsible parties will be all but the ones that expressly opposed to it and did not execute the agreement.
58. The agreement reached within the framework of an organization can be analyzed as decisions of that organization or as agreements between its members. This is to prevent partners from avoiding their collusive responsibilities by transferring the formal authorship onto the collective entity. This way, the decision of a group of companies is presumed to be multilateral on the fact that it groups several companies, even though it is supposed to be a unilateral act of one single legal entity.
(…)
60. As seen, when it comes to a group of companies, the agreements and decisions reached are both sides of the same coin. If the assembly of associates approves the prices there are going to charge by each associated company, such act is an agreement of the companies and a decision of the association. In both cases it is a collusion practice classified as administrative offense".[25]

Finally, also according to Indecopi, recommendations have the following characteristics when compared to decisions:

"53. The understandings adopted by group of companies or corporations for purposes or effects that are contrary to the competition constitute decisions if such are binding, or recommendations if such are only guidelines. In other words, the decisions can be of mandatory compliance in virtue of the rules governing the association, within which such decision was adopted, or may be otherwise and simply be a recommendation.
(…)
61. If the statement of one organization authority (for example, the president of the association) is not binding but is merely a suggestion or guidance, then the offense will be classified as follows: the president made a recommendation and will be penalized for that, meanwhile the companies that applied such recommendation will be penalized according to the form of the agreement"[26].

25 Resolution 036-2004-INDECOPI/CLC, of June 23, 2004.
26 Op. cit.

Graph N° 8
Collusion practices between competitors



Collusion practices between competitors can cause adverse effects resulting from restricting the competition, as well as beneficial effects derived from the joint action of competitors in the market. Based on the above, there are two typical criteria to analyze collusion practices between competitors.

On one hand is the automatic prohibition criterion, according to which it is enough for the practice to exist, independent from the adverse effects caused. This analysis criterion was originally called *per se* illegality. On the other hand, is the prohibition criterion based on the effects of the collusion practices, so that the illegality statement requires the demonstration of the adverse effects on the market, which implies comparing the benefits and detriments of such collusion practices with mix effects so as to identify if the net effect is negative, because only in such case the behavior would be illegal. This criterion was called rule of reason[27].

The automatic prohibition criterion or per se illegality was created by the Supreme Court of the United States for cases of price fixing between competitors, by agreement or through a pact, also for those practices that –indirectly- have a similar effect like the reduction of production, or offer, or distribution to the market. According to the Supreme Court of the United States, the experience shows that this type of conduct, due to its own nature, tends

27 GELLHORN, Ernest & KOVACIC, William. (1994). *Antitrust Law and Economics in a Nutshell*. United States of America, West, pp. 165-169. HOVENKAMP, Herbert. (2005b). *The Antitrust Enterprise, Principle and Execution*. United States of America, Harvard University Press, pp. 253-268.

to restrict competition without a reason that justifies it, and therefore it turns out to be inconvenient to use private or public resources to determine if, in any remote case, it causes beneficial effects[28].

Collusion practices above mentioned are severely followed up and penalized without further queries about its effects because its only purpose is to restrict competition. Such type of practice is also called hard core cartels. The adverse effects of such practice are not required to be quantified or whether if it produced the adverse effects expected by the offenders for declaring it illegal[29].

Without detriment to the above mentioned, the application of the automatic prohibition criterion has been restricted to the most harming practices, considering that in many circumstances it is adequate to study the reasonability of such practices and its effects on each particular case, avoiding thus penalizing as illegal those agreements that, without appearing to do so, generate more welfare for consumers, reduce transaction costs, or lead to greater efficiency in the supply chain[30].This is to say that a group of horizontal collusion practices are analyzed under the criterion of the so-called rule of reason.

This is because, besides producing restrictive effects on the competition, collusion practices between competitors may also produce beneficial effects, for instance: quality standardization agreements benefit consumers by reducing the so-called research costs between different presentations[31]. Only as example the agreements of development and research can be considered as such[32].

Usually, companies try to improve the products or services they offer to satisfy consumers' needs, generating innovations at different levels. In general, innovation is achieved through

28 AREEDA, Philip & KAPLOW, Louis. (1988). *Antitrust Analysis: Problems, Text, Cases.* United States of America, Wolters Kluwer Law & Business, pp. 226-227. HOVENKAMP, Herbert. (2005b). Op. Cit., 260-267.

29 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. (2000). Hard Core Cartels. The name Hard Core Cartels is recognized in the field of Competition Law and is observed in the guidelines issued by the authorities for the defense of competition in the United Stated or the European Community. Read: FEDERAL TRADE COMMISSION AND US DEPARTMENT OF JUSTICE. (2000). Op. Cit., pp. 3 y 8-9; COMISIÓN EUROPEA. (2001). Op. Cit., paragraphs 18 and 25.

30 AREEDA AREEDA, Philip y KAPLOW, Louis. (1988). Op. Cit., pp. 198-199 y 225. BORK, Robert. (1993). *The Antitrust Paradox, a Policy at War with Itself.* United States of America, Simon & Schuster, pp. 26-30.

31 To have a review of this type of collusion practices and its legal treatment in Peru, read: BULLARD, Alfredo & FALLA, Alejandro. (2002). "La mujer del César...: ¿son los Acuerdos de Compras Conjuntas Ilegales según las Normas de Libre Competencia?". In: *Ius et Veritas.* No. 25. Lima, Tarea Gráfica Educativa. QUINTANA, Eduardo. (2009). "Los Acuerdos de Investigación y Desarrollo frente al Derecho de la Competencia Peruano". In: KRESALJA, Baldo (editor). *Anuario Andino de Propiedad Intelectual.* No. 6. Lima, Palestra Editores.

32 What follows has been taken from: QUINTANA, Eduardo. (2009). Op. Cit., pp. 312-315.

research and development activities that require investments that can be expensive and sometimes very risky.

For example, think about drug researches for treating very serious diseases, this is an activity that requires expensive resources without being possible to ensure in advance that positive results will be achieved and that it may take quite a long time. These are activities that require risky, expensive and long-term investments

Given the characteristics of the investment required, it is possible that competing companies may decide to carry out together such activities, and for that purpose they will try to enter into research and development agreements. These agreements reduce the exposure to risk and allow them to collect and invest, as a group, the necessary resources. Likewise, this allows companies to contribute with the assets, knowledge and/or technologies that each one has separately and which are complementary.

However, a research and investigation agreement can also cause significant restrictions to the competitive process between the participants, as well as the exclusion of other competing companies that do not take part in such agreement. As mentioned before, the agreements between competitors allow them both to reach together the market power they would not have individually. The research and development agreements between competitors can include conditions that involve practices usually forbidden by competition rules, for example: concerted price fixing of the products obtained from the innovation achieved or the division of the market to commercialize such products.

With regards to the above mentioned, the Competition Law validly assumes that the best criterion to evaluate this type of agreements is by considering its positive and negative effects for the market and the well-being of consumers in the long and short term. It should be noted that a restriction on the competition in the short term can be more beneficial for the market as a whole in the long run. For example, a transitory restriction on the capability of a laboratory to individually conduct the research and development activities so as to conduct them together with other competitor's laboratories may result in a great benefit for consumers in the long term.

b. Vertical Restraints to competition

Vertical restraints to competition occurs between economic agents operating at different levels of the production or trading chain – activities which are generally complementary such

as that of a manufacturer and its input supplier, or a manufacturer and wholesale and/ or retail distribution channels –, that is why they are classified as vertical since it involves such a relationship[33].

Necessarily, vertical restraints require the participation of two or more mutually independent agents, and that at least one of them decides or accepts to hold or to restrict its free will in business depending on the commitment made to it or with other agents. This coordinated restriction of freedom may be expressed in various aspects of the business relationship between the agents involved at different levels of the production and trading chain, for instance: the prices to be charged, the geographic area to be served, the products that may be sold, the trading channel to be used, among others

Vertical collusion practices may be observed in the same modalities as horizontal collusion practices by agreements, concerted practices, decisions or recommendations. The main difference is that vertical practices involve agents from different levels of the production chain or trading.

Notwithstanding the foregoing, vertical restraints may happen in a variety of scopes and aspects of business activity; therefore, some of its main manifestations will be explained[34].

Particularly, three generic groups of vertical restraints are described. For explanatory purposes, a relationship between manufacturer and wholesale or retail distributor is assumed.

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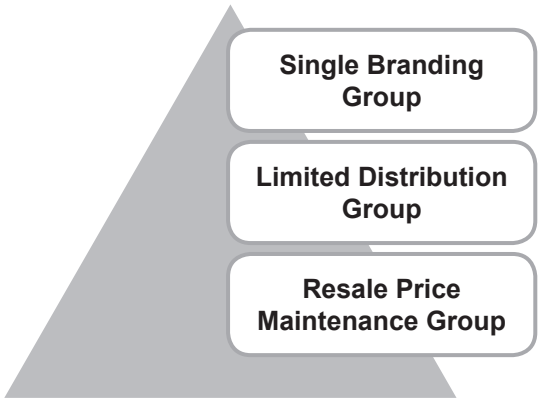
33 Read about vertical collusive practices in, among others: ABA SECTION ON ANTITRUST LAW. (2006). *Antitrust Law and Economics of Product Distribution*.United States of America, ABA Publishing. BAMBERGER, Gustavo. (2009). "Revisiting Maximum Resale Price Maintenance: State Oil v. Khan". In: KWOKA AND WHITE. (editors). *The Antitrust Revolution.* United States of America, Oxford University Press, pp. 456-472. COMISIÓN EUROPEA. (2010). *Directrices relativas a las restricciones verticales.* FALLA, Alejandro and BULLARD, Alfredo. (2002). "¡Prohibido prohibir!: el fantasma de los precios sugeridos y la fijación de precios de reventa en el Derecho de la Competencia". In: *Themis.* N°45. Lima, pp. 215-227. KATZ, Michael. (2009). "Exclusive Dealing and Antitrust Exclusion: U.S. v Dentsply". In: KWOKA y WHITE. (editores). *The Antitrust Revolution.* United States of America, Oxford University Press, pp. 389-415. MARTÍNEZ, Martha and QUINTANA, Eduardo. (1998). "Contratos de exclusividad y ventas atadas. Cuando lo atado es la exclusividad". In: *Boletín Latinoamericano de Competencia.* No. 5. pp. 51-59. Comunidad Europea, see: *http://ec.europa.eu/competition/publications/blc/ (visited on December 17, 2012)*. REY, Patrick and CABALLERO, Francisco. (1996). "The Policy Implications of the Economic Analysis of Vertical Restraints". In: *European Community - Economic Papers.* N° 119. Directorate-General for Economic and Financial Affairs, European Commission.

34 For this purpose, the European Commission classification is used for providing a simple explanation.

Graph N° 9
Groups of vertical restraints



b.1. Restraints that determine a single branding group

Such restraints occur when one or more firms agree to sell goods from one single manufacturer or brand. Under this light, firms restrict their business free will by committing to only purchase goods from a particular manufacturer and to only offer those goods through its distribution channel or outlet. Such practices may be found in exclusive supply contracts, non-compete clauses, minimum sales quotas, among others

The most direct restrictive effects generated by these constraints on competition are mainly the following:

- Other manufacturers are excluded from having access to trade channels or outlets already engaged with one single brand;
- The competition that may exist between different brand products in retail outlets is reduced. This type of practice limits the competition between manufacturers or goods from different manufacturers therefore limiting inter-brand competition, or the competition between brands.

b.2. Restraints that determine a limited distribution group

These occur when a manufacturer decides to sell its goods through one single distributor. By doing so, the manufacturer limits its free will in business by committing to conduct all of its sales through one single distribution or sales channel. The most typical form in which this type of practices can be found is in exclusive distribution contracts, which usually assigns

a defined geographic area or number or type of customers. Often, the manufacturer is in charge of prohibiting or restricting the possibility of a distributor to reach out of its exclusivity scope and invade the scope of other exclusive distributors. Another way of having limited distribution restrictions are selective distribution contracts. By means of such contracts a manufacturer chooses to designate a limited number of authorized representatives to sell its brand, after a rigorous selection process based on the compliance of stringent quality, reputation or others requirements.

The most direct restrictive effects generated by these constraints on competition are mainly the following:

- Other distributors are excluded from having the power of acquiring goods from the manufacturer that entered into an exclusive distribution covenant.
- The competition that may exist between distributors of goods from one manufacturer is prevented or reduced.

This type of practice restricts competition between distributors of goods from one single manufacturer or of the same brand, therefore limiting intra-brand competition, or competition within one brand.

b.3 Restraints that determine a Resale Price Maintenance Group

In this case, the manufacturer convinces and engages one or more distributors to sell its goods to customers at the price defined by such manufacturer. In this way, a distributor constraint its business will by accepting the retail price defined by the manufacturer. These constraints are observed in three ways: fixed resale price, maximum price or minimum price; being the former the one that generates the greater constraint, while the other two offers the distributor a certain margin of decision downstream or upstream, respectively.

The restrictive effects of the competition that produce such constraints are mainly the elimination or reduction of the price competition that may exist between distributors of goods from a manufacturer [35]. These kinds of practices also restrict competition among distributors of goods from the same manufacturer or the same brand; therefore, these are also part of a group of practices that restricts intra-brand competition or competition within a particular brand.

35 Some indicate that horizontal collusion practices among producers can be facilitated by creating greater transparency in the market price information.

The different vertical restraints to competition may take place independently or simultaneously. Thus, a manufacturer can commit to give the exclusive distribution of its brand to a distributor and, in turn, the distributor can also commit to hold one single brand to the manufacturer, and even in this business relationship having a resale price fixed by the manufacturer may be agreed upon. The more complex the vertical restraint network enforced is, the greater the likelihood of generating more serious and possibly illegal restrictive effects.

The analysis of the restrictive effects of the competition, in the case of vertical practices, usually begins by assessing if the competition between manufacturers, or inter-brand competition, is strong, weak or non-existent. If inter-brand competition is considerable, the intra-brand vertical restraints effects (for example, if a manufacturer selects only one dealer or fixes the resale price of its different dealers) may be neutralized because even when distributors of a same brand do not compete against each other, they shall do so against other brands distributors, thus allowing buyers to find assorted sale conditions between the different brands[36]. Nevertheless, when inter-brand competition is weak, the vertical inter-brand restraints effects may turn out to be graver because it hinders or makes it difficult for buyers to find different options – at least – between different distributors of the same product or brand.

Furthermore, as for the analysis of inter-brand restrictions, each manufacturer may have its own business and convincing strategy to try and make sales and distribution channels decide to solely commit to their brand or products. This struggle to "win" trading channels could be in itself a way of competition between manufacturers, but it should be noted that once vertical single-brand commitments are established, the trading and end-sales market may become rigid and make it more difficult for the entry of new manufacturers. Likewise, there is also the possibility that a manufacturer has more success in convincing sales and distribution channels, thus isolating other manufacturers from the means to reach end consumers. On that basis, these restrictions can have more serious restrictive effects on the competition when one of the participants has a dominant position.

36 In this sense, the European Commission pronounced the following: *"In a market where individual distributors distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers."* European Commission (2010) Op. cit.

Notwithstanding the identification and measurement of its restrictive effects on the competition, the analysis of vertical practices also requires the examination of its possible beneficial effects under the reasonability criterion. In other words, vertical restraints are usually analyzed under the so-called rule of reason or sound judgment criterion, which has been defined as:

> *"A legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. Some market restrictions which prima facie give rise to competition issues may on further examination may be found to have valid efficiency enhancing benefits. For example, a manufacturer may restrict supply of a product in different geographic markets only to existing retailers so that they earn higher profits and have an incentive to advertise the product and provide better service to customers. This may have the effect of expanding the demand for the manufacturer's product more than the increase in quantity demanded at a lower price. The opposite of the rule of reason approach is to declare certain business practices per se illegal, that is, always illegal. Price fixing agreements and resale price maintenance in many jurisdictions are per se illegal."*[37]

Considering the benefits that may be produced as a result of vertical restraints to competition, the analysis includes reviewing whether a greater efficiency is generated and if it tends to correct market failures or externalities generated by the business policy in every link of the production or distribution chain. For example, exclusivity contracts (single branding or limited distribution type) may reduce transaction costs that would be otherwise undertaken by the manufacturer if it had to deal with numerous distributors, and can also offer to assure a certain amount of sales on the side of one sole distributor, thus allowing better a production planning. At the same time, the exclusive distributor can focus its sales efforts on one single product brand offering for example more guarantees or pre-sale and post-sale services to the consumer, thereby encouraging competition between brands. Additionally, the producer can make more investment, promotion and training in favor of the exclusive distributor or seller, because the manufacturer would not have direct competitors that could freely take advantage of such investments. In the last two cases, one can affirm that vertical restraints allow controlling undesired free-rider situations.

37 KHEMANI, Shyam & SHAPIRO, D. (1996). Op. Cit., p. 55.

To measure and compare the negative effects related to competitive restriction against the positive effects mentioned above, some assessment principles are set forth, such as:

- The position of the manufacturer and its competitors, or the distributor and its competitors, and the degree of existing inter-brand competition.
- The legitimate justifications for establishing the vertical restraint (reduction of transaction costs, assurance of sales flow for investment and production planning, control of free rider issues, promote the entry and positioning in new markets).
- The share of distribution or sales channels that are available for other current or potential manufacturers, after creating the vertical restraint
- The term of the contracts through which the vertical restraint is established and the possibility of waiving the obligations undertaken therein without incurring significant costs[38].

To conclude, the lack of independence of the agents usually exempts them from incurring in vertical collusion agreements and concerted practices. Indeed, if firms operating at different levels of the production chain belong to the same group, it is not possible to substantiate that one of them, or both, limit their free will in business in terms of the commitment made to each other because the decision of such firms responds to the same business will. A similar situation occurs when the so-called agency relationships exist. In this case, a firm acts in the name of and on behalf of another, strictly following its instructions and without power to bargain beyond the sales conditions indicated by the latter to the former, i.e. under the typical logic of a sales agent. In such situations, the agent's lack of capacity to decide determines that there is no vertical collusion practice.

Notwithstanding the above, depending on the circumstances, a more detailed analysis on the firms' independence might be needed; particularly in cases qualifying as agency relationships. To do this, the specific characteristics of each business relationship between the firms must be considered, because if the seller undertakes the investments necessary for the activity performed (e.g. acquires assets necessary for the sales or covers the costs required for its engagement, such as transport, storages, advertising materials, etc.) or assumes the risks of the business (for example, whether to cover the cost of the products it is impossible to place them), the lack of independence aforementioned dilutes and gets increasingly closer to the trader or distributor status within a vertical restraint of competition.

38 EUROPEAN COMISSION. (2010). *Guidelines on Vertical Restraints,* Op. Cit., paragraphs 110 and the following. HOVENKAMP, Herbert. (2005a). *Federal Antitrust Policy: the Law of Competition and its Practice.* United States of America, Thomson-West, pp. 441-445. MARTÍNEZ, Martha & QUINTANA, Eduardo. (1998). Op. Cit., p. 71.

1.2. Controlling Structures

Controlling structures are observed in the regulations establishing a procedure through which any State authority approves mergers, either before or after the acts required for the execution of such operations are completed. The purpose of these regulations is for the authority to analyze the scope of the mergers and define, in anticipated terms, which effects it may have on competition in the relevant market and, accordingly, conclude whether or not to approve the operation.

This means that the authority assesses how the market currently operates with the structure it has (with its number of participants and the conditions of competition shown) and compares it against the new market configuration if operation is was to be approved and the impact it would have on future competitive conditions. If the potential effects of the merger are identified as adverse to competition and consumers, the merger is disapproved. This system does not prohibit nor prevent mergers, except in the most serious cases in which it can end up in a prohibition to merge, although this are almost always exceptional cases.

Depending on the type of operation designed by the firms, mergers are called:

- Horizontal merger: when competing firms that produce and / or sell substitute goods are merged.
- Vertical merger: when firms acting in different stages of the production or trading process are involved. For example: a producer and its supplier of inputs, or a producer and its wholesale or retail distribution channel.
- Conglomerate merger: when economic agents performing unrelated activities are involved; i.e.: agents that are neither competitor nor have a vertical relationship, as the abovementioned.

Often, the control of structures operates before carrying out the actions required to effectively implement the merger of the companies involved. Therefore, this works as an *ex ante* evaluation of the mergers according to the consequences it would bring to the market, unlike controlling behaviors which operates *ex post*. Notwithstanding the above, there are legal systems where controlling structures can be applied *ex post*.

Considering the above, controlling structures have within its scope those situations where market power finds its origin in mergers, therefore it is also known as merger control.

As part of the substantive analysis that is performed on mergers, the negative effects that it may have (restrictive effects on the competition) are compared against its positive effects (efficiencies and cost savings) with the purpose of determining whether to authorize the notified operation, or not.

Chart N° 3
Types of corporate groups and their effects

	Horizontal	Vertical	Conglomerate
Possitive Effects	• Economies of scale in the production, input purchase or in the distribution for the new entity resulting from the merger.	• Cost reductions for the new entity resulting from the merger: Production costs; Transactions costs	• Use of similar technologies in the productive process. • Cost reductions in the distribution of complementary goods for the new entity resulting from the merger.
Negative Effects	• Unilateral effects : Generation or increase of the dominant position for the new entity resulting from the merger which may generate an increase on the prices or the capacity to handle the production. • Collusion effects : Reduction of the number of participating agents which may generate incentives for tacit collusion.	• The new entity resulting from the merger can hinder the access of competitors to vertically related markets or increase the access cost of rivals through: (i) the strategic control of inputs; or (ii) the creation of entry barriers.	• In rare cases, it is deemed that it may facilitate the practice of cross-subsidies or predatory practices on the side of the new entity resulting from the merger. • Reduction of the potential competition when the new entity resulting from the merger incorporates enterprises that where considered before as potential competitors.

Chapter 2

Legislative Development in Peru

The Peruvian competition law regulations include both controlling behaviors and controlling structures. This paper will only refer to the control of behaviors in Peru considering that controlling structures have quite limited scopes.

On this last point is noteworthy to mention that controlling structures in Peru do not cross-cut all economic activities, but one. Indeed, the control of structures is enforced by Law 26876, Antitrust and Anti-oligopoly Law of the Electricity Sector[39], and its regulations, Supreme Decree 017-98-ITINCI (applicable to all mergers of Peruvian companies holding concessions in power generation, transmission or distribution)[40], and Supreme Decree 087-2002-EF (applicable to all mergers of said companies that may result as a consequence of winning a bid of the private investment promotion process)[41]. The main difference between these regulations is the approval process to which the merger is subject to, being the latter case much shorter[42]. The merger control procedure in Peru is *ex ante,* meaning that it involves the evaluation and approval of the operations prior to its execution, on charges of lacking legal effect and the imposition of fines of considerable amount.

On the other hand, the control of behaviors in Peru is cross-cutting to all productive or commercial activities of the economy, by means of Legislative Decree 1034, Law on the Repression of Anti-competitive Conducts, in force as of July 24, 2008[43], and previously by Legislative Decree 701, Law on the Elimination of Monopolistic, Controlling and Restrictive Practices Affecting Free Competition[44].

39 Law published in El Peruano official gazette on November 19, 1997 and entered into force the next following day.

40 Regulation published in El Peruano official gazette on October 16, 1998 and entered into force the next following day.

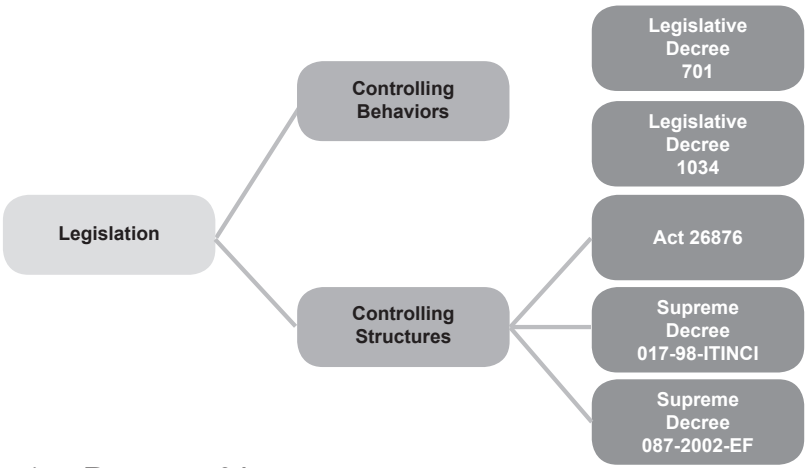
41 Regulation published in El Peruano official gazette on June 1, 2002 and entered into force the next following day.

42 Review a current version of the actual position on merger control in Peru in: DIEZ CANSECO, Luis; FALLA, Alejandro; QUINTANA, Eduardo & TÁVARA, José. (2012). "Mesa Redonda: Control de Fusiones y Concentraciones Empresariales en el Perú". In; Ius et Veritas. No. 44. Lima, Tarea Gráfica Educativa. For a comprehensive review of the existing literature on this subject see Appendix I, which includes a long list of papers on the subject.

43 Legislative Decree 1034 was published in El Peruano official gazette on June 25, 2008 and its fourth supplementary and final provision set forth that it would enter into force 30 days after its publication.

44 Legislative Decree 701 was published in El Peruano official gazette on November 07, 1991.

Graph N° 10
Legislative Development of the Regulations concerning Competition Law



2.1. Legislative Decree 701

Most of Indecopi's experience on this matter was gained during the enforcement of Legislative Decree 701, a regulation that was in effect and applied for approximately 15 years since Indecopi began its work back in 1993 until July 2008, date in which Legislative Decree 1034 took effect[45].

The validity of Legislative Decree 701 was conditional to the establishment of the National Commission of Free Competition which, according to the initial version of the regulation, was created as a stand-alone agency with technical and administrative autonomy and whose purpose was to ensure the compliance of said legislation. For this purpose, the Commission was empowered to make its own rules and that of its Technical Secretariat, which would then be approved by Supreme Decree. However, such entity was not created. It was necessary to found the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) for Legislative Decree 701 to become officially enforced.

Indeed, through Law Decree 25868 the Act on Organization and Functions of Indecopi[46] was enacted and, with this regulation the first amendment to Legislative Decree 701

45 Although Legislative Decree 701 was published in late 1991, it started to be effectively applied when Indecopi started to operate in 1993.
46 Published in *El Peruano* official gazette on November 24, 1992.

was enforced. This amendment was intended to repeal various provisions related to the National Commission of Free Competition[47], for its establishment and operation to remain as part of the organizational structure of Indecopi. Also other articles relating to the character and functions of the Commission (Article 8) were amended; likewise, its court of appeal became Indecopi's Court (Article 18). Thus, the enforcement of Legislative Decree 701 remained within the organizational structure of Indecopi[48].

The following amendment to Legislative Decree 701 was made by means of Legislative Decree 788[49]. This was the first substantial amendment to the law and it is important to delve into it. Legislative Decree 701, in its original version, not only contemplated a regime for prohibiting restrictive practices on the competition between economic agents under the modalities of agreements, concerted practices, decisions and recommendations (Article 6), but also an regime for authorizing such practices when certain conditions were met related to its effects and capability to generate benefits for consumers (Article 7). Particularly, it allowed for the authorization of practices restricting competition but which, at the same time, contribute to improving the production or trading of goods and services, or to promoting technical or economic progress, provided that it allows consumers to adequately participate of its advantages, it prevents the imposition of restrictions which are not indispensable to achieve the benefits, and not to substantially eliminate competition[50]. It should be noted,

47 The articles repealed were # 9, 11, 12 and 13.

48 It is noteworthy that shortly after Decree Law 25868 was passed, Legislative Decree 701 was further amended by Decree Law 26004, published in the official gazette *El Peruano* on December 27, 1992. This amendment was minor, including a paragraph in Article 23 stating that *"By Supreme Decree, with the approval of the Council of Ministers, any further sanctions and measures that the Commission may adopt in order to ensure the free competition shall be established."* This Decree was never passed.

49 Published in *El Peruano* official gazette on December 31, 1994.

50 *"Art. 7.- The Secretariat of the Multisectoral Commission of Free Competition may authorize agreements, decisions, recommendations, concerted practices or parallel actions referred to in Article 6 or categories thereof, in the following cases:*
a) When it contributes to improving the production or trade of goods and services, or to promoting technical or economic progress provided that it:
1) Allows consumers or users to adequately participate in its benefits;
2) Do not impose on the concerned individual or legal entity restrictions which are not indispensable to the attainment of those objectives and,
3) Do not allow the concerned individuals or legal entities to eliminate the competition of a substantial part of the goods or services covered.
b) When it has for purpose to protect or promote national export capacity, to the extent that it is consistent with the obligations arising from international treaties signed by Peru with other States, and in particular integration treaties, as provided in Articles 101 and 106 of the Constitution;
c) When it has for purpose to, in any transitory or temporary form, match the supply to the demand, when a sustained bearish trend appears on the market or when the excess of the productive capacity are clearly against the economy;
d) When it produces a significantly large improvement in the living standards of the economic sectors or geographical areas depressed; or for its small size, it is not capable of significantly affecting the competition; or have for purpose to cooperate towards the improvement of production, technology or similar".

moreover, that authorization applications were subject to positive administrative silence (Article 21). Through Legislative Decree 788, the authorization regime was repealed[51].

The second and more significant substantive amendment to Legislative Decree 701 was made by means of Legislative Decree 807[52]. This regulation introduced the following relevant changes:

- Two behaviors were eliminated which were classified as acts of abuse of dominant position[53].
- Two other behaviors also classified as abuse of dominant position were amended[54].
- Three behaviors classified as restrictive practices on the competition were modified.[55].
- Three new restrictive practices on the competition were added.
- The provision relating to the possibility of filing a criminal procedure in cases of violation to Legislative Decree 701 was amended, noting that the Provincial Prosecutor was solely responsible for filing a procedure after receiving a complaint forwarded by the Commission

51 Furthermore, Article 10 of Legislative Decree 701 which provided the requirements of holding a professional degree and not less than ten years of experience to be a member of the Commission was also repealed considering that such requirements became part of the general requirements for any member to a committee of Indecopi.

52 Published in *El Peruano* official gazette on April 18, 1996.

53 In particular, paragraphs d), and e) of Article 5 were repealed as these considered as abuse of dominant position the following behaviors:
"(…)
d) The application to the local sale of raw materials, whose selling prices are regulated on the basis of international prices, pricing systems, conditions of sale, delivery or financing involving the gain of higher sales values in the local market than the sales values obtainable in the export of these same materials.
e) The use of the terms granted by tax stability agreements entered into prior to the effective date hereof, in such way that it prevents other companies producing similar goods from having equitable competition opportunities both in the domestic market, and internationally"

54 Paragraphs a) and f) of Article 5 were amended. The two texts that were modified were:
"a) The unjustified refusal to meet the demands for the purchase of products from the local market.
(…)
f) Other cases with similar effect that are classified by Supreme Decree countersigned by the President of the Council of Ministers, and the Ministers of Economy and Finance, of Justice and of Industry, Domestic Trade, Tourism and Integration".

55 Paragraphs a), d) and g) of Article 6 were modified. The texts that were modified were:
"a) The unjustified agreement on prices or other market conditions.
(...)
d) The agreement on the quality of the products, when it does not correspond to national or international standards.
(...)
Other cases with similar effect that are classified by Supreme Decree countersigned by the President of the Council of Ministers, and the Ministers of Economy and Finance, of Justice and of Industry, Domestic Trade, Tourism and Integration."

when the violation was willfully committed causing serious consequences for the general economic interest.

- The possibility for offenders to apply for a liability waiver was introduced provided that they submit evidence to help identify and prove the existence of an illegal practice, and which are crucial to penalize those responsible.
- The possibility to impose penalty payments to ensure the compliance of the order was introduced by means of injunctions in case the offender is reluctant to comply with it.
- The scale of fines applicable to violators was substantially increased[56].

After the last modification described, Legislative Decree 701 has been enforced without any amendment for over ten years, although its interpretation was subject of substantial variations across the case law, as will be explained in later chapters. The following is the scope of Legislative Decree 701 considering its latest version after the changes introduced by Legislative Decree 807.

2.1.1. Purpose

Legislative Decree 701 indicated as its purpose is the development of the free private initiative seeking the best interest of consumers.

2.1.2. Subjective Scope

Individuals and legal entities, whether public or private, engaged in economic activities, as well as those individuals who manage or hold the legal representation of legal entities were considered as part of the subjective scope.

2.1.3. Objective Scope

Two categories of prohibited behaviors were considered as the objective scope of the law:

- Acts of abuse of dominant position, and
- Restrictive practices on the competition.

56 The scale of penalties existing prior to this amendment indicated up to 50 tax units (UIT) as the maximum penalty for the most serious offenses.

It should be noted that Legislative Decree 701 also contained a general statement indicating that those behaviors limiting the competition in such way *"…that generates an adverse effect against the general economic interest of the country"* (Article 3) are prohibited and will be penalized. Such general statement resulted to have a rather broad legal interpretation of the scope of Legislative Decree 701, as will be explained later on.

a. Acts of Abuse of dominant position

With respect to acts of abuse of dominant position, first, Legislative Decree 701 qualified dominant position as the capability of one or more undertakings to act independently regardless of the other participants in the market (competitors, buyers, clients or suppliers), by factors such as a significant share, supply and demand characteristics, technological development, competitors' access to funding sources and supply and distribution networks. This allowed for the possibility of a joint dominant position between two or more companies

Additionally, Legislative Decree 701 stated that an abuse of dominant position was committed when a dominant firm acted improperly in order to obtain benefits and cause harm to others, which would not have been possible otherwise[57]. Thus, to find a case of abuse of dominant position it should be established that, as a result of the practice, the dominant firm obtained a benefit and also caused damage to another market agent.

The acts of abuse of dominant position, as explicitly defined in the regulation (Article 5), were:

- The unjustified refusal to meet the demands for the purchase or acquisition, or the sales offer or delivery of products or services.
- Enforcing commercial relationships under unequal conditions for equivalent transactions that place some competitors in a disadvantageous position in face of others. Giving discounts and bonuses that correspond to generally accepted business practices which are granted or awarded under certain compensatory circumstances, such as advance payment, amount, volume or others and / or which are granted in general, in all cases where there are the same conditions do not constitute abuse of dominant position.

57 *"Article 5.- An abuse of dominant position happens when one or more companies that are in the situation described in the previous article and act improperly in order to obtain benefits and harm others, which have not been possible otherwise."*

- Subordinating the execution of contracts to the acceptance of supplementary obligations which, by its nature or according to commercial usage, have no connection with the purpose of such contracts.
- Other similar cases.

b. Restrictive Practices on the Competition

With regards to restrictive practices on the competition, Legislative Decree 701 observed that it may be done through agreements, concerted practices, decisions and recommendations, without specifying if these were behaviors involving competitors or companies operating at different levels of the supply or trading chain. The behaviors specifically classified as restrictive practices on the competition are the following (Article 6):

- Competitors agreeing directly or indirectly on fixing prices, or other trade or service conditions.
- Dividing up the market share or the sources of supply.
- Distribution of production quotas.
- Agreeing on the products' quality when it does not correspond to national or international standards, and it adversely affects the consumer.
- Enforcing commercial relationships under unequal conditions for equivalent transactions that place some competitors in a disadvantageous position in face of others. A practice is not restrictive on the free competition when discounts and bonuses are given pursuant to generally accepted business practices, when these are granted or awarded under certain compensatory circumstances, such as advance payment, amount, volume or others and / or which are granted in general, in all cases where there are the same conditions.
- Subordinating the execution of contracts to the acceptance of supplementary obligations which, by its nature or according to commercial usage, have no connection with the purpose of such contracts.
- The concerted and unjustified refusal to meet the demands for the purchase or acquisition, or the sales offer or delivery of products or services.
- The concerted limitation or control of production, distribution, technical development or investment.
- The establishment, agreement or coordination of offers or refraining from bidding in tenders, bids, auctions or public auctions.
- Other similar cases.

2.1.4. Procedure

The procedure's definition in Legislative Decree 701 is relatively scarce. Based on the logic of a procedure already initiated, either by order *ex officio* or at the request of one of the parties, a term of 15 days for disclaimers used to be established, after which a testing period of 30 days was scheduled, then the Secretariat Technical issued an opinion that was submitted to the Commission without stating a specific deadline; and, finally concludes with the first instance decision that should be issued within five days of receipt of such opinion.

The proceedings in the second instance began with the appeal. A 15-day notification was granted, as of the decision of first instance. The ruling of the second instance should be issued within the next 30 days following the appeal.

2.1.5. Penalty Regime

The only sanctions provided for in Legislative Decree 701 were fines. Offenses were classified as minor, serious and very serious for the purpose of determining the fine to be imposed. The minor or serious violations could result in fines of up to 1,000 UIT, provided that they do not exceed 10% of the sales or gross income earned in the year prior to the resolution imposing the fine. In very serious offense cases, the fine could be higher than 1,000 UIT, provided that they do not exceed 10% of the sales or gross income earned in the year prior to the resolution imposing the fine.

Additionally, the possibility of imposing fines of up to 100 UIT to each legal representative or members of the governing bodies of the offender was also contemplated according to their liability in the offenses committed.

Finally, different scoring criteria to grade the severity of the offenses related to the scope of the breach and the effects produced were also considered.

2.1.6. Other relevant aspects

Among other relevant aspects of the regulations, it should be noted that the power of issuing injunctions at any stage of the process was foreseen, and for doing so the application should be settled within a period not exceeding 10 days. The measures could constitute an injunction for halting, or the imposition of certain conditions to prevent damage.

Also the possibility of offenders filing a commitment to stop doing the acts under investigation within a period of 30 days, foreseen for rebuttals, was considered. Such commitment was to be evaluated by the Secretariat and, if appropriate, a proposal was made to the Commission to accept it.

Finally, an option for any of the offenders to submit a request for liability waiver was foreseen. Offenders had to provide evidence to help identify and substantiate the existence of an illegal practice. If the evidence was crucial to impose a sanction, the Commission could accept such request.

2.2. Legislative Decree 1034

Legislative Decree 1034 was the natural evolution of the regulatory framework after more than a decade of enforcing the controlling behavior regulation. Aspects that were not expressly defined before were defined, and the absence of certain regulations identified were completed[58].

2.2.1. Purpose

Legislative Decree 1034 is more accurate in setting forth its purpose which is to promote economic efficiency in markets for the sake of consumers.

2.2.2. Subjective Scope

This regulation defines with more detail the agents subject to investigation and penalties, noting that it applies to individuals or legal entities, irregular corporations, standalone equities or other public or private, governmental or non-governmental, for-profit or non-for-profit entities that offer or demand goods or services or whose partners, affiliates, unionized or members conduct such activity.

58 Read comments relating the scope, interpretation and convenience of issuing Legislative Decree 1034, in: PATRÓN, Carlos. (2008). "Aciertos, divergencias y desatinos de la nueva Ley de Represión de Conductas Anticompetitivas". In: *Ius et Veritas.* No. 36. Lima, Tarea Gráfica Educativa, pp. 122-144. QUINTANA, Eduardo. (2011a). "El objetivo de la ley de competencia peruana y la interpretación de las conductas prohibidas". In: *Revista de la Competencia y la Propiedad Intelectual.* No. 13. Lima, Indecopi, pp. 19-59. RUIZ, Gonzalo. (2011). "La nueva Ley de Represión de Conductas Anticompetitivas: acotando la discrecionalidad de la autoridad de competencia". In: *Revista de la Competencia y la Propiedad Intelectual.* No. 13. Lima, Indecopi, pp. 163-182.

59 *"Art. 10.- Abuse of dominant position*

Furthermore, individuals conducting, managing or representing the legal subjects mentioned above are also subject to the regulation, to the extent that they have participated in the planning, implementation or execution of the offense.

Finally, the regulation provides that individuals acting on behalf of such holders of rights are liable for their actions, even if they do not have civil representation conditions.

2.2.3 Objective Scope

In the case of Legislative Decree 1034, three categories of prohibited behaviors are considered: (i) acts of abuse of dominant position; (ii) horizontal cartel behaviors (agreements, pacts and recommendations among competitors); and (iii) vertical cartel behaviors among different agents of the production or commercialization chain.

a. Acts of Abuse of Dominant Position

Regarding the abuse of dominant position, Legislative Decree 1034 establishes how to delimit the relevant market, which was not foreseen in Legislative Decree 701. In that regard, Legislative Decree 1034 states that the relevant market is formed by the product market and the geographic market. Furthermore, it defines product market as a good or service subject of the behavior investigated and its substitutes, noting the factors to be evaluated in the substitution level. As well, the regulation defines geographic market as the group of geographical zones where alternative sources of supply of the relevant product are located, and notes the aspects to be considered to determine the alternatives of supply.

Regarding the dominant position, Legislative Decree 1034 estates that this position may only be individual (setting aside the possibility of a joint or collective dominant position accepted in Legislative Decree 701), and qualifies it as the possibility to substantially restrict, affect or distort conditions of supply and demand, without the other market participants (competitors, suppliers or customers) to counteract said possibility, due to the same factors foreseen in Legislative Decree 701, but adding as well, the existence of barriers to legal, economic or strategic access and the power of negotiation of suppliers, customers or competitors.

In Legislative Decree 1034 the definition of abuse of dominant position is more developed than in Legislative Decree 701, because it states that it is produced when an economic agent, having a relevant dominant position, uses this position to unlawfully restrict competition,

obtaining benefits and harming real or potential, direct or indirect competitors, that would not have the ability to hold that position. Additionally, the regulation states that if the exercise of a dominant position does not affect real or potential competitors, it is not abuse of dominant position[59].

As for prohibited behaviors, the regulation typifies a broader list of acts of a dominant position (number 10.2 of art. 10):

- Unjustified refusal to meet purchase or acquisition demands, or accept offers to sell or supply goods or services.
- Application in commercial relations of unequal conditions for equivalent services that place some competitors in an unfavorable situation among other competitors. It does not constitute abuse of dominant position the granting of discounts and bonuses that correspond to generally accepted commercial practices, which are granted or awarded for specific compensations circumstances, such as advance payments, amount, volume and/or others to be concluded in general in all cases where there are unequal conditions.
- The subordination of the execution of agreements when accepting supplementary services, that due to their nature or according to commercial practices is not in relation with the object of such contracts.
- Unreasonably impede a competitor from entering or remaining in an association or organization of intermediation.
- Establish, impose or suggest distribution or exclusive sales agreement, non-compete clauses or similar, that are unjustified.
- Use in an abusive and repeated way legal processes or administrative proceedings to restrict competition.
- Incite third parties not to supply goods or services, or accept them.

Finally, Legislative Decree 1034 as well contains a general prohibition of acts of abuse of dominant position, stating that they are the behaviors which prevent or hinder the access

10.1. There is abuse when an economic agent, having a dominant position in the relevant market, uses this position to unlawfully restrict competition, obtaining benefits and damaging real or potential, direct or indirect competitors, which would have been impossible to hold that position. (…)
10.5. It does not constitute abuse of dominant position the exercise of said position if it does not affect real or potential competitors".

60 Arguments to the bill of law of the Legislative Decree approving the Law on Suppression of Anticompetitive

or permanence of current or potential competitors in the market for reasons different from a greater economic efficiency.

It is important to note that at the beginning of the list of acts of abuse of dominant position expressly typified, the regulation states that they are exclusionary behaviors (number 10.2). In addition to the abovementioned, it also specifies that the exercise of said position is not a case of abuse of dominant position, if it does not affect real or potential competitors. On this basis, acts of exploitative abuse, as explained on the previous chapter, are not qualified as abuse of dominant position under Legislative Decree 1034, as they do not affect real or potential competitors.

In a subsequent chapter the interpretation of Indecopi about exploitative abuses will be explained. Suffice it to add at this point that the presentation of motives elaborated by Indecopi to support the bill of law that led to Legislative Decree 1034 states that the regulation aimed to rule out the possibility to be applied to acts of exploitative abuse[60].

b. Horizontal Cartel Behaviors

Legislative Decree 1034 defines horizontal cartel behaviors as the agreements, concerted practices, decisions and recommendations carried out between competitive economic agents that have the object or effect of restricting, hindering or distorting free competition.

Behaviors expressly typified as horizontal cartel behaviors are: (number 11.1 of art. 11):

- Direct or indirect concerted price fixing or other commercial or service conditions
- Concerted limitation or control of production, sales, technical development or investments.
- Concerted distribution of customers, suppliers or geographical areas.

Behavior. In effect, Indecopi stated that was looking to "*... clarify the regulation in the sense that it is established that alleged exploitative behaviors are not considered violations of competition rules, discharging the possibility of different interpretations of meaning*." Also, Indecopi stated that: "*the nature of the abusive behavior of a dominant position has been specified, noting that are those behaviors the ones that affect the competitive process by restricting competition, hence that harmed agents are real or potential competitors, direct or indirect. Therefore, any abusive behavior of a dominant position, in accordance with the provisions of the Project, shall have exclusionary effect. Identifying acts of abuse of dominant position with the effect of excluding competitors is directly related to the purpose of the project contained in Article 1, that is, the prohibition of behaviors that harm the competitive process and, therefore, economic efficiency* ".

61 Regarding the abuse of dominant position in the form of unjustified refusal to deal, the following may be seen

- Agreeing on products quality, when they do not correspond to national or international standards or adversely affect the consumers.
- Concerted application in commercial relations of unequal conditions for equivalent services that place some competitors in an unfavorable situation among other competitors.
- Concert unjustifiably the subordination of the execution of agreements when accepting supplementary services that due to their nature or according to commercial practices are not in relation with the object of such contracts.
- Unjustified and concerted refusal to meet demands for the purchase or acquisition, or accept offers to sell or supply goods or services.
- Concert unjustifiably distribution or exclusive selling.
- Concert or coordinate bids, positions or proposals or refrain from bidding or tendering in public or private or other forms of public procurement or acquisition under the relevant legislation and in public auctions and auctions.

Finally, Legislative Decree 1034 as well contains a general prohibition of horizontal cartel behaviors, stating that they are those behaviors of equivalent effects that seek to obtain benefits for reasons different from a greater economic efficiency (paragraph k).

c. Vertical Cartel Behaviors

Legislative Decree 1034 defines vertical cartel behaviors as the agreements, concerted practices, decisions and recommendations carried out between different economic agents that operate in different stages of the production, distribution or commercialization chain, that have the object or effect of restricting, hindering or distorting free competition.

Regarding the behavior qualified as vertical cartel behaviors, the regulation states that they can be carried out through any of the suppositions typified as cases of abuse of dominant position or horizontal cartel behaviors. Finally, there is only vertical cartel behavior if at least one of the involved parties has a dominant position in the relevant market before the prohibited behavior was carried out. (art. 12).

2.2.4. Criteria to analyze prohibited behaviors

Legislative Decree 1034 considers two criteria for analyzing prohibited behaviors, unlike Legislative Decree 701, which does not consider any specifically. These criteria are relative prohibition and absolute prohibition.

a. Relative Prohibition

To determine the occurrence of an unlawful behavior subject to this criterion, the authority shall demonstrate (i) the existence of the behavior, and (ii) that it has or may have negative effects on competition and consumer welfare. In accordance with the presentation of motives elaborated by Indecopi to support the bill of law that led to Legislative Decree 1034, the application of relative prohibition is:

> *"Comparative legislation, in broad consensus, grants those behaviors that may have both negative and positive effects, a presumption of legality, and thus a treatment of relative prohibition, or what is the same, the analysis under the rule of reason. In a similar sense, the bill of law establishes a relative prohibition to particular behaviors. As abovementioned, this type of analysis requires the authority to evaluate what is the net effect of the behavior and, only in the case where this effect is negative – because positive effects are less than negative effects – the behavior shall be considered as an infringement".*

This is the general rule of analysis under Legislative Decree 1034, because it applies all the acts of abuse of dominant position and vertical cartel behaviors, as well as most of horizontal cartel behaviors.

b. Absolute Prohibition

To determine the occurrence of an unlawful behavior subject to this criterion, the authority shall only demonstrate the existence of the behavior, without evaluating its effects in the market. It is worth mentioning that the effects of the unlawful behavior are only evaluated once it was demonstrated that said behavior existed and in order to grade the severity of it and the applicable sanction.

This is an exceptional rule of analysis under Legislative Decree 1034, applicable only to four types of agreement among competitors (number 11.2 of art. 11):

- Price fixing or other commercial or service conditions.
- Limit production or sales, particularly through quotas.

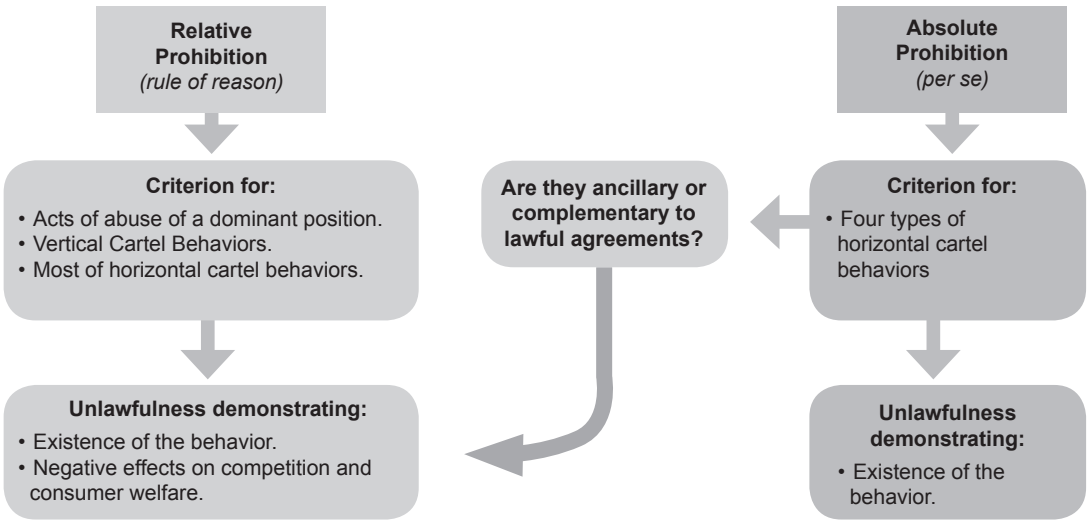
- Distribution of customers, suppliers or geographical areas.
- Establish positions or abstentions in bids, tenders or other form of public procurement or acquisition under the relevant legislation and in public auctions and auctions.

Additionally, it should be stated that when establishing horizontal cartel behaviors subject to absolute prohibition, Legislative Decree 1034 states that it is about those *"inter-brand horizontal agreements which are not complementary or ancillary to other lawful agreements"* and which are aimed at one of the four types of agreements previously stated.

The abovementioned indicates that the four types of inter-brand horizontal agreements listed may have the complementary or ancillary character to other lawful agreements, in which case they would no longer be under absolute prohibition. Thus, the agreements that are usually absolute prohibitions may stop having this qualification and may have to be evaluated in accordance with the relative prohibition criterion.

For this, it shall be relevant to define when an agreement is ancillary to another lawful agreement. Legislative Decree 1034 does not establish this, so it may have to be outlined through jurisprudence and could take as reference a declaration issued by Indecopi under Legislative Decree 701, which will be explained in a subsequent chapter.

Graph N° 11
Relative Prohibition and Absolute Prohibition



2.2.5. Proceedings:

The proceeding in Legislative Decree 1034 is far more developed than in Legislative Decree 701 in different relevant aspects.

First, it considers that once a complaint is filed, there is a 45 day term for proceedings prior to its admission, in which merits of the complaint are evaluated. If the Technical Secretariat considers that there is merit, it issues a resolution initiating the proceeding, presents it to the Commission and notifies the investigated party within five days. After that, there is a 30 day term for discharges and the eventual presentation of third parties. After this deadline, the stage of proofs starts, which lasts seven months.

Once this stage is completed, the Secretariat has 30 days to issue a technical report analyzing the infringing conduct and recommending to the Defense of Free Competition and Protection Commission to declare grounded or not the complaint and, if applicable, any appropriate measures. Subsequently, the parties may submit their allegations on the report of the Secretariat within 15 days and may also speak to the Commission. As an exception, the Commission may conduct evidentiary proceedings within 30 days, after which there is a possibility for the parties to present their allegation within the following 15 days. Finally, the Commission has 30 days to issue the final resolution in the first instance.

The first instance resolution shall be notified to the parties within 10 days of issuance and they have 15 days to appeal. The processing in the second instance should not exceed 120 days.

2.2.6. Sanctions Regime

The Sanctions Regime of Legislative Decree 1034 has a more precise order than the stated in Legislative Decree 701 and modifies the maximum amount of fines, based on the severity of the infringement

The sanctions regime has the following structure:

- Minor infringement of up to 500 UIT, provided that it does not exceed 8% of the sales or gross income of the previous year per offender or economic group.
- Serious infringement of up to 1.000 UIT provided that it does not exceed 10% of the sales or gross income of the previous year.

- Very serious infringement, which has a fine exceeding 1.000 UIT, provided that it does not exceed 12% of the sales or gross income of the previous year.

In the case of professional associations or unions or economic agents that have started their activities after January 01 of the previous year, the fine shall not exceed, in any case, 1.000 UIT.
The regulation as well provides the possibility to impose fines of up to 100 UIT to each legal representative or member of the governing or administrative bodies of infringing companies, as to determine their liability on the infringements committed.

Legislative Decree 1034 also sets the criteria to grade the severity of the infringements, largely related to the scope of the infringement and the effects produced (as happened with Legislative Decree 701, but adding others, as unlawful benefits expected by the offender, the probability of detecting the infringement and the procedural conduct of the offenders.

Finally, it contemplates as novelty the faculty to impose coercive fines in case of breach of injunctions and/or corrective measures, which were imposed.

2.2.7. Corrective Measures

Other new aspect in Legislative Decree 1034 is that it expressly establishes measures that can be used to reestablish the competitive process, including:

- Cease or fulfillment of activities.
- Obligation to hire, even under certain conditions.
- Unenforceability of anti-competitive clauses or provisions of legal acts.
- Access to an association or organization of intermediation.

2.2.8. Other relevant aspects

Legislative Decree 1034 also includes the power to impose injunctions at any stage of the proceedings, which shall be resolved within 30 days, extendable for a similar term. It is noted that those measures may be innovative or non-innovative, generic or specific, and may consist particularly in the cessation order, the obligation to hire, the imposition of conditions, suspension of legal acts and the application of positive behaviors.

Regarding the commitment to cease acts under investigation, it is noted that it may be presented within 45 days of the notification of the imputation of charges and that the Secretariat evaluates it, provided that it fulfills with the following: (i) all or part of the agents investigated shall recognize all or some of the charges filed; (ii) it shall be credible that the conduct has not caused any serious impairment to the consumers welfare; (iii) those under investigation shall offer corrective measures that allow the verification of the injunction and guarantee no recurrence. The Secretariat proposes the suspension to the Commission.

Finally, it also contemplated the possibility of filling an application for exemption from liability, which shall provide evidence to help identify and accredit the existence of an unlawful practice. If evidence is decisive, the Commission may accept. A new and important aspect is that only the first to achieve to accept the scheme will benefit from the exemption from liability, while the following are only eligible for a reduction of the fine.

As noted, the development of substantial and procedural aspects of Competition Law is more comprehensive in Legislative Decree 1034 than it was in Legislative Decree 701. As well, current regulation states different aspects than in the previous regulation, which are not expressly defined.

The following summary chart compares the mentioned aspects (see Chart No. 4):

Chart N° 4
Comparative chart between Legislative Decree 701 and Legislative Decree 1034

	Legislative Decree 701	Legislative Decree 1034
Objective	• Free private initiative to develop in the best interest of consumers.	• Promote economic efficiency in market for the best interest of consumers.
Subjective scope	• Public or private agents carrying out an economic activity. • People who manage or represent legal entities.	• Companies, independent patrimonies or other public or private, profit or nonprofit entities, which offer or demand services or goods in the market, or whose associates or members do. • People, who direct, manage or represent the aforementioned.
Objective scope	• Abuse of dominant position. • Restrictive competition practices.	• Abuse of dominant position. • Horizontal Cartel Behaviors. • Vertical Cartel Behaviors. • Out of the scope of behaviors as consequence of the stated in any legal regulation.

	Legislative Decree 701	Legislative Decree 1034
Dominant position	• One or more companies acting independently without competitor, buyers, customers or suppliers.	• A company with the possibility to substantially restrict, affect, or distort the condition of supply or demand, without competitors, suppliers or customers to counterattack this possibility.
Criteria of analysis	• Not foreseen.	• Relative prohibition as general rule. • Absolute prohibition as exceptional rule in limited assumptions. • Agreements ancillary to principal legal agreements, as exception to the exceptional rule.
Proceedings	• Only reference to terms of mayor acts in first and second instance.	Development of the procedure with most of procedural acts defined and with express terms, mainly in first instance.
Sanctions	• Minor or serious infringement of up to 1.000 UIT, without exceeding 10% of the income of the offender. • Very serious infringement of up to 1.000 UIT, without exceeding 10% of the income of the offender.	• Minor infringement of up to 500 UIT, without exceeding 8% of the income of the offender or economic group. • Serious infringement of up to 1.000 UIT, without exceeding 10% of incomes. • Very serious infringement more than 1.000 UIT, without exceeding 12% of incomes. • Coercive fines.
Corrective Measures	• It is not foreseen	• Different modalities are foreseen.
Injunctions	• At any stage and within 10 days to make a decision.	• At any stage and within 30 days to make a decision, extendable for other 30 days.
Injunction commitment	• Within 30 days after discharges, prior evaluation of the Secretariat with specifying the aspects to be considered.	• Within 45 days of notifying the imputation of charges. Evaluation of the Secretariat with several conditions to be followed.
Exemption from liability	• May be accepted if evidence is decisive.	• May be accepted if evidence is decisive. • Only the first to achieve it will benefit from the exemption, the following may get a reduction of the fine.
Prescription of infringements	• 5 years after de infringement was committed.	• 5 years after the last infringing conduct was executed.

2.3. Indecopi's decision making bodies

Indecopi's bodies in charge of applying the regulations for the defense of competition and protection are the following:

2.3.1. First Instance

The Defense of Free Competition Commission (hereinafter referred to as Commission) is the first instance for decision making for both the application of control behaviors and structures as well as for issuing injunctions within or outside the administrative proceeding.

2.3.2. Second Instance

The Specialized Defense of Competition Chamber of the Tribunal of Indecopi (hereinafter referred to Tribunal) is the second administrative instance to review the decisions of the Commission, either on substantive, procedural or preventive matters. Additionally, it is also an instance to review resolutions issued by the Technical Secretariat at the beginning of the administrative sanctioning proceeding, as explained below.

2.3.3. Instructive Body

The Technical Secretariat of the Commission (hereinafter referred to as Technical Secretariat) has the functions of an instructive body and is responsible for the investigation of anticompetitive conducts themselves, and as well evaluates business concentration in the electrical sector that are notified for prior authorization; in both cases, either upon application or ex-officio. Pursuant to current law, the Secretariat is responsible for initiating the administrative sanctioning proceeding to control behaviors through a resolution of imputation of charges against economic agents under investigation.

Graph N° 12
Indecopi's decision making bodies

As every administrative decision, final resolutions of the Specialized Defense of Competition Chamber of Indecopi may be contested to the Judiciary through a contentious administrative proceeding.

Chapter 3

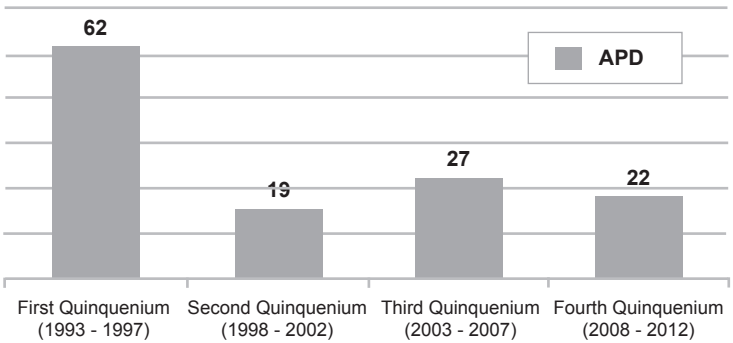
Jurisprudence and Indecopi Contributions

3.1. Abuse of dominant Position

The investigation of acts of abuse of dominant position has occupied considerable part of Indecopi's labor. As general principle, these actions started at the initiative of competitors, customers or associations representing customer. Complaints for abuse of dominant position have been filed against private or public companies, as well as against intermediary organizations.

In the following graph (see Graph N° 13) the evolution of the number of proceedings initiated for abuse of dominant position is shown.

Graph N° 13
Number of proceedings initiated for abuse of dominant position



Source: Technical Secretariat

Below is a selection of cases that make it possible to review the experience of Indecopi and identify the interpretative criteria and evolution in the treatment of various forms of abuse of dominant position. The level of development and explanation of selected cases varies according to their significance and/or more relevance.

3.1.1 Unjustified Refusal to deal[61]

From the beginning, Indecopi has known and resolved a number of considerable cases of abuse of dominant position in the form of unjustified refusal to deal. Typically, these proceedings are solved at the initiative of either party, and, certainly, this type of abuse of dominant position has arisen most cases in Indecopi, in comparison with the proceedings initiated to investigate the other types of abuse.

Existing jurisprudence related to the prohibition of unjustified refusal to deal shows that companies with a dominant position that hold the right to freely decide who to hire, when not to hire (this is to say, when they refuse to deal with a specific economic agent) shall have an objective and reasonable justification to sufficiently explain the reasons for their decision. This is due to the reason that the refusal to deal by a dominant economic agent may prevent competitors from entering the market or hinder their permanence in it.

Thus, for example, the refusal to sell indispensable supplies produced or offered by a dominant company may cause the retirement of one or more competitors from a related market. Likewise, the refusal to access an intermediary organization – controlled by a dominant entity- which is the necessary channel to reach buyers or consumers, may determine that a competitor may not access the market. The cases described below show situations like these and explain the method that Indecopi has followed in order to analyze them.

Jurisprudence described shows that the typical elements to identify the abuse of dominant position in the form of unjustified refusal to deal are:

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in: BULLARD, Alfredo. (2003b). "El Regreso del Jedi (o de la Discrecionalidad en la Aplicación de las Normas de Libre Competencia)" *(the Return of the Jedi [or of the Discretionality in the Application of Free Competition Regulations])* . In: *Themis.* No. 47. Lima, pp. 129-158. DIEZ CANSECO, Luis. (2012). "Teoría del Cuello de Botella: Las Facilidades Esenciales" (*"Bottleneck Theory: Essential Facilities"*). In: *Themis.* No. 61. Lima, pp. 65-93. FALLA, Alejandro. (2004). "Facilidades Esenciales y Negativa Injustificada a Negociar" (*"Essential Facilities and Unjustified Refusal to Negotiate"*). In: *Themis*. La Evolución de la Libre Competencia en el Perú.(*The Evolution of Free Competition in Peru*) Lima, *Themis*, pp. 69-76. HARO, José Juan. (2005). "Contra los excesos de la regulación económica. Sobre monopolios naturales, instalaciones esenciales y otros fantasmas"(*"Against economic regulation excess. Natural monopoly, essential installations and other ghosts"*) In: *Themis*. No. 50. Lima, pp. 151-167. HIGA, César and CIGÜEÑAS, Francisco. (2011). "Las Negativa Injustificada a Contratar: Aplicación y Límites de la Legislación de Defensa de la Libre Competencia" ("*Unjustified refusal to hire: application and limits of the legislation of Free Competition Defense"*). In: *Revista de Derecho Administrativo.* No. 10. Lima, Tarea Asociación Gráfica Educativa, pp. 95-99. KRESALJA, Baldo and QUINTANA, Eduardo. (2005). "La doctrina de las facilidades esenciales y su recepción en el Perú"(*"The doctrine of essential facilities and it reception in Peru"*). In: *Ius et Veritas.* No. 31. Lima, Tarea Gráfica Educativa, pp. 59-89. QUINTANA, Eduardo y VILLARÁN, Lucía. (2008). Op. Cit., pp. 317-326.

62 Resolution 002-99-INDECOPI/CLC, dated March 19, 1999. Confirmed in all particulars by Resolution

- Dominant position in a relevant market.
- Existence of the refusal to deal showed through express manifestation of will or delaying or similar responses.
- Unjustified character of the refusal, considering reasonable and objective reasons that may be duly proved.
- Exclusionary effect of competition.

Regarding the justification for the refusal, jurisprudence shows that it may respond to technical (for example, security reasons or impossibility of additional production), legal (due to regulations demanding refusal to meet some orders in certain circumstances), contractual reasons (for example, when previous commitments entered with third parties cover all the available offer), among others.

As shall be seen, cases of unjustified refusal to deal have generated discussion on whether or not there is need of competition, direct or indirect (through related companies) between the dominant company and competitors harmed by the refusal is a necessity. As well, it has led to the evaluation on when the good offered by the dominant company may be qualified as essential facility for competitors.

Chart N° 5
Abuse of dominant Position
Cases of Unjustified Refusal to deal

CASES OF UNJUSTIFIED REFUSAL TO DEAL	Bergerman and Barbosa v. Asociación de Productores Agrícolas del Mercado de Santa Anita (1999)
	Cab Cable SA. v. Electrocentro SA. (2002)
	Aero Continente SA. v. Banco de Crédito del Perú (2002)
	Ferrocarril Santuario Inca Machupicchu SAC. (FERSIMSAC) v. Ferrocarril Transandino SA. (FETRANS) (2007)
	Compañía Cervecera Ambev Perú SAC. (Ambev) v. Unión de Cervecerías Peruanas Backus y Johnston SAA. (Backus), the Comité de Fabricantes de Cervezas de la Sociedad Nacional de Industrias (CFC), and others (2009).

a. Bergerman and Barbosa v. Asociación de Productores Agrícolas del Mercado de Santa Anita (1999)

The first case that is interesting to explain is the one corresponding to the complaint filed by Mr. Roberto Bergerman Acosta and Mr. Walter Barbosa Mendoza v. Asociación de Productores Agrícolas del Mercado de Santa Anita, for unjustified refusal to access of Extra Super Rice under Molino del Rey brand – commercialized by the plaintiffs – to market of Santa Anita, administrated by the aforementioned Association[62].

Some days prior to the complaint, two trucks carrying Molino del Rey rice were prevented from accessing the market of Santa Anita, although they had all documentation in order for their access and having already paid their entrance fee. As demonstrated by the facts and evidence, the refusal to access was due to the order of the administration of the market. After the corresponding preliminary analysis and at the request of the plaintiffs, the Free Competition Commission ordered as injunction that the Association and its governing bodies allow the access of vehicles carrying Molino Rojo rice to the market of Santa Anita, as well as free commercialization of that product in said market.

In the evaluation of the case, the Commission considered that the Association has a dominant position in the relevant market defined as supplies centers where rice was commercialized at wholesale level in the city of Lima. Furthermore, it found that the access of trucks with Molino del Rey rice were prevented without justification, and that instead of explaining the reasons for preventing the entrance of trucks, the Association only denied having ordering the refusal to access and it was irrefutably demonstrated in the proceeding that such order was given, without evidence of an objective reason to justify it.

Finally, the Commission concluded that such behavior had restricted competition in the sale of rice of different brands in the market of Santa Anita. Consequently, it penalized the Association with 10 UIT and ordered not to restrict the access of Molino Rojo rice to the market.

In this case, the Association, as administrator of the market of Santa Anita, was considered as an entity with a dominant position that incurred into an unjustified refusal to deal by ordering not to allow the access of trucks with the product of the plaintiffs. In this case, the

0216-1999-TDC-INDECOPI, dated June 16, 1999.

63 It is worth mentioning in the Resolution the Commission stated that the refusal had occurred under "suspicious

Association, as itself, was not competing with any the plaintiffs but however it was considered that it has restricted competition in the sale of rice of different brands inside the market of Santa Anita. Besides, it was not demonstrated that the Association would have prevented the access of trucks in agreement with rice traders who could be benefited with the plaintiffs' rice unavailability for sale[63].

b. Cab Cable S.A. v. Electrocentro SA. (2002)

In this case, the behavior denounced by Cab Cable was an unjustified refusal to lease power poles for the installation of cables to transmit television signals. In January 1998, Cab Cable, concessionaire of cable television service in the city of Huancayo, acquired part of the infrastructure that Cable Visión Huancayo S.A. had been using to render that service in the aforementioned city. The latter company had entered a lease agreement on poles for laying cable networks with Electrocentro, the power concessionaire.

When Cab Cable informed Electrocentro that it had acquired the assets of Cable Visión Huancayo S.A. and requested the execution of a new lease agreement on poles to include an expansion to other poles, Electrocentro communicated it the impossibility to execute the agreement due to *"the current circumstances and requirements of the Standards of Quality of Electrical Services, due to the reason that our distribution equipment was not the appropriate to render that type of collateral services"*. In this light, Cab Cable offered Electrocentro to purchase an insurance to cover any possible accidents for using its poles, and give a letter of guarantee to cover any eventual monetary compensation that Electrocentro may have to pay to affected users due to problems with power shortage. Nevertheless, Eletrocentro did not accept these offers in order to execute an agreement.

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circumstances". This is because the impediment of trucks to access the market coincided with a complaint for violation of intellectual property rights raised by one of the plaintiffs against a rice seller of the market of Santa Anita which, in turn, was a member of the Association. In that complaint, Mr. Bergerman denounced the owner of company CODIREY EIRL for misuse of the distinctive sign of his property – use of the design and distinctive colors of Molino del Rey- on the package of rice CODIREY. This complaint was the reason to order as injunction the cease of the misuse of the distinctive sign and the immobilization of product Arroz Grano Esmeralda of CODIREY EIRL company. The complaint argued that the refusal of access of trucks with rice Molino del Rey to the market of Santa Anita would have been prompted by a letter from a member of the Association to the President of the latter, Mr. Romulo Rodriguez, requesting to refuse the access to the market of Molino del Rey rice because due to the complaint filed for r violation of distinctive signs. However, there was no evidence to prove such claims, but only the existence of disciplinary proceedings for violation of intellectual property rights.

64 Resolution 011-2000-INDECOPI/CLC, dated October 09, 2000.

The abovementioned facts led Cab Cable to file a complaint against Electrocentro for unjustified refusal to deal. To that end, it stated that the impossibility to access Electrocentro poles prevented it from operating in the market, which was not only harming Cab Cable but also users of cable television service in the city of Huancayo, who were impeded from having an alternative service, different from the offered by Cable Mágico. Additionally, Cab Cable presented as evidence of the absence of support of the refusal, that in August 1998 Electrocentro entered a lease agreement on poles with Telecable Pichanaki S.R.L., concessionaire of cable television, for the area of Pichanaki Vally. In the clauses of this agreement, it is stated that the concessionaire of cable television shall assume full responsibility in case of accidents of users of electrical service supply and staff of Electrocentro during installation, maintenance and service operations.

Electrocentro suggested for its defense that the decision to suspend the lease of poles was due to the reason that during the lease term, its maintenance and repair operations were hampered by cable installations, thus power shortages were longer, making it difficult to comply with the Standards of Quality of Electrical Services that establish the minimum quality of electrical services that power companies are obliged to render. In addition to the abovementioned, it was also noted that its refusal was because it was in the middle of a process of privatization, thus, it had express order not to accept any contractual obligations beyond 1998.

As well, Electrocentro declared that the refusal to hire did not cause any economic harm to the plaintiff because, according to the agreement entered with Cable Visión Huancayo S.A., Cab Cable shall receive three times the initial amount of the compensation stated in the agreement if Electrocentro does not enter a new lease agreement on poles. As for the agreement with Telecable Pichanaki, it specified that those poles were made of cement and not wood, and were found in good conditions, while the ones requested by Cab Cable were 15 year old and were not tall enough for installing additional cables.

Finally, Electrocentro declared that its refusal did not restrict competition in its favor, because rendering cable television services was not part of its business, and besides, it could not be accused of trying to benefit Telefónica del Perú, because there was no reason for doing that.

The Commission explained the scope of the refusal to deal and to what extent a company with a dominant position may justify its decision to refusal to hire. It pointed out that in cases of unjustified refusal to deal, *"the existence of competition between the company carrying out*

that practice and the company that is being affected by competition is assumed in both cases". As well, it also explained that:

> *"In general, competition regulations do not oblige companies to cooperate with their competitors, even in cases where a company is in a dominant position. (…) For example, a producer may justify the refusal to sell his/her product due to very simple economic reasons, such as, failure to comply with some agreements related to the sale (quality, terms, etc.), failure to pay or the violation of intellectual property rights by the consumer of the good".*

Notwithstanding the aforementioned, the Commission suggested that there may be cases of refusal where there is no competition between the dominant and the company concerned, calling them as "arbitrary refusal". In this regard, the following was noted:

> *"(…) this Commission considers that the practices of refusal to deal or negotiate, which do not involve competition between the parties, may be treated by agencies and regulations protecting free competition. The final decision of the intervention by the competition authority shall be based on a case by case evaluation, which may give rise to assumptions in which the intervention would not be convenient because: (i) the case involves industries that require special treatment from an specific agency; (ii) the market may solve the problem by itself; (iii) the cost of the intervention is higher than the benefit to be obtained."*

Applying the previous concept, the Commission analyzed the reason stated by Electrocentro. First, it considered that the plaintiff could not ignore the existence of a commercial relation with Cab Cable, because there was sufficient evidence of a fluent communication between the companies prior to the refusal of Electrocentro. Regarding the process of privatization and the impossibility to execute agreements with obligations beyond 1998, the Commission understood that the communication sent by the General Management of Electrocentro to its line managements was not enough to demonstrate by itself that the new owner of the company were obliged to comply with the lease agreements on poles executed by the previous administration. With regard to the eventual breach of the Technical Standard of Quality of Electrical Services, the Commission considered that, according to it, power shortages may be caused due to different causes, which are not necessarily related to maintenance works on poles or other elements of support. Furthermore, regarding the technical argument of crossed networks and parallelism, it pointed out that in a large group of blocks was possible to determine that poles of Electrocentro would not have any problems of crossed networks and parallelism.

Based on the analysis before mentioned and even if there is no evidence of competition between Cab Cable and Electrocentro, the Commission concluded that *"the arguments expressed by Electrocentro (..) are not reasonable economic grounds to justify the refusal denounced"*. As consequence, it declared the complaint grounded and imposed a fine of 20 UIT to Eletrocentro.

Additionally, it ordered to notify the Resolution and its reports to the authorities on energy and telecommunications, in order to propose a multi-sectoral regulation that allows a better utilization of the infrastructure described, thereby allowing the development of competition in markets involved[64].

The second instance ruled confirming the decision of the Commission, although the fine was reduced to 5 UIT[65].

The Tribunal rejected the different justifications presented by Electrocentro, considering that if existing poles of this company have available capacity it was not reasonable for Cab Cable to invest in building high cost poles and social loss by not using integrally existing resources. As well, the Tribunal understood that the installation of cable television networks in power distribution poles do not necessarily imply energy shortages due to the reason that other distribution companies has permitted such installation without necessarily damaging the rendering of electrical power supply service. Likewise, it stated that problems of crossed networks and parallelism that may be presented would arise, in principle, only by the breach of set standards in the National Electrical Code. With all of that, it concluding that there were no reasons to justify the refusal to renew the agreement with Cab Cable.

In its argumentation the Tribunal explained that:

> *"If a company cannot acquire the resource or service controlled or rendered by the dominant company, it would be prevented from competing in the market, to the detriment not only to said company, but as well to potential consumers. The decision that a competitor does not enter or leave the market is not due in this case to – the refusal to hire – the decision of consumers, but to the unilateral decision of the dominant company".*

65 Resolution 0869-2002/TDC-INDECOPI, dated December 11, 2002.
66 Resolution 022-2001-INDECOPI/CLC, dated June 11, 2001.

At the same time, the Tribunal was clear at stating that:

> *"This does not mean that the dominant company has the obligation to hire anyone who requests it, but it means that cannot refuse to hire unjustifiably. In other words, the obligation to hire is not imposed, but the burden of justifying its refusal".*

Additionally, the Tribunal stated that although a dominant company retains the right to decide freely whether or not to hire a third party, when controlling an essential facility shall allow access to it if it has available capacity to do so. It asserted that:

> *"(…) an essential resource is that infrastructure indispensable for the production of a certain product in another market, thus, the refusal to provide that good harms competition. In this sense, if a company that has a resource or service considered as essential, unjustifiably refuses to hire another person and said behavior harms general economic interest, especially consumers, shall be sanctioned by the free competition authority".*

The Tribunal sought to be more accurate at this point and defined four conditions so that the obligation to allow access to an essential facility exists:

- The control of an essential facility shall be in the power of a monopolist (or a company in a dominant position).
- Incapability or unreasonableness to duplicate the essential facility.
- Refusal to use the essential facility.
- Possibility to provide the facility.

c. Aero Continente SA. v. Banco de Crédito del Perú (2002)

Aero Continent denounced that it had tried to open a checking account at Banco de Crédito for its authorized agent in the city of Puerto Maldonado to deposit money from the sales of services in such city; this is to say, to have, transfer and use money safely. Nevertheless, Banco de Crédito has denied rendering that service, despite it was the only private banking institution operating in Puerto Maldonado.

The Commission considered that the complaint was groundless because it understood there were other alternatives for Aero Continente to have secure money availability from the sale of

its services in Puerto Maldonado, as for example, the correspondent banking service of Banco de la Nación that also operated in said city and allowed the transfer of money for a payment. The Commission also understood that the refusal of Banco de Crédito was justified, since the plaintiff did not comply with the proceeding adopted by Banco de Crédito in compliance with the Regulations of the Superintendency of Banking and Insurance for the surveillance of activities of money laundering or other illegal activities[66].

The Tribunal had also another criterion and revoked the decision in the first instance, declaring grounded the complaint, ordering Banco de Crédito to accept the application for a checking account in Puerto Maldonado, and imposing a fine of 2 UIT[67].

This decision was founded on the dominant position hold by Banco de Credito in the checking accounts service in Puerto Maldonado, because there were no other agencies, branches or offices of banking entities authorized to render that service. For that, the Tribunal ruled out that the correspondent banking service of Banco de la Nación was comparable to transfers via checking accounts, because it only allowed one deposit at a time with a different financial cost. Besides, it also considered that there was no evidence that other banks intended to establish in that city. Based on these circumstances, the Tribunal stated that the checking account service was essential to Aero Continente en Puerto Maldonado.

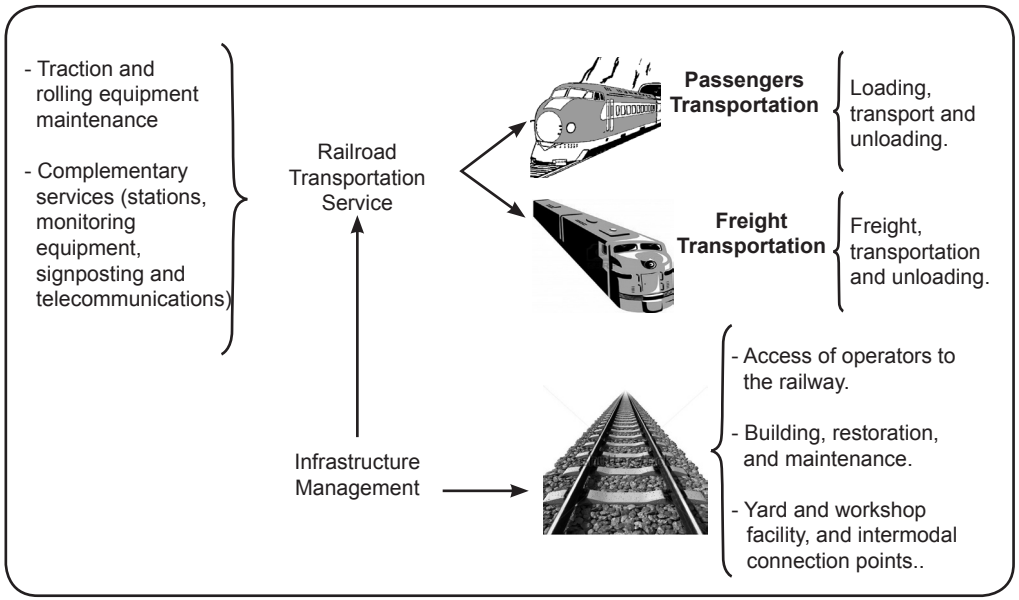
As for the justifications presented by the defendant, the Tribunal did not consider them acceptable to validate the refusal to open a checking account. In that regard, the Tribunal noted that although the regulations of the financial system granted discretion to banks to evaluate the moral and economic suitability of possible customers, such discretion shall be restricted when the bank had the capacity to prevent a user to be completely deprived of the service (this is to say, if it has a dominant position), in which case the selection and exclusion of potential customers shall be sustained at maximum objective conditions and according to the criteria provided by law. Having said that, it considered that the applicable legal regulations did not allow the exclusion of a client on the basis of suppositions and, as well, that the refusal to treat could not be supported by criteria contained in a document prepared internally by the Bank.

67 Resolution 00870-2002-TDC/INDECOPI, dated December 11, 2002.
68 Resolution 064-2006-INDECOPI/CLC, dated September 04, 2006.

d. Ferrocarril Santuario Inca Machupicchu SAC (FERSIMSAC) v. Ferrocarril Transandino SA. (FETRANS) (2007)

In the process of promoting private investment on Project of Railway South-East, stretch Cusco-Machu Picchu-Hydroelectric Station, the infrastructure of Railway Cusco-Machu Picchu was awarded to FETRANS. In the corresponding bidding process, it was established through Circular N° 17 that (i) as part of the award, locomotives and rolling stock (locomotives and wagons) used by ENAFER will be given to the awardee to transport passengers and load; and (ii) the *"Awardee shall hire, or in its case incorporate a legal entity to act as Operator of Railway Services"*.

Graph N° 14
Railway Activity



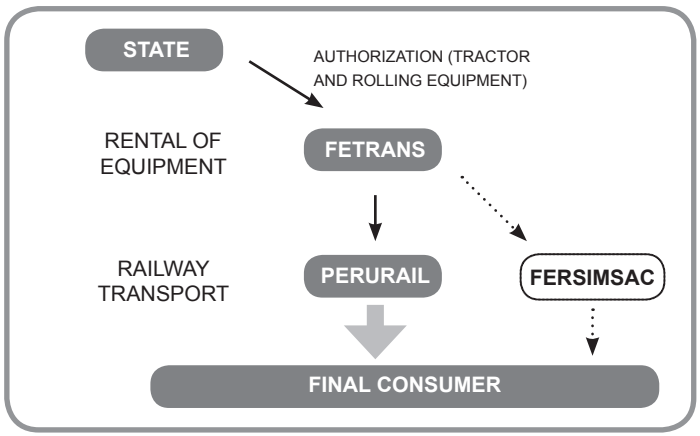
Prepared by: ST-CLC/Indecopi.

Once the award was granted, FETRANS incorporated Perurail SA company in order to render the service of passenger and load transport in Cusco- Machu Picchu stretch using the abovementioned locomotives and rolling stock. For those effects, FETRANS entered a lease agreement on all locomotives and rolling stock with Perurail.

FERSIMSAC, company authorized to render services of passenger and load transport in the Cusco-Machu Picchu stretch, requested FETRANS to enter a lease agreement on the locomotives and rolling stock awarded and also requested the same commercial conditions maintained with Perurail. FETRANS stated that it was impossible to accept the requested because it had already entered a lease agreement with Perurail on all the above means of transport.

FERSIMSAC filed a complaint against FETRANS for abuse of dominant position in the form of unjustified refusal to lease locomotives and rolling stock, based on the lease agreement entered with Perurail, preventing it from competing with this company in the rendering of passenger and load transport in the South-East Railway. According to the plaintiff, any alternative to have its own locomotives and rolling stock (for example, buying or leasing them from other companies) was much more onerous than leasing them directly from FETRANS, whereupon this company has a dominant position. Furthermore, the plaintiff stated that the refusal to lease based on the execution of the agreement with Perurail was not justified because it was a form to maintain monopoly on passenger and load transport on said stretch.

Graph N° 15
Railway award model



Prepared by: ST-CLC/Indecopi.

FETRANS objected that it was technically and economically feasible for FERMINSAC to lease or buy its own locomotives and rolling stock from third parties, but that it did not want to make the corresponding investment. As well, it stated that the refusal was fully justified because there was an agreement with Perurail that shall be respected. As well, it noted that

the award model allowed a vertical integrated operation, which meant that it had preferred to recover investment in railway infrastructures and improve the quality of the service, instead of encouraging competition since any direct or indirect obligation to provide access to locomotives and rolling stock was foreseen.

The Commission found the complaint groundless[68]. Although it considered that FETRANS had a dominant position and that the existence of a lease agreement on locomotives and rolling stock entered between FETRANS and Perurail, without proper due process in which parties interested may have accessed it to compete for the leasing, may prevent competition in the market of passenger and load transport services, concluded that the refusal was justified in the fact that Circular NO17 of the bidding process allowed FETRANS to lease 100% of locomotives and rolling stock from the related company that it may create.

Notwithstanding the abovementioned, the Commission stated that the existing situation consolidates a monopoly in the rendering of transport service in the Cusco-Machu Picchu stretch, for which it was convenient for the State to intervene to establish a proceeding to ensure access to locomotive and rolling stock which is part of the assets of FETRANS award.

The Tribunal held an opposite opinion because revoke the first instance decision and declared the complaint grounded, ordering FETRANS to stop with the refusal to lease and imposed a fine of 165 UIT[69].

First, the Tribunal agreed with the Commission that FETRANS has a dominant position in the relevant market, because it ruled out that the purchase or supply of locomotive and rolling stock of third parties was a substitute in economic terms of the lease with FETRANS; this since such investment would have been a barrier of access due to higher costs and a barrier to exit due to sunk costs, and besides it was an investment that only may be recovered in seven years.

Second, the Tribunal stated that:

> *"Literal interpretation of Circular N° 17 shows that vertical integration was protected by FSO, provided that the awardee of Fetrans Award could choose to hire a company as transport service operator or incorporate a legal entity acting as such. However, this does not imply the recognition of a kind of exclusivity on the material in favor of Fetrans-*

69 Resolution 1122-2007/TDC-INDECOPI, dated July 02, 2007.
70 The other defendants were Maltería Lima SA., Compañía Cervecera del Sur del Perú SAA. and Cervecería San

Perurail Group, in virtue of which Fetrans may deny to lease materials to third parties, other than the existing".

For that reason, the Tribunal made a systematic interpretation and comprehensive view of Circular N°17, pointing out that it:

"… suggested an exceptional scenario, in which the lease of the entire material of Perurail was justified; however, when an operator unrelated to Fetrans requested access to this material, it shall receive a nondiscriminatory treatment, which means that Fetrans could not refuse access to the material only on the basis of a previous lease agreement with Perurail".

According to the Tribunal, said interpretation was consistent with the purpose sought when admitting the vertical integration between the awardee and the transport company, which was to ensure continuity of the service for passenger and load transport, and not to grant a kind of exclusivity to the Concessionaire in the use of locomotives and rolling stock to render the service for passenger and load transport. In function of that, it concluded that the refusal to lease to FERSIMSAC was not justified by the previous contract entered with Perurail.

e. Compañía Cervecera Ambev Perú SAC. (Ambev) v. Unión de Cervecerías Peruanas Backus and Johnston SAA. (Backus), the Comité de Fabricantes de Cervezas de la Sociedad Nacional de Industrias (CFC), and others (2009)[70]

Ambev would enter the Peruvian market of selling beer and tried to join CFC, as it controlled the Containers Interchangeable System (SIE) in which the company sought to participate. CFC was the holder of collective brands that distinguished beer containers of 620 ml used by consumers to buy beer at that time, by exchanging empty containers with full containers with their favorite brand, being the latter the SIE.

For that, after joining the National Society of Industries (SIN) as adherent member, Ambev requested as well to join CFC, but its access was denied, pointing out that said company did not elaborate bottles or bottle beer in Peru. Ambev requested the decision to be reconsidered because the Statute of SNI and CFC did not establish the elaboration or bottling of beer in

Juan SAA.

71 Resolution 045-2009-INDECOPI/CLC, dated June 25, 2009.

Peru as a requirement at the moment of presenting its request, but the refusal continued. Therefore Ambev requested CFC to provide the percentage of beer production necessary for joining CFC, and CFC simply replied that it was necessary to be an industrial member of SNI (not only an adherent member) and develop the brewing or malt industry in Peru.

In January 2004, Ambev filed a complaint for abuse of dominant position against Backus and CFC for unjustified refusal to deal as part of a strategy to prevent its access to SIE. In the complaint Ambev stated that its access to CFC had been denied in spite of complying with all the requirements, without one being making and bottling beer in Peru. As well, it confirmed that as a member of SIN it was entitle to attend union committees such as CFC.

CFC defended itself stating that joining CFC requires the joint consideration of the requirements foreseen in both SIN and CFC Statute, and that this determines that in order to join CFC, it is required to be an industrial member, have started activities and pursue activities related to the members of CFC. As well, CFC stated that it was unreasonable to include companies which are not engage in producing beer, only by adducing to be a member of SIN, because the Statue foresees to group industrial members developing the same activity into committees.

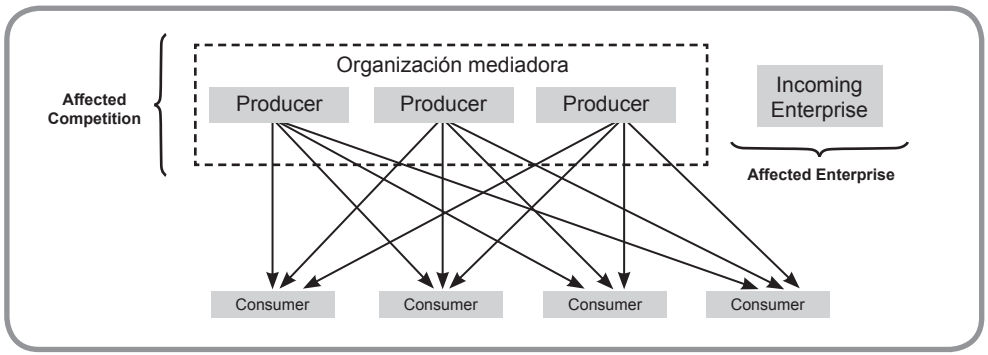
On the other hand, Backus defended itself stating that Ambev had requested to join CFC and not to establish a system of bottle exchange with Backus or its related companies. Similarly, it declared that companies from Backus group did not seek to create any barriers for Ambev to access the market, thus they offered it to establish a real system of bottle exchange that benefit consumers and prevent the improper use of Backus group assets. Finally, Backus pointed out that adherent members of SNI, who do not represent a current industry and are not involved with a percentage in domestic production could not access SNI committees, due to the reason that these bodies seek to group specialized manufacturing producers of a particular industry and not future industries, that being in activity, classified in a category of CIIU which does not correspond to the committee they want to apply, as happened with AmBev and its desire to join CFC.

During this proceeding different actions were taken, even an injunction was issued in favor of Ambev that was subsequently revoked in the second instance. After a long investigation, in 2009 the Commission decided to accept the withdrawal of the complaint presented by Ambev, mediating for this, the presentation of the extrajudicial settlement reached by the plaintiff and Backus.

Notwithstanding the aforementioned, the Commission Resolution accepted the withdrawal of the compliant and decided to conclude the proceeding due to the lack of involvement with general interest[71]. In particular, the Commission considered that although there had been an unjustified refusal to access CFC, said behavior did not produce any adverse effect on the capacity of Ambev to compete, thus an affectation on the competitive process would not have been verified.

For the analysis, the Commission distinguished two scenarios to access an intermediary organization. On one hand, it stated that access to an organization of this nature is relevant when it is indispensable or significant for the company to offer its products and services to buyers, by which the refusal to access the organization reduces its capacity to compete in the market. In that case, the Commission noted that it was necessary to evaluate the nature of the agreements that support that organization and the purpose of its operation. The following Graph (see Graph N° 16) shows the scenario in which access to an intermediary organization is indispensable.

Graph N° 16
Indispensable or significant intermediary organization

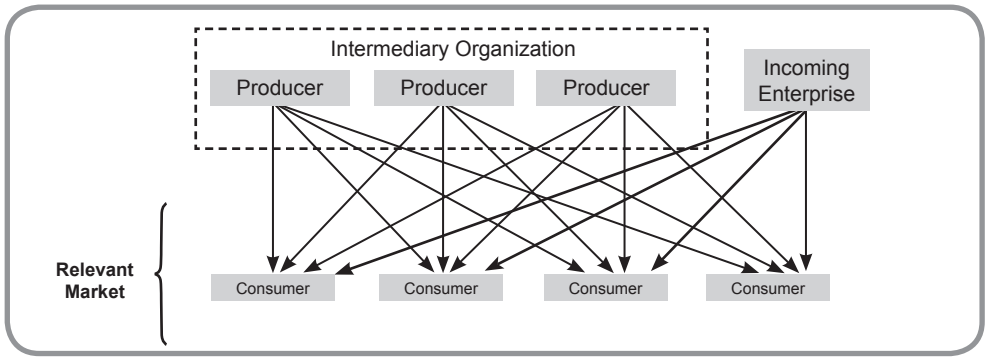


Prepared by: ST-CL/Indecopi.

On the other hand is the scenario in which belonging to an intermediary organization is not a significant or vital requirement for the company to commercialize its goods in the market, so that the refusal to access is not a barrier to entry and its effect is diminished or disappears. This scenario is shown in the following graph (see Graph N° 17).

72 BULLARD, Alfredo. (1997). Op. Cit. DIEZ ESTELLA, Fernando. (2003). La Discriminación de Precios en el

Graph N° 17
Not indispensable or insignificant intermediary organization



Prepared by: ST-CL/Indecopi.

Considering the aforementioned, the Commission understood, in first place, that pursuant the Statutes of SIN and CFC, the only requirement to join CFC was to be a member of SIN, but not an industrial member. Besides, it considered that it was not valid to refuse the incorporation of CFC by stating that Ambev was not a beer producer in Peru, because *"… the incorporation of adherent partners with experience in the industry developed by CFC does not distort the fulfillment of its functions"*. Thus, it concluded that the refusal was unjustified.

Regarding the effect of this refusal, the Commission stated that *"…a harmful effect on the capacity of Ambev to compete would not be verified, nor that it has been in disadvantage for not participating in SIE, all of this for the scenarios analyzed*".

In order to reach to this conclusion, the Commission stated that it would analyze if the alleged behavior had created barriers to access to Ambev, pointing out that:

> *"… 'barriers to access", for the purposes of antitrust analysis, are those structural conditions of the market or behaviors of incorporated companies that prevent or delay the access of potential competitors, in such way that allows the execution of power of the first ones in the market".*

As well, it stated that:

> *"The delay to access of a new competitor, product of a behavior incompatible with the economic efficiency of the established agent, is as well contained under the prohibition of abuse of dominant position due to its harmful effects on the competitive process".*

With regards to the access of an intermediary entity, such as CFC, the Commission stated that:

> *"… refusal to incorporate or maintain an agent within an agreement between competitors involving a facility to participate in the market (intermediary organization) may result in an anticompetitive behavior by the company, in the case of abuse of dominant position (…)".*

However, it also explained that:

> *"… when the intermediary organization brings together producers of a specific good, and being a member of that organization is not an indispensable or significant requirement to commercialize in the market, the refusal to incorporate or maintain does not constitute a barrier to access".*

Finally, the Commission stated that:

> *"… for an unjustified refusal to collaborate among competitors to be a behavior of abuse of dominant position, in the form of barriers to strategic access, the costs imposed to the competitor entering due to that behavior are relevant. In effect, what is relevant for identifying an anticompetitive behavior, under these suppositions, is the magnitude of those costs and how they impact on the capacity to compete of rivals, and, particularly in the opportunity of potential competitors to access the market".*

Based on these ideas, the Commission evaluated in what extent Ambev had been affected for not belonging to CFC and not participating in SIE, finding that said company had accomplished to enter the market and launch its products in its own containers, even without been part of CFC. Consequently, it noted that although the refusal may have created higher costs for Ambev, the magnitude of them did not have an impact in the vital capacity to compete against the plaintiff.

3.1.2 Discrimination[72]

The experience of Indecopi regarding abuse of dominant position in the form of discrimination is not as wide as its experience on unjustified refusal to deal. However, there have been several cases of discrimination that have given rise to interesting developments.

Derecho de la Competencia (*"Price discrimination on Competition Law"*). Madrid, Thomson - Civitas. GERADIN, Damien and PETIT, Nicholas. (2005). "Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach". In: *Global Competition Law Centre Working Paper.* No. 07/05. See: *http://www.coleurope.eu/nl/node/5844.* QUINTANA, Eduardo. (2007). "Discriminación de Precios y Libre Competencia: ¿Nuevos Aires para una Antigua Figura?"(*"Price discrimination and Free Competition: new looks for an old figure?"*) In: *Ethos.* No. 1. Lima, Impresso Gráfica, pp. 63-72.

73 Resolution 003-93-INDECOPI/CLC, dated August 31, 1993.

Jurisprudence demonstrates that the prohibition of discriminatory practices is a limitation to commercial strategies that may be used by companies in a dominant position. Even though they can freely define, for example, their discount policies, they shall always do it with a reasonable support, so that they do not place some competitors in disadvantage with others, because is evident that a buyer who obtains discounts when acquiring inputs may produce or offer these inputs in better conditions than the competitor who does not have access to such discounts.

Discrimination may be presented in different forms, including situations of price differentiation or selective discounts, as well as non-uniform processes with regard to other sale or contracting conditions (contractual terms, credit conditions, obligations assumed by the buyer, among others). These cases, which will be described further on, mainly refer to complaints filed for price discrimination, although other forms are as well included, identifying the method usually used by Indecopi to analyze them.

Typical elements of Discrimination

- Dominant position in the relevant market.
- Unequal conditions applied by a dominant company.
- Equivalence of buyers, for example due to costs related to serving them.
- Exclusionary effect of competition

Regarding equivalence or not of buyers, jurisprudence shows that this may be evaluated in terms of costs assumed by the dominant company to serve each buyer (if costs are similar, different sale conditions shall not be applied) or, in some cases, in terms of its willingness to pay (“elasticity of demand”) given the particular characteristic of it demand. In fact, the most usual way to evaluate equivalence is through incurred costs.

In the cases of discrimination described, the issue of whether or not a competitive relationship, direct or indirect (through related companies), between the dominant company and harmed competitors by unjustified differential treatment, may also be identified.

Chart N° 6
Abuse of dominant Position
Cases of Discrimination

CASES OF DISCRIMINATION	Fondo de Fomento para la Ganadería Lechera del Sur (Fongal Sur) contra Gloria S.A. (1993).
	Empresa Editora El Comercio SA. contra Aero Continente S.A. (1999).
	Asociación de Empresas Envasadoras de Gas del Perú (ASEEG) contra Vopak Serlipsa S.A. y Petróleos del Perú S.A. (Petroperú) (2007).

a. Fondo de Fomento para la Ganadería Lechera del Sur (Fongal Sur) v. Gloria S.A. (1993)

Fongal Sur filed a complaint against Gloria for paying discriminatory prices for whole raw milk bought from stockbreeders grouped in said Fongal, against the prices paid by stockbreeders grouped in Fongal Arequipa[73].

Particularly, Fongal Sur denounced several practices of price differentiation consisting of: (i) payment of different purchase prices, depending on whether the milk came from the group of producers of Fongal Sur or Fongal Arequipa, (ii) a bonus granted on the price to be paid based on the content of fat in milk, for which the results of the exam of fat content were changed, and (iii) bonuses granted for sales of greater milk volume, that only some stockbreeders may reach. According to Fongal Sur, the objective of Gloria was to unduly benefit Fongal Arequipa, placing an advantage on stockbreeders who were members of Fongal Arequipa.

With regard to the first alleged behavior, the Commission identified that the difference in prices paid was given and finished before Legislative Decree 701 was issued, so greater analysis was not necessary. Regarding bonuses for fat content, the Commission demonstrated that Gloria, independently from the origin of milk, was granting them by using a scientific method recognized in this industry for offering accurate results when measuring the fat content of milk; and, in addition it did not find any evidence that Gloria had distorted the results of the exam of fat content. Finally, regarding bonuses for volume sold, the Commission considered that Gloria grant them indistinctly, based on an objective criteria as the volume of daily milk sold by each stockbreeder, stating that this bonus was only a measure to incentive greater production.

74 Resolution 004-98-INDECOPI/CLC, dated September 30, 1998.

In this case, the Commission considered that price differentiation may be justified by *"intrinsic reasons for the operation itself"*. In particular, the reasons for price differentiation paid by Gloria were related to the characteristics of milk supply, such as the volume sold and the amount of fat contained in a product. The explanation behind these reasons may be that the costs of Gloria were reduced according to the higher fat content of milk and more purchase volume, so it was justified to pay higher prices to whole raw milk producers, who achieved the abovementioned conditions.

b. Empresa Editora El Comercio S.A. v. Aero S.A. (1999)

El Comercio used air cargo services rendered by different companies, including Aerocontinente, to transport the journal to cities inside the country. Price policies of such airline included a general price per kilogram of cargo depending on the destination and other price, 50% higher for transport of cargo with any characteristics classifying it as perishable (fertile eggs, loading of material sent by *courier*, journals, and newspapers among others). In 1997 Aerocontinente created a third price, 100% higher than general cargo, applicable only to journals, newspapers and magazines.

Due to the aforementioned, El Comercio filed a complaint against Aercontinente for price discrimination, stating that the creation of a higher price for journals and magazines, different from other perishable cargo, was unjustified. This is to say, it denounced price discrimination in the transport of two types of perishable cargo.

Additionally, El Comercio denounced that there was also discrimination in the prices that Aerocontinente charged to different journal publishers, and presented evidence showing that El Comercio was charged with the new price, while other journals were charged with lower prices for the same destination, despite of having similar or lower volumes to the ones transported by El Comercio.

The Commission found that Aerocontinente had a dominant position in four of the routes that were matter of the complaint (Lima-Iquitos, Lima-Pucallpa, Lima-Puerto Maldonado and Lima-Tarapoto). Additionally, due to the proofs that different prices were charged between perishable and daily cargo and among journals, the existence of circumstances justifying such differentiation was evaluated.

Regarding discrimination among types of perishable cargo, the Commission concluded that the transport of journals was different from other types of perishable cargo. Those differences were related to the cost of opportunity of carrying the journal every day of the year, on the first flight in the morning, and in only one-way route (because the cargo did not return on the return flight). As well, the creation of the new rate was given at a time of restriction of air transport services, because of the exit or gradual retirement of several airlines (as Faucett, Americana de Aviación and, to some extent, Aero Perú), therefore the first flight in the morning of Aerocontinente for different routes had much more demand. Finally, it also considered as a difference that journal companies had less elasticity of demand (this is to say, the need for air transport was not considerably affected by changes in the price of the service), thus they were willing to pay a higher price. In accordance with those characteristics, the Commission considered that there was a justification for charging different prices according to the type of perishable cargo, thus, the behavior denounced was not a case of abuse of dominant position.

Regarding discrimination among journals, the Commission found that Aerocontinente has entered agreements (hereinafter referred to "swap account") with most journals, through which both parties froze their rates at the date of executing the agreements and as well mutual discounts were granted. El Comercio did not accept to enter into a contract of that nature, although it was offered by Aerocontinente. Therefore, the Commission found that, through such contracts, journals granted specific advantages to Aerocontinente, which was not getting from El Comercio, for that reason it was justified to charge lower prices to the first companies. Consequently, as well in this case was concluded that this behavior was not an act of abuse of dominant position[74].

The Tribunal upheld the ruling of the Commission, stating that the demand of journals and magazines was of a special nature because they required daily and immediate dispatch on the first flight in the morning, circumstances that reasonably explained the higher rate applied by Aerocontinente. As well, it noted that in order to determine the legality of price differentiation the existence of a reasonable enough explanation for such difference shall be evaluated, and on the other hand, if it was possible to appreciate a clear purpose to grant special treatment to some competitors in detrimental to others[75].

75 Resolution 0078-1999/TDC-INDECOPI, dated March 05, 1999.
76 Resolution 051-2006/CLC-INDECOPI, dated July 10, 2006.

c. Asociación de Empresas Envasadoras de Gas del Perú (ASEEG) v. Vopak Serlipsa S.A. y Petróleos del Perú S.A. (Petroperú (2007).

Petroperú carried out, apart from activities of production and commercialization of hydrocarbons, the operation of storage terminals for hydrocarbons. Notwithstanding the aforementioned, the storage terminals for hydrocarbons, chemicals and gases in the port of Callao were operated exclusively by Vopak, under an agreement with the Peruvian government, after obtaining the award on the public bid for awarding that service. For that reason, Petroperú had hired all Vopak storage capacity in the Port of Callao.

In September 2000, Pemagasa, company belonging to ASEEG, that imported liquefied petroleum gas (LPG), requested for storage capacity to Petroperú, but it answered that it did not have capacity because it was storing LPG necessary for domestic demand. Subsequently, in March 2001, LLamagas requested storage to Petroperú for LPG; this company gave up to 9,500 barrels capacity, yielded to Vopak, after which Llamagas requested Vopak that storage and was able to enter an agreement for said volume. A few months later, in June 2001, Llamagas requested additional storage to Petroperú for 1,000 barrels, and again it gave up to storage capacity and yielded to Vopak, after which Llamagas requested Vopak this additional capacity, obtaining a contract for it.

ASEEG filed a complaint against Vopak and Petroperú for establishing unequal conditions for equivalent services in the LPG storage market, to the extent that Petroperú had granted Llamagas preferential rights to acquire storage, restricting the possibility of any other distributor as Pemagasa to access to the new storage capacity available, harming with that the competitive process at that level of the value chain of LPG commercialization.

Vopak declared that it did not obtain any benefits from the alleged infringement because it would have obtained the same income for entering a contract with Llamagas or with any other competitor. As well, it stated that there were no unequal conditions for equivalent services, because when Permagasa presented its application there was not storage capacity available, situation that changed when Llamagas requested that service. Besides, it explained that there was no contractual or legal obligation requiring the company to communicate to all stakeholders about the storage capacity available in the market. Finally, it stated that if Permagasa had been harmed by the agreement entered with Llamagas, this constitutes a legal competitive harm.

Petroperú claimed that it was not responsible for the obligation of achieving storage rights prior importing LPG. As well, it stated that it did not participate in the market supply of LPG

storage, but rather, it requested that service, thus it and Vopak did not have a dominant position in the market.

The Commission declared grounded the complaint and imposed a fine of 154.8 UIT to Petroperú and 9.5 UIT to Vopak[76].

To this end, the Commission identified that Vopak had a dominant position in the market of hydrocarbons storage services of Callao. However, it also considered that this position was shared with Petroperú, due to the facts related to Pemagasa's request and the storage agreement entered between Vopak and Llamagas.

Regarding the behavior denounced, the Commission considered that there was evidence supporting the conclusion that Petroperú had previously informed Llamagas its decision to give up part of the storage capacity contracted with Vopak in the port of Callao; placing it in an advantageous position over any other LPG distributor interested in contracting the storage capacity released. This was deduced by the Commission by the fact that communication between Petroperú and Llamagas, informing that it had given up the storage capacity and the communication from Llamagas to Vopak requesting to hire the capacity released was only a day difference.

Additionally, the Commission considered that Vopak had granted preferential rights to Llamagas, to the detrimental of other LPG distributors, when hiring directly with the first company without giving the opportunity to other LPG packagers, as Pemagasa, to access the available storage capacity. With this behavior, it would have prevented to comply with the principle of free competition contained in its Agreement which states that "*... The Operator shall not grant preferential rights to any wholesaler, which involves or allows the exclusion of others in the use of storage facilities in Terminals, or the release of hydrocarbons in Terminals*".

In the appeal, Petroperú set out that Vopak did not have a dominant position in the hydrocarbon storage service, because Repsol and Zeta Gas (LPG packaging companies) had greater storage capacity in the area and, despite this, were improperly excluded from the relevant market. Although these companies did not compete effectively in the rendering of said service, thus they were not potential competitors in the provision of the service. In addition to the abovementioned, it also stated that it was not accredited that the alleged behavior would have generated a profit to Petroperú, as required by law. Finally, it stated that there had not been harm to the competitive process or the general economic interest.

77 Resolution 0454-2007/TDC-INDECOPI, dated March 30, 2007.

The Tribunal upheld the first instance decision. First, it ruled out that LPG storage capacity of Repsol and Zeta Gas was available to other packagers, because both companies had declared that they were not engage in leasing storage capacity. Consequently, said capacity was not a substitute of the storage capacity of Vopak and was not part of the relevant market.

Graph N° 18
LPG storage plants in Peru

Source: Ministry of Energy and Mines - DGH.
By: STC-CLC/Indecopi.

On the other hand, it considered that, when Pemagasa and Llamagas presented the requests to hire storage, Petroperú had already hired all its capacity, thus Vopak could only hire this service with another LPG packager if Petroperú released part of its capacity, for which the dominant position of Vopak depended only in Petroperú decision.

Second, it considered that the principle of free competition contained in Vopak's agreement obliged this company to act trying to hire those agents who may perform a more efficient use of the capacity released. Moreover, it stated that its dominant position in the leasing market of LPG storage capacity impeded it from discriminating among agents that may require said service, so that it may affect competition.

Related to the aforesaid, the Tribunal verified that capacity leasing agreements between Vopak-Petroperú and Vopak-Llamagas showed that rates charged to Llamagas for storage and dispatch operations were higher than those charged to Petroperú, whereupon Vopak had as well obtained individualized benefits derived from a discriminatory behavior.

Chart N° 7
Storage Agreeements entered by Vopak

Concept/Client		Petroperú	Llamagas
Date of entry		29 01 99	28 05 01
Validity		Indefinitive	Until 31.03.04
Forms of remuneration (US$)	Storage Capacity Fee	0,60 barrel/month	0,6473 barrel/month
	Operation Fee (dispath) Throughput	0,58 barrel	0,6258 barrel
Contracted Capacity		**49 500 barrels**	**10 500 barrels**
Additional Services	Overtime (US$)	7 truck/hour (minimum 25 dollars per hour or fraction)	7 5524 truck/hour (minimum 46 9544 dollars per hour or fraction)
	Fuel transfer to another tank	0,22 barrel	0,3129 barrel
	Additionals	25 dollars per ship/hour or fraction (Bunker dispatch)	0.015 dollars per barrel (received in bonded warehouse)
		0,05 soles per gallon (Dispatch in cylinders)	15,51 dollars per m^2 (Leasing office spaces)
Reason of the Contract ending		Current Contract	Contract termination at the request of Llamagas

Source: Petroperú y Llamagas. Elaboration: ST-CLC/Indecopi.

Finally, the Tribunal affirmed that the cession of storage capacity to Llamagas, instead of to Permagasa, may enclose an intention of Petroperú to protect its position in the commercial level where it participates in the commercialization chain of LPG, upon which it does obtain benefits from the behavior denounced[77].

3.1.3 Abuse of Legal Proceedings[78]

As it is known, companies shall meet the requirements and conditions stated in the legal framework and obtain authorizations, licenses, concessions or operating licenses to start operating in the market. Although the compliance with necessary requirements is vital for the adequate and safe operation of such companies, the existence thereof and the legal channels to question their non-compliance may be a way of indirectly occasioning undue restraints to competition. In effect, companies or agents already established may find attractive or convenient to impede access of new competitors or to delay their access to the market, opposing to the granting of permissions, or operating licenses mentioned before. As well, they may find useful to question, through the corresponding legal channels, the validity of the permissions or authorization already granted to competitors.

In this way, competitors may wrongfully use processes or proceedings established by the legal framework to impede or delay the access of competitors or hinder their permanence in the market. It is clear that in this type of cases it shall be extremely debatable if the company who opposes to the access of a new company is trying to unlawfully restrict competition or is simply taking care through the right of action that all regulations of an adequate and safe operation are fulfilled.

78 On the abuse of dominant position in the form of abusive and repeated use of processes and procedures the following may be seen: BULLARD, Alfredo y FALLA, Alejandro. (2005). "El Abogado del Diablo. El Abuso de Procesos Legales o Gubernamentales como Práctica Anticompetitiva"(*"Devil´s Advocate. The abuse of legal or governmental proceedings as anticompetitive behavior"*). In: *Ius et Veritas*. N° 30. Lima, Tarea Gráfica Educativa, pp. 40-51. FALLA, Alejandro y DRAGO, Mario. (2012). "Unas son de Cal y otras de Arena. Aplicación de la Ley de Competencia durante el 2011"(*"Some are of lime and the others of sand. Application of Competition Right in 2011"*) In: *Ius et Veritas*. No. 44. Lima, Tarea Gráfica Educativa, pp. 158-182. QUINTANA, Eduardo. (2012). "Cuando los Litigios se Convierten en una Herramienta Anticompetitiva". (*"When Litigation turns into an anticompetitive tool"*) In: *Diálogo con la Jurisprudencia*. No. 160. Lima, Editorial el Búho, pp. 59-64. RIVERA, Alfonso. (2012). "Cómo pasar un camello por el ojo de una aguja: sobre cómo el Indecopi ha dejado prácticamente sin efecto la figura del Abuso Anticompetitivo de Procesos" ("*How to pass a camel through the eye of a needle: how Indecopi has virtually left the Figure of Abuse of Anticompetitive Processes without effect"*). In: *Diálogo con la Jurisprudencia*. No. 160. Lima, Editorial El Búho, pp. 51-58.

79 Resolution 057-96-INDECOPI/CLC, dated April 08, 1995.

The experience of Indecopi in this matter is circumscribed to three cases. However, as may be observed hereinafter, the level of study of this figure has become deeper, contributing to adequately to delimit the scope of the behavior prohibited.

The prohibition of abuse of legal processes allows a healthy balance between the exercise of the right to act or petition and protection of competition, constituting as well a limitation to the behavior of dominant companies. In that sense, companies with a dominant position retain their right to start legal actions, but shall take care that their actions do not constitute barriers to access or stay in the market.

After the development of jurisprudence given, the characteristic elements of this form of abuse of dominant position are: (i) the repeated use of legal actions against competitors, and (ii) the abusive use of such actions. Being the latter the element most difficult to identify, it has been considered that the abusive character is set if two conditions are met. First, the absence of an objective foundation or a reasonable expectation of triumph that supports the aspiration of the agent that starts and/or promotes legal actions shall be identified (this is to say, it shall be established that they are legal actions without merit). Only if the aforementioned is found, the second step shall be to identify if legal actions without merit try to affect the correct operation of the market, going against competitors or seeking to establish barriers to access (anticompetitive effect).

Chart N° 8
Abuse of dominant Position - Abuse of Legal Processes

ABUSE OF LEGAL PROCESSES	Lebar SA. v. Asesoría Comercial SA. and Asociación de Grifos y Estaciones de Servicio del Perú (AGESP) (1995).
	Asociación Peruana de Operadores Portuarios (APOP) and others v. Pilot Station SA. (Pilot) (2007).
	Asociación de Operadores de Ferrocarriles del Perú (APOFER) v. Ferrocarril Transandino SA. (FETRANS), Perurail SA. (Perurail), Peruval Corp. SA. (Peruval), and Peruvian Trains & Railways SA. (PTR) (2011).

a. Lebar SA. v. de Asesoría Comercial S.A. y la Asociación de Grifos y Estaciones de Servicio del Perú (AGESP) (1995).

This was the first case heard in this matter by Indecopi and occurred while Legislative Decree 701 was in effect, a regulation that did not include the abusive use of legal processes and proceedings as specifically prohibited behavior. The facts are described below:

Lebar is a company that was following the necessary procedures to obtain the necessary authorizations to install and operate a fuel service station and fuel sales at the intersection of Javier Prado and Nicolás Arriola avenues in the city of Lima.

The AGESP had questioned before several authorities the installation and operation of Lebar´s petrol station, affirming that the establishment breached the prohibition of installing petrol stations and service stations on the roads, established by the Security Regulations for Establishments selling Hydrocarbons Derivatives to the Public (Decree Supreme 054-93-EM). Particularly, it has started different proceedings before administrative authorities (General Directorate of Hydrocarbons from the Ministry of Energy and Mines, the Municipality of Lima and the Municipality of La Victoria) and a legal process (actions for constitutional guarantees initiated by the Municipality of Lima for authorizing the establishment of Lebar's petrol station).

Diego Thompson Superior Pedagogic Institute as well was against the establishment of Lebar´s petrol station, following the recommendations stated by AGESP, to the extent that it was located in Nicolas de Arriola Avenue, just in front of the petrol station.

Additionally to the aforementioned, the Directorate of Hydrocarbons from the Ministry of Energy and Mines annulled the authorization to install Lebar's petrol station, considering that it had not comply to start the corresponding works within 90 days, pursuant to the provisions of art. 17 of the Regulations for Commercializing Liquid Fuels derived from Hydrocarbons.

Due to the aforementioned, Lebar filed a complaint against Acosa and AGESP for having "*… agreed between them, as well as with different companies and entities, on several actions with the apparent purpose to impede the development of its project;* stating as well that the defendants had agreed on"*… commercialization and dispatch conditions in the market, every time that those acts are directed to impede the operation of our company, so that it cannot represent competition for other petrol station related to AGESP and, mainly to Acosa, which is located very close to ours*".

The Commission considered that "*… the abuse of governmental proceedings (administrative or legal) may be considered as a prohibited behavior susceptible to be understood within the legislation that sanctions restrictive practices of free competition*". However, after the corresponding investigation, the Commission concluded that evidence demonstrating that Acosa or AGESP had used "*… governmental proceedings with the single purpose to hinder competition, impeding the access of LEBAR to the market*, were not presented*; nor given or*

presented evidence demonstrating that one or other had used unlawful means to influence the action of governmental authorities in charge of solving the proceedings".

In its evaluation, the Commission rejected that the document titled "Aide Memoire" presented by Lebar was enough evidence to demonstrate the alleged behavior. In this document there was a review of the actions taken by AGESP and Diego Thompson Superior Pedagogic Institute, recommending the start of several actions for each of them. It is worth mentioning that this document was a copy of the original document and that the original one was apparently printed in Acosa's letterhead, although it did not have the date and signature, as well as any evidence of the author.

In this regard, the Commission considered that it was not demonstrated that the wording of such document was attributable to Acosa's staff, besides, it has repeatedly denied its participation during its drafting and AGESP also refused receiving it. It also considered that even if the wording of that document was attributable to Acosa, by itself it would not prove the participation, direct or indirect, of this company in the acts referred to in the document. Moreover, there was no evidence that Acosa would have determined the decision of the Board of Directors of AGESP to take the actions taken against Lebar's petrol station.

Additionally, the Commission considered that although the General Directorate of Hydrocarbons exceeded the scope of its powers to rule on issues that were not questioned in the administrative proceedings (determine if the petrol station was located on public roads) and qualify as invalid the documentation presented by Lebar to accredit the date of start of works, had not provided evidence that Acosa or AGESP impelled the decision of the Directorate of Hydrocarbons Inspection to rescind the authorization of installing Lebar's petrol station.

Based on the aforementioned, the Commission declared groundless the complaint, considering that the wrongful use of governmental proceedings as restrictive behavior of free competition was not sufficiently accredited[79].

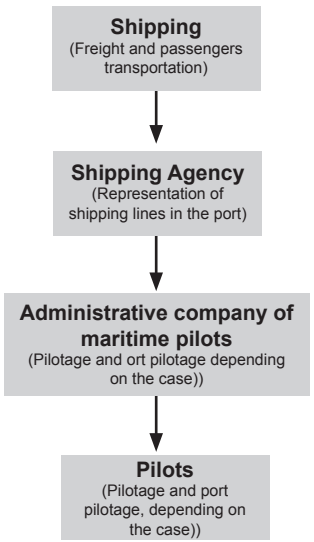
80 Resolution 037-2005-INDECOPI/CLC, dated August 04, 2005.

b. Asociación Peruana de Operadores Portuarios (APOP) *et al* v. Pilot Station S.A. (Pilot) (2007)

The pilotage service is offered to support the captain of a vessel or ship maneuvers, complying with the nautical regulations during the performance of operations of mooring or unmooring, relocation, turning maneuvers, among others, when a vessel uses a port. Given the characteristics of this service and pursuant to Peruvian regulations, its provision is mandatory for all vessels entering main ports of a country. In Peru this service is rendered under free competition conditions.

The marine pilot is the professional who renders this service, for which he shall board the vessel and give support in the operation to be performed. For example, if you are going moor in one of the country's ports, the pilot goes to open sea to reach the vessel that is outside the port, boards it and once inside gives the instructions for the ship to enter and settle in port terminal facilities, in proper and safe conditions.

Graph N° 19
Agents involved in the provision of port services



Source: Resolution N°0407-2007/TDC-INDECOPI.

In order to be a pilot, specific studies and experience shall be achieved particularly on geographical, weather conditions as well as location in the port where the service of pilotage is rendered. Additionally, a license (licensed captains) granted by the competent authority, General Directorate for Port Authorities and the Coast Guard (DICAPI) is required. On the basis of that, the number of pilots is reduced for each port, and there is no practical possibility of substitution between pilots providing services in different ports of the country, due to the specific characteristics of each port.

Furthermore, in Peru, the service of pilotage was rendered through companies duly incorporated for rendering such service, called pilots' management companies.

Pilot is a pilots' management company licensed to provide services at Callao Port Terminal since December 2000. In 2001, several maritime pilots working in Pilot voluntarily resigned, becoming members of other pilots' management companies. It is worth stating that the agreements entered by the aforementioned pilots with Pilot contained an exclusivity clause, and were for a specific term, for which, resigning to Pilot was not enough to terminate the existing contractual relationship.

After resignations, Pilot started a series of legal and administrative proceedings against those pilots who had resigned, most of them related to breach of contract, as indicated in the following chart (see Chart N° 9):

Chart N° 9
Legal and administrative proceedings carried out by Pilot against those pilots who has resigned

Pilot	Process	Competent Authority	Outcome
Mr. Chávez	Actions for constitutional guarantees	Third Civil Court of Callao	Inadmissible
	Actions for constitutional guarantees	First Corporate Court specialized in Public Law of Lima	In progress
	Complaints of fraud	Third Penal Court of Callao	In progress
Mr. Petrozzi	Actions for constitutional guarantees	First Corporate Court specialized in Public Law of Lima	Does not apply
	Complaints of fraud	Third Penal Court of Callao	Groundless
Mr. Lavado	Complaints of fraud	Ninth Penal Court of Callao	Groundless
	Complaint for breach of obligations	DICAPI	Groundless

Source: Resolution 0407-2007/TDC-INDECOPI.

As well, the following actions were started against Mr. Boggiano:

- Penal proceeding for alleged offense against public trust in the form of forgery before the Ninth Penal Court of Callao, against pilot Boggiano Morales.
- Administrative complaint for alleged forgery at DICAPI, against pilot Boggiano Morales

Due to all legal actions started, APOP and the pilots being processed, filed a complaint to Indecopi stating that Pilot was unlawfully using administrative and legal proceedings to increase legal barriers to access the market of pilotage in the port of Callao, in order to impede maritime pilots, who were not working for that company, to freely exercise their professional activity with other pilotage service companies, excluding them from the market and/or relevant competition costs.

Pilot refused the abovementioned behavior stating that a predatory behavior of that nature occurs when the objective of the offender is to prevent or delay the access of competitors in the market. In that sense, said supposition would not have been presented in this case because legal processes and administrative proceedings were initiated against pilots who resigned to Pilot by misconduct regarding the company and not against other maritime pilots' management companies. As well, Pilot declared that the actions taken against pilots were not aimed to interrupt the activities of competitors, but they were actions taken to safeguard the compliance of the commitment assumed by dissident pilots (contractual term and exclusivity).

The Commission declared the complaint against Pilot grounded, ordering it to refrain from implementing behaviors against free competition aimed to punish pilots who were leaving the company and/or impeding the access of new pilots in the market. As well, a fine of 81.2 UIT was imposed among all offenders including Pilot, its directors, director general manager and managers[80].

For those effects, the Commission considered that although legal actions taken

> *"… were aimed to prevent pilots who resigned to Pilot Station to continue carrying out their pilotage activities (…) it actually had the only purpose to cause harm to competing pilots' management companies, by reducing their possibility to obtain the most important input for competing in the market, this is to say, maritime pilots object of legal actions"*.

81 Resolution 0407-2007/TDC-INDECOPI, dated March 22, 2007.

With that, it was demonstrated that the use of these legal actions *"did affect direct competitors of the company denounced, because it meant a delay or obstacle to access the market, in turn consolidating the dominant position of Pilot Station through different means of economic efficiency"*.

Notwithstanding the foregoing, the Commission sought to differentiate the correct and legal right to act of anticompetitive behavior implemented by unlawfully taking legal actions, considering for such distinction, for example, the sense in which actions initiated by Pilot were solved. In particular, it noted:

> *"This Commission recognizes the legitimate right of every person to request for jurisdictional protection and to exercise their right to administrative petition before the corresponding bodies; however, if legal processes and administrative proceedings filed by the company denounce are disparaged (most of them) by competent authorities, the Commission in the scope of its powers may evaluate and eventually conclude on the anticompetitive intention of a company that uses unnecessarily those legal mechanisms with the only objective to hinder the access or permanence in the market of potential or real competitors, and do not exercise in the regular way its right to act."*

Regarding the criterion noted, the Commission concluded that *"In this case, from the analysis of the processes and proceedings mentioned it may be inferred that the intention of Pilot Station was to restrict the access of other competing companies to services of pilots who were object of legal and administrative proceedings"*.

At appeal, the Tribunal upheld the first instance decision, including all sanctions imposed[81]. The Tribunal agreed with the Commission when stating that the sense in which actions initiated by Pilot were resolved, made it possible to infer the anticompetitive intention of this company:

> *"From the file it may be observed that authorities in charge of ruling on the processes initiated by Pilot dismissed the allegations and complaints filed, declaring them inadmissible in some cases for lack of jurisdiction or groundless because the alleged infringement was not configured. From that, it may be deduced that the purpose of Pilot to take action against resigning pilots was to prevent these to continue to provide pilotage services through competing companies."*

Additionally, the Tribunal stated that the number of actions initiated and the demands were as well a relevant aspect for the analysis of the legal character of the use of such legal actions:

82 Resolución 026-2010-INDECOPI/CLC, date May 03, 2010.

"(…) the number of actions filed by Pilot against each resigning pilot, as well as the demands in each of the processes initiated, evidence the intention of Pilot to impede resigning pilots to exercise their services through competing companies".

Finally, the Court also emphasized the limited possibility of companies competing with Pilot to get alternatives for the services of authorized pilots to operate in the port of Callao, and who were not rendering any services to Pilot, whereupon the strategy used through the use of legal actions had a greater impact on competition:

> *"This situation, in practice, implied a restraint to competition considering that the operations of pilot's managing companies are subject to the availability of professionals to carry out maneuvers inside the port, and considering as well that resigning pilots were the only choice available to cover the requirements of competing companies during the period of investigation."*

c. Asociación de Operadores de Ferrocarriles del Perú (APOFER) v. Ferrocarril Transandino S.A. (FETRANS), Perurail S.A. (Perurail), Peruval Corp. S.A. (Peruval) and Peruvian Trains & Railways S.A. (PTR) (2011)

FETRANS is the concessionaire of the infrastructure of South and South-East Railway that includes the stretch Cusco-Machu Picchu. Perurail is the company incorporated by FETRANS, in accordance with the stated in its concession agreement, in order to render the service of passenger and load transport in awarded railways. Peruval and PTR are companies related to FETRANS and Perurail, for having common shareholders or director and officials

FETRANS, Perurail, Peruval and PTR filed different legal actions and began several administrative proceedings related to various subjects, which were of common interest to one or more of them, with one of the following objectives:

- Question through the contentious administrative way Resolution 1122-2007-TDC-Indecopi, by which it was declared that FETRANS had committed an abuse of dominant position in the form of refusal to deal and was obliged to stop with the refusal to lease FERSIMSAC locomotives and rolling stock, that have been awarded as part of the concession of railway infrastructure and was imposed the right of non-discrimination for the company to provide the service in stretches administered by FETRANS, including the Cusco-Machu Picchu stretch.

- Request the disapplication of Supreme Decree 031-2007-MTC, which amended the National Railway Regulations, reducing the legal requirements for companies to obtain authorizations to operate railway services.
- Request the amendment of the Central Railway Concession Agreement entered between Ferrovías Central Andina SA. and the Ministry of Transport and Communications, in order to maintain the obligation of concessionaire of not operating in South Railway and South-East Railway, awarded stretches to FETRANS and where Perurail operates.
- Oppose to requests of railway operating authorizations in South-east Railway presented by Andean Railways Corp., Wyoming Railways SA. and Inca Rail SAC.
- Adopt legal actions to extend the process of amendment of the Access Regulations to railways administrated by FETRANS.

The questioning in this case was that defendants had made improper use of various legal actions, in order to hinder or prevent competition in railway transport companies in the Ollantaytambo-Machu Picchu-Hydroelectric South-Eastern Railway (FSO). It was suggested that defendants were part of the same economic group, and they used the right to act and petition for purely predatory objectives, by initiating a series of legal processes and administrative proceedings aimed to preventing or delaying access to the market of competing operating companies for railway transport services of passengers in the FSO, thus contributing to maintain the dominant position of PERURAIL on those stretches. In this way, they would have carried out a behavior of abuse of dominant position due to the misuse of legal processes and administrative proceedings.

Defendant companies refused having committed the alleged behavior. Thus, Perurail and FETRANS stated that among defendants there was not an economic group. As well, they stated that claims and demands requested in legal actions questioned by APOFER were fully founded and were aimed to defend, lawfully, the model of business that was recognized to both companies by the Estate when the award was granted to FETRANS for the administration of FSO and the corresponding rendering of railway transport service through a related company.

Peruval affirmed that its condition as shareholder of FETRANS and Perurail did not determine its participation in a joint legal predatory condition, even when legal actions in relation to the subjects matter to the case were filed. As well, Peruval stated that it did not participate as economic agent in the relevant market stated by APOFER, so it may badly have committed an act of abuse of dominant position and, moreover, it was not even evaluated if the action filed y Peruval has or not legitimate legal foundations.

Finally, PTR affirmed that the corporate connection among defendant companies was inadequate for claiming responsibility and, as Peruval, it stated that it did not participate in the relevant market, so it had not committed acts of abuse of dominant position.

The Commission considered that the

> *"(…) the retrospective and individual analysis of each legal action is inadequate to determine if the rights to act or petition were exercised for obtaining other illegal purposes, such as the one affecting free competition. For that reason, the Commission choses a prospective parameter that notice motivations that lie beneath a group or a pattern of legal actions"*

In this sense, it affirmed that instead of asking if there is a probable cause in each legal action taken, it shall ask if it is reasonably to consider if those actions respond to the interest of protecting the right of the plaintiff or if there is an ulterior or collateral purpose for affecting competition.

According to the analysis of the Commission, in these cases it is necessary to evaluate *"(…) which is the real motivation of the plaintiffs",* for which it stated that "*... if behind legal processes instituted it exists a real economic advantage that justify incurring in litigation costs.*" It also should be noted that "*... the number of legal actions brought may be as well an enlightening element regarding the motivations of the trial*", as *"... the opportunity in which legal actions are started, the subjects against they are filed and the effects they may have on competition* ", as this allows the verification of anticompetitive intention. Finally, the Commission stated that *"... The result of processes is not a determinant factor if the rights of action or petition of an operator have been used legitimately."*

Based on the previous thoughts, the Commission considered that legal actions initiated by the defendants, taken together, did not constitute a valid exercise of the legally recognized rights to act and petition, but rather they were an strategy for abuse of legal processes with the objective to restrict, discourage or delay the entry of competitors into the market of rail transport in FSO. For this it was indicated that it was not necessary to determine the existence of an economic group between the defendant companies, but it was necessary to have different elements that may prove the existence of a common and shared interest between them, this is to say, such material proceedings of said companies related to the facts under investigation and property and management relations between them and management, being latter situation found in the analyzed case.

As result of its analysis, the Commission upheld the complaint grounded and ordered the cessation of alleged abuse of dominant position through a strategy of abuse of legal processes. Additionally, it was fined with 657.5 UIT[82].

At appeal, the Tribunal decided to take a different path to that proposed by the Commission and, instead of trying to identify the alleged intention of complaints when initiation legal actions, it decided to evaluate each of the processes and proceeding questioned, concluding that the defendants an objective foundation or probable cause that supported the regular exercise of the rights to act and petition. In this regard, the Court noted that *"... to the imputation of a predatory abuse of legal processes it is fundamental to analyze whether there is an objective foundation, this is to say, a reasonable expectation of success that supports the claim or the claims of the applicant."*

The Tribunal pointed as elements to determine the abuse characters of initiating legal actions to identify: *"…the absence of an objective foundation against a plurality of deduced claims or petitions, which shall be evaluated prospectively, that is, in view of the reasonable expectation of success that they had when initiated legal proceedings ".*

Therefore, it considered that the factors evaluated by the Commission were not suitable to reveal conclusively an anticompetitive intention. For example, did not accept the fact that a litigant tries to meet the same interest by initiating various processes or proceedings evidence an anticompetitive intention, because "*... to increase the spectrum of possibilities to achieve a favorable outcome is a legitimate decision that falls within the procedural strategy that adopt each subject of law "*. Similarly, the Tribunal also ruled that the consideration of economic costs that occasion a process against the expected economic benefit (cost of the process versus benefits obtained from an eventual favorable outcome), was a good indicator of anticompetitive motivation, as such consideration is not only very difficult to measure but gives way to arbitrary decisions of authority.

Rather, the Tribunal considered that if alleged actions initiated by the defendants had an objective foundation, their qualification as part of a strategy of abusive use of legal processes designed to prevent and affect competition in the market of transport services in the FSO shall be discharged. For that reason, it studied each of the legal actions initiated and concluded that they had an objective foundation. For example, it considered that FETRANS could have a reasonable expectation of achieving, through contentious-administrative proceeding, that the judiciary issues a judgment revoking the decision of Indecopi, which stated that

83 Resolution 1351-2011/SC1-INDECOPI, dated August 27, 2011.

it had committed an abuse of dominant position in the form of unjustified refusal to lease locomotives and rolling stock to FERSIMSAC. The Tribunal understood that although such contentious-administrative proceeding may delay the possibility of competition in the provision of railway services in FSO, this effect was admissible because the defendants had an objective foundation to proceed through the contentious-administrative way.

Consequently the Tribunal revoked the decision in first instance and declared it groundless[83].

3.1.4. Behaviors of Exploitative Effect[84]

The approach of Indecopi to acts of abuse of dominant position of exploitative effect has changed over time, presenting diametrically opposed positions depending on the different interpretation of Legislative Decree 701. However, the new law on that matter, Legislative Decree 1034, has come to close the debate and let those behaviors outside the scope of the regulation, after a wide selection of legal and economic arguments.

Following, the evolution of jurisprudence on exploitative behavior is briefly explained, showing the advances and forwards that have been registered in this area, up to the current position. While most of the discussion has focused on behaviors related to over-pricing (or abusive, as they are also called), as well other cases shall be described showing that exploitative behaviors may be reflected in other forms of abuse of dominant position and as well to identify the position taken by Indecopi on that subject.

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84 Regarding the forms of exploitative abuse of dominant position the following may be seen: ADRIANZEN, Luis Carlos. (2007). "El Control de Precios Excesivos en el Derecho de la Competencia Europeo y su Aplicabilidad en el Perú"(*"Price control in European Competition Right and its use in Peru"*). In: *Revista de la Competencia* y *la Propiedad Intelectual.* No. 5. Lima, Indecopi, pp. 5-63. BULLARD, Alfredo. (2003b). Op. Cit., pp. 129-158. DIEZ CANSECO, Luis y PASQUEL, Enrique. (2004b). "Precios Abusivos: Una Mirada a la Luz del Derecho Comparado" (*"Abusive Prices: a hint to Comparative Law"*). In: *Advocatus.* No.10.Lima, pp. 355-364. DIEZ CANSECO, Luis y PASQUEL, Enrique. (2004a). "El Excesivo Precio de una Decisión Impredecible. A Propósito del Caso de las AFP" (*"The excessive price of an unpredictable decision Regarding the Case of AFSs"*). In: *Diálogo con la Jurisprudencia.* No. 71. Lima, Editorial El Búho. FALLA, Alejandro y DRAGO, Mario. (2012). Op. Cit., pp. 158-182. HOLZ, Johanna y SAMANIEGO, Percy. (2007). "A veces sí, a veces no. Análisis de Prácticas Explotativas: Comentario al Reciente Precedente de la Comisión de Libre Competencia"(*"Sometimes yes, sometimes No. An analysis to exploitative behaviors: Commenting the Recent precedent of the Commission of Free Competition"*) . In: *Actualidad Jurídica.* No.168. Lima, pp. 288-291. MARTÍNEZ, Martha y QUINTANA, Eduardo. (2007). "La Necesidad de Tomar Nuevos Rumbos en la Aplicación de Políticas de Competencia en el Perú: a Propósito de las Prácticas Anticompetitivas de Precios" (*"The need to take new paths in the application of Competition policies in Peru: regarding anticompetitive price behaviors"*). In: *Derecho & Sociedad.* N° 28. Lima, Editora y Comercializadora Cartolan, pp. 116-136. ROJAS, Juan Francisco. (2005). "La Defensa de la Competencia en una Nueva Dimensión"(*"The Defense of Competition in a New Dimension"*) . In: *Coyuntura*. No. 4. Lima, CISEPA, pp. 16-22.

85 Resolution 003-93-INDECOPI/CLC, dated August 31, 1993.

Chart N° 10
Evolution of jurisprudence related to exploitative behaviors

MILESTONE	1993 - Fondo de Fomento para la Ganadería Lechera del Sur (Fongal Sur) vs. Gloria S.A.
	1998 - Empresa Editora El Comercio S.A. vs. Aero Continente S.A.
	1995 - Asociación Peruana de Consumidores y Usuarios (ASPEC) vs. Los Portales S.A. and Corporación Peruana de Aeropuertos y Aviación Comercial (CORPAC).
	2004 - Central Unitaria de Trabajadores and Congressman, Mr. Javier Diez Canseco vs. Asociación de Administradoras de Fondos de Pensiones y cuatro AFP
	2010 - Asociación de Ganaderos Lecheros del Perú (AGALEP) and Fondo de Fomento para la Ganadería Lechera de la Cuenca de Lima vs. Gloria S.A.

The position of Indecopi on over-pricing was quite clear during the first decade of the application of Legislative Decree 701. In effect, the rulings issued were relatively explicit in stating that such behavior was not within the scope of the law and was not Indecopi's function to rule on the level of prices in the market, because they shall be set pursuant the rules of supply and demand. In this regard it is necessary to mention the following examples.

One of the first cases met by Indecopi in 1993 was related to the complaint filed by Fondo de Fomento para la Ganadería Lechera del Sur (Fongal Sur) v. Gloria SA. for abuse of dominant position. Fongal Sur affirmed that Gloria was paying an unreasonably low price for raw whole milk bought from breeders conforming said Fongal, taking advantage that it was the only significant buyer in the south of the country to which breeders could offer their product. This is to say, Fongal Sur accused Gloria of abusing of its position as monopsony in the purchase of milk, paying a price that did not allow breeders to get a reasonable return on their product and not even allowed them to cover their production costs. The ruling of the Commission discharging that this type of behaviors constituted an infringement to competition law was forceful:

> *"… with respect to the part of the complaint (...) which states that Gloria SA would be abusing of their suppliers by imposing them a price below their costs of production, it is necessary to remember that it is not competency of the Commission, in accordance with the provisions of Legislative Decree NO701, to establish or rule on the sale or purchase prices, for any product or service, because the shall be set according to the confluence of supply and demand"* [85].

86 Resolution 004-98-INDECOPI/CLC, dated September 30, 1998.

Years later, in 1998, the Commission ratified the aforementioned position, at the time of the complaint filed by Empresa Editora El Comercio SA. v. Aerocontinente SA.

In this case, related to air transport service offered by the defendant and that El Comercio used to send its journal from Lima to different cities of the country, it was denounced that Aerocontinente had created a new special rate only for cargo corresponding to journals and magazines, which was 100% higher than the rate applicable to all other cargo with perishable characteristics (such as fertile eggs or material sent by *courier* service), resulting in an excessive price that said company attempted to charge by using its position as sole provider of the service on certain routes. Again, the Commission was explicit in refusing to make any ruling on this matter:

> *"Regarding the alleged abuse of dominant position by setting over-pricing, pursuant to Legislative Decree NO701 and as stated in Resolution NO003-93-INDECOPI/CLC, it is not competency of the Free Competition Commission to establish or rule on the level of sales or purchase price of any product or service, because they shall be set freely on the market. In this regard, it is relevant to indicate that (...) measures to prevent the abuse of dominant position cannot be converted in forms of price control, because it is inconsistent with the promotion of competition"* [86].

Like this, the position was notoriously contrary to admit complaints against exploitative behaviors related to the level of prices fixed by companies, whereas prices shall be fixed freely on the market as a result of the confluence of supply and demand, so that regulations of free competition do not become price control mechanisms.

However, it is worth mentioning that the explicitly position stated by Indecopi on that time with regards to excessive prices did not extend to other forms of exploitative behaviors, as shown in the following example.

In 1995 the Commission declared grounded the complaint filed by Asociación Peruana de Consumidores y Usuarios (ASPEC) v. Los Portales SA. and Corporación Peruana de Aeropuertos y Aviación Comercial (CORPAC). One of the behaviors denounced was that Los Portales, as administrator of the parking lot of Jorge Chávez International Airport, had decided to charge for two-hour parking or fraction, rather than following the commercial use of charging for an hour or fraction. Thus, Los Portales, as sole provider of the parking service

87 Resolution 057-95-INDECOPI/CLC, dated December 29, 1995. It is worth mentioning that this decision was

in said airport, this is to say, as dominant company, was accused of charging for the use of two-hour parking to the detriment of consumers requiring to access the airport with their vehicles and park them only for an hour or less.

The Commission qualified the behavior as an act of abuse of dominant position in the form of tied sales (conditioning the use of an hour or fraction of the parking service to the acquisition of an additional hour of service) and imposed a fined of 50 UIT for each defendant[87].

In this case, the behavior denounced, directly affected users of Jorge Chavez International Airport parking lot, without having any restrictive effect on competition. This is to say, it qualified as an act of abuse with exploitative effect as well as behaviors like over-pricing abovementioned; but in this case, the Commission recognized the complaint and ruled on it agreeing with the plaintiff.

In 2004, the position held for a decade against over-pricing also suffered a substantial variation. This drastic change of position was presented in a case in which Central Unitaria de Trabajadores and Congressman, Mr. Javier Diez Canseco, filed a complaint against Asociación de Administradoras de Fondos de Pensiones and four AFP operating in the Peruvian market for abuse of dominant position by charging its affiliates an excessive amount of portfolio management fees.

In the complaint it was stated that the excessive amount of fees was typified and prohibited by article 5, paragraph f) of Legislative Decree 701, as a behavior of equivalent effect to the acts of abuse of dominant position, explicitly typified by that law. The Commission analyzed the acts of abuse of dominant position explicitly typified in the law and declared that all acts referred to behaviors of exclusionary effect, this is to say, with anticompetitive effects, whereby a behavior of exploitative effects such as over-pricing would not qualify as a behavior of equivalent effect. In this regard, it concluded that:

> *"The imposition of 'abusive prices' is not a behavior that is contained in paragraph f) of Article 5 of Legislative Decree 701, because it lacks the necessary exclusionary effect to qualify as a form of abuse of dominant position with 'equivalent effect' to those explicitly contained in paragraphs a), b) and c), so that the complaint at that end shall be unjustified"*[88]

approved by the Tribunal through Resolution 1003-96-INDECOPI/TRI, dated June 19, 1996.

88 Resolution 054-2003-INDECOPI/CLC, dated December 10, 2003.

89 Resolution 0225-2004/TDC-INDECOPI.

The Tribunal revoked the first instance decision and concluded that Indecopi was competent to investigate cases of over-pricing and, moreover, that Legislative Decree 701 not only prohibited the acts of abuse of dominant position that have the effect of excluding competitors from the market, but also those who sought to exploit consumers directly by cutting out part or all of the consumer surplus.

The Tribunal stated that the typical figure of exploitative abuse was in over-pricing and that although such behavior was not expressly defined by Peruvian regulations, as happens with the unjustified refusal to hire or lock-up agreements, it had the same exploitative effect that these two figures, whereupon it was prohibited as a behavior of equivalent effect. As well, it noted that there was no practical difference between the analysis carried out to sanction discriminatory prices or price fixing, and the one required to investigate alleged over-pricing, because in all these cases prices were evaluated, having no reason to consider that Indecopi may not rule on the last figure. Finally, it added that over-pricing was also prohibited by other laws and that there was foreign jurisprudence which had sanctioned this conduct[89].

Given the new position of the Tribunal, in 2005, the Commission sought to delimit the scope of the cases in which complaints of over-pricing shall be analyzed. Thus, the Commission stated that it would only consider that over-pricing may have a detrimental effect on the market if the following conditions are met:

a) The level of existing barriers to access is too significant to prevent potential competition.
b) The defendant is a monopolist, this is to say, it has 100% of the market share.
c) There is no economic regulation or authorized regulatory body to fix prices or rates. Only at this scenario consumer choice would be severely restricted and market conditions may allow the significant appropriation of consumer surplus by company in question[90].

90 Resolution 005-2005-INDECOPI/CLC, dated February 02, 2005. Decision issued in the proceeding started by a complaint filed by Representaciones Tecnimotors EIRL. against Luz del Sur S.A.A.
91 Resolution 052-2007-INDECOPI/CLC, dated September 14, 2007.

However, in 2007 the Commission questioned again the possibility of knowing over-pricing complaints pursuant to Legislative Decree 701. This ruling was in the context of the complaint filed by Asociación de Agencias de Turismo del Cusco v. Consorcio de Servicios de Transporte Turístico Machu Picchu (CONSETTUR) for abuse of dominant position in the form of imposition of over-pricing and discriminatory deal (exploitative discrimination) in the passenger transport service on the stretch Aguas Calientes-Puente Ruinas-Ciudadela Inca de Machu-Picchu.

The Commission restated that prohibited conducts by Legislative Decree 701 were those that exclude competitors or prevent their access to the market, this is to say, exclusionary effect behaviors. As for over-pricing, it stated that although the Tribunal had noted that *"... the Commission is empowered to declare the existence of a behavior that constitutes abuse of dominant position on the market in the form of over-pricing"*, which is opposed to the stated in article 4, of Legislative Decree 757, which states that *"... the only prices that may be fixed administratively are the rates of public services"*, as it was contradictory for Indecopi to sanction a company for charging a price that in accordance to its criterion was too expensive, but was impeded of determining the top from which that price was excessive or what the allowable profit margin for this company.

Based on the abovementioned, the Commission concluded that Legislative Decree NO757 prevented it from hearing cases of over-pricing, and also that punish them as a form of abuse of dominant position was an inefficient and unpredictable remedy, since Indecopi would not be able to define what the top price or the corresponding reasonable profit margin, for lack of tools designed for regulatory bodies. Finally, the Commission stated that consumer protection through the application of competition regulations was as protection of the competitive process, because it was in benefit of consumers. This means that protection afforded by free competition regulations to consumers is indirectly given through its impact on the proper functioning of the competitive process[91].

Contrary to the stated in 2004, this time the Tribunal (comprised of new members) confirmed the first instance decision, noting that the current Peruvian Constitution prevents the authority of defense of competition to hear cases of over-pricing and exploitative discrimination, by which the debate on this matter was closed[92].

92 Resolution 0027-2008-SC1/INDECOPI, dated October 16, 2008.
93 Resolution 005-2010/ST-CLC-INDECOPI, dated April15, 2010.

Current law, Legislative Decree N°1034, defines explicitly that the only acts of abuse of dominant position prohibited by law are behaviors of exclusionary effect, leaving behind the debate in the application of Legislative Decree 701 on the possibility of punishing any act of exploitative effect.

The current approach on exploitative behavior with the new law is shown in the case of the complaint filed by Asociación de Ganaderos Lecheros del Perú (AGALEP) and Fondo de Fomento para la Ganadería Lechera de la Cuenca de Lima v. Gloria SA. (2010). AGALEP and Fondo filed a complaint against Gloria for alleged abuse of dominant position in the form of predatory pricing, price discrimination and handling of the system of milk quality analysis, noting that as a buyer with a dominant position, Gloria established base and end prices using an incentive scheme for producers of fresh milk according to a set of criteria established by itself (milk quality, location of livestock, etc., among others), allowing it to obtain greater economic benefits in the sale of their products. According to plaintiffs, Gloria behaviors were intended to pay a low price to producers of fresh milk, causing the exit of said milk producers from the dairy market. Paying a lower price for the input would allow to sell their products at lower prices than their competitors, affecting competition in the secondary dairy market.

In applying the regulations on admission of complaints to proceedings, foreseen in Legislative Decree 1034, the Technical Secretariat of the Commission assessed the complaint and declares it groundless.[93]

For that, it considered that reported behaviors qualified as acts of exploitative effect, as plaintiffs had not provided evidence that there was a competitive relationship between Gloria and fresh milk producers allegedly involved in the primary dairy market, so that the behaviors reported could not cause an improvement in the participation of Gloria in that market at the expense of the output of fresh milk producers.

Additionally, the Secretariat considered that, unlike exclusionary behaviors that generate direct impact on the competitive process (by reduce levels of competition) and indirect impact on consumer welfare (by reducing the options available to consumers), exploitative behaviors do not affect the competitive process but they even, may expedite it, encouraging the entry of new competitors attracted by the profits of the dominant. It also took into account that:

94 Resolution 0708-2011/TDC-INDECOPI, dated March 16, 2011.

> *"… the sanction of exploitative behaviors would be contrary to the regime of social market economy, established by Article 58 of the Political Constitution of Peru, to the prohibition of administrative price fixing, contained in Article 4 of Legislative Decree N°757, as well as to the practical need to avoid distortions that may lead to the existence of a competition agency dedicated to determine the level of prices (or profit margins) that is 'acceptable' in the market".*

According to the abovementioned, the Secretary concluded that *"... acts of abuse of dominant position prohibited by both Legislative Decree 701 and Legislative Decree 1034 are behaviors of exclusionary effect, that nor the Technical Secretariat or the Commission are the competent authorities to recognize behaviors of exploitative effect*".

At appeal, the Tribunal settled the decision of the Secretariat on the inadmissibility of the complaint[94]. In this Resolution, the different arguments that had been used during the term of Legislative Decree 701 against the sanction of acts of exploitative abuse has been quite fully consolidated and, more importantly, the correct interpretation of Legislative Decree 1034 on this subject has been stated.

First, the Tribunal makes a relevant conceptual distinction when noting that:

> *"Unlike the abuse of an exclusionary dominant position that directly affects the dynamics of competition as it prevents or hinders access or permanence of competitors in the dominant market, the abuses qualified as exploitative are focused on punishing how much a dominant economic agent earns in detrimental of consumers or pro*viders".

As regards to the application of Legislative Decree 701, it indicates that

> *"... restraining exploitative behaviors such as "over-pricing" may lead the competition agency to sanction how much a specific economic agent earns and to establish a limit to said profits, which may indirectly intervene in price fixing, although this possibility is expressly prohibited by Article 4 of Legislative Decree 757 ".*

As Legislative Decree 757 is subsequent to Legislative Decree 701, it precluded any interpretation in the sense that it may have allowed something proscribed by the first law. Additionally, the Tribunal reiterates that all forms of abuse of dominant position typified in Legislative Decree 701 had exclusionary character, so it is incorrect to argue that behaviors of

95 See in this regard ROJAS, Juan Francisco. (2005). Op. Cit., pp. 16-22.

exploitative effect were also prohibited by paragraph f) of article 5 as acts of equivalent effect, since there is no equivalence between the effects of both types of practice.

Regarding Legislative Decree 1034, the Tribunal states that for the existence of abuse of dominant position number 10.1 of the law requires that the dominant company unlawfully restricts competition, obtaining benefits and causing harm to real or potential competitors, direct or indirect. As well, it also notes that number 10.2 states that alleged abuse behaviors may only consist on behavior of exclusionary effect, that *"... are those by which it is intended to exclude or prevent the entry of competitors to the market thus affecting the competitive process."*

As a final argument, the Tribunal explained that number 10.5 of the law expressly establishes that there is no abuse of dominant position if that position without affecting real or potential competitors is simply exercised. Undoubtedly, this provision demonstrates *"the requirement of the exclusionary character of abuse of dominant position"* and discharges any sanction on exploitative behaviors. To the extent that

> *"... price fixing by a dominant company at a level that only involves maximizing its benefits-as is the case of denominated 'exploitative behaviors' (for example, over-pricing') -, is a behavior that only represents the exercise of that position, but that is not in the field of law enforcement, since it does not affect the competitive process because is not directed to real or potential competitors."*

3.1.5 Impact and Contribution of Indecopi

As it is observed in the selection of jurisprudence described and commented before, the experience of Indecopi on investigation and sanctioning of acts of abuse of dominant position dates since the beginning of its work, is broad and deep, covering an important variety of practices and commercial strategies.

There has been an investigation on complaints against all kind of entities, such as private companies from different economic sectors (electricity distribution, financial services, commercial air transport services, dairy production or beer, commercialization of hydrocarbons, etc..), public companies (Electrocentro, Petroperú, Córpac) intermediary organizations (Asociación de Productores del Mercado de Santa Anita, Comité de Fabricantes de Cerveza of SNI) and economic groups (case against FETRANS and others).

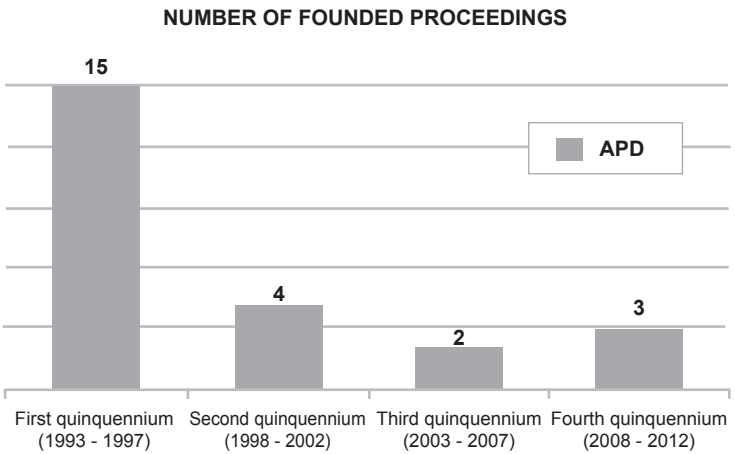
"The monitoring of compliance of the prohibition of acts of abuse of dominant position by Indecopi had allowed an adequate balance among the free exercise of rights of dominant companies, proper of a social market economy and the protection of a competitive process for the welfare of consumers".

In effect, the prohibition of acts of abuse of dominant position is a manifestation of the regulatory power of the State concerned with controlling the behavior of economic agents with substantial market power, in order to ensure that competition may be carried out maximizing the welfare of consumers. Through the prohibition of acts of abuse appropriate limits are set on the free exercise of rights of free company, creating special conditions so that those economic agents exercise different rights on the market. Thus, for example, limits are set on the right to hire, demanding a justification for refusals to deal; the right to define their strategies and commercial policies, demanding them objective reasons to create differentiated treatments; to the rights to act and petition, demanding one objective basis or a reasonable expectation of success.

Recognizing the broad scope of the limits imposed on the exercise of rights of economic agents that have a dominant position, Indecopi has measurably managed the power that has been given. On one hand, it has sought to be prolix in defining the existence of a dominant position in the market, thus it does not unduly extend the limitations imposed by the prohibition of acts of abuse of dominant position to companies or entities that do not have substantial market power. On the other hand, it has been careful to determine that there has been an act of abuse, considering that the reasons and justification raised have been reasonably and fairly explained by economic agents investigated to support their market behavior.

The careful examination of Indecopi explains why the percentage of investigations on abuse of dominant position declared grounded is not very elevated compared to the number of proceedings initiated due to this matter, as shown in the following graph.

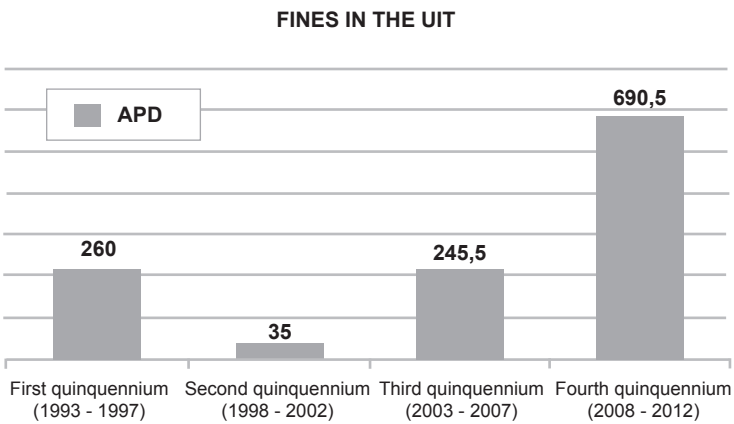
Graph N° 20
Abuse of dominant position: grounded proceedings (1993-2012)



Source: Technical Secretariat.

Sanctions imposed by Indecopi in cases declared grounded have been applied to both companies and individuals (case against Pilot Station), and the amounts calculated responded to the evaluation of the negative effects on the market, being noted that comparatively such sanctions have been considerably lower than those imposed by other prohibited conducts, such as agreements or concerted behaviors between competitors. The following chart presents the sanctions for acts of abuse of dominant position.

Graph N° 21
Abuse of dominant position: fines imposed (1993-2012)



Source: Technical Secretariat.

Another aspect of great importance in terms of contribution to Indecopi's practice in matters of supervision of acts of abuse of dominant position is that, through the compliance of this function, through the years, new types of behaviors of dominant economic agents that may harm the competitive process have been identified. This has been very useful to enrich the process of policy development.

In this regard, the majority of cases discussed in previous sections has been investigated and ruled while Legislative Decree NO701 was in effect. After almost 15 years, the task to elaborate a new law in matters of free competition was assumed, giving rise to Legislative Decree 1034. This process of policy development has been notoriously enriched by prior experience of Indecopi in the supervision and sanction of acts of abuse of dominant position. In particular, said experience has had first-order importance when typifying prohibited behaviors.

As examples of the aforementioned, it is sufficient to mention that within cases of acts of abuse typified in Legislative Decree 1034 it is *"unreasonably to hinder a competitor from entering or remaining in an intermediary association or organization"*. The origins of this prohibited figure may be traced in the proceedings followed against Asociación de Productores del

Mercado de Santa Anita or against Backus and others. Similarly, it has also been typified the *"Abusive and repeated use of legal processes or administrative proceedings, which effect shall be to restrict competition."* Undoubtedly, this prohibition responds to the experience gained in the proceedings against Acosa and Pilot Station.

In addition to the abovementioned, the experience gained by Indecopi, including drastic changes in posture that may have been registered in its instances for decision-making, has enabled to adequately clarify the scope of the application of the regulation of free competition and how it protects and contributes to consumer welfare. Proof of this is the extensive and detailed jurisprudential development of arguments for and against the prohibition and punishment of acts of exploitative effect through competition regulation. The knowledge generated through jurisprudence was then appropriately transferred to the development of policies that led to Legislative Decree 1034. Effectively, this regulation only prohibits acts exclusionary effect leaving aside any option to interpret that also includes acts of exploitative effect. This line of reasoning has been explicitly confirmed, in major pronouncements of Indecopi decision making instances (proceedings followed by AGALEP v. Gloria).

Additionally, the experience acquired by Indecopi has been used to influence the criteria to evaluate prohibited behaviors under the new law and to define more precisely the conditions required to qualify as abusive the behavior of agent in a dominant position. An example of this has been shown with the abuse of legal actions, figure for which the conditions required for the exercise of rights to act and petition to be considered as abusive has been duly defined. Although these conditions are challenging- raising the standard of proof required for a complaint in this matter to be grounded-, the energy shown by Indecopi when defining them is acceptable, considering how delicate is to question the free exercise of those rights.

Abuse of Dominant Position

Indecopi's Contributions

- Identifying new types of behavior of dominant economic agents that may harm the competition process, which is very useful to enrich the regulatory development.
- Properly elucidate the scope of application of the rule of free competition concerning the acts of abuse of dominant position and how it protects and contributes to consumer welfare, regardless of the possibility of punishing acts of exploitative effect.

Concerning the most controversial subjects, it should be included, first, the acts of exploitative effect. Positions on this subject have been completely opposite. Those in favor of sanctioning such acts through the competition act posed that behaviors such as over-price fixing are the typical expression of abuse of dominant companies, and they understood Indecopi must intervene to directly ensure consumer rights[95]. Those opposing to it, produced not only legal arguments but economic and competition policy arguments as well. These arguments were gathered, in great extent, by further Indecopi jurisprudence which denied the possibility of sanctioning acts of exploitative abuse[96].

Another subject that has also generated an interesting discussion is that of essential facilities and how the prohibition of unjustified denials of treatment should be applied in cases where the dominant company controls an essential facility. In this regard, opinions have been coincident, although there were different nuances about avoiding the indiscriminate use of this concept and qualifying any good as essential, since it may result in enforceability to dominant companies in the obligation to cooperate with their competitors[97].

Finally, discussion has also arisen about the need for the existence of a competitive relationship between the dominant company and the competitor affected by the behavior complained as abusive, so that a punishable act of abuse of dominant position is set[98].

The last issue that deserves a comment is that Indecopi's practice in terms of acts of abuse of dominant position has been mainly reactive, i.e., as a result of ex Parte orders. This is understandable, to the extent that the acts of abuse of dominant position typically affect other economic agents competing in the market and, therefore, have an incentive to directly defend their interests and, thereby, allow Indecopi to indirectly meet its protective role for the customers' welfare, ensuring a healthy competitive process.

96 See: BULLARD, Alfredo. (2003b), Op. Cit., pp. 129-158. DIEZ CANSECO, Luis and PASQUEL, Enrique. (2004b). Op. Cit., pp 355-364. DIEZ CANSECO, Luis and PASQUEL, Enrique. (2004a). Op. Cit. HOLZ, Johanna and SAMANIEGO, Percy. (2007). Op. Cit., pp. 288-291. MARTÍNEZ, Martha and QUINTANA, Eduardo. (2007). Op. Cit., pp. 116-136.

97 In this regard, it may be reviewed: DIEZ CANSECO, Luis. (2012). Op. Cit., pp. 65-93. FALLA, Alejandro. (2004). Op. Cit., pp. 69-76. HARO, José Juan. (2005). Op. Cit., pp. 151-167. KRESALJA, Baldo and QUINTANA, Eduardo. (2005). Op. Cit., pp. 59-89.

98 On this subject it may be seen: FALLA, Alejandro. (2004). Op. Cit., pp. 69-76. HARO, José Juan. (2005). Op. Cit., pp. 151-167. HIGA, César and CIGÜEÑAS, Francisco. (2011). Op. Cit., pp. 95-99. QUINTANA, Eduardo and VILLARÁN, Lucía. (2008). Op. Cit., pp. 317-326.

99 On horizontal cartel behaviors it may be seen: BOZA, Beatriz. (2005). "Case Study 1: Making Room for

- Acts of exploitative effect.
- Essential facilities.
- Set a punishable act of abuse of dominant position, with and without a competitive relationship.

However, Indecopi has the tools to identify markets and situations in which the probability that economic agents affected by acts of abuse of dominant position file a complaint is very low, either for fear of reprisals, for the high transaction costs to agree in case of several agents, etc. In these cases, the damage to the consumer welfare may be higher, and justify the authority's intervention. Should both conditions are met, Indecopi's ex officio action would be justified as it happens on investigations against cartels of competitors.

The aforesaid would be very important if the improvement levels that may be produced in the markets performance are taken into account remediating situations of abuse of dominant position, i.e., in markets far from urban areas or affecting the small business.

3.2. Horizontal Cartel Behaviors[99]

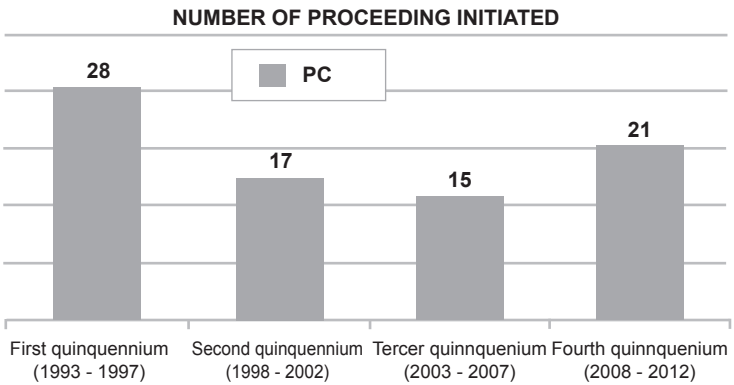
Investigation of cartel behaviors among competitors is one of the areas where Indecopi's work has a higher impact, both in the consumers' welfare and the efficient performance of the market.

Competition Policy" and "Case Study 2: Knowing One´s Own Strength". In: *Tailor-Made Competition Policy in a Standardizing World: The Experience of Peru*. Lima, Instituto Apoyo – Ciudadanos al Día. Chapter "Cuando Concertar es Malo. Prácticas Restrictivas de la Competencia" (*"When Settlement is Wrong. Restrictive Practices of Competition"*) in BULLARD, Alfredo. (2003a). Derecho y Economía. El Análisis Económico de las Instituciones Legales. (*Law and Economics. Economic Analysis of Legal Institutions*) Lima, Palestra Editores, pp. 747-814. It can also be seen chapters "El Cartel de Precios en el Mercado Avícola" (*"Cartel of Prices in the Poultry Market"*), "La Settlement de las Primas del Seguro Obligatorio de Accidentes de Tránsito (SOAT)" (*"Settlement of Primes for the Mandatory Insurance for Traffic Accidents (SOAT)"*), and "La Supuesta Settlement de Precios en las Licitaciones Convocadas por EsSalud para la Adquisición de Oxígeno Medicinal" (*"The Alleged Price Settlement on Tenders Announced by EsSalud for Procurement of Medical Oxygen"*) in FERNÁNDEZ-BACA, Jorge. (2012). *Experiencias de Política Antimonopólica en El Perú*. (*Experience of Antitrust Policy in Peru*) Lima, Universidad del Pacífico, pp. 41-86, 87-117, and 157-208, respectively. GAGLIUFFI, Ivo. (2003). "Derecho de la Competencia: ¿Cómo debe Evaluarse una Settlement de Precios según la Legislación Peruana" (*"Right to Competition: How to Evaluate Price Settlement according to Peruvian Law?"*). In: *Diálogo con la Jurisprudencia*. N° 60. Lima, Editorial El Búho. MARTÍNEZ, Martha and QUINTANA, Eduardo. (2007). Op. Cit., pp. 116-136. QUINTANA, Eduardo. (2011c). "Prácticas concertadas entre competidores y estándar de prueba requerido". (*"Agreed practices between competitors and test standard required"*). In: *Revista de Derecho Administrativo*. N° 10. Lima, Tarea Asociación Gráfica Educativa, pp. 15-45.

100 Comments on conceptual issues formulated below are also applicable, as appropriate, for the market-sharing

Given the importance of these cases, most of the investigations have been initiated ex officio by the Commission or, currently, by the Technical Secretariat. This is very useful since these investigations demand a very intense production of evidence, as it will be seen below in the description and analysis of cases. In the following graph it is shown the evolution of the number of proceedings initiated for horizontal cartel behaviors (See Graph N° 22):

Graph N° 22
Evolution of the number of proceedings initiated for horizontal cartel behaviors



Source: Technical Secretariat.

Below is an explanation and analysis of a selection of cases that allows reviewing the experience of Indecopi and identifying the interpretative criteria and evolution in the treatment of the main modality of horizontal cartel behaviors, particularly those involving cartels of competitors. The development and explanatory level of the selected cases varies according to their relevance.

3.2.1 Price Fixing[100]

The most characteristic cases of Indecopi in terms of horizontal cartel behaviors are for price fixing cartels. Indecopi's concern on investigating and punishing these types of illegal behaviors has been shown since the beginning of its functions. As a general rule, investigations have been initiated through Indecopi's own initiative.

cartel behaviors evaluated in the next chapter.

101 The investigation was even initiated because of the increase in the price of bread, which producers argumented

Indecopi's statements in this subject show that agreements or settlements among competitors in order to coordinate price fixing – and, in general, all those behaviors qualified as cartels among competitors – are automatically qualified as illegal, once their existence is demonstrated, and regardless of their specific effects on the market or the eventual reasons that may be formulated to justify them. In this regard, Indecopi's statements have used the rule of illegality *per se* to analyze these types of infringements and, currently, this rule is expressly included in Legislative Decree 1034 as the absolute prohibition.

Indeed, Indecopi's decision-making bodies have been clear stating that an infringement is committed when companies agree not to compete for prices, and that negative effects this behavior may cause in the market are not an element required to set the infringement, and they are evaluated only when qualifying the seriousness and sanction to be imposed.

Two exceptions to the rule of illegality *per se* for cartels are embodied in the rulings. On one side, the need to evaluate if the agreed practice caused damage to the general economic interest was formulated since, if it did not cause such effects, the practice should be deemed legal. On the other side, the need was specified to consider if agreements between competitors were accessory or supplementary of other legal agreements, in which case they were no longer illegal *per se*. As it will be explained, the first exception was further dismissed and, currently, it is not admissible according to Legislative Decree 1034, while the second keeps its validity and has been even included in the current rule.

On the other hand, cases exposed show that it is usually very hard to prove the existence of cartels of competitors for price fixing, except in cases where the illegal behavior is embodied in an agreement or commitment formally assumed by the offenders. This is due to the fact that economic agents usually are very careful and do not leave traces that may involve them in such practices. This is particularly true in the case of settlements, in which it is necessary to turn to material evidence in order to demonstrate the infringement.

The analysis of these illegal practices requires studying coordinated behavior of competitors in the market, as well as preparing inferences or presumptions through indications that allow concluding that such behavior is a result of a prior agreement between the participants. Indecopi has fought tirelessly, and we should say successfully, so that the validity of the use of this type of evidence is recognized to sanction cartels of competitors.

In the absence of direct evidence, Indecopi's decision-making bodies follow, as a general rule, an evaluation method to solve the following matters:

- If the market conditions facilitate an agreed behavior.
- If a similar or same behavior is verified among competitors (such behavior is called behavior parallelism).
- If there are concurrent indications that suggest the hypothesis that there has been an agreement or arrangement between competitors (such indications are called *"plus factors"*).
- If they acted in compliance of an arrangement.
- If contra indications and/or alternative explanations formulated by the persons being investigated weaken or dismiss the settlement hypothesis (this evaluation is called counterfactual analysis).

Indications considered by Indecopi include official information, submitted to the authorities by the investigated companies, such as internal documentation between officers of the companies, e-mails, handwritten notes, mere details or coincidences, among others. The large number of indications is not necessary to conclude the existence of the infringement. In certain cases, notorious and repeated coincidences in the economic agents' behavior, that do not appear to have a reasonable explanation, may be considered by Indecopi as a relevant and different indication to mere behavior parallelism, which joint evaluation has allowed finding such coincidences. In these cases, Indecopi has seek those coincidences are completely clear and vanish all doubts concerning the existence of a settlement.

Notwithstanding the foregoing, the evaluation of contra indications or alternative explanations facing the settlement hypothesis is acknowledged as an issue of major relevance in the production of evidence made by Indecopi.

Chart N° 11
Horizontal cartel behaviors - Price fixing cases

PRICE FIXING CASES	Ex officio investigation v. the Wheat Mills Committee of the National Society of Industries and 18 wheat flour producing companies (1996).
	Ex officio investigation v. Peruvian Poultry Association (APA) and 21 poultry producing companies, breeding companies and incubators (1997).
	Miguel Ciccia Vásquez EIRL. (CIVA) v. Empresa Turística Mariscal Cáceres SA. - Mariscal Cáceres (1997).
	Ex officio investigation v. Peruvian Association of Insurance Companies (APESEG) and nine insurance companies (2003).
	Ex officio investigation v. Central Regional de Transporte Público de Pasajeros (Passenger Public Transportation Regional Headquarters), Sierra-Ancash Zone, its representatives and several transportation companies (2010).
	Ex officio investigation contra la Freight Forwarders Union –Ancash Region, Sierra – Unión Zone, six former members of its Board of Directors, and 72 carriers (2011).

a. Ex officio investigation v. Wheat Mills Committee of the National Society of Industries and 18 wheat flour producing companies (1996)

This was the first notorious experience of Indecopi persecution of cartels of competitors. It not only involved a high impact product in the economy of the large majorities of the population, while it was the main input for bread production[101], but it was also the first investigation against a group of number of long tradition companies in the Peruvian market.

Investigation conducted by Indecopi not only involved the requirement of a big amount of statistical information, but also surprise visits the premises of the companies subject to investigation, interviews to their officers, gathering and reproducing documentation *in situ*, among others, all this with the purpose to gather evidence on the alleged infringement.

As a result of analyzing the statistical information submitted by the companies, the Commission found that there were parallel movements in the sale prices of wheat flour and, also, that price dispersion had been reduced since March 1995 for sales higher than 300 sacks. In particular, the difference between the highest and the lowest prices was significantly reduced since mid March, 1995.

The companies' public price list was usually higher than the effective sale price but, since the first half of March, 1995, the difference was notoriously reduced for sales over 300 sacks. The Commission explained that reduction of this difference had been a mechanism to facilitate collusion: *"The reduction of that breach would constitute a mechanism to facilitate verifying the compliance of the agreement by the companies involved since, by supporting the price policy in price lists known by the public, the margin for the companies is reduced in order to apply discount policies at their discretion"*.

In addition, the Commission found that the average prices or wheat flour in Lima had been increased in parallel since March, 1995, before the international prices of wheat raised, so the price of wheat flour was increased before their costs. Finally, it also demonstrated that by the end of 1994, competition in the wheat flour market was strong – qualified as a "war of prices" by the industry players -, embodied in sales with discounts on list prices; this competition would have led most of the companies to a difficult financial situation.

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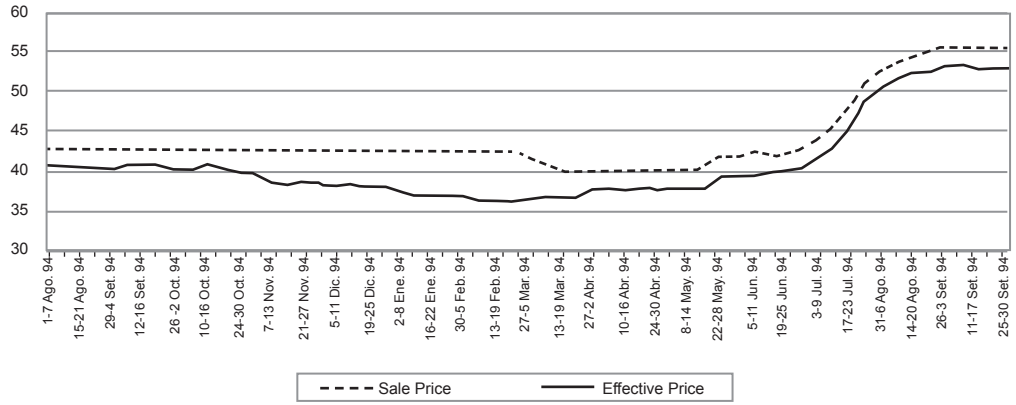
with the increase, in turn, of the price of wheat flour.

102 A media reported in an anecdotal way the details of this finding of the Commission: *"That investigation shows*

The following chart, included in the resolution of the Commission, shows the time of the "war of prices" since the last months of 1994, the reduction of the difference between the list price and the effective sale price between March and April 1995, and further prices increase (See Graph N° 23).

Graph N° 23
Milling Companies: weighted list price v. weighted effective price.
Volume: 300 sacks and up (Aug.94 –Sep. 95)



Source: Resolution N°047-95-INDECOPI/CLC.

With this, the Commission considered that since March 1995 a notorious change in price policy of the investigated companies had occurred, which indicated the existence of an agreed practice between competitors.

This hypothesis, originated in the behavior of the investigated companies, was later sustained with circumstantial evidence on an agreement to fix sale prices of more than 300 flour sacks, which had been adopted in a camaraderie meeting on March 23, 1995.

In this regard, one of the proves used by the Commission was the meeting minutes of Molinera Valencia Sucesores SA. Board of Directors, dated March 27, 1995, which stated the following:

> *"In several the Manager reported that on March 23, 1995, he had a meeting with milling businessmen which, this time, also held with businessmen from La Fabril S.A.; they*

discussed about the positive perspective that glimpse from this month on since the war of prices started by La Fabril S.A. is over"[102].

Other minutes of the Board meetings of the investigated companies were submitted, such as the minutes of the meeting dated March 16, 1995, held by the Board of Directors of Industrias Teal SA., in which one of the attendants summarized the information as follows:

"Anyway, she had the impression that 1995 was going to be a better year, financially, since from the sale of La Fabril industrial complex to Peru Pacífico company, subsidiary of Banco de Crédito, an agreement had been reached with competitor firms in order to make a readjustment, rise product prices to reasonable levels, because the phenomenon in our company is not an isolated case, but it is shown in all companies".

In addition, the Commission showed evidence that the agreement was executed and its compliance was permanently monitored by the investigated companies. As shown above, communication submitted by the Flour Supervisor to the Sales Management of Molino Italia SA company on May 8, 1995, was submitted, which reported how prices of the companies were being applied, in the following terms:

"Nicolini:	*Respects prices*
Peru:	*Respects prices.*
Sta. Rosa:	*Respects prices.*
Cogorno:	*Respects prices.*
Triunfo:	*Respects prices, but sometimes receives deferred checks for cash purchases.*
Cogorno Trujillo:	*Its prices are as follows:* *1 to 100 49.50 credit* *100 and up 48.40 credit* *1 to 100 48.10 cash def. check 15 days* *100 a + 47.40 cash deferred ch. 15 days*
Inca:	*Respects prices, but from 200 sacks and up does not charge freight to the client. Cash is made with deferred checks on one week.*

that even a friendly grill leads to burning dangers [sic]. According to the document, on March 23, 1995, La Fabril (Romero Group) organized the get-together. Among sausages and steaks they would have glimpsed 'the positive perspective in the sector since the war of prices started by La Fabril S.A. is over as it has been bought by the Argentinian group Bunge Born', as stated by the general manager of Molinera Valencia, Humberto Delgado, in the Board minutes dated 03/27/95. (…). On its side, La Fabril, although it accepts the organization of the grill, it states that the appointment was merely a camaraderie meeting between the main executives of milling companies, and strongly denies there had been a meeting to discuss prices". Caretas N° 1391, November 30, 1995 (section Mar de Fondo).

103 Resolution 047-95-INDECOPI/CLC, dated November 23, 1995.

Sayón: *Its prices are as follows:*
45.20 cash without scales
48.20 credit without scales
Finna: *Respects prices. From 200 sacks and up does not charge freight to the client".*

The weekly sales report dated July 22, 1995, was also considered. It was directed by the Marketing Manager to the General Manager of Molinera Inca SA. In this document, the following was stated: *"Concerning prices, in Lima, we have been informed that Nicolini, Molitalia, Cogorno and Fabril mills made effective an increase [sic] in prices since the 24th day, as it had been agreed. For Molinera Peru, Finna, Lugón and Triunfo it is stated [sic] that they will change their prices since the 27th day".*

Taking into consideration the aforesaid, the Commission concluded that 11 of 18 companies investigated had settled prices for the marketing of wheat flour, infringing art. 6 letter a) of Legislative Decree N° 701. Therefore, it imposed each one of them the highest sanction applicable according to the current law at that time[103]:

Chart N° 12
Sanctions to Milling Companies

Company	Commission (Tax units)
Cía. Molinera del Perú S.A.	50
Consorcio de Alimentos Fabril Pacífico S.A.	50
Corporación Molinera S.A.	50
Eugenio Cogorno Molino Excelsior S.A.	50
Eugenio Cogorno Molino Trujillo S.A.	50
Industrias Teal S.A.	50
Molinera El Triunfo S.A.	50
Molinera Inca S.A.	50
Molinera Valencia Sucesores S.A.	50
Molino Italia S.A.	50
Nicolini Hermanos S.A.	50

Source: Own development.

104 Resolution 1104-96-INDECOPI/TRI.

After that, almost all the sanctioned companies decided to pay the fine imposed and end the proceedings.

However, as it is the first high-profile investigation performed by Indecopi against a cartel, the use of circumstantial evidence to determine the responsibility of the offenders was questioned by two of the sanctioned companies, who appealed the first instance decision. In particular, they stated that the existence of similarity in prices and movement they showed in the market (i.e., parallel behavior) was no proof of settlement and the existence of this infringement could not be deduced merely from indications.

These questionings were reviewed by the Tribunal in an appeal, being entirely dismissed, taking into consideration that the Commission had full powers to investigate infringements in Legislative Decree 701, and the Peruvian legal frame acknowledged the validity of circumstantial evidence to demonstrate the existence of administrative offenses[104].

However, one of the companies appealed to the Judiciary, requesting to declare null and void the Resolution of the Court and, therefore, to dismiss the charge of price settlement against it. In determining this question, the Supreme Court of the Republic not only recognized Indecopi's authority to use circumstantial evidence, but confirmed its validity to demonstrate the existence of concerted practices in general, and of wheat flour price settlement in particular, in the following terms:

> *"As noted by the plaintiff company, it may be that the simple price parallelism is not enough to state that prices are "agreed", but instead, this fact added to other proven acts lead to the conviction that there was a settlement (...) That the proof of 'indication', before belonging to criminal law, is the action or signal disclosing what is hidden, is the suspicion that a fact allows concerning another unknown fact. No evidence offers as much variety as indication; it is based on facts or circumstances that are supposed to be proven and try by means of reasoning and inference to establish the relationship with the fact being investigated, the mystery of the problem (...) That, as a premise, it is noticed that indications, in order to meet their purpose, i.e., to be used as evidence, should be considered as a whole and not individually (...) That indications identified in the challenged decisions based on the ex officio investigation conducted by Indecopi (...) are facts that lead to establish that the plaintiff did participate in price settlement in conjunction with the other companies investigated and sanctioned (...) that, for the probative value of the 'indications', it is required that they meet certain requirements, such as the fact that there be no 'Contra*

105 Judgement dated October 18, 1999, entered on the la administrative complaint filed by Corporación Molinera

Indications' that cannot be reasonably disregarded and diminish the evidence of the indications (...) In this case file there is an absence of Contra Indications (…)"[105].

Thus, an important chapter in the experience of Indecopi as the authority in charge of persecuting the cartels of competitors was closed.

b. Ex officio investigation against Peruvian Poultry Association (APA) and 21 poultry producing companies, breeding companies and incubators (1997)

The investigation was initiated for several anticompetitive behaviors of the investigated companies in the market of trading of live chicken in Lima, during the period between May 1995 and July 1996. On one hand, the investigated companies were attributed the settlement of the prices of chicken; on the other hand, eleven of them were attributed the settlement of prices, marketing conditions and production volumes, as well as establishing of barriers for the entrance of potential competitors and forcing the exit of others.

This was the most famous case of settlement between competitors Indecopi has known in its entire history to date, due to the characteristics that converged on it. The price of chicken has a direct and immediate impact on the family budget - unlike investigation in the wheat flour production market, which impact was indirect -; the number of companies involved was quite high, the behaviors investigated were several and their complexity was higher, as it was evaluated whether within the overall settlement a group of companies had incurred, in turn, into a more complex and particular infringement, through the so-called Poultry Strategic Alliance (AEA).

Along with the above, on April 1996, the Executive Branch had issued the Legislative Decree NO807, by which it granted Indecopi increased powers of investigation and punishment. The investigation against the poultry market cartel was a "trial by fire" for Indecopi that did not hesitate to use its new powers, particularly when requesting information from the investigated companies, including that of a confidential nature, either during the number of inspection without further notice, or during the processing of the proceedings.

The details of the investigation were quickly moved to the media, thus creating anticipation for the results of the procedure.

S.A. against Resolution 1104-96-INDECOPI/TRI.

106 Resolution 001-97-INDECOPI-CLC, dated January 15, 1997.

The Commission, based on the report issued by the Technical Secretariat, deemed that the defaulting behavior had been implemented in four periods, identifying on each of them different behaviors or formulas, as shown in the following chart:

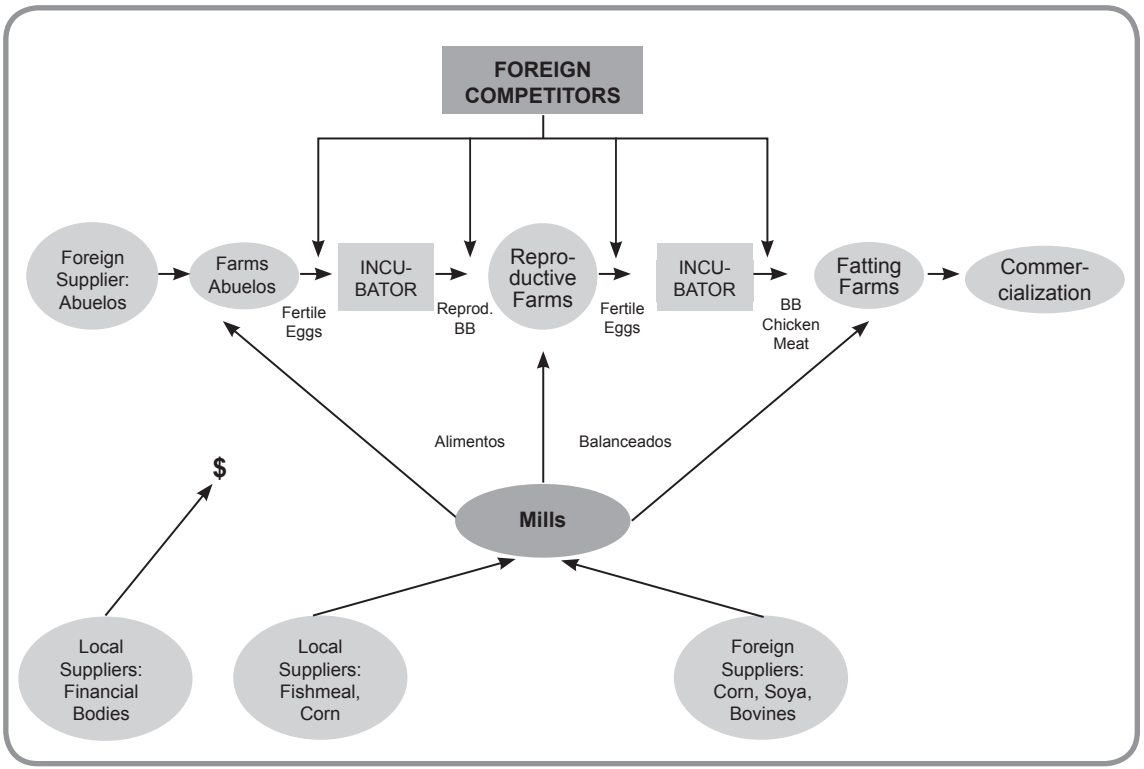
Chart N° 13
Defaulting behaviors detected in the poultry market cartel

Period	Defaulting behaviors
Mayo - agosto de 1995	Settlement for determining (stabilization) of prices. Settlement for creating entrance barriers to potential competitors (importers).
Septiembre - diciembre de 1995	Settlement for determining (reduction, increase and further stabilization) of prices. Forming of the AEA which involved an agreement for the agreed price fixing, production volumes and creation of entrance barriers and permanence of competitors.
Enero – marzo de 1996	Settlement for determining (increase) of prices. Continuous operation of AEA.
Abril - julio de 1996	Settlement for determining (reduction and further increase) of prices. Continuous operation of AEA.

Source: Own development.

For purposes of evaluation, it was first taken into consideration how the chicken production process was organized, which can be seen in the following graph (See Graph N° 24):

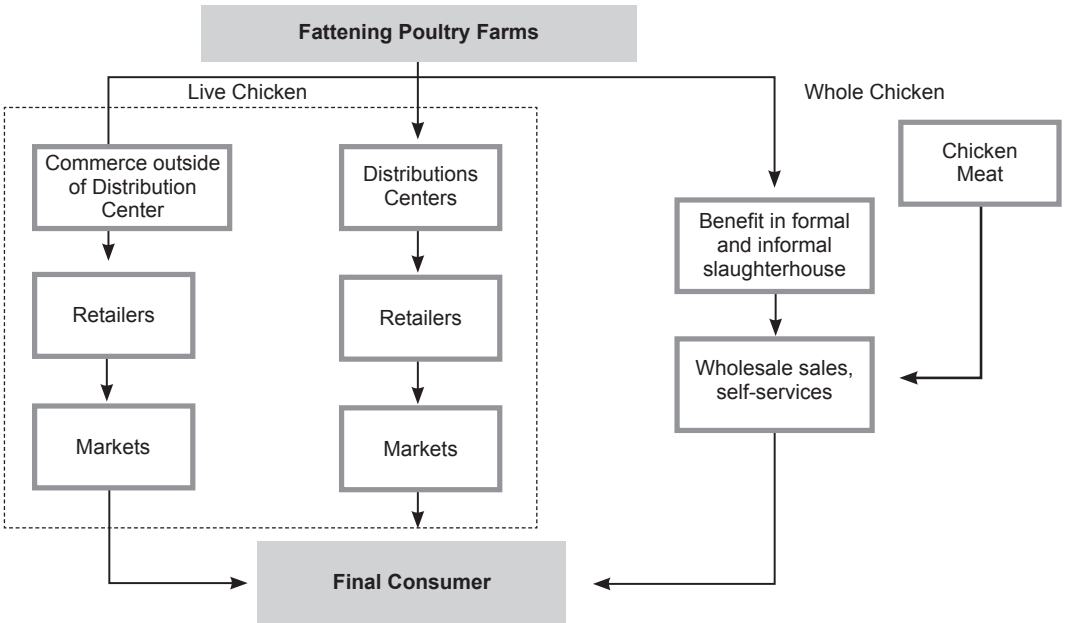
Graph N° 24
Chicken production process



Source: Technical Report N° 001-97-CLC.

Also, the organization of chicken trading process was taken into account, as it can be seen below (See Graph N° 25):

Graph N° 25
Chicken trading process



Source: Technical Report N° 001-97-CLC.

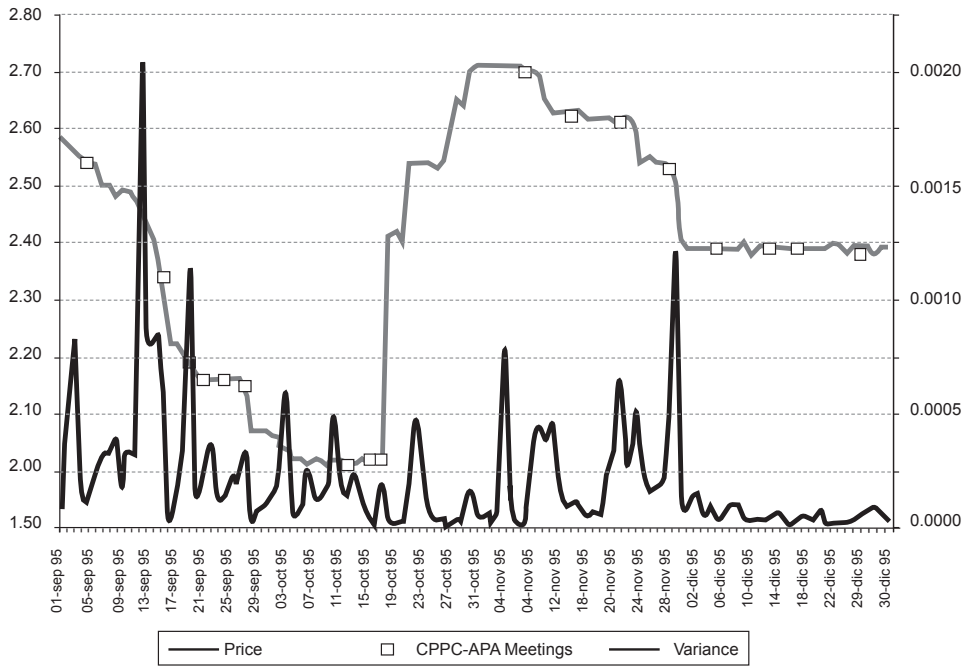
Having defined the above, the Commission examined whether the market characteristics could be considered as elements facilitating settlement between competitors, stating the following:

> *"Chicken meat is the meat product of highest demand among Peruvian consumers; its price is below the price of meat and most of the fish flesh, which makes it the most accessible choice for Peruvian families. In the live chicken trading market in Lima and Callao there is a high concentration of both production and trading; in conjunction with the main producers, other companies participate in that market which, due to their smaller size, do not substantially affect the market. They trade their production through systems other than those used by the main producers. Companies of higher participation in that market are grouped into the Chicken Meat Producers Committee of the Peruvian Poultry Association, which representatives have held periodic meetings during the investigation period – at least once a week. In those meetings, the market behavior and the behavior of each company in particular from the information exchanged was evaluated or gathered directly by professional bodies.*

In that market, there are conditions facilitating the creation of entrance barriers to potential competitors, that derive from the currently existing trading system, which is implemented primarily through 14 Distribution Centers and less than 240 wholesalers who are directly controlled by producers grouped within the APA" [106].

After that, the Commission assessed the behavior of companies in the market, to identify whether there was a parallel behavior, and identified that there was coincidence between the different dates on which meetings of a large part of the investigated companies in the APA and relevant changes in prices. Also, it found that the difference between the prices of the different companies was coincidentally reduced in times were price increases were given. The following graph shows this (See Graph No. 26):

Graph N° 26
Chicken sale: prices without VAT



Source: Technical Report N°001-97-CLC

107 Resolution 001-97-INDECOPI/CLC, dated January 15, 1997. Below is included the value of the fine imposed to

In view of that, miscellaneous documentation gathered in the inspection visits was evaluated to determine whether the behavior of companies could be explained as a result of an agreement or settlement.

The evidence indicated that early in the second quarter of 1995, the companies belonging to the APA identified that a considerable overproduction of chicken was approaching which, if sold in the market, would cause a reduction in price would cause them losses. Thus, in the minutes of the meeting Chicken Meat Producers Committee of the APA (CPPC) dated April 13, 1995, the following was stated*: "[it was] shown to those present the Baby Chicken Meat Production Projection Period April 1995 - September 1995. Concerning this point, the team that has been preparing these figures will suggest the different alternatives that may be adopted by the sector."* The Commission found that in this session the document entitled "Projected BB Meat Chicken Production Period April 1995 - September 1995", and the chart entitled "Real and Theoretical Production of Baby Chicken Meat", in which there was a projection indicating that national chicken production would reach 22 million in the month of September, the following being stated:

> *"(...) as it can be seen in Baby Chicken Theoretical Production, from the month of March there is a clear upward trend. In the 8 months curve it exceeds 17 million in February to 18 million in March, 19 million in April, 20 million in May, 21 million in June and it continues increasing until reaching 22 million in September.*
>
> *If this projection is complied, we would have a major problem in the market, because of the overproduction that would happen. The market easily absorbs only about 17.5 million baby chickens.*
>
> *We should not forget that a drop in farmgate price of S/. 0.10 cents of Nuevo Sol in a month, represents a lower income for the poultry companies of approximately US$ 1,500,000 Dollars."*

In addition, in the document entitled "Determination of Baby Chicken Meat Excess in the coming months", which was also distributed at the session subject to comment, the expected surplus level for the months of June to November 1995 was specified, as well as the losses that it would cause according to the chosen alternative:

Chart N° 14
Determination of Baby Chicken Meat Excess in the coming months

MONTH	MONTH	CARGO BB CHICKEN	POLLO BB		SURPLUS
SALE	DOM.	POLLO BB MILLIONS	IMPORTED MILLIONS	EXPORTED MILLION	MILLION
MAR	JAN	17.400			
APR	FEB	17.544	(0,649)		
MAY	MAR	17.903	(0,454)		
JUN	APR	19.335	(0,854)	0,400	1,789
JUL	MAY	20.145			2,145
AUG	JUN	21.029			3,029
SEP	JUL	21.277			3,277
OCT	AUG	21.581			3,581
NOV	SEP	21.967			3,967”

Chart N° 15
Hypothetical case of an increase of 290,000 baby chicken in the domestic placing

VALUATION OF LOSSES PER ALTERNATIVE. LOSSES EXPRESSED IN SOLES PER MONTH	S/. POR MES
Sell live poultry = (17 300.00 + 290 000) *0,95*2,2*0,1	= 3 676 000
Slaughter excess poultry = 290 000*0*0,95*2,2*0,65	= 394 000
Dispose of BB chicks = 290 000*0,60	= 174 000
Dispose of H.F. of BB chicks = 290 000/0,85*0,40	= 136 000
Remove excess breeding flocks = 290 000/13*3,5*0,7	= 55 000
Export H.F. of BB chicks	= 136 000
Export BB chicks	= 174 000
Export slaughtered poultry	= 144 000
Cut down imports	
Reduce cargo	
Select *	

Source: Resolution N°276-97-TDC.

The topics discussed at the meeting on April 19, 1995 were explained in the Memorandum 223-95, dated April 24, 1995, which was found in the inspection visit carried out on the

premises of the company Avícola El Rocío SA. In the referred document, an official of the company who attended the meeting explained what happened to the director of the company which head office was in Trujillo:

> *"At the last meeting of the Chicken Meat Producers Committee, Mr. Victor Eyzaguirre made a presentation on the crisis that may occur with overproduction of Cargo Baby Chicken, which I am enclosing.*
> *The corrective actions planned to be taken in the event that the cargo data are verified are as follows:*
>
> *1.- Trying to sell baby chicken fertile eggs to the companies that are importing, which at the moment are:*
> *a) ROSMAR S.A.* *c) MOLINOS MAYO*
> *b) CORPORAC. GANADERA* *d) MOLINERA SAN MARTIN*
> *2.- The second measure would be to freeze chickens for those integrations which average exceeds 2.30 Kg.*
> *3.- The elimination of breeding companies for those integrations exceeding the agreed weight.*
> *These are the measures to be discussed at the meeting on Wednesday this month".*

The next session of CPPC was held on May 03, 1995. Again, an internal memorandum of Avícola El Rocio was submitted by the Commission to explain the details of what happened:

> *"At the meeting held at the Chicken Producers Committee on Wednesday 03 this month, extremely important issues were treated:*
> *1.- Maintain a standardized average weight. The motion was approved unanimously.*
> *2.- Average monthly Load of Chicken Meat each integration should have.*
> *Mr. Polo Suárez and Mr. Fernando Fabres Ikeda, submitted the following chart, attached in annex sheet, based on average cargoes of the last three (03) months.*
> *By viewing this chart a voting process was performed among all attendants to eliminate their May surplus, which were the closest, via drowning of embryos or Baby Chickens. This was accepted by the majority in the first voting, except for TAKAGAKI; who put into consideration a number of reasons why it could not give an immediate answer.*
> *On the other hand, Mr. Fabres made the following proposals:*
> *1.- Reduction of Import by breeding companies.*
> *2.- Cancelling of Baby Chicken or Fertile eggs imports and proposed they were bought nationwide.*
> *3.- Elimination of breeding companies.*
> *4.- Chicken freezing.*

(...) Mr. Bellido's proposal to form with all members of the Chicken Meat Committee a company that would buy the Frozen Chicken, sell it to the provinces or try to export it was added to this measure. (...)
Chicken managed by the new company would be the production surplus for the month of May and the following months. The new company would work without profit breaking the entrance to Chilean chicken. According to their calculations these will represent a loss of 0.05 per kilo of chicken, a less amount than that resulting from not freezing and allowing these groups to approach each time more to Lima, as well as sales of Live Chicken due to the subsequent drop in prices.
(...)
At 01.30 p.m., a recess was asked until tomorrow so that each of the members of the Committee thinks and, in the special case of Mr. Pedro Komatsudani who opposes the measure, makes its cash flow and sees if it is convenient for him, since he opposes claiming that months ago the Committee has proceeded to work as a Free company."

Another evidence of later dates showed that the investigated companies agreed to implement, jointly, some of the measures proposed as an alternative to face overproduction, and thus avoid all chicken produced to be sold in the market, causing the price drop. It can also be mentioned other evidence considered by the Commission, for example, the minutes of the Board meeting of Alimentos Protina SA dated June 12, 1995, which stated the following:

"The Engineer (...) reported on the agreement recently taken by the Chicken Producers Committee, stating the imminent decision to slaughter and freeze chickens to avoid drop in prices. He finally stated that the company achieving an average weight level of 2,200 Kg. or less, shall not be affected with the agreement of slaughtering and freezing."

The evidence also showed that the arrangements had been implemented, with difficulty at first, but more regularly after. The implementation of the agreements required the recall involved comply with information on their production levels as well as on volumes of frozen chicken. The CPPC Circular/053/95, dated May 11, 1995, sent to all member companies, is proof of this:

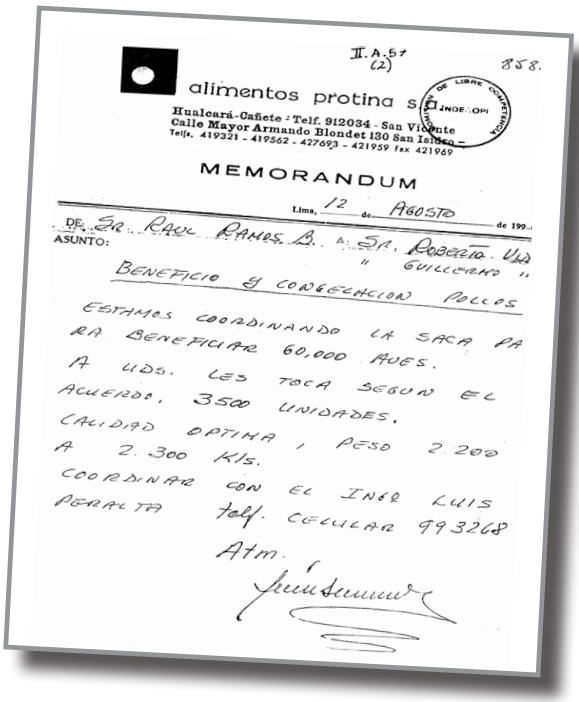
"We are pleased to address to you, in order to express our serious concern, because we do not timely have information on your company's Baby Chicken Meat production.
As agreed in the Committee dated 05.10.95, companies should send their information on a weekly basis.
This will help to make more intelligent decisions in the right time."

Subsequently, on 06 July 1995, the General Manager of CPPC sent letters to all companies, communicating with the quantities that would participate in the program "take for slaughter and freeze" of chicken. The text of the letter was as follows:

> *"We are pleased to address to you, as agreed at the meeting of the Committee held on 07.05.95, to attach a copy of the Program for the slaughter and freeze of 160,000 chickens, in which your company is involved with (X QUANTITY) of chickens.*
> *In this regard, we would very much appreciate you to kindly send at least on Friday 07/07/95, the corresponding pickup orders on behalf of the Peruvian Poultry Association."*

In addition, memorandum dated August 12, 1995, addressed by an official of Alimentos Protina SA to two officers from Molinera San Martín de Porres SA., not only referred explicitly to the existent agreement, but also reported about the freezing quota to meet the said agreement (See Graph N° 27):

Chart N° 39
Memorandum from Alimentos Protina S.A.



II.A.57
(2)
858.

alimentos protina s.a.

Hualcará-Cañete - Telf. 912034 - San Vicente
Calle Mayor Armando Blondet 130 San Isidro
Telfs. 419321 - 419562 - 427693 - 421959 fax 421969

MEMORANDUM

Lima, 12 de AGOSTO de 199..

DE: SR. RAUL RAMOS B. A: SR. ROBERTO VILLA
" GUILLERMO "

ASUNTO: BENEFICIO Y CONGELACION POLLOS

ESTAMOS COORDINANDO LA SACA PARA BENEFICIAR 60,000 AVES.
A UDS. LES TOCA SEGUN EL ACUERDO, 3500 UNIDADES.
CALIDAD OPTIMA, PESO 2.200 A 2.300 KLS.
COORDINAR CON EL INGR LUIS PERALTA telf. CELULAR 993268

Atm.

Source: Resolution N°276-97-TDC.

Based on the above, the Commission concluded that the schedule for the execution of the agreement was demonstrated, regularly reporting the monthly volume requested to withdraw from the market and the corresponding quota to be frozen for each participating company.

The following stages of the agreement were also studied and demonstrated through various types of circumstantial evidence. Just as an example, the formats titled "Wholesale prices of domestic products sold in the country" can be cited, which were found at the premises of Molinera San Martin de Porres SA. There, the company submitted to the National Institute Statistics and Information Technology (INEI), data on the evolution of prices of chicken. In the "Comments" section of the format submitted on October 23, 1995, the following was stated: *"The 10/18/95 the price recovered. In the market it still cannot be observed the demand for the product, since it depends on the average price of chicken and the agreement taken by the group of farmers."*

In the "Comments" section of the format submitted a month later, i.e., on November 23 of the same year, the mentioned company informed the INEI that the farmgate price of chicken had been S/.3.20 on October 30 and S/.3.10 November 09, including the following explanation: "The price of S/.3.10 is being maintained because all integrations [i.e., the poultry companies] have reduced their production by means of an agreement, since the market needs to stabilize."

As for the measures taken in 1996 by all investigated companies, the Commission also submitted various indications, such as the following manuscript, found a copy of the report entitled "Supply Week April 16 to 22, 1996", that the investigated companies discussed in the CPPC meeting on April 24, 1996, a document that was found at the premises of Avícola Rosmar SA.

Chart Nº 40
Manuscript found in a copy of the report entitled "Supply Week April 16 to 22, 1996"

Source: Resolution N°276-97-TDC.

To explain this manuscript it should be mentioned that, according to the findings of the Commission, at the time corresponding to the date of this document, poultry companies had agreed to conduct a joint advertising campaign to promote an increased consumption of chicken, in order to rapidly control production surplus that was going to show again, and then coordinate raising the price again.

Thus, the Commission concluded that the investigated companies had participated in a settlement to fix the price of chicken together, managing to do different variables that allowed them to coordinately control the volumes that would be traded.

In addition to the above, the Commission considered that a smaller group of the investigated companies had incurred in additional illegal behavior through the establishment of the AEA, which was a more complex agreement within the overall settlement, and which they tried to hide through the figure of an alleged transit to an integration of the companies involved.

In particular, the Commission deemed to have proven that the agreements adopted by the companies of the self-named AEA have had the objective or purpose to agree the price of chicken, by direct settlement of prices and different issues related to the production and trading (volumes and quality of chicken, input purchase unification, joint determination of the wholesale margin, unification of the trading system, etc.). Similarly, it realized that it had proved the existence of agreements within the AEA which purpose was to prevent or restrict

the entry of competitors -marginal producers, informal or foreign – to the market through the development of financial, business and governmental access barriers.

As evidence of the aforesaid, the Commission took into account the document entitled "Poultry Strategic Alliance - AEA. Defining AEA Strategic Guidelines", which stated the following:

> *"The general description of each of the objectives linked to the sub-strategy of creating entrance barriers is as follows:*
> *(...)*
> *b) Determine the wholesale margin: drive standardization marketing margin of wholesalers at a fair level.*
> *(...)*
> *d) Corner farms and hatcheries: carry out activities related to avoid having idle capacity outside the AEA, so that it can be purchased or used by others.*
> *e) Lobbying in Banks, IPSS, SUNAT, etc: looking forward to discuss with them so that they do not favor uneven growth of the sector.*
> *f) Sanitary Barriers: suggest SENASA to approve the "rules of farms" in order to meet certain health standards in the industry. "*
> *(…)*
> *a) Action Plan "lobbing with Banks"*
> *This plan aims at creating entrance barriers for potential investors and in turn, makes the financial sector gain confidence in the AEA and its members. Specific activities to be implemented in this action plan are:*
> *(...)*
> *- Inform them not to promote distortions in the sector by wrongly encouraging some investors who want to enter the poultry sector.*
> *b) Union attitude*
> *This plan focuses on a series of proactive activities that must be implemented to strengthen the AEA while creating entrance barriers for certain investors. Ongoing activities would be as follows:*
> *(...)*
> - Propose a review of the problems that would be generated by imports of breeding *chickens and baby chickens.*
> *- Pressure SENASA to approve regulations for farms, slaughterhouses, storage centers, etc."*

Therefore, the Commission declared to be well founded (i) the charge of price fixing against all investigated companies, and in addition, (ii) the charge of price fixing and implementation of other measures to control production and the creation of entrance barriers (through the AEA)

against a smaller number of companies. Consequently, differentiated fines were imposed to them according to their level of participation, size in the market, number of illegal behaviors made, etc. The whole amount of the fines imposed by the Commission amounted to 6,373 Peruvian Taxation Units[107].

On the appeal the use of circumstantial evidence was questioned, the alleged abuse in the use of investigative powers, improper use of circumstantial evidence, particularly the implications of settlement that the Commission had deduced from the evidence obtained, and the existence of alternative explanations for the documents found, other than an agreement of competitors. In addition, companies sanctioned for participating in the AEA also questioned who would have thought that through it an additional illegal behavior was committed and they were more severely punished for it.

The Tribunal dismissed the questions related to the use of the Indications, as well as on the powers of investigation, noting that the Commission's approach was completely according to law and at all times had allowed companies to fully exercise their right of defense.

For analysis of indications found, the Tribunal agreed that there was evidence of the existence of an agreement by the majority of the investigated companies for a coordinated price fixing through a set of measures for overproduction control, jointly applied. In the words of the Tribunal:

> *"To conclude this point, the Court considers that it can be concluded from the evidence and indications jointly assessed, that on the CPPC meeting dated May 3, 1995, the poultry companies attending, except Takagaki (today Avinka SA) agreed to tackle the problem that would mean to their companies the "overproduction" they had confirmed that would occur based on the information collected at the end of the month of April and prepared by Mr. Izaguirre. To this end, these companies adopted a series of measures to restrict competition designed to be implemented jointly and simultaneously. The measures agreed at these meetings were to decrease the levels of breeding (e.g., reducing the importation of fertile eggs, exporting fertile eggs jointly and/or eliminating fertile eggs and embryos), standardization of the weight of chickens and the joint management of surpluses through their freezing and sale outside the Lima market. For this, Mr. Rafael Bellido, representative of Corporación Ganadera SA, suggested forming a company that*

each of the companies, in a comparative chart with the fines fixed by the Tribunal.

108 Resolution 276-97-TDC, dated November 19, 1997.

would be responsible for selling the surplus production - that is, the frozen chicken - in other markets, mainly in provinces (Cuzco and Puno, places where, unlike Lima, it is primarily traded frozen) and institutions (e.g., the Navy of Peru). This suggestion was accepted, entrusting Mr. Bellido to develop a project for the creation of the new company."[108]

In this regard, the Tribunal upheld the first instance decision regarding the charge for settlement price against fifteen producers and traders of chicken and the APA. Notwithstanding this, it considered that there was no evidence that incubator companies and breeding companies, which were included in the investigation after it was initiated, had committed the said offense, therefore it dismissed the first instance decision in this regard.

Finally, the Tribunal considered that any violations that may have occurred within the AEA *"have occurred simultaneously with the settlement of prices, production conditions and restrictions involving all investigated companies"*, so that any restriction of competition within the AEA *"would have juxtaposed to the agreements and behaviors generated within the frame of a larger settlement and, therefore, should be considered as part of the settlement acts involving other companies"*.

Based on the foregoing, the Tribunal reduced the fines imposed by the first instance to the infringing companies, as outlined in the following chart:

109 This situation has been reported ironically, but true, by Alfredo Bullard: "*After 13 years of litigation, the Supreme*

Chart N° 16
Fines imposed to infringing poultry companies

Company / Entity	Commission (UIT)	Tribunal (Peruvian Taxation Units)
Peruvian Poultry Association (APA)	100	50
Agropecuaria Contán S.A.	30	20
Agropecuaria El Pilar S.A.	56	25
Agropecuaria Villa Victoria S.A.	149	--
Alimentos Protina S.A.	348	130
Avícola del Norte S.A.	64	--
Avícola El Rocío S.A.	64	30
Avícola Galeb S.C.R.L.	113	50
Avícola Rosmar S.A.	75	30
Avícola San Fernando S.A.	1 055	450
Avícolas Asociadas S.A.	115	50
Corporación Ganadera S.A.	1 045	340
El Palomar E.I.R.L.	60	20
F.Car SA.	37	15
Germán Orbezo Suárez	384	140
Granja Los Huertos S.A.	1 055	--
Granja de Reproductoras El Hatillo S.A.	10	--
Haidarliz S.A.	10	--
Molinera San Martín de Porres S.A.	300	220
Molinos Mayo S.A.	1 055	450
Redondos S.A.	248	100

Source: Resolutions 001-97-INDECOPI/CLC y 276-97-TDC
Own development.

An additional issue of the highest importance in the Tribunal's decision is that, as a result of the theoretical analysis and the interpretation given to the Legislative Decree N° 701, it

decided to establish the mandatory compliance precedent (rule of mandatory application by Indecopi's decision-making bodies) for subsequent cases of settlement between competitors:

Resolution N° 276-97-TDC-INDECOPI

"According to the rules contained in Legislative Decree Nº701, the settlements of prices, market sharing, allocation of production quotas and production limitation or control must be punished according to the per-se rule. This implies that the mere performance embodiment of the forbidden practice constitutes an administrative offense to which the required legal sanction must be applied. In that sense, to consider the offense configured it is not necessary to take into account the detrimental effects of the practice on the market, or their reasonableness, i.e., the fact that the practice is appropriate or not to produce detrimental effects on the market."

Thus, in 1997, Indecopi took the illegality criterion *per se* to sanction price settlements and other behaviors classified as cartels of competitors. Under this rule, these behaviors should be classified as illegal with the mere demonstration that the participants had agreed to restrict competition, without the need to demonstrate detrimental effects on the market or to assess the reasonableness of such practices.

As it has been already discussed in the first chapter, the strictness of this rule is explained because the behaviors that qualify as a cartel allow competitors to act in coordination in the market, as if they were a single company but simulating to compete. Thus, they achieve in a veiled way the market power they do not have individually and get monopolistic benefits that would not have been possible had they not coordinated their behavior.

A very relevant issue concerning this case is that the infringing companies took the dispute to the Judiciary, requesting to declare null and void the Resolution issued by the Tribunal. The judicial process culminated at the last instance by the end of 2010.

Although its term in court was exaggerated (about 13 years), the final and definitive outcome was notoriously positive for Indecopi. Both the Provisional Civil Division of the Supreme Court, as the Constitutional Law and Permanent Social Division of the Supreme Court, which heard the case at first and second instance courts, respectively, confirmed and supported Indecopi's decision.

Among the most interesting aspects of the judgment should be mentioned that the Supreme Court concluded that the settlement of poultry companies was duly proven by circumstantial evidence and evaluated used by Indecopi instances. Additionally, it fully confirmed, according to the Legislative Decree 701, the criterion of illegality *per se* was the applicable rule of analysis to this type of conduct forbidden.

Given the importance of the case, as one of the key processes in the development of Indecopi's practice in the persecution of cartels of competitors, we deem appropriate to reaffirm what we have already noted in a previous work on the final and definitive judgement of the Judiciary:

> *"In fact it is one of the most important rulings of the Supreme Court in this matter, which supports an investigation properly made and a duly supported analysis by Indecopi in one of the most emblematic cases of this institution. Although it draws the attention, and can cause a fair critic, it has taken a long time to arrive to the final decision, it should not lose sight that this decision has not been a consensus or was not free of opposing positions. Rather, it is the product of a large dispute between the members of the Supreme Court who vote to vote were considering three different positions in regard to the matters dealt background109. (…)*
>
> *The majority vote concluded that the settlements type committed by poultry companies are punishable under the per-se rule, i.e., that such behaviors are automatically illegal for their mere performance without needing to evaluate their impact on the market. To reach this conclusion it was considered that, although Article 3 of L.D. 701 stated that there should be a detriment to the general economic interest110, such policy referred to an abstract economic interest, not to a specific interest, therefore it not necessary to evaluate the effects of investigated practice on the market"*[111].

Court finally gave its final judgment: the poulterers made a settlement and must be punished. Already in the first instance the Provisional Civil Division of the Supreme Court had declared that the offense was made with a non-substantial reduction of the fine imposed. The poulterers appealed and the case (simple and clear) became complicated. Suddenly, all the members began to vote against Indecopi's decision. A total of five members (with formalist arguments which were not related to the core problem) voted for the annulment of the case. Some sought to bring it back to the judicial first instance, others to Indecopi itself (imagine, 14 years). With the game against Indecopi, it did not give up to have the case settled properly. It turned the game into the poulteres and was given four votes in favor of confirming the decision in the first instance and declaring poultry companies guilty". See: *http://blogs.semanaeconomica.com/blogs/prohibido-prohibir/posts/gallina-vieja-da-buen-caldo-el-final-feliz-de-la-concertacion-de-precios-del-pollo#ixzz2I50jLBbA* (visited on December 17, 2012).

110 It should be noted that Art. 3 of the Legislative Decree Nº 701 stated the following: "*It is prohibited and it will be punished, in accordance with the provisions of this Act, any act or behavior related to business, that constitute an abuse of dominant position in the market or that limit, restrict or distort free competition, so as to generate detriment to the general economic interest in the country".*

111 QUINTANA, Eduardo. (2011b). Op. Cit., pp. 340-341.

112 Resolution 003-97-INDECOPI-CLC, dated February 11, 1997.

Notwithstanding the positive judgment, it should not be forgotten that the fines imposed were even lower, because of 2,120 Peruvian Taxation Units which the Tribunal had imposed altogether, the Supreme Court stated that they should be reduced to 1,224 Peruvian Taxation Units altogether.

c. Miguel Ciccia Vasquez E.I.R.L. (CIVA) vs. Empresa Turística Mariscal Cáceres SA. - Mariscal Cáceres (1997)

CIVA signed a "Transportation Agency Services Agreement" with Mariscal Caceres, under which the latter agreed to allow the use of the facilities of the bus station for the sale of tickets, receipt and delivery of parcels, loading and unloading of passengers of Civa. For this purpose, Mariscal Caceres would set up a sales service counter for CIVA to sell its tickets. Meanwhile, CIVA agreed to pay the corresponding consideration for, and to respect the Internal Regulations and decisions of the person responsible for the administration of the terminal, being the breach of this obligation ground for the termination of the contract.

The aforementioned Internal Regulations stated the routes served by user companies of the bus station, in the following terms:

> *"The users, as for the use of the terminal, are four interprovincial transportation companies that own the following routes:*
> *• Transportes Soyuz S.A.: Lima-Ica and intermediates;*
> *• CIVA: Lima-Chiclayo and other points to the north and northeast of Chiclayo;*
> *• Empresa de Transportes Mariscal Cáceres S.A.: Lima-Huancayo; and,*
> *• Expreso Cruz del Sur S.A.: Lima-Chimbote-Trujillo-Chiclayo-Piura-Tumbes, Lima-Ica-Arequipa-Moquegua-Tacna, Lima-Juliaca-Puno-Yunguyo-Sicuani-Cuzco-Cotahuasi-Orcopampa, Lima-Huacho-Barranca."*

Additionally, it provided that *"User companies, subject to these regulations, shall undertake not to use the routes of another user, except pursuant to a written agreement in which one of the companies granted the other a number of frequencies; such document shall be a part of this document."*

Regarding rates, the Regulations stated that *"... these will be determined by the management"* and also stated: *"Only in the cases mentioned in the twelfth point, companies can reduce rates after having demonstrated the need for a technical and economic study, and obtained approval from the administration."*

Although among the routes assigned to CIVA by the Regulations it was not provided the route the Lima-Tacna-Lima, the company obtained from the Ministry of Transport, Communications, Housing and Construction concession to provide services on that route. Then CIVA informed Mariscal Caceres this and started to provide services on this route from the bus station. Therefore, Mariscal Caceres asked it to stop serving this route, with a deadline of 72 hours to withdraw the service. Since CIVA ignored this request, Mariscal Caceres stated it would order to prevent the entrance or exit from the bus terminal to the buses serving that route and also warned CIVA that, if it persisted, it would be forced to suspend the service of all CIVA's routes.

CIVA initiated an action for constitutional guarantees against Mariscal Cáceres and it terminated the "Transportation Agency Services Agreement" for breach of its contractual obligations, with a deadline of 30 days to clear and return the terminal sector it had rented, after which its vehicles would be prevented from entering. Finally, Mariscal Caceres began an eviction process against CIVA.

CIVA reported that Mariscal Caceres was incurring in a restrictive practice to competition through the Internal Regulations, which limiting the operation of new user companies in routes in for public passenger transportation served by any of the user companies already operating in the terminal. In particular, it reported that it was being prevented to work on the route Lima-Lima-Tacna, in order to benefit the company Expreso Cruz del Sur SA that was already assigned that route. It also questioned whether the terminal manager fixed transportation service prices.

The Commission found that through the Regulations of the terminal several competing transportation companies (which served or could serve the same routes, either fully or partially), had reached a market sharing agreement by assigning routes for each company and service operating limitation with the prohibition of serving other routes already assigned. However, the Commission found that those agreements did not constitute an illegal restraint of competition, since they did not prevent CIVA to serve other routes authorized, provided it does so from other terminals. In particular, the Commission stated that:

> *"This kind of agreements are common in the market when companies providing complementary services share the same physical space and usually are aimed at achieving greater efficiency - reducing transaction costs, new services and products, etc. - and generating competition at higher-level organizations. In this regard, it is not itself contrary to the rules of the Legislative Decree Nº701 that in the internal regulations of any bus station bringing together companies that serve different routes, establishing a limitation on routes which may be covered by companies*

from the said terminal, as companies are free to take another route different from other terminals. Even in some cases this may contribute to increase competition".

Concerning price fixing, the Commission noted that although the Regulations provided that the terminal management would set the rates, it did not violate the rules of free competition because it covered only the routes that were operated from the terminal, without preventing CIVA or other transportation company to set different rates for different routes served from the said terminal, or even for the same routes but served from another terminal.

Based on the above, the Commission dismissed the complaint[112]. CIVA appealed this decision, reaffirming the same arguments and noting that Mariscal Caceres and the other companies using its bus terminal had engaged in a cartel agreement for market sharing and price fixing.

On appeal, the Tribunal considered that the four transportation companies operating in Mariscal Caceres' terminal agreed to join and provide their services from the said terminal, for which they agreed to divide the routes to be covered and that the service fee is fixed by the administrator of said premises. In this regard, the Tribunal stated that the agreement did not constitute an infringement of Art. 6 Legislative Decree Nº701, then:

"A distinction cam be made between restrictions on competition: on one side are pure restrictions, which are those considered illegal per se, i.e., objectively forbidden, regardless who may or may not cause damage to the market, and on the other side are accessory or complementary restrictions".

In this regard, the Tribunal stated that the restrictions are considered pure when the agreement is given not to improve certain productive activity but with the sole purpose and effect of restricting production and competition. Instead, accessory or complementary restrictions are part of integration situations for several companies to perform certain productive activity and thus create the possibility of generating efficiency and reduce costs for the consumer, even when they reduce competition. In the latter case, the main issue is not the price fixing or market sharing agreement, but the partnership agreement, *joint venture* or the way of productive integration.

As an example of complementary or accessory arrangements, the Tribunal raised the case of a law firm consisting of members that can compete with each other, but they agree to eliminate that rivalry and integrate their activities in order to provide more effective

113 Resolution 206-97-TDC-INDECOPI, dated August 13, 1997.

customer service by sharing costs. Lawyers participating in the agreement may provide for the prohibition of working on their own, the sharing of certain areas of work, and charge for their services a common fee jointly established by all. Such a business model should not be seen as a mechanism to restrict production, but rather, to compete with other law firms or independent lawyers operating in the market. In this regard, it is understood that this law firm is a professional association contract in which a common fee is established incidentally and complementarily to make the association feasible or more efficient. Therefore, the Court concluded that such agreements should not be considered illegal *per se*.

As it is a complex matter, the Tribunal defined the conditions to be verified in order to consider an integration agreement measures as accessories restricting competition:

- They should be performed as a result of an integration agreement or business developed jointly by the members, and should be able to increase the efficiency of the integrated group and be applied within the limits necessary to achieve such efficiencies.
- The market quotas for each member of the agreement should not jeopardize competition.
- Members of the agreements must not have the primary purpose or intent of restricting competition.

The Tribunal found that the three conditions were present in the case subject matter of the complaint, as the agreements between transportation companies operating in the Mariscal Cáceres terminal contributed to greater efficiency of the service provided, since they allowed offering consumers a greater variety of destinations and routes, providing a comprehensive service. The purpose of participating companies was not to restrict competition, but provide a more comprehensive and beneficial service for users from the terminal. Finally, the agreements in question only restricted competition between those companies mentioned concerning interprovincial transportation services that were provided from the terminal; therefore, restriction of competition generated no damage to the market, while companies could provide even the same service from another terminal or by themselves.

Consequently, the Tribunal upheld the first instance decision and also decided to establish the following mandatory compliance precedent on accessory or complementary agreements[113]:

114 Resolution 025-2002-INDECOPI/CLC, dated December 11, 2002.

Resolution N°206-97-TDC-INDECOPI

"The price fixing and market sharing agreements are illegal per se when they aim and have the essential and unique purpose to restrict competition, i.e., when they are naked or pure contracts. On the other hand, those price fixing and market sharing agreements which are ancillary or complementary to an integration or association agreed and have been adopted to achieve greater efficiency of productive activity in question, should be analyzed case by case in order to determine the reasonableness or otherwise of them.
(...)
When the integration can be beneficial but is not considered essential to carry out certain production activities, the integration agreement and accessory and complementary agreements restricting competition shall be allowed if they meet three characteristics:

- *Price fixing or market sharing agreements are performed as a result of an integration contract, meaning that members must be performing an economic activity together. Also, these agreements should be able to increase the efficiency of the integrated group and must be applied within the limits required to achieve such efficiency.*
- *The market quotas for each member of the agreement do not lead to determining that the restriction of competition resulting from the integration will cause damage.*
- *Members of the agreements must not have the primary purpose or intention of restricting competition.*

Should the presentation of the three conditions described above fails, the agreement will be considered illegal".

d. Ex officio investigation against the Peruvian Association of Insurance Companies (APESEG) and nine insurance companies (2003)

Art. 30 of Act Nº 27181, Transport and Traffic General Act, published on October 8, 1999, prescribes that every motor vehicle circulating within the territory of the Republic must have a Mandatory Insurance for Traffic Accidents (SOAT) covering all persons, occupants or third parties non-occupants, who suffer injury or death as a result of a traffic accident.

The term to make SOAT enforceable for vehicles used for public passenger transportation, taxis and private and school vehicles was extending in time. However, it was determined that the vehicles should have SOAT later than January 01, 2003.

On the other hand, the Regulations on Insurance Policies, approved by SBS Resolution Nº52-99, establishes the obligation of the insurance companies to submit to the Superintendency of Banking and Insurance (SBS) the policy draft, the policy summary, riders, technical note and the rate of each of the insurance products offered on the market.

Through Multiple Official Letter Nº18538-2001-SBS, dated November 19, 2001, the SBS communicated insurance companies to submit the SOAT sticker model, policy and certificate, as well as the rate and corresponding technical note.

This technical note is the technical support pure hazard rate – i.e., the expected cost of the risk assumed by the insurer - of casualty insurance. It is prepared according to statistical sampling of the risks assumed established in a homogeneous and representative way, using figures of at least four years before the corresponding study, and making projections for the two following years.

As the SOAT is a new product on the market, insurers who made part of the Automobile Committee of APESEG hired actuary Mr. Amadeo Vallejo, to prepare the Technical Note for the SOAT, in order to comply with the requirements of the SBS through Multiple Official Letter Nº18538-2001-SBS, as stated in the minutes of the meeting of the Automobile Committee on December 04, 2001:

> *"MINUTES N°15/2001*
> *AUTOMOBILE COMMITTEE*
> *MEETING, DECEMBER 04, 2001*
> *(…)*
> *1.- TECHNICAL NOTE*
> *In connection with the subject heading, the Chairman indicated that, as it is necessary to meet the laws, there should be a prompt answer to the Multiple Official Letter received from the Superintendency of Banking and Insurance, by which that institution reminds us to meet some requirements such as submitting the Technical Note before starting trading the Mandatory Insurance for Traffic Accidents.*
> *After an exchange of ideas, the following was agreed:*
> *Entrust Mr. Amadeo Vallejo the preparation of the corresponding Technical Note to submit to each insurance company that will operate in this new insurance. The Note will be developed on the basis of market statistics to decrease deviations, therefore the figures should be those previously used in the calculations for the implementation of this insurance. The cost of this work will be made as usual by every company in the accounts of the Clearing House of this month. Mr. Vallejo must send APESEG the 10 of this month*

the corresponding technical notes. The members of this Committee will meet the next day after receiving (sic) these technical notes, in order to evaluate them."

Subsequently, in the meeting of the Automobile Committee on December 11, 2001, the insurance companies approved the Technical Note prepared by Mr. Vallejo for the SOAT, according to the corresponding minutes:

"MINUTES NO16/2001

AUTOMOBILE COMMITTEE

MEETING, DECEMBER 11, 2001

(…)

MANDATORY INSURANCE FOR TRAFFIC ACCIDENTS – SOAT

Mr. Richard Mauricci noted the need to verify compliance with the resolutions adopted at the meeting held last December 4, and take measures that help to make feasible the beginning of this new insurance operations for the category.

In that regard, he said that it was necessary to emphasize the following topics:

1. - TECHNICAL NOTE

In connection with the subject of the category, the Chairman indicated that Mr. Amadeo Vallejo had submitted us the Technical Note he had prepared for the members of this Plenary review and approve it.

Mr. Gustavo Sardinia explained the methodology and referred to the statistical bases that had been used for the development of this document; also, he explained in detail its structure.

After an exchange of ideas, the following was agreed:

Approve the development of the Technical Note, APESEG having to meet within 24 working hours the proceedings of the order established for these cases, in order to meet as soon as possible the provisions on the matter."

Subsequently, between December 18, 2001 and January 18, 2002, eight insurance companies submitted to the SBS the corresponding SOAT Technical Note. All these Technical Notes indicated identical surcharge percentages for external and internal management, utility and issuance fee, i.e., the commercial premium. This being so, once added to those items the corresponding pure hazard premiums and the VAT, end premiums (also called sale premiums or rates) of all insurers' Technical Notes proved equal in all categories, as shown in the following chart:

Chart N° 17
Comparative chart of the Technical Standards for SOAT submitted by the insurance companies

En dólares americanos (US$)								
SOAT	Pacífico	Sul América	Wiese Aetna	Generali	Mapfre	Rimac	Royal & Sun Alliance	La Positiva
Automobile	60,00	60,00	60,00	60,00	60,00	60,00	60,00	60,00
Trucks	150,00	150,00	150,00	150,00	150,00	150,00	150,00	150,00
Taxis	100,00	100,00	100,00	100,00	100,00	100,00	100,00	100,00
Long distance bus	1 250,00	1 250,00	1 250,00	1 250,00	1 250,00	1 250,00	1 250,00	1 250,00
Combi	200,00	200,00	200,00	200,00	200,00	200,00	200,00	200,00
Urban bus	350,00	350,00	350,00	350,00	350,00	350,00	350,00	350,00

Source: Technical Report N° 012-2002-CLC

Subsequently, in the meeting of the Automobile Committee on January 02, 2002, the insurance companies agreed to reduce the SOAT prime for automobiles from US$ 60 to US$ 55, as it is shown in the corresponding minutes:

> *"MINUTES N°02/2002*
> *AUTOMOBILE COMMITTEE*
> *MEETING, FEBRUARY 05, 2002*
> *(…)*
> *1. MANDATORY INSURANCE FOR TRAFFIC ACCIDENTS (SOAT).-*
> *Mr. Richard Mauricci said the purpose of this session was to determine the position of the Committee on the approach of the Ministry of Transportation and Communications, in relation to the Mandatory Insurance for Traffic Accidents - SOAT:*
> *Then, he stated that the topics discussed last Thursday with consultants from the Ministry focused on the application made to us regarding cost reduction of around 30%, subject on which he offered further analysis of the changes suggested in SOAT rules and send a reply jointly with our ruling on their request to cover the SOAT within the coverage of automobile insurance, which earned a unanimous response of non-acceptance because both insurances have a different nature and are, therefore, incompatible.*
> *(...)*
> *Based on the above, and after an exchange of ideas, the following was agreed:*
> *1. With respect to Private Service insurance, a maximum reduction of the minimum premium from $ 60.00 to U.S. $ 55.00, which is equivalent to 8.33% reduction*

2. Regarding the Public Service insurance, taking into consideration its complexity and in order to give a corporate response to the Ministry, companies that operate this risk will meet on Wednesday 6 at 11, to make a decision on the matter.

(…)".

Therefore, the Commission opened an ex officio investigation against APESEG and nine insurance companies for the price settlement of the SOAT during the period between July 28, 2001 and April 20, 2002.

In evaluating the facts, the Commission considered that if in the Automobile Committee meeting of February 5, 2002, the nine investigated companies jointly agreed to reduce the SOAT fee for private automobiles (from U.S. $ 60 to U.S. $ 55), they had also agreed to fix the price of SOAT at U.S. $ 60. Additionally, the Commission found that the above was verified by the fact that eight of the nine companies informed the SBS identical rates, six offered SOAT (through advertising) at rates similar to those reported to the SBS and, finally, four sold SOAT to the said rates.

At the discretion of the Commission, *"The joint analysis of this evidence, along with price reduction agreement of February 5, 2002, allows to infer that on the meeting of December 11, 2001 the companies reached an agreement on the SOAT rate fixing for six types vehicles".*

The Commission noted that although nine companies investigated gave their consent to the price agreement, one of them (Interseguros) did not execute the agreement rates for neither advertised nor SOAT sold at that price. However, the Commission noted that this would only be considered when evaluating the severity of the sanction, to the extent that the price agreement was subject to the rule of illegality *per se*, for its very existence.

Finally, the Commission also considered APESEG as a participant in the offense because inside of it not only the decision to hire an actuary and approve an only Technical Note he prepared was taken, but also the guild had facilitated companies absent from the meeting of December 11, 2001 to become aware and give their consent to the agreement.

The investigated companies formulated some alternative explanations and tried to justify the absence of detrimental effects on competition. Thus, they stated that the Technical Note communicated to the SBS contained merely referential calculations. They also noted that the SOAT market was incipient and product sales were still lower, therefore the effect that it might have caused was not serious.

The Commission rejected the above arguments, noting that the values specified in the notification to the SBS were not referential as several companies had advertised the service at prices equal to the final premium amounts set forth in the Technical Note forwarded to the SBS, and also, a group of companies sold SOAT at those prices. It also noted that the existence of the agreement was independent of the fact that during the investigated period few SOAT sales transactions have been registered, or that consumers had just begun to know the market.

Therefore, the charges against the nine insurance companies and APESEG declared to be well founded, and they were imposed the fines indicated below, for having settled the SOAT price during the period between December 2001 and February 2002[114].

The insurance companies appealed the decision in first instance, with the following arguments:

- The cartel behaviors should be evaluated by applying the rule of reason rather than the per-se rule, in response to art. 3 of Legislative Decree Nº701, which requires that damages are verified for general economic interest to determine the existence of an infringement, having to address the legislative history of that rule (as the Free Competition Act of Argentina).
- The Technical Note submitted to the SBS did not contain SOAT prices, but referential rates and was developed following the request of the Ministry of Transportation and Communications (MTC) to report SOAT costs.
- The similarity in the risk premium is explained since this insurance has conditions determined by law and is oriented to the same user group.
- Reduction on the rate answered to a request from the MTC to the insurance companies.
- APESEG merely served as a link between the MTC and the insurance companies.

When deciding on the appeal, the Tribunal openly moved away from the interpretation criterion used by the Commission and that was formulated in the mandatory compliance precedent issued in 1997 to settle the case of the settlement in the poultry market. Indeed, the Tribunal understood that the cartel behaviors between competitors aimed at fixing prices should be analyzed according to the effects they had on the market and not based on the criterion of illegality per se. Notwithstanding the foregoing, the Tribunal stated that APESEG and six insurance companies had incurred in an infringement of art. 3 and 6 letter a) of Legislative Decree Nº701, by making a settlement of the price of SOAT between December 2001 and April 2002, holding harmless two insurance companies[115].

115 Resolution 0224-2003/TDC-INDECOPI, dated June 16, 2003.
116 It should be noted that, pursuant to its investigation powers for infringements of Legislative Decree Nº1034, the

Regarding the interpretation of price settlements, the Tribunal noted that the implementation of Legislative Decree Nº701 did not apply the rule of illegality *per se* or the rule of reason, as they were the result of the United States judicial creation, not compatible with the Peruvian legal system of European tradition.

Also, it said that the precedents of mandatory compliance previously established in the case of the poultry market settlement (illegality *per se* for cartels of competitors) and CIVA v. Mariscal Cáceres (accessory or complementary arrangements) neither clarified the reason or the application assumptions of the per-se rule, nor the limitation to apply the rule of reason. It also stated that those interpretive precedents were ignoring art. 3 of the Legislative Decree Nº701, which requires impairment to general economic interest to constitute an infringement.

Therefore, the Tribunal concluded that, subject to art. 3 of the Legislative Decree Nº701, to qualify a cartel behavior between competitors as illegal, it required to be able to produce the effect of restricting, preventing or distorting competition and also to run on the market.

Regarding the behavior of the investigated companies, the Tribunal noted that the communication from several insurance companies to the SBS with the same premiums for SOAT had no explanation other than an agreement, to the extent that if insurers stated that they offered differentiated services according to their customers, it was hard to understand why they sent a report to the SBS on *"... identical margins for internal and external expenses, and utilities; and they offered and advertised in the market those services with prices for commercial premium rates also identical to those contained in the Technical Note "*.

Concerning the last item, the Tribunal understood that it had been established that Sul America, La Positiva, Mapfre, Royal & SunAlliance, Generali and Pacifico had offered the public prices equal to the rates notified to the SBS, which was not the same for Interseguro and Wiese Aetna. In this regard, the first six companies had entered into the price fixing agreement and also had executed it by offering SOAT to the public at the prices previously fixed within the Automobile Committee of APESEG, being the damaged general economic interest. This damage distorted the SOAT market and contributed to a greater public resistance to the process of implementation of such insurance, regardless of the number of SOAT effective sales. Additionally, the Tribunal noted the following:

> *"It can be seen that the motive of insurance companies to fix SOAT prices through a settlement was not helping to reduce the access costs to the information required to implement the SOAT, neither improving production or distribution of this new product nor promoting technical or economic progress, not even to benefit consumers. On the contrary,*

the insurance companies' motive was to prevent an increased level of competition in the traditional vehicle insurance market – an existing and fully operational market - as a result of the intrusion of a new element like SOAT, the outcome of a legal imposition".

Based on the foregoing, the Tribunal concluded that seven insurance companies had violated Art. 3 and letter a) of Art. 6 of Legislative Decree Nº701, by agreeing price fixing settlement that did not contribute to improving the production or distribution of goods, or to promoting technical or economic progress. It also stated that APESEG was responsible since one of its bodies, the Automobile Committee, adopted the decision to approve the Technical Note with the agreed prices, and also facilitated the adoption of the agreement. Finally, he noted that there was not enough evidence gathered that would prove the execution of the agreement by Interseguros and Wiese Aetna, therefore they had not violated the law. The Tribunal's decision included a reduction of the fines imposed by the first instance, as shown in the following chart:

Chart N° 18
Fines imposed to offender insurance companies

Company / Entity	Commission (Peruvian Taxation Units)	Tribunal (Peruvian Taxation Units)
Peruvian Association of Insurance Companies (APESEG)	20	10
El Pacífico Peruano Suiza Compañía de Seguros y Reaseguros	60	40
Generali Perú Compañía de Seguros y Reaseguros	100	28
Interseguros	5	--
La Positiva Seguros y Reaseguros S.A.	100	40
Mapfre Compañía de Seguros y Reaseguros	60	35
Rímac Internacional Compañía de Seguros y Reaseguros	100	36
Royal & Sunalliance Seguros Fénix	80	20
Sul América Compañía de Seguros S.A.	100	26
Wiese Aetna	50	--

Source: Own development.

It should be added that leaving aside the mandatory compliance precedents established in cases of settlement in the poultry market and CIVA against Mariscal Caceres, the Tribunal decided to issue a new precedent for mandatory compliance precedent for qualifying the cartel between competitors and illegal behavior, which is quoted below in its most outstanding parts:

Resolution N°0224-2003-TDC-INDECOPI

"1. The grading of any behavior as restrictive of competition and therefore illegal, requires that such behavior is able to produce the effect of restricting, preventing or distorting competition and to run on the market and that it is run on the market. The ability of that behavior to produce the effect of restricting competition and its execution on the market constitutes the damage to the general economic interest referred to in Article 3 of Legislative Decree Nº701, in accordance with the positive assessment of the legal institution of competition contained both in the Constitution of Peru and in the Legislative Decree Nº701 (…).

3. Pursuant to the provisions of Article 3 of Legislative Decree Nº701, as to prejudice to the general economic interest, exceptionally, and provided that it can be credited sufficiently, accurately and consistently, beneficial effects on the behavior challenged that overcome the damage to consumers and the legal institution of competition, such behavior will be qualified as restrictive of competition, but exempt from reproval and punishment due to their positive balance concerning the effect on general economic interest.

4. The determination of the exceptional cases exempt from reproach and punishment mentioned in the preceding number should be analyzed in each case, considering the concurrence of the following requirements for exemption:

- *If questioned behaviors contribute to improving the production or distribution of goods or to promoting technical or economic progress, while reserving consumers a fair share of the resulting benefit;*
- *If the restrictive behavior is the only mechanism to achieve the beneficial objectives outlined in the above requirement; and,*
- *If those behaviors become indirectly a way that facilitates companies involved eliminating competition in respect of a substantial part of the market in which they participate.*

5. The price fixing settlement (...) directly contravenes the very essence of the legal institution of competition. Consequently, to exempt from reproach to such behavior it is required of a qualified analysis very thorough, demanding and rigorous of indubitable and precise compliance of all the requirements for exemption set out in the preceding number".

Thus, Indecopi modified a rule of interpretation it had created to drastically treat competitors who incurred in very serious behaviors for competition, the so-called cartels, noting that these behaviors were illegal only if they ran on the market, and while there were no reasons to justify them in terms of greater efficiency and consumer benefit.

This precedent has been set aside now. Indeed, with the new law on protection of competition in force since July 2008, i.e., after Legislative Decree Nº1034 entered into effective, cartels are treated as behaviors subject to an absolute prohibition, a regulation equivalent to illegality *per se*. So, Indecopi has returned to the sanctioning cartels of competitors more drastically.

e. Ex officio investigation against the Passenger Public Transportation Regional Headquarters, Sierra-Ancash Zone, its representatives and several transportation companies (2010)

The Headquarters is an association of transportation companies of the city of Huaraz, which groups several transportation companies.

In August 2008, Indecopi became aware of the increase in urban and interurban passenger transport in Huaraz through the media. Indecopi's Regional Office in Ancash (ORI Ancash), reported the Technical Secretariat of the Commission that it had received information from a person related to the transportation sector in Ancash, about actions adopted by the Headquarters to increase prices.

Subsequently, the Technical Secretariat met with such person, who gave it the Multiple Official Letter Nº001-2008-Central Transp.Hz.C.Hy. / P, dated August 15, 2008, in which the scope of an agreement to increase transportation prices was explained[116]. This Official Letter stated the following:

Technical Secretariat gave protection to the person who provided help in identifying illegal behavior, keeping private the identity of that person throughout the procedure, naming him/her only as the "collaborator".

117 Resolution 069-2010/CLC-INDECOPI, dated October 06, 2010. At the time of preparing this work, the decision

"SUBJECT.- SETTLEMENT OF URBAN INTERURBAN FARE INCREASE IN THE COLLECTIVE TAXI MODE DUE TO THE FUEL INCREASE AND OTHER OPERATING EXPENSES.
(...) The current social and economic situation forces us to set aside differences to make way for coincidences, for the defense of common interests; among them is the permanent increase in the operation cost of the service we offer to users in urban and interurban COLLECTIVE TAXI transportation in the province of Huaraz (...) so it is necessary to also increase the cost of urban and interurban passenger evenly and it must be obeyed by all companies so that users have no reason to question the increase or on the pretext of some charge less, consequently, sabotage these new costs. (...) we inform you that from the day Saturday 16 of this month all companies will apply this new cost. Collective: Urban S/.0.70. Cents, from the center of Huaraz to EsSalud S/.1.00 Nuevos Soles, Urban TAXI S/ 2.50 Nuevos Soles.
(...)
Without further ado, we say goodbye to you, and we are sure to count on your participation and willingness to serve and fulfill the stated purpose."

Taking this evidence into consideration, the Technical Secretariat initiated this Ex officio investigation, for horizontal cartel behaviors in the categories of agreements and decisions or recommendations aimed at agreed price fixing of the urban and interurban passenger service and transportation in the city of Huaraz.

As part of the investigation, inspection visits were made to the Headquarters, which also found copies of that Official Letter. Additionally, surveys were conducted to different transportation companies on the dates the price increase was given.

According to the information obtained, a majority of transportation companies said the price increases occurred after August 13, 2008, which matched with the date from which the new price would start being in force according to the aforesaid Official Letter. Additionally, we found that the member companies of the Headquarters had made price increases for collective and taxi service, according to what was indicated in the aforementioned Official Letter and, also, after the meeting called by the Headquarters.

As a defense, those being investigated indicated that the meeting convened by the Headquarters had other purposes, but spontaneously and unexpectedly the suggestion came up to standardize prices. They also noted that there was no premeditation to fix prices, and

the agreement was rather in response to companies that set their prices unfairly, below their operating costs. Finally, it was argued that the Headquarters represents only 15% of vehicles in Huaraz.
When settlíng, the Commission concluded that *"the behavior of transportation companies in Huaraz after the meeting convened by the Headquarters was similar to that proposed in the Headquarter's Official Letter, a circumstance showing the execution of the agreement between the investigated companies."*

However, the Commission found that the market share of the Headquarters was significantly lower than that of the other agents. Regarding collective taxi service, it determined that there were 25 companies that provide it and only three of them belonged to the Headquarters. Furthermore, in terms of number of vehicles, the companies belonging to the Headquarters represented only 11%. As for the collective service, it identified 18 companies operating in Huaraz, from which only three belonged to the Headquarters, and regarding the number of units, these three companies represented 19%.

On that basis, the Commission concluded that seven transportation companies had incurred in a price fixing agreement, although its impact was not as severe in the market, because:

> *"(...) The transportation companies associated to the Headquarters have a negligible market share in the passenger transportation market in the city of Huaraz. Consequently, to ensure the effectiveness of the agreement, it was necessary to ensure that transportation companies not associated to the Headquarters adhere to the horizontal cartel behavior. Otherwise, the competitive pressure would have prevented transportation companies to reach the extraordinary profits derived from the agreed price. "*

Additionally, the Commission submitted evidence that the Official Letter had not only been forwarded by the Headquarters to its members, but also to other transportation companies, therefore it considered that the Headquarters and its executives had incurred in a recommendation practice.

Therefore, the Commission fined the companies, to Central and its directors, with the following fines[117](See Chart N° 19):

was already in appeal proceeding before the Tribunal.

118 Resolution 008-2009/ST-CLC-INDECOPI dated May 21 2009. It must be mentioned that the investigation also

Chart N° 19
Multas impuestas a empresas de transporte y a la Central

Company / Entity / Individual	Commission (Peruvian Taxation Units)
Mars Soledad E.I.R.L.	17,1
Empresa de Transportes 12 S.A.	15,1
Empresa de Transportes Shasho S.R.L.	8,5
Empresa de Transportes y Turismo 18 S.A.	8,3
Empresa de Transportes Turismo Huascarán S.R.L.	5,2
Empresa de Transportes Cordillera Negra 13 S.A.	2
Empresa de Transportes Suiza Peruana S.R.L.	0,4
Central Regional de Transporte Público de Pasajeros, Zona Sierra – Ancash	Amonestación
Macario Sáenz La Rosa Sánchez	1
Plácido Condori Ccalla	1
Gabino Araucano	1

Source: Own development.

Currently, the appeal filed by those being investigated is pending before the Specialized Tribunal for the Defense of Competition.

f. Ex officio investigation against the Freight Forwarders Union – Region Ancash Sierra Zone - Union, six former members of its Board of Directors, and 72 carriers (2011)

The origin of this investigation is in the criminal complaint filed before the First District Attorney's Office with Jurisdiction over Criminal Offenses of the city of Huaraz by Mr. Juan Crisolo Molina v. Mrs. Ana Huerta, Mrs. Elvira Toledo Chauca, Mrs. Elizabeth Huerta Poma and others, on charges of abuse of economic power and hoarding. The criminal complaint was brought to the attention of the Technical Secretariat on July 25, 2005.

In that complaint, it was being questioned that La Union prevented normal circulation of carriers, restricting the entry of cargo to the city of Huaraz and distorting free competition;

and that it was speculating on the price of freight from Lima to Huaraz and vice versa, leveraging the increased demand for cement existing in that part of the Callejon de Huaylas, a consequence of which was the price of the service increased by approximately 32%.

As part of the documents attached to the criminal complaint was the following and most relevant texts, which are reproduced below:

- The Engagement Agreement dated November 8, 2004, by which twenty heavy freight forwarders decided to increase their prices for transporting cement to S/.60 metric tons and S/.2.50 per bag, on the route Lima-Huaraz and vice versa, as from November 8, 2004. The text is shown below:

Carrier's Engagement Agreement

ENGAGEMENT AGREEMENT

Huaraz, november 8th 2004

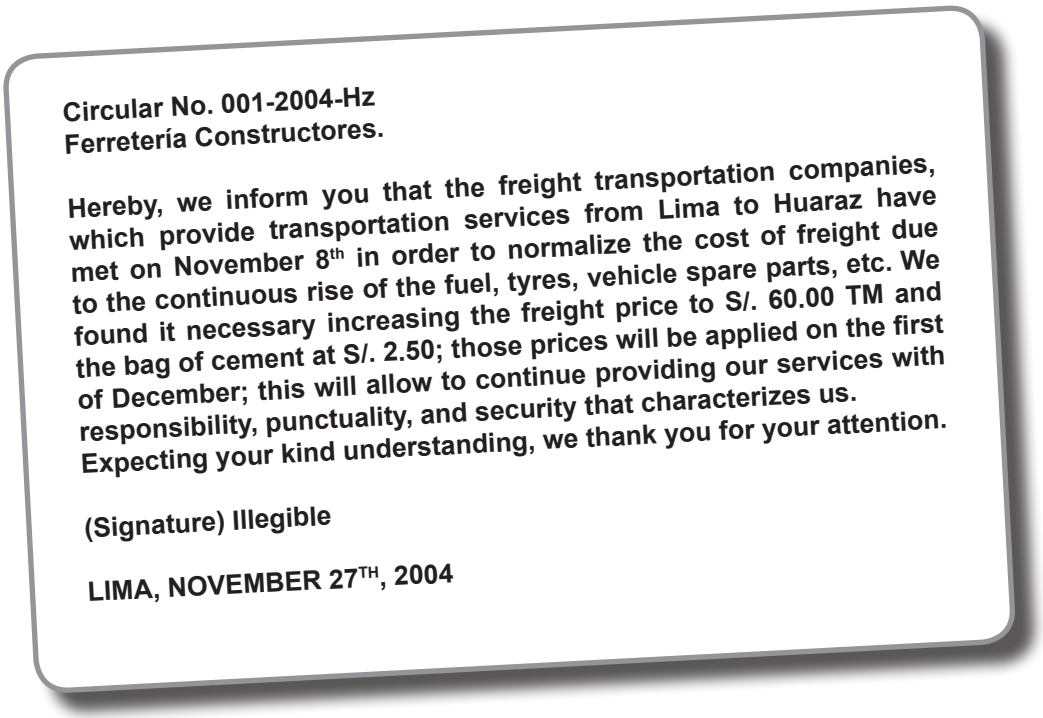
The undersigned, transportation companies, which provide transportation services from Lima to Huaraz and vice versa, aware of the unsustainable and critical situation that the freight transportation is undergoing, affected by the continuous rise of the fuel, tyres, vehicle spare parts, etc. We found it necessary increasing the freight price to S/. 60.00 TM and the bag of cement at S/. 2.50 from november 8th, 2004, we ask all our users for their understanding.

We call upon all the undersigned to duly comply with the present document hereunder, that in fact will continue providing our services with responsibility, punctually and security that characterizes us.

Source: Resolution N°008-2009/ST-CLC-INDECOPI.

- Circular No. 001-2004-Hz, dated November 27, 2004, in which Mrs. Ana Huerta Rondán, as coordinator of the aforementioned carriers, informed Constructores Hardware the decision contained in the Engagement Agreement, noting that begin to apply as from December 01 2004. The text of the circular is as follows:

Circular N°001-2004-Hz, dated november 27, 2004



Circular No. 001-2004-Hz
Ferretería Constructores.

Hereby, we inform you that the freight transportation companies, which provide transportation services from Lima to Huaraz have met on November 8th in order to normalize the cost of freight due to the continuous rise of the fuel, tyres, vehicle spare parts, etc. We found it necessary increasing the freight price to S/. 60.00 TM and the bag of cement at S/. 2.50; those prices will be applied on the first of December; this will allow to continue providing our services with responsibility, punctuality, and security that characterizes us.
Expecting your kind understanding, we thank you for your attention.

(Signature) Illegible

LIMA, NOVEMBER 27TH, 2004

Source: Resolution N°008-2009/ST-CLC-INDECOPI.

- La Union Act of Constitution, dated December 15, 2004, which stated the agreement reached by the Members Assembly to "regulate prices of freight rates" under the following terms:

  "After a heated debate, the Assembly agreed to regulate freight rate prices; for such accomplishment an analysis on current costs and those actually charged was made, to prevent unfair competition it was agreed to unite prices as follows: for those effective as from 12-20-04, Cement, transfer from Lima to: Huaraz two Soles and fifty cents, Carhuaz two Soles and sixty cents; Yungay and Caraz two Soles and seventy cents.
  Bricks from Lima to: Sixty five Nuevos Soles and 00/100 cts. for unloading per ton; Carhuaz Seventy Nuevos Soles and 00/100 cts.; Yungay and Caraz seventy five Nuevos Soles and 00/100 cts. unloading per ton shall cost three Nuevos Soles and 00/100 cts.

Iron, transfer from Lima to: eighty Nuevos Soles per ton; Carhuaz eighty two Nuevos Soles; Yungay and Caraz eighty five Nuevos Soles.
(…)"

- Official Letter No. 002-2004-UTC-C.H./CD-Hz, dated December 18, 2004, whereby La Union informed their clients about "the agreements reached regarding rates", comprised in the Act of Constitution, according to the following text:

  "We request your understanding and support, by hiring the services of our guild members and respecting the established rates; therefore attached herewith we send you copy of the act of constitution and of the agreements reached regarding rates to be effective as from December 20 of the current year".

In view of the serious content of the referred documents, the Technical Secretariat started an investigation on price agreement[118]. As part of the procedure, it made unannounced inspection visits to the premises of La Union and to the carriers; furthermore, information was also requested to those under investigation. As part of the obtained information by the Technical Secretariat, ample evidence was found on implementation and details of the prices agreement, including its duration until the beginning time of investigation.

As an example of the formerly mentioned evidence, the following excerpts from La Union Assembly minutes can be quoted. In the minute of the meeting of May 28, 2008, the following is mentioned:

"1.- Whereas, with reference to freight, the reference rate is currently in effect, and shall be respected by the cargo originators and by carriers, under the following prices:
Lima – Caraz S/. 4.00 Per cement bag
Lima – Yungay S/. 4.00 Per cement bag
Lima –Carhuaz S/. 3.85 Per cement bag
Lima – Huaraz S/. 3.71 Per cement bag
Lima – Catac S/. 3.41 Per cement bag".

In the extraordinary members' assembly of September 21, 2008, the following is found:

"The third point of the Board of Directors' scheduled report was discussed:
Madam President, Mrs. Felicitas Ana Huerta Rondán stated that the freight increase is everyone's concern and it is the reason for the meeting in Lima with Mr. Diego de la

included a client's allocation agreement as an imputation, charge which was also proved during the proceeding. The case review herein only refers to the prices agreement.

119 In this regard, the Commission considered that although the investigated behaviors had started during the

Piedra Minetti, general manager of LA VIGA S.A. and with engineer Owen Cisneros Rafael, general manager of Consorcio CAF S.A.C. who are worried by the document they have received from Indecopi; and therefore they consider t it is not the appropriate time for freight increases due to Indecopi's investigation of the freight price issue..
However, the lawyer hired by us states that there should not be any reason for concern as we are collecting lower freights than those in the Reference Table (…)"

In the extraordinary members' meeting of October 05, 2008, the following is noted:

"The second point of the agenda was discussed:
Report from the Board of Directors about freights:
Mr. Jaime Benites, Chairman of the Assembly give the floor to Madam President, Felicitas Ana Huerta Rondán, who informed that she held several meetings with representatives of both cargo originators which are: LA VIGA S.A. and Consorcio CAF S.A.C., but that there was some concern from the mentioned cargo originators due to Indecopi's intervention which could impose exorbitant fines if it becomes aware that we have agreed to fix new freight rates; however she said that afterwards a contract will signed with the two cargo originators and that it is already prepared by the lawyer hired by the board of directors in the city of Lima".

Given the evidence forcefulness, the investigated parties submitted the following arguments of defense:

- The agreed price fixation was not due to carriers' decision but was due to regulations issued by the Transport and Tax sector as the Ministry of Transport and Communications established minimum costs for the cargo transport service by truck, Supreme Decree 049-2002-MTC dated December 30, 2002, and the National Superintendency of Tax Administration (SUNAT) (acronym in Spanish), established that the Carrier Waybill should record the minimum costs to be valid, in agreement with Superintendency Resolutions 004-2003/SUNAT and 005-2003/SUNAT dated January 09, 2003.
- Prices fixed by carriers were always lower than the minimum costs fixed by the MTC.
- The agreements reached were supplementary to other agreements intended for a better organization of La Union associates and to increase their Productivity.

The Commission discarded the former arguments and pointing out that the minimum costs approved by Supreme Decree 049-2002-MTC were only referential values to facilitate the tax auditing as established by the regulation itself, and that it did not imply as obligation to fix a determined price. Furthermore, in a statement dated January 31, 2003, SUNAT informed that the carriers could be audited when the actual income declared by the carrier

were lower or inconsistent with the minimum costs approved by Supreme Decree 049-2002-MTC. Therefore, according to the Commission:

> *"… neither the minimum costs approved by Supreme Decree 049-2002-MTC nor the possibility to be audited by SUNAT implied the obligation to the carrier to fix a determine price. Consequently, none of these aforementioned circumstances justified the agreed fixation of the heavy cargo transport service price".*

With reference to prices fixed by the investigated parties, the Commission made it clear that "in order to determine the fact of prices agreed fixation by the investigated parties, it is irrelevant to analyze if amounts of the agreed prices were higher or lower than the referential values established by Supreme Decree 049-202-MTC".

Regarding the supplementary nature of the agreements, the Commission stated that no evidence was furnished to support it but rather, the existing information indicated that the agreement had "…*as a sole goal to maximize the benefits of those under investigation, by making a larger surplus from clients through a coordinated behavior*" which was proved "…*by the fact that, in repeated opportunities those under investigation adopted measures oriented to prevent the competition of non-associated carriers with them*".

As a consequence of the above, the Commission stated that the investigated parties had incurred in infringement of dispositions stipulated by Legislative Decree 1034[119] through a prices agreement, releasing of such accountability to only one of them after finding evidence that he did not participate in the agreement and had opposed to the accomplishment of infringing behavior.

Fines imposed to the 71 infringing carriers (including individuals dedicated to the transporting activity) summed up 720.7 UIT (*Peruvian Taxation Unit*). Additionally, another fine of 1 UIT was imposed to each of the six La Union ex-directors and one admonishment addressed to La Union[120].

At present, the appeal submitted by the investigated parties is pending of decision before the Specialized Court in Defense of Competition.

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validity period of the Legislative Decree 701, their implementation had continued until Legislative Decree 1034 came into effect.

120 Resolution 056-2011/CLC-INDECOPI dated October 11, 2011. At the time of preparation of this work, the relevant decision was still under appeal proceeding before the Court.

121 Resolution N° 004-97-INDECOPI-CLC, dated february 21, 1997.

3.2.2 Market Sharing

Chart N° 20
Horizontal Collusive Practices Market Sharing

MARKET SHARING	Petroleos del Peru S.A. (Petroperú) v. Rheem Peruana SA. (Rheem), and Envases Metálicos SA. (1997)
	Ex officio investigation against Productos Químicos Industriales SA. (PROQUINSA) and Silicatos SA. Under Liquidation (1998)
	Ex officio investigation against Praxair Perú SRL. (Praxair), Aga SA. and Messer Gases del Perú SA. (Messer) (2010)

a. Petroleos del Peru S.A. (Petroperu) v. Rheem Peruana SA. (Rheem) and Envases Metálicos SA. (1997)

In this case, Petroperú complained about price fixing and quantities agreements between the two 55-gallon steel cylinder manufacturers to pack lube oils in Peru, occurred in tenders carried out by the complaining company between October 1995 and March 1996.

The main consensus indication was the selling conditions offered by both companies, which were exactly the same regarding price while slightly different regarding quantity, despite the fact that, in previous tenders, offers submitted by both companies had been significantly different. Given the similarity of their offers, the bid was jointly awarded to these two companies in the last three tenders, in contrast to the more than 10 former tenders where only one of them had won after submitting a more aggressive offer. The main information used by the Commission to conduct its analysis is shown in the following Offer Comparative Chart.

Chart N° 21
Offer comparative chart of steel cylinder manufacturers

Date	Requirement from Petroperú	Rheem Peruana		Envases Metálicos	
		Price	Quantity	Price	Quantity
apr-92	900	30,98	900		
apr-92	1 000	31,83	1 000		
may-92	1 000	28,82	1 000		
jul-92	900	28,07	900		
aug-92	900	28,07	900	28,00	900
dec-92	600			27,85	600
dec-92	600	27,80	600	27,85	600
jan-93	600	27,70	600	27,50	600
jan-93	600	27,20	600	27,50	600
feb-93	600	27,20	600	26,90	600
feb-93	600			26,85	600
mar-93	600	27,20	600	26,60	600
mar-93	600	27,20	600	26,55	600
mar-93	600	26,50	600	26,35	600
apr-93	600	26,00	600	26,25	600
apr-93	600	23,35	600		
feb-94	3 500	22,00	3 500	22,34	3 500
mar-94	30 000	19,95	30 000	17,95	30 000
nov-94	10 000			17,94	10 000
jan-95	10 000	20,50	10 000	19,50	10 000
apr-95	20 000	17,70	20 000	18,97	20 000
oct-95	10 000	23,80	5,020	23,80	5 090
feb-96	10 000	23,80	5,100	23,80	5 090
mar-96	10 000	23,80	5,102	23,80	5 000

Source: Report Nº003-97-CLC-INDECOPI.

The interesting thing about this case was that no documentary evidence was found that constituted a settlement indication, as in the other cases we have previously discussed. Although the Commission recognized this fact, it took into account the inexplicable coincidences that occurred in the last three procurement processes, as well as the characteristics of such processes, noting that:

> *"…Although in this procedure no a direct evidence revealing the existence of agreements or agreements between the companies complained about the prices and/or volumes offered to Petroperú has been found, a series of events coincidental in time compared to the same buyer occurred after a large prices level competition, events that in no way appear to respond to a situation of effective competition and can only be explained as the result of a prior agreement between the respondent companies".*

In particular, the Commission analyzed the strange behavior that the two respondent companies had as from the buying process awarded in October 1995, after a long period of competition between them through the gradual reduction of prices:

> *"(...) The facts to conclude the existence of anticompetitive behavior in these proceedings were produced exactly from the quotation request by Petroperú in October 1995. First, both companies complained simultaneously modified prices quoted to Petroperú in October 1995. Second, the price quoted by both companies in October 1995 and then in two subsequent opportunities - February and March 1996 - was completely identical, i.e., U.S. $ 23.80 U.S. dollars per unit. Third, both Rheem and Metal Packaging SA submitted their offer reducing the volume of cylinders offered to a figure almost equivalent to 50% of those required by Petroperú, in the three orders that the company placed consecutively. To this sum of coincidences it must be added that in the three preceding years such companies had submitted their offers to Petroperú for the total quantity of cylinders required and in a clear situation of price competition.*
>
> *The facts mentioned, when occurred isolated or sporadically, do not constitute proof of a settlement, but when they occur repeatedly, for three consecutive times in just six months, within a process of procurement of closed and confidential nature in which the only possibility to know the offers is at the time of opening the envelopes and, finally, where the only two companies producing the goods required by Petroperú had been competing at such price level maintained for three years in a row, there is clear evidence of the existence of a settlement by the companies complained concerning the sale proposals of 55 gallon cylinders submitted to Petroperú as from October 1995."*

Based on the above, the Commission concluded that there was no other alternative explanation for the events of the last three procurement processes conducted by Petroperú, other than the existence of a price settlement between the companies complained. Therefore, it imposed them a fine of 20 Peruvian Taxation Units each.[121]

The sanctioned companies appealed the first instance decision, questioning they were convicted without any major settlement indications of which they were accused. Also, one of them said that during the investigation period it had been unable to offer Petroperú the entire order as it had to supply its other customers.

The Tribunal reviewed the facts again and concurred with the analysis made by the Commission, strengthening the joint assessment of the extraordinary coincidences found. It also noted that such coincidences were not only inexplicable, but met both conditions necessary to maximize the benefits of the offenders in a sales sharing agreement:

> *"Thus, it appears that the competition processes convened by Petroperú, were held in strict confidence, therefore none of the bidders had the opportunity to learn the bids submitted by the other before the opening of the envelopes. (...).*
> *The simple fact that an exact price coincidence had occurred is an important element to presume the existence of an agreement. Note that in the previous three years an exact coincidence in prices had never been produced. (...).*
> *But the coincidence not did only occur with respect to price. The quantities offered by both companies suddenly changed. In previous years each of them offered the full of the quantity Petroperú ordered each time. However, in the three procurement processes referred and in which there is equality of prices, both companies reduce the quantity offered to approximately 50% of the quantity requested by Petroperú in each case.*
> *These data are consistent with the existence of an agreement and reflect extraordinary coincidences that can hardly be explained by different reasons. If there were a settlement that seeks sharing the sale between the two companies, both conditions should be met precisely in order to maximize the utility of the two companies in the process: (i) the price given should be the same to avoid an offer to be preferred over the other, and (ii) the quantities must be close to 50% so as to give the award, it should be divided between the two companies involved in almost equal parts. The succession of coincidences and perfect consistency with an agreement that maximizes the utility of both companies in the context of market sharing, are evidence that create conviction in the Court on the existence of an agreement between the companies complained."*

122 Resolution 255-97-TDC/INDECOPI, dated October 22, 1997.

Notwithstanding that analysis, the Tribunal also dedicated itself to confront alternative explanations of the events brought by the sanctioned companies, stating that such explanations were not true:

> *"The parties have argued that the coincidence in prices is explained by a coincidence in the costs of making the cylinders. However, this explanation is totally inconsistent with the information available in the file. Prices were always different in the offers made in earlier proceedings convened by Petroperú and there is no element of judgment made by the companies complained demonstrating the existence of any fact or factor that would lead to the fact that, as from October 1995, there was a exact balance of the costs of both companies, not even that such standardization is reflected in prices. Further still, after that date, the prices at which cylinders of identical characteristics were offered to customers other than Petroperú did not match the price offered to the latter company. If an identical cost structure explains the identity of prices, these prices would be identical to the other customers of these companies in the market, which does not occur in the available information obtained from the companies themselves.*
> *As for the near identity of the quantities offered to Petroperú reflecting in each case 50% of the quantity of cylinders requested (...) it has been explained by the companies in the fact that there were other customers in the market and that Petroperú fell behind in payment, so it was not convenient for them to cover the whole order, and they must leave free production capacity to cover other possible orders from other buyers who did pay promptly.*
> *The companies have not submitted any evidence to prove their claims in this regard. Not accredited Petroperú order effect on their ability to meet orders from other customers has been proved (...).*
> *In the aforementioned months, Envases Metálicos addressed orders from other customers, who (...) have not undergone significant changes in orders placed during the investigation period.*
> *Rheem's situation is not very different. (...) In the months mentioned, Rheem addressed orders from other customers, who, also, have not undergone significant changes regarding orders placed during the investigation period (...)"*

Ruling out alternative explanations by the Tribunal in this case is a good example of so-called "counterfactual analysis", through which the settlement hypothesis is confronted with potential Contra Indications or alternative explanations identified or formulated by the investigated companies. Only when the aforementioned hypothesis is the only reasonable explanation for the behavior of agents in the market, having ruled out alternative explanations, it can be concluded that there was a settlement of competitors.

In this case, the counterfactual analysis developed by Indecopi was not only strong, but properly reinforced the lack of documentary indications that refer or allowed deduction of a prior agreement between the investigated companies.

Consequently, the Tribunal upheld the conviction of first instance decision and the sanctions imposed[122].

b. Ex officio investigation against Productos Químicos Industriales SA. (PROQUINSA) and Silicatos SA under Liquidation (1998)

In this case the market of sodium silicate sale (quality 2.0 and 1.6) was investigated; a product used primarily for the production of detergents and has no close substitutes. In this market only two investigated companies participated until September 1994, then a third competitor entered, generating a restructuring of the business involvement and a competition period identified by them as the "price war".

On the behavior of the companies in the market, it was found that the investigated companies had registered fairly similar prices from April 1993 to November 1994, and as from December 1994 until the date Silicates SA ceased operations, prices of both of them showed a greater differentiation from the previous period.

Regarding sales volumes of sodium silicate (quality 2.0) and income collected by major consumer sales from April 1993 to December 1994, both Silicatos and Proquinsa registered quite similar volumes and revenues.

The Commission found that the market behavior reflected a price fixing and market sharing agreement, so it sought if there were indications supporting that hypothesis. Its search was not in vain, as it identified several details about exchanges of sensitive information between the investigated companies, which allowed inferring the existence of that agreement.

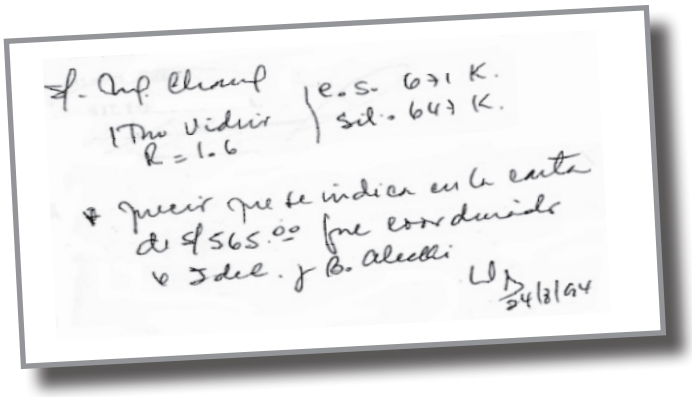
Thus, for example, it was considered as indication of settlement that in a letter addressed to a customer from PROQUINSA making a quotation of a product, the ballot that indicating a successful referral via fax was stapled to it, and that the fax number printed on the said ballot was not from the customer but that of Silicatos. This indicated that the companies exchanged confidential information.

123 Resolution 020-97-INDECOPI/CLC, dated August 25, 1997.

It was also considered as a settlement indication that in two private quotations from PROQUINSA to its clients (which already had the reception seal from them) there was a handwriting that said: *"Att: Mrs. Linda"*. This was not the name of any official of the client that was recipient of the quotation, but coincidentally there was a high official of Silicatos named Linda Rios. In addition, after inquiries made by the Commission it was found that no officer or employee of PROQUINSA answered to that name during the investigation period.

Another indication taken into account by the Committee was the handwriting on the back of a letter dated August 24, 1994, by which Silicatos informed Procter & Gamble it was able to supply the product at a price of S/.565.00 per metric ton. The aforementioned manuscript text was the following: "the price indicated in the letter for S/.565.00 was coordinated x J of C and B. Alecchi", being general managers of Silicatos and PROQUINSA José de Cardenas and Bruno Alecchi, respectively.

Manuscript text on the back of the letter dated August 24, 1994



Source: Resolution N°020-97-INDECOPI/CLC

Based on the above, the Commission considered that the documents containing indications as those already mentioned showed unusual exchange of sensitive information between the investigated companies. Such exchange of information was given in a market where transactions were not made on a daily basis, but answered to specific and eventual requests from specialized industrial consumers, and where sales were direct, without intermediaries or dealers who might be a way to spread price lists and other terms of sale.

Consequently, the Commission concluded that at least from August 1993 until October 1994, Silicatos and PROQUINSA agreed on prices and allocated customers or, more precisely, the volumes demanded by each customer. Therefore, it imposed them a fine of 25 Peruvian Taxation Units each.[123].

On appeal, the Tribunal upheld the first instance decision regarding the infringement constituted by the price settlement since August 1993 until October 1994, although revoking concerning the market sharing, for which it said there was insufficient evidence to demonstrate such behavior. Finally, it also confirmed the sanctions imposed on each infringing company[124].

c. Ex officio investigation against Praxair Perú SRL. (Praxair), Aga SA and Messer Gases del Perú SA. (Messer) (2010)

The origin of this procedure dates back to January 2003, when the Social Health Insurance (EsSalud) informed the National Control System about the existence of repeated overlaps in the economic proposals from Praxair, Aga and Messer in public tenders conducted by such entity in the years 1999, 2000 and 2001 for the purchase of liquid and gaseous medical oxygen, nationwide. According to EsSalud, such coincidences may indicate a geographic market sharing of medical oxygen supply.

Some years later, after the preliminary investigation, the Commission decided to initiate an ex officio investigation against Praxair, Aga and Messer for alleged anticompetitive practices in the form of market sharing, in the selection processes convened by EsSalud for procurement of liquid and gaseous medical oxygen, nationwide, during the period between January 1999 and June 2004, offense under art. 6 of Legislative Decree Nº701[125].

In a similar way to what happened in the case against Rheem and Metal Container, in this case no documentary evidence was found that would identify the existence of a settlement. However, the Commission based its analysis on the offers submitted by the bidders, the characteristics of the procurement process and the behavior modification of the companies due to external events derived from the change in the design of the tenders by EsSalud.

124 Resolution 0082-1998-TDC/INDECOPI, dated March 25, 1998.
125 Resolution 003-2008-INDECOPI/CLC, dated January 25, 2008.
126 Resolution 051-2010/CLC-INDECOPI, dated August 13, 2010. At the time of preparing this work, the decision

The findings that serve to support the research considered, among other issues, the following:

- The investigated companies were awarded in different zones (of lower dimension) to their respective areas of influence, which were determined by the location of their production, the characteristics of the country and the specificity of the selection processes made by EsSalud.
- Repeatedly, the awards determined that Aga supplied the north zone of the country, Messer the central zone and Praxair the southern zones and Lima, with prices close to 110% of the reference value set by EsSalud. In parallel, losing companies were self-disqualified by offering prices higher than 110% of the reference value in areas that some of the other won.
- The investigated companies had enough production capacity to meet EsSalud's total demand of oxygen.
- After five years, the investigated companies began to win the award in new areas and their prices were close to 70% of the reference value.

The defense of the companies investigated was based, to a greater or lesser extent, in the arguments described below:

- The submission of bids higher than 110% of the reference value was due to the implementation of a signaling strategy, which purpose was to indicate EsSalud that the reference values established for each process were lower than expected.
- The fall in the price of medical oxygen in subsequent processes as to June 2004 was a result of changes in design in the basis of the awards conducted by EsSalud, changes that caused an increase in the number of competitor companies.
- The market subject to analysis should be broader, taking into consideration the substitutability of medical oxygen produced by the PSA system, the high elasticity of the supply of the companies with the ASU system and the existence of imports.
- The modality of auction on sealed bid reduces the likelihood of conducting a settlement, since it eliminates effective mechanisms for monitoring and control.

In the absence of documentary evidence that would directly infer the existence of a settlement, the Commission assessed the behavior of the investigated companies in the different procurement processes conducted by EsSalud, in the period considered to have been given the settlement and subsequently. In particular, the Commission stated:

> *"(...) It is not necessary to find direct evidence, such as a signed document or recording of a meeting, to prove that certain companies agreed to restrict competition, but enough indications and assumptions determined by the competition authority to prove the existence of an agreed practice.*
>
> *A useful tool in analyzing indications and assumptions is called event-analysis, in which, from an exogenous fact, it is possible to demonstrate the anticompetitive behavior of the agents investigated. It should be noted that this analysis assumes the exogeneity of the event concerning the behavior of the agents investigated because, otherwise, they could anticipate and adjust their expectations or behaviors, especially those related to prices and quantities offered.*
>
> *In this case, there is no direct evidence of the existence of a market sharing agreement between the investigated companies. Therefore, to identify or rule out the existence of an agreed practice, the evidence substitutes will be drawn on, consisting of the indications and assumptions. The program will use the so-called 'event analysis' to evaluate the performance of the investigated companies facing the change implemented by EsSalud on how to organize its medical oxygen demand as from Bidding 0199L00052 (September, 2002)".*

Based on the above, the Commission divided the processes into two periods. The first period extends from August 1998 tender to September 2001 awards (including three tenders and some direct awards at the end), and the second, from September 2002 tender to November 2005 tender (includes three tenders and several intermediate awards). To distinguish the two periods it was taken into account the changing conditions of the Tender Bases since 2002, when the number of items for which the companies could compete was increased and the required amount of each of these items was reduced (the purpose was to facilitate the submission of new bidders). This change was considered by the Commission as an exogenous event to regular suppliers of oxygen (i.e., the three investigated companies) that modified the characteristics of the market and the incentives to compete.

Chart N° 22

Selection processes convened by EsSalud during the analysis period

Period	Process	Call	Supplying period	Awarding	Volume Required (m^3)	Reference value (S/.)
First period	018-IPSS-98	Nov-08	From January 1999 to December 1999	Jan-99	Gaseous: 756,867.00 Liquid: 1'609,426.00	11 352 999,30
	053-EsSalud-99'	May-00	From June 2000 to June 2001	Jun-00	Gaseous: 1'704,187.96 Liquid: 971'937,07	14 074 870,65
	01999-L00051	Jul-01	null and void	Sep-01	Gaseous: 348,148,00 Liquid: 406,920.00	5 634 845,81
	Allocations	Sep-01	From October 2001 to November 2002	…	Gaseous: 502,565,00 Liquid: 721,305.00	29 250 185,13
Second Period	0199-L00052	Sep-02	From November 2003 to June 2004	Nov-02	Gaseous: 1'099,711,00 Liquid: 2'029,220.00	17 654 195,95
	allocations	Oct-03	From November 2003 to June 2004	…	Gaseous: 307,223.95 Liquid: 1'190,490.73	10 702,479,43
	0399-L00091	Apr-04	From June 2004 to June 2005	June-04	Gaseous: 1'351.991.00 Liquid: 1'267,836.00	15 024,068,44
	Allocations	Jun-05	From June 2005 to January2006	…	Gaseous: 223'913.00 Liquid: 54.811.00	926,012,40
	0599-L00081	Nov-05	From February 2006 to February 2007	Jan-2006	Gaseous: 1'606.205.00 Liquid: 2'362.515.00	11 751,275,30

* This process consisted of 3 calls. In this sense, the volume demanded as well as the reference value correspond to be required.

*** All the while, the allocations confer at national level and independently. There is not a joint date for the Awarding Grant.

Source: EsSalud.

Author: Technical Secretariat

According to the assessment, during the first period, the share of the investigated companies in the procurement processes showed repeated uncommon coincidences. In the first two tenders for the period (1998 and 2000) the companies submitted offers very close to 110% of the reference value set by ESSALUD in all areas where they were awarded, while in areas where they were not awarded, it was because they did not submit or submitted offers higher than 110% of the reference value, thus being automatically disqualified. In the third tender (2001) all companies agreed to refrain from participating, informing ESSALUD that the expected reference prices were not enough, and the process was cancelled. Then there were direct awards (2001), in which the investigated companies were awarded in the areas they were serving in previous years.

Chart N° 23
Award bidders during the first period
(Liquid and gaseous medical oxygen).

Area	Entity	LP 018IPSS98 (Nov. 1998)	LP 053 EsSALUD-99 (May. 2000)	LP 0199L00051 (Jul. 2001)	Allocations (Sep. 2001)
North	H.N.A. Aguinaga	A	A	Cancelled	-
	G.D. Lambayeque	A	A		A
	G. D. Piura	A	A		A
	G.D. Tumbes	A	A		A
	G.D. Amazonas	A	A		A
	G.D. Cajamarca	A	A		A. C.
	G.D. San Martín	A	A		A
	G.D. Ancash	A	A		A
	G.D. La Libertad	A	A		A
	Inst. Peruano Ophtalmology	A			-

Area	Entity	LP 018IPSS98 (Nov. 1998)	LP 053 EsSALUD-99 (May. 2000)	LP 0199L00051 (Jul. 2001)	Allocations (Sep. 2001)
Centre	G.D. Huánuco	M	M	Cancelled	M
	G.D. Junín	M	M		M
	G.D. Pasco	M	M		M
	G.D. Huancavelica	M	M		M
	G.D. Ucayali	M	--		--
South	H.N.A. of the South	P	P	Cancelled	--
	G.D. Apurímac	P	P		P.OC
	G.D. Ayacucho	P	P		P.OM
	G.D. Ica	P	P		P
	G.D. Cusco	P	P		P
	G.D. Madre de Dios	P	P		--
	G.D. Puno	P	P		P
	G.D. Arequipa	P	P		P
	G.D. Moquegua	P	P		P
	G.D. Tacna	P	--		P
Lima*	H.N.E. Rebagliati M.	P	P	Cancelled	P
	H.N.G. Almenara I.	P	P		P
	G.D. Lima	P	P		P
	Hemodialysis center	P	P		--
	G.D. Loreto	--	--		--
	G.C. Programs	--	P		P

*It should be pointed out that initially, the G.D was included in the present item.
A: Aga OM: Oxyman C: Caxamarca gas P: Praxair M: Messer Not available OC: Oxycusco
Source: EsSalud Author: Technical Secretariat

The result of this behavior, according to the Commission, was that in the first period each company managed to have the exclusive supply of all departments in an area of Peru: Praxair in Lima and the southern area, Aga in the north, and Messer in the middle area, as shown in the map below (See Graph N° 27):

Graph N° 27
Award bidders during the first period, by geographic zone

Source: EsSalud.
Author: Technical Secretariat.

In the interpretation of the Commission, the results of the procurement processes conducted by EsSalud were consistent with the existence of a settlement between the investigated with the aim of sharing the market. In particular, the Commission stated that:

> *"(...) The way in which one of the investigated companies obtained the Award with a price close to the maximum allowed (110% of reference value) and the other two did not win, offering prices higher than 110% (auto disqualifying) or not submitting offers is consistent with the existence of an anticompetitive practice in the form of geographical market distribution. Indeed, ensuring that there would not be effective competition (represented by the strategy of self-disqualification or non-submission of tenders) allowed investigated companies to extract the maximum surplus from EsSalud. It is worth remembering that is characteristic of geographical market distribution schemes that each of the operators involved in the agreement act as if it were a regional monopoly in the area that has been assigned by the cartel".*

In the second period, EsSalud introduced the modification in the design of biddings, allowing other providers to participate, such as Oxycuzco and Oxyman, in order to result in increased competition. In this period there was initially a coincidence in the behavior of the investigated companies, since they all continued supplying the areas they had traditionally served, but then all of them participated and won processes to supply areas where they had not previously won.

Thus, in the first bid (2002) companies managed to maintain the supply of the area traditionally served, but became involved in all processes, even with non-competitive offers (i.e., stopped refraining from participating or submitting offers higher than 110% of the reference price). Then there were direct awards (2003) in which the three companies maintained their traditional areas of supply.

In the second and third bid (2004 and 2005) and companies did not follow the pattern of behavior they had in the previous five years, starting to submit competitive offers and awarding processes to serve areas where they had not previously won, and at prices close to 70% of the reference value set by EsSalud. As proof of this, it is included below the behavior of the investigated companies in 2005 processes.

Chart N° 24
Awards convened in June 2005

Type	Area	Entity	Volume (m^3)	Value Assigned (S/. X m^3)	Winner
GASEOUS	NORTH	G.R.A. Lambayeque			
		G.D. Piura			
		G.D. Tumbes			
		G.D. Amazonas			
		G.D. Cajamarca			
		G.D. San Martín			
		G.D. Ancash	700,00	3,81	M
		G.D. La Libertad	18 294,00	3,59	M
	CENTRE	G.D. Huánuco	2 250,00	3,81	A
		G.D. Junín	4 789,00	2,67	P
		G.D. Huancavelica	-	-	-
		G.D. Pasco	2 060,00	3,81	A
	SOUTH	G.D. Apurímac	-	-	-
		G.D. Ayacucho	-	-	-
		G.D. Ica	-	-	-
		G.R.A. Cusco	19 440,00	3,81	P
		G.D. Madre de Dios	-	-	-
		G.D. Puno	-	-	-
		G.R.A. Arequipa	93 600,00	3,48	P
		G.D. Moquegua	-	-	-
		G.D. Tacna	-	-	-
	LIMA	Headquarters	35 840,00	2,64	I
		H.N.A Sabogal S.	3 360,00	3,14	A
		H.N.E. Rebagliati	11 600,00	2,96	P
		H.N.G. Almenara	31 980,00	2,59	A,I

Type	Area	Entity	Volume (m^3)	Value Assigned (S/. X m^3)	Winner
LIQUID	NORTH	G.R.A. Lambayeque	7 358,00	4,36	A
		G.D. Piura	11 924,00	3,87	A
		G.D. Ancash	21 742,00	3,60	A
		G.D. La Libertad	-	-	-
	CENTRE	G.D. Huánuco	-	-	-
		G.D. Junín	-	-	-
	SOUTH	G.D. Arequipa	87,49	5,95	OM
		G.R.A. Cusco	13 700,00	3,60	P
	LIMA	H.N.E. Rebagliati M.	-	-	-
		H.N.A. Sabogal S.	-	-	-
		H.N.G. Almenara I	-	-	-
		G.D. Lima	-	-	-

A: Aga I: Indura OM: Cayman P. Praxair M: Messer - : Not available
Source: EsSalud Author: Technical Secretariat.

The Commission interpreted that what happened in the second period, showed that the investigated companies were indeed able to submit competitive offers and win in areas other than those they had traditionally supplied since 1999. Thus, the Commission noted the following facts as the main indications of settlement:

- The companies were awarded in the same areas since 1998 until October 2003 biddings.
- The companies had a strategy to offer prices above 110% of the reference value or not to participate in processes in areas other than those they traditionally supplied. This happened in biddings for the years 1998, 2000 and 2001.
- The companies changed the strategy used since the 1998 to 2001 biddings, to start offering low prices in 2002 bidding and 2003 awards, retaining each company the area they had traditionally been supplying since the 1998 tender.

Based on the above, the Commission concluded that:

> *"(…) These Indications or coincidences are duly proved and, analyzed as a whole, they allow to presume the existence of an anticompetitive practice in the form of market sharing for the provision of medical oxygen to EsSalud, since Public Tender IPSS-98-018 (November, 1998) until October 2003 Awards, so that Praxair would always serve Lima and southern areas, Aga the northern area and Messer the central area".*

The settlement hypothesis was, in turn, faced with alternative explanations raised by the investigated companies, which have been advanced to be the following:

- The geographical distribution observed in the provision of medical oxygen to EsSalud was the result of inefficient design of the selection processes.
- The submission of bids higher than 110% of the reference value that caused automatic disqualification responded to a signaling strategy, so that EsSalud increases the reference value.
- No competitive bids were submitted in areas other than those in which they traditionally won, because it was too expensive for them to venture into other areas (due to infrastructure and logistics issues), and because they had no available productive capacity.

The Commission analyzed each of the arguments indicated. As to the first, it stated that:

> *"(...) Although the organization of the EsSalud's selection processes during the First Period implied that its demand was divided into only four major geographical areas, this does not mean that the companies investigated had been forced to win the Award always in the same areas. On the contrary, the investigated companies were always free and able to provide medical oxygen to EsSalud in any area. The fact that every item has comprised a particular geographical area, does not justify that each investigated company had obtained the Award, steadily over time, in a single area.*
> *(...) Since Public Tender 0199L00052 (September, 2002) this organization was redesigned, defining smaller areas divided into twenty-four items. (...) The geographical distribution may not have answered the demand organization of EsSalud, for when this change, the investigated companies continued to win the Award solely and exclusively in the areas they traditionally supplied.*
> *(…) From the Public Bidding 0399L00091 (April, 2004), (...) the investigated companies began to participate competitively in areas other than those traditionally supplied, a fact which shows that they were always able to participate competitively in other areas and that the initial organization designed by EsSalud not forced to always win Praxair southern and Lima, Aga in the north and in the southern Messer".*

Regarding the second argument, the Commission stated that:

> *"(...) In the selection process there was a direct mechanism by which companies could send EsSalud information about the reference value recorded in the database. This mechanism is in the stages of consultation and observations on the bases (...).*
> *According to the above, the investigated companies had the opportunity to formally communicate EsSalud their nonconformity and expectations concerning the reference value.*
> *Additionally, even if an investigated company had made remarks on the reference value and EsSalud had decided not to consider them, the investigated company could have chosen not to participate in the selection process, since it had already used the existing formal mechanism to communicate its expectations and its willingness to participate in other areas if conditions changed."*

Finally, on the third argument of the investigated companies, the Commission considered the following:

> *"In regard to the cost of supplying other areas, although it is true that the winner of a selection process in a certain area gets some competitive advantage (experience and logistical cost savings), in this case, that advantage cannot have been significant or exclusive since, as from Tender 0199L00052 (September 2002), the investigated companies lowered their prices and, from Public Tender 0399L00091 (April 2004), they supplied other areas ".*

After all the evaluation, the Commission concluded that the only reasonable explanation for the behavior of the investigated companies was the existence of a market sharing settlement, therefore it declared to be well founded the charges against them. It also imposed them the following fines[126]:

was already in appeal proceeding before the Tribunal.

127 See, for example: BULLARD, Alfredo. (2003b). Op. Cit., pp. 129-158.

Chart N° 25
Fines imposed to liquid and gaseous medical oxygen suppliers

Company / Entity / Individual	Commission (Peruvian Taxation Units)
Praxair Perú S.R.L.	3 836,82
Aga S.A.	1 333,90
Messer Gases del Perú S.A.	578,98

Source: Resolution N°051-2010/CLC-INDECOPI.

Currently, the recourse of appeal submitted by the investigated companies is pending decision before the Specialized Defense of Competition Chamber.

3.2.3 Indecopi Impact and Contribution

The selection of pronouncements that have been described and commented shows that Indecopi has acquired significant experience in the investigation and sanction of horizontal cartel behaviors, particularly on sanctioning cartels of competitors to fix prices or share the market.

The investigations that have been conducted include different sectors, although there is a marked tendency of sanctioning collusion on goods or services markets that have great demand of general population. Thus, most of sanctioned price-fixing agreements or settlements have taken place in products markets or services of mass consumption (chicken, urban land transportation services, SOAT) or consumables used to produce that type of goods (wheat flour). In cases of market-sharing do not exist this tendency, because they have been verified in both intermediate goods markets (steel cylinders, sodium silicate) and goods markets that can be considered of mass consumption (medical oxygen). These investigations have usually been initiated against private companies, but have also included unions or associations to which those belong. In some cases, individuals have also been involved as offending agents, denoting the thoroughness with which Indecopi treat cartels, chasing them up until reaching individuals who heads and drive them.

Cartels of competitors have been drastically treated by Indecopi, qualifying them as a per se or automatic illegal practice. Notwithstanding, Indecopi has also sought to generate a balance, considering that some price-fixing or market-sharing agreements can be permissible when they are complementary or accessory of other most relevant legal agreements.

Thus, since 1997, Indecopi established the *per se* illegality rule that sanction most firm agreements or settlements among competitors (precedent of mandatory compliance established in the investigation regarding poultry market cartel). This harsh treatment is understood because through such practices, competitors collude to act as if they were a single economic agent although they pretend to compete, resulting in "market fraud". According to Indecopi's instances, the effects that cartels of competitors may have in the market will be considered only to quantify the applicable sanction.

Without limiting the foregoing, that same year of 1997, Indecopi introduced the category of agreements among competitors that were accessory or complementary of other legal agreements, mainly of integration, which aims to achieve greater efficiency in a particular productive or commercial activity; in order to specially exonerate such *per se* illegality agreements (precedent of mandatory compliance established in the proceedings initiated by CIVA v. Mariscal Caceres). With this exception, some rationality was allowed when evaluating agreements involving the integration of a group of competitors, enabling them to compete more aggressively with the other remaining competitors.

On 2003, the indicated rules analysis were left without effect in order to demand the inclusion in horizontal cartel behaviors evaluation of its concrete effects to the detriment of general economic interest (precedent of mandatory compliance established in the investigation regarding SOAT price-fixing). At that time, this change received hard and valid critics for increasing the authority discretion degree[127] leading to a broad debate on its suitability or utility[128].

Seeing this issue in perspective and with the benefit of the elapsed time, this change can be considered to be an episode in the evolution of Indecopi's interpretive criteria, in which fact cannot be considered as a substantial modification regarding severe persecution of cartels of competitors.

128 In this regard, it may be reviewed round table of FELICES, OLAECHEA, REBAZA y ROJAS. (2003). "¿Regla *Per Se* o Regla de la Razón? Premisas y Efectos de un Cambio". In: *Themis*. No. 47. Lima, pp. 287-296. Likewise, it may be seen: MARTÍNEZ, Martha y QUINTANA, Eduardo. (2007). Op. Cit., pp. 116-136.

129 This would have happened in case of SOAT price-fixing, in which two of the investigated insurance companies

In effect, interpretation rule change required the authority to demonstrate that illicit practice had been conducted to verify its detrimental effects on general economic interest. Additionally, those who were investigated could give the reasons that, according to their opinion, justified agreements or settled practices, to produce efficiencies and benefits to consumer. Therefore, while rule change could complicate Indecopi's work to verify illegality of infringing conducts (for raising test standard), there was a limited possibility to prevent sanction of a harmful conduct for the competitive process.

On one hand, competitors' agreements implementation are common and, regarding settlements, their execution in the market are usually an inherent requirement of illegality, thus its existence is normally demonstrated through the competitors parallel conduct. Nevertheless, once an agreement has been reached, it is possible that some may decide not to align themselves, while others put it into practice, showing a certain degree of execution[129]. In summary, rule change only prevented to sanction agreements that remain in a mere attempt for its participants' integrity.

On the other hand, cartel behaviors that qualify as cartels of competitors are usually harmful for the competitive process. It is highly unlikely that real justifications can be argued to restrict competition generated by that type of agreement, thus it would have to be demonstrated to produce greater efficiency and consumer welfare. If those beneficial effects could be demonstrated, the agreement could probably fit within the conditions required to qualify as accessory or complementary of other legal agreement, so that they could have just been exempt from *per se* illegality according to CIVA's precedent. Consequently, it was difficult that those whose behaviors had clearly negative effects will be released from responsibility due to rule change[130].

As a result, main disadvantages regarding rule change are:

- Rise test standard required to sanction cartels.
- Prevent sanctioning attempts.
- Reduce market signs against cartels of competitors.

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were clear of all responsibility because no evidence of involvement was found.

130 Regarding SOAT price-fixing case, for example, no justifications raised by the investigated companies on the agreement reduced effects according to the number of product sales were accepted, for not showing the agreement significant benefits.

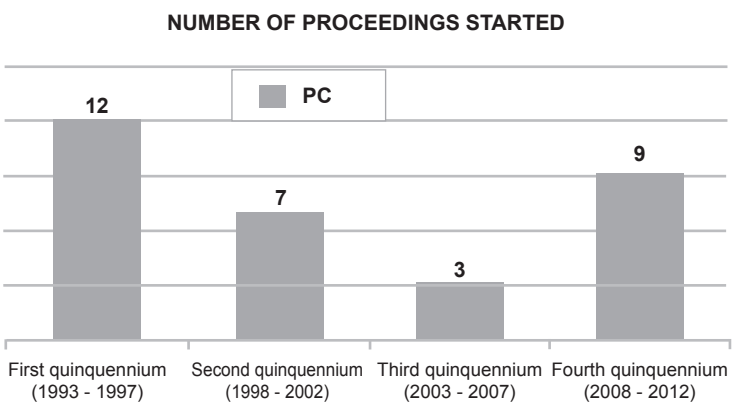
131 The legal definition of this interpretation rule has been considered to be correct by authors: PATRÓN, Carlos.

However, these major difficulties, which could be created for cartels persecution policy, did not prevent sanctioning those who had really harmful effects.

More importantly, experience gained by Indecopi as a product of this interpretive evolution was fully exploited during the regulatory development process that gave rise to the Legislative Decree 1034. As it has already being explained, through absolute prohibition, the existing law collects the per se illegality rule for cartels of competitors. Additionally, when defining behaviors subject to absolute prohibition, there is possibility according to the new law to qualify the agreements subject to this prohibition as accessory or complementary of other legal agreements, which might be released from the absolute prohibition. The Legislative Decree 1034 legally restores thereby two interpretation rules in force until 2003, separating it from the criterion tested in the investigation regarding SOAT price-fixing[131].

Continuity of Indecopi severe treatment of cartels of competitors can be seen on the proceedings statistics declared founded, as it shown in the following graph (see Graph N° 28).

Graph N° 28
Cartels of Competitors: founded proceedings (1993-2012)



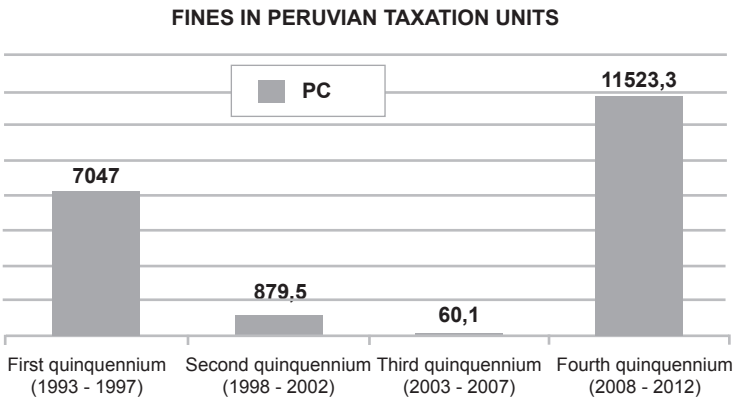
Source: Technical Secretariat.

(2008). Op. Cit., pp. 122-144. QUINTANA, Eduardo. (2011a). Op. Cit., pp. 19-59. RUIZ, Gonzalo. (2011). Op. Cit., pp. 163-182.

132 Sentences issued by the Judicial Branch on these matters have been discussed in the presentation of

It has been seen that Indecopi's sanctions on cases declared founded have been quite higher than those concerning abuse of dominant position, already revised on the previous item. Total of applied sanctions to participants in cartels have been calculated according to the caused negative effects, mainly considering the affected market, practices duration, number of agents involved, probability of infringing conducts detection and illegal benefit gained. The following chart presents imposed sanctions for horizontal cartel behaviors. (See graph N° 29).

Graph N° 29
Imposed fines for horizontal cartel behaviors



Source: Technical Secretariat.

Treatment of the circumstantial evidence is another relevant aspect on Indecopi's experience on sanctioning horizontal cartel behaviors. The Judicial Branch, as supervisory authority of Indecopi's decisions, has validated and confirmed that Indecopi is fully enabled to use circumstantial and presumption evidence. The Judicial Branch has furthermore confirmed based on the known cases that Indecopi given interpretation of found indications is correct[132].

cases (Petroperu against Rheem and Envases Metálicos and investigation of the poultry market cartel).
133 Regarding this matter, it may be seen, for example: QUINTANA, Eduardo. (2011c). Op. Cit, pp. 42-43.

Although there are matters that Indecopi can strengthen and improve[133]; it cannot be denied that Indecopi's decision-making bodies have improve its analytical and contrasting capacities of indications and against indications which, undoubtedly, improves the quality of its decisions.

Attention should be given to the exercise Indecopi's bodies powers of investigation. One of the aspects that was strongly questioned on the investigations against cartels of competitors was the so-called excess that could be made using those powers[134]. However, Indecopi's performance has been usually careful on this matter, gaining credibility on the exercise of its powers. This is a crucial aspect to ensure its legitimacy at the moment of collecting evidence as complex as those required to demonstrate the existence of competitors settlements.

In this regard, the Technical Secretariat and Commission of one of Indecopi's major investigations referred to the poultry market cartel was questioned on obtaining and evaluating evidence, based on the violation of the right of defense and due process of investigated companies and organizations. This matter was analyzed by the Ombudsman, respected entity who protects constitutionally recognized rights. The Ombudsman, at the time, dismissed the allegations above mentioned, concluding that there were no signs indicating violation of due process or that arbitrary measures were adopted[135].

- Criterion of analysis to sanction cartels: per se illegality or rule of reason.
- Use of presumption and circumstantial evidence to evidence of settlements.
- Evidence of settlement in the absence of documentary indications and analysis of alternative explanations.

134 An example can be seen on the news and press release published by the investigated companies or companies' unions on the proceeding against poultry market cartel. Among which it can be seen: "El absurdo abuso" (*Expreso*, 22 de enero de 1997); "¿Matamos el pollo peruano a garrotazos?" (*Síntesis,* 22 de enero de 1997); "Avicultores Dicen que Consecuencias Serán Fatales" (*Síntesis*, 22 de enero de 1997); "Empresarios insisten 'Indecopi adopta métodos policiacos'" (*La República*, 27 de enero de 1997); "'No es función de Indecopi juzgar a gremios empresariales': Confiep" (*Expreso*, 06 de diciembre de 1997); "Eduardo Farra cuestiona multa a los polleros; 'Indecopi se excede en sus facultades'" (*La Reforma,* 07 de diciembre de 1997). Citados en: BOZA, Beatriz. (2005). Op. Cit.

135 Statement issued by the Ombudsman on Communication No. 4356-97-DP-OP, July 02, 1997. Quoted by BOZA, Beatriz. (2005). Op. Cit.

136 Once again investigation against poultry market cartel serves as example, as media quickly made clear

In addition, Indecopi's experience on sanctioning cartels is emphasized within the country, which in turn is considered to be a very drastic entity against offenders[136]; but it is also valued on explaining and demonstrating both the appropriate manner to conduct investigations on this matter and positive results generated for market performance. As it has been mentioned by Boza, Indecopi's work is internationally recognized as a "better practice" regarding the investigation and sanction of cartels due to its sophistication degree and its technical quality[137].

HORIZONTAL cartel beahviors
Indecopi's Contributions

- Creation of a rigorous criterion on sanctioning cartels, through the absolute prohibition referred to in Legislative Decree 1034.
- Option to consider as accessory or complementary agreements some agreements that otherwise would be per se illegal.
- Validation of circumstantial evidence as standard for settlements investigations.

Indecopi's severity regarding this case decision, although it was also noted that many times they focused on highlighting imposed sanctions, rather than mentioning why were they imposed. Among the examples given of the above mentioned, it may be seen the following journalistic news: "Indecopi multa a avícolas con S/. 15'343,200. Las acusa de concertación de precios y competencia desleal" (*Expreso,* January 21, 1997); "Multan con S/. 15.3 mllns a avícolas que concertaron precio del pollo" (*El Peruano*, January 21, 1997); "Indecopi multa a Avicultores con más de S/. 15 Millones" (*Síntesis,* January 21, 1997); "Ente regulador no da marcha atrás y aplica sanción final: Indecopi multa con S/. 5 millones a 16 avícolas por concertar precios" (*Expreso*, November 27, 1997), "Indecopi multa con 5'088,000 soles a polleros" (*Síntesis,* November 27, 1997); "Indecopi sanciona a 15 empresas por concertación en precios del pollo" (*Gestión,* November 27, 1997); "Confirman sanción a avícolas por concertación de precios" (*El Comercio*, November 27, 1997). See: BOZA, Beatriz. (2005). Op. Cit.

137 Ibid. According to the author the investigation carried out by Indecopi on poultry market cartel was studied in the following events: "First International Training Program on Competition Policy", organized by the World Bank Economic Development Institute (Washington, December 1998); and "First International Course on Defence of Competition and Economic Regulation: Common Challenges", organized by the el World Bank Economic Development Institute and Universidad Argentina de la Empresa (Buenos Aires, March 2001).

138 Regarding vertical cartel behaviors, it may be seen: FALLA, Alejandro y BULLARD, Alfredo. (2002). Op.

3.3. Vertical Cartel Behaviors (exclusivities)[138]

Indecopi's practice concerning the supervision of vertical cartel behaviors is not as extensive as other types of illegal conducts. Notwithstanding this, the evaluation conducted in those resolved proceedings has been quite complete and discussed.

The main ruling issued by Indecopi concerning vertical restraints to competition or vertical cartel behaviors according to the law in force, referred as exclusivity cases, are described and discussed below.

3.3.1 Indecopi's Pronouncements

Chart N° 26
Vertical Cartel Behaviors
Cases on Indecopi's Pronouncements

CASES ON Indecopi's Pronouncements	Tele Cable S.A. – Tele Cable vs. Fox Latin American Channel Inc. - Fox and Turner Broadcasting System Latin American Inc. - Turner (2003)
	Group Multipurpose S.R.L. – Gromul and Dispra E.I.R.L. – Dispra, vs. Quimpac S.A. – Quimpac and Clorox Perú S.A. – Clorox (2009)
	Operaciones Arcos Dorados de Perú – Arcos Dorados vs. Jockey Plaza Shopping Center S.A. – Jockey Plaza, Sigdelo S.A. and several natural persons (2011)

Cit., pp. 215-227. FALLA, Alejandro y DRAGO, Mario. (2012).Op. Cit., pp. 158-182. See also chapters "La Exclusividad de las Ventas de Hipoclorito de Sodio para la Producción de Lejía" and "La Exclusividad en el Alquiler de Espacios dentro de un Centro Comercial" in FERNÁNDEZ-BACA, Jorge. (2012). Op. Cit., pp. 211-243 y 244-273, respectively. See also MARTÍNEZ, Martha y QUINTANA, Eduardo. (1998). Op. Cit., pp. 51-59.

139 Tele Cable also filed a complaint against Telefonica del Peru SAA and Telefonica Multimedia SAC. (Cable

a. Tele Cable S.A. – Tele Cable vs. Fox Latin American Channel Inc. - Fox y Turner Broadcasting System Latin American Inc. - Turner (2003)[139]

TV Cable, concessionaire of cable television network service in the city of Lima, had a signal distribution agreement (broadcasting of programs) with Fox and Turner since 1993 and 1989, respectively. However, from April 30, 1999 Fox unilaterally terminate the agreement and Turner did the same on December 31, 1999, which coincided with the execution of exclusive distribution agreements by both companies with Telefonica del Peru SAA contracts (Telefonica).

Tele Cable filed a complaint against Fox and Turner for the alleged development of anti-competitive practices consisting in establishing signal exclusive distribution agreements. Tele Cable argued that subscribed exclusivity agreements aimed at excluding the company from the television cable market, since Fox and Turner channels represented "essential inputs" to compete in that market.

The defendants denied having engaged in anti-competitive practices. Turner submitted rebuttals indicating that the company was not in a dominant position in the international market of programmers, in view of the existence of a myriad of programs and content substitutes. Likewise, Fox dominant position could not be confirmed due to its channels had enough substitutes.

The Commission considered that the case involved an alleged abuse of dominant position[140], for that reason an evaluation was conducted on whether the defendants held this position in the relevant market. For these purposes, the Commission noted that the relevant product was not limited to Fox and Turner signals, but that it should include all those signals and programs that could be broadcasted by cable television channels. In addition, the Commission identified the categories to which each signal or program from the defendants belonged to

Mágico), which are telecom operators. Notwithstanding the complaint was filed by telecom regulator (OSIPTEL), Indecopi presented the complaint as the Fox and Turner case, according to the arguments stated by the Tribunal in Resolution 0355-2000/TDC-INDECOPI.

140 It is important to consider that this procedure was presented during the effective period of Legislative Decree 701, regulation that did not independently classify vertical cartel behaviors, as now does Legislative Decree 1034. Accordingly, these complaints had to be presented considering that it was an act of abuse of dominant position or a restrictive competition practice (agreements or settlements between companies).

141 Resolution 005-2003-INDECOPI/CLC, dated May 14, 2003.

and defined which could be substitutes in each category, depending on their characteristics, content and audience levels. The comparative evaluation of all existing programs for each category gave the following results (see Chart N° 27):

Chart N° 27

Comparative evaluation programs of the Fox and Turne

Category	Channel	Enterprise	Substitute Programs	Audience Percentage
Sports	Fox Sports	FOX	ESPN and America Sports. Cable Mágico Deportes had more tunning, but it was a Cable Magico propierty.	Equivalent to the competitors
Financial News	CNN Financial	TURNER	Bloomberg	Equal to the competitors
International News in Spanish	CNN in Spanish	TURNER	News International Chains (CBS-Telenoticias) and local news chains (Canal N, Antena Informativa)	Lower than the local competitors
International News in English	CNN International	TURNER	BBC World, NBC	Equivalent to the competitors
Movies	TNT	TURNER	HBO, Cinecanal, Cinemax, USA Network, MGM Network Film and Arts.	Lower than the local competitors
Children's Programs	Cartoon Network and Fox Kids	FOX TURNER	Nickelodeon, Discovery Kids and Boomerang	Higher than the competitors, but not being dominant
Series	Fox Channel	FOX	Warner Channel, AXN and Sony Entertainment Televisión	Lower than the competitors

Source: Own development.

Consequently, the Commission determined that Fox and Turner did not held a dominant position in any of the analyzed categories *"(...) to the extent that the development of abusive behaviors in this market would not be allowed by the existence of substitutes channels and international market of programmers dynamic"*. However, the Commission considered convenient to analyze reported behaviors assuming they did hold a dominant position.

The Commission evaluated whether exclusivity agreements between the defendants and Telefonica could represent abuse of dominant position. Therefore, it was considered that *"(...) exclusivity agreements can have a double effect; on one side they can increase consumers welfare as a result of the efficiencies that could arise from such agreements"*. On the other hand, *"(...) they can also produce a negative effect by restricting or excluding competitors from sources of supply or inputs, decreasing the competition level and thereby to a loss of welfare for consumers"*.

As a result of the comparative evaluation of positive and negative effects of exclusivity agreements, the Commission concluded that negative effects concerning customers loss presented by Tele Cable, would be quite reduced to the total of disconnections sustained (customers loss) by the aforementioned company during the analyzed period. Thus, disconnections were mostly caused by other variables, than exclusivity agreements, such as problems with television signals, inadequate distribution of magazine, subscriber travel, bad programming, lack of Canal N and international broadcasters, such as ABC, NBC, CBS, among others.

The Commission considered that exclusivity agreements would be only explaining a very small part of Tele Cable total number of disconnections and, accordingly, it not could not be confirmed that such exclusivities could lead to Tele Cable loss of customers and to be ousted from the market.

Under these considerations, the Commission declared unfounded the complaint filed by Tele Cable against Fox and Turner[141].

b. Group Multipurpose S.R.L. (Gromul) and Dispra E.I.R.L. (Dispra) vs. Quimpac S.A. (Quimpac) and Clorox Peru SA. (Clorox) (2009)

In 1995 there were two manufacturers of sodium hypochlorite in Peru: Quimpac and Paramonga. In 1997, Quimpac bought Paramonga, becoming the only producer of sodium hypochlorite in the domestic market.

Later, Quimpac subscribed a sodium hypochlorite exclusive distribution agreement with Clorox, which is the sole distributor of that product and it could not be directly bought from Quimpac by any other company.

142 Resolution 005-2008-INDECOPI/CLC, dated February 22, 2008.

As a result of what it is stated in the above mentioned agreement, Quimpac refused to meet a sodium hypochlorite purchase order of the plaintiffs: Gromul is in the market of bleach packaging and commercializing, and Dispra commercialized bleach prepared by Gromul in Huánuco and Ucayali.

Gromul and Dispra filed a complaint against Quimpac and Clorox for alleged vertical cartel behaviors by arguing that defendants maintained an exclusive contractual relationship of sodium hypochlorite sale or distribution, as well as the application of dissimilar conditions to equivalent, placed a few competitors at a disadvantage against other.

Gromul and Dispra argued that the exclusivity agreement described above aimed to maintain and increase Quimpac and Clorox dominant position, as Quimpac refused to meet the purchase order by specifying that there was an agreement with Clorox. Likewise, this agreement allowed Clorox to stock up on sodium hypochlorite at a lower price than its competitors, enabling it to reduce its bleach sales prices to the consumer, to the detriment of Gromul and Dispra.

Clorox stated that the exclusive distribution agreement was not effective, since its conditions were more flexible, as Clorox hypochlorite volumes depended on Quimpac decision and not based on Clorox requirements and quantities. Clorox indicated that its dominant position resulted from its economic efficiency, achieved by reducing its production costs, to benefit the consumer with a better and more comfortable package at a lower price.

Quimpac stated that it did not hold a dominant position in production and distribution of sodium hypochlorite, to the extent that there were not barriers to entry the market. The absence of barriers to entry establishes a potential competition within the sodium hypochlorite market and Quimpac was not responsible if anyone decides to import it. In addition, Quimpac denied the existence of an exclusive distribution agreement with Clorox, by indicating that business relationships were maintain with different companies, such as Intradevco, to sell hypochlorite during the period of its alleged validity.

According to the Commission analysis, exclusivity agreements between companies that are at different levels of the production chain, in case one of the involved companies holds a dominant position, could produce an exclusionary effect for competitors of the affected market. Therefore, this type of behaviors could be tried under article 6 of Legislative Decree N° 701, currently in force, as a restrictive competition practice.

Thus, the Commission understood that when these practices involve, at least, one company holding dominant market position, there can be negative effects on the efficiency, since the capacity of competitors to compete in the market is affected, being necessary to evaluate involved benefits and costs.

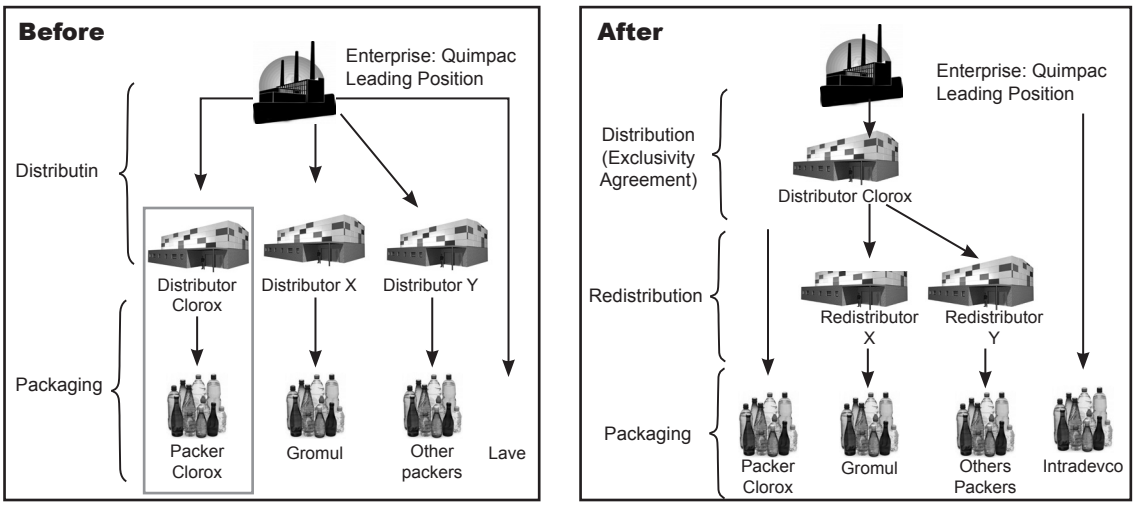
Contrary to Quimpac's statements, the Commission determined that this company held a dominant position on the relevant market during the investigation period. Furthermore, the exclusive distribution agreement was considered to be made and executed, limiting competition and creating more costs than social benefits.

The Commission particularly understood that the referred agreement had created a new business level on selling sodium hypochlorite, and that:

> *"...competition restriction established by the exclusive distribution of sodium hypochlorite, did not find justification on achieving the involved companies indicated beneficial objectives, since these could not be achieved through less restrictive mechanisms for competition".*

The Commission illustrated on a graph the situation before and after exclusivity agreement and its effect on the business market of hypochlorite of sodium through the following graphical comparison (see Graph N° 30):

Graph N° 30
Situation before and after the exclusive agreement to commercialize sodium hypochlorite



The complaint was therefore declared well-founded by the Commission regarding the implementation of vertical restraints of sodium hypochlorite exclusive distribution agreements. Both Quimpac and Clorox were sanctioned by the Commission with an equivalent fine of 325.93 Peruvian Taxation Unit[142].

On appeal, the Tribunal ruled on the classification of reported conduct as a vertical agreement punishable according to article 6 of Legislative Decree 701. In this regard, the Tribunal stated that prohibited behavior according to first paragraph of article 6 is equivalent to what in doctrine is referred to as cartel behaviors, cartels or settlements, characterized by:

> *"... a meeting of the minds (covenant, convention, contact, etc.) between two or more independent economic operators which undertake a behavior to restrict competition, by the exclusion of competitors (e.g. acts of boycott) or concerted fixing of a business condition (e.g. prices, quality standards, etc.)".*

According to Tribunal developed analysis:

> *"... exclusive distribution agreements between independent economic agents working in different stages of the production chain and in which one of them holds dominant position, could restrict competition in one of the related markets (production - distribution, wholesale - retail, etc.) through the exclusion of competitors who eventually could not access exclusive input supply".*

Therefore, the Tribunal determined that such arrangements were intended as an alleged case of infringement according to letter j) ("cases of equivalent effects") and the first paragraph of article 6 of Legislative Decree 701 (agreement between companies).

On the other hand, vertical collusions constitute resulting infringements according to the Tribunal, requiring its modification:

- Execution of accused conduct (conclusion of exclusive distribution agreement), and
- To prove the existence of a negative result or its specific potentiality concerning competition and consumer welfare.
- According to the Tribunal the agreement did not generate an effective damage in the market, although it could generate:

143 Resolution 068-2009/SC1-INDECOPI, dated February 24, 2009.

- Negative results for competition through possible exclusion of bleach packers from the market, and
- Any negative effects for consumers who could have been affected for reducing consumption alternatives and competitive pressure resulting in lower prices.

Notwithstanding the above mentioned, the Tribunal considered being necessary defining the market size in order to evaluate the effect potentiality; concluding that market size in this particular case was not significant, due to the fact that the conduct was developed in a not-so-extensive market, compared to other inputs market within chemicals sector. This fact should be considered, to the discretion of the Tribunal, at establishing the sanction.

As a result, the complaint was considered to be well-founded and the fine was reduced to 81.48 UIT for both Quimpac and Clorox[143], according to the decision issued by the court of first instance which was confirmed by the Tribunal.

In addition, the Tribunal decided to establish the following precedent of mandatory compliance as a binding guide for future cases to be processed under Legislative Decree 1034, presenting as follows the transcription of its overall content:

> *"1. Legislative Decree 1034 - Law on the Repression of Anti-competitive Conducts – under articles 11 and 12, respectively, horizontal and vertical cartel behaviors are classified; i.e., unlike repealed regulatory system where both cartel behaviors were classified under article 6, under the exiting regulation, according to lawmaker separate classification is necessary by considering their nature and particular typical elements.*
>
> *(…)*
>
> *3. Under the existing regulations, vertical cartel behaviors have two particular typical elements: (i) that it is undertook by two or more independent economic agents acting at different levels of the production chain; and (ii) that one of the involved infringing agents holds dominant position in one of the production chain markets.*
>
> *(…)*
>
> *7. From this point of view, vertical cartel behaviors are 'resulting infringements'. In other words, in order to establish the infringement and, therefore, violate the principle of free competition as a legally protected right, it is necessary not only to undertake the accused conduct (e.g., concluding a restricting exclusive distribution agreement,), but to prove the existence of a negative result, or its potentiality (certain and imminent)*

144 As it is referred to in the discussed resolution, "tenant mix" is the combination of business premises in a shopping

concerning the competition and consumer welfare. Specifically, vertical cartel behaviors agreement shall generate an effective tort or risking tort to competition and consumer welfare (certain and imminent), in order to sanction this behavior as an infringement of competition defense regulations.

(…)

12. This Chamber considers that in order to analyze vertical cartel behaviors legality *(or illegality), based on the above mentioned, an analysis shall be conducted by the competition authority according to the following methodology:*

(i) determine if any of the defendants holds dominant position in the relevant market;

(ii) establish the existence of restricting agreement charged to the defendants;

(iii) consider competition restrictive objectives against efficiencies for competition that arise from vertical cartel behavior under analysis; and

(iv) in the event that the restrictive objectives are larger than the efficiencies, determine whether vertical cartel behavior had in fact a negative result, or the potential of causing a particular detrimental result for competition and consumer welfare (affecting general economic interest). Failure to observe these effects, or potential effects, vertical restriction will be not declared as offense, although it might have the object of restricting competition".

c. Operaciones Arcos Dorados de Perú (Arcos Dorados) vs. Jockey Plaza Shopping Center S.A. (Jockey Plaza), Sigdelo S.A. and several natural persons (2011)

In Peru, Arcos Dorados is the licensee company of McDonald's international fast food chain, while Jockey Plaza Shopping Center is managed by Jockey Plaza and Sigdelo is the licensee company of Burger King and Pizza Hut international fast food chains.

Arcos Dorados constantly requested Jockey Plaza to lease one or several business premises inside the shopping center to establish various formats of McDonald's restaurants, receiving several negative replies from Jockey Plaza who stated that his category was sufficiently covered. Finally, on June 12, 2006, Jockey Plaza replied Arcos Dorados leasing request made on June 08, 2006, by stating that although there was an interest on McDonald's participation, there were contractual limitations agreed with another operator that prevented it.

Arcos Dorados file a complaint for the existence of vertical restraints to competition between Jockey Plaza (shopping center-lessor) and Sigdelo (client-lessee), as Jockey Plaza would

have refused to enter into an agreement with Arcos Dorados due to an agreement held with Sigdelo.

Therefore, Arcos Dorados alleged that Jockey Plaza is the only leasing company of business premises for fast food sale in the shopping center, making evident its dominant position in that market. Regarding negative effects of exclusivity agreement between Jockey Plaza and Sigdelo, the plaintiff argued that not only did its ability to operate in the relevant market was restricted, but affected consumers by reducing options and products at higher prices, as McDonald's prices are relatively lower than Burger King. Finally, it was stated that Burger King was not an anchor shop to the shopping center, which did not need to maintain a suitable "*tenant mix*"[144], therefore there were no reasonable justifications to exclude McDonald's from the shopping center for an indefinite period.

According to Jockey Plaza and Sigdelo, leasing and selling business premises in Lima and Callao is the relevant market, which cannot be restricted only to Jockey Plaza shopping center. In addition, the agreement was economically justified, as Sigdelo pledged to lease several premises in the shopping center and to pay an additional amount for exclusivity. This situation maintained the desired combination of operators and "*tenant mix*", and granted security to operators who took a risk in a business when profitability was unknown.

Likewise, the defendants stated that a shopping center is not an essential establishment for Arcos Dorados to operate in the market and either to considered that Jockey Plaza holds share of a market that difficult, limit or restrict Arcos Dorados function, thus (i) there are numerous shopping centers in Lima Metropolitan Area and Callao, (ii) Arcos Dorados can operate in establishments other than shopping centers, and (iii) there are many potential suppliers of business premises.

Finally, as Lima and Callao are considered to be the relevant market, Arcos Dorados complaint against Sigdelo cannot be expelled by the exclusivity agreement, on the contrary, the agreement stimulated competition, causing Arcos Dorados to set up an establishment close to the Jockey Plaza Shopping Center.

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center in order to produce, as an assembly, optimum sales, profits, community service and financial viability for shopping center owner.

145 Resolution 059-2011/CLC-INDECOPI, dated November 15, 2011. This decision was on appeal before the

Firstly, the Commission verified that Jockey Plaza and Sigdelo entered into an agreement on February 20, 1997, which remained in force until September 26, 2007, in which no shopping center premises or any other area that may hold in the future rights in rem in the Hippodrome of Monterrico shall be leased by the former to any McDonald's licensee. Similarly, it was verified that due to this agreement, Jockey Plaza refused to lease business premises to Arcos Dorados.

The Commission considered that, regarding the relevant market, the product referred to were fast food hamburgers and related products. Shopping centers are considered to be a sales platform of goods and services for consumers, thereby the complaint on different products (for example, purchase of clothing and fast food) is consolidated within this type of premises and buyers usually do not incur costs by going into another place to change one of the suppliers. It was also considered that, during the investigated period (1997-2007), there were no shopping centers that could be considered as appropriate substitutes for Jockey Plaza Shopping Center. Thus, it was determined that leasing of premises in Jockey Plaza Shopping Center limited the market to sale hamburgers similar to the ones sold by McDonald's.

According to the Commission, Jockey Plaza held high market share, there were high entry barriers and there were no potential competition, stating as conclusion that Jockey Plaza held a dominant position during the investigated period.

A set of goods and services offered at the Jockey Plaza Shopping Center determined the affected market, including McDonald's, Burger King and Bembos hamburgers, considering Arcos Dorados requested service, scope of the agreed negative between Jockey Plaza and Sigdelo, consumers' characteristics of the referred product, and Arcos Dorados, Sigdelo and Bembos products characteristics. The Commission identified therein that the reported behavior had significantly restricted the competition level between Arcos Dorados, Sigdelo and Bembos and, consequently, possible consumers' options were reduced.

In addition, there was no relation between the exclusivity agreement and the need to ensure a particular "*tenant mix*", nor did it solve the need to return a significant investment made by Sigdelo. That is, there were no justifications regarding efficiency or any other nature of reported behavior that could validate caused competition restriction.

Based on the foregoing, the Commission declared the complaint as well-founded for infringing letter b) of article 6 of Legislative Decree 701, since the investigation period was from 1997 to 2007, before Legislative Decree 1034[145] came into force.

As a corrective measure, the decision of not making an agreement with Arcos Dorados was declared unenforceable and ordered Jockey Plaza to refrain from entering into exclusivity agreements. In addition, Sigdelo was sanctioned with a fine of 564.4 Peruvian Taxation Unit, Jockey Plaza received a fine of 100 Peruvian Taxation Unit and individuals involved in the investigation received fines of 5 Peruvian Taxation Unit each.

The appeal submitted by the defendants is currently pending decision by the Specialized Defense of Competition Chamber.

3.3.2 Indecopi's Impact and Contribution

As it has already being mentioned, Indecopi's experience on vertical cartel behaviors is not such extensive, however, it has given rise to diligent and relevant rulings.

Attention has to be particularly paid to elements below that are usually used by Indecopi to analyze this type of behaviors:

- The existence of agreement or collusion between agents operating at different levels of the productive or business chain.
- Dominant position of some participants.
- Restrictive effect of competition (true or its potentiality).
- Agreement positive effects for consumer welfare.

Tribunal at the time this work was being drafted.

146 See chapter *"La Exclusividad de las Ventas de Hipoclorito de Sodio para la Producción de Lejía"* - FERNANDEZ-

As can be observed, this method of analysis is consistent with international practice, as explained in the first chapter.

Without a doubt, Indecopi's gained experience regarding vertical restraints of competition has also been used to develop Legislative Decree 1034.

As part of the implementation of Legislative Decree 701, it was observed that vertical restraints can be detrimental to competition when involving, at least, one company holding a dominant position since the agreement made between the former and an economic agent can imply an advantageous position compared to its competitors, preventing them to access dominant company's goods or services. This analysis was used, for example, in the case against Fox and Turner.

In addition, the absence of a specific provision to classify prohibition of vertical cartel behaviors when implementing Legislative Decree 701 was also identified, in which systematic interpretation of Legislative Decree 701 provisions was used at that time to decide about this class of behaviors. This analysis used on the proceeding against Quimpac and Clorox.

Based on that experience, classification of vertical cartel behaviors and establishment of conditions to be modified have been carefully made when establishing regulations of Legislative Decree 1034.

VERTICAL CARTEL BEHAVIORS
Indecopi's Contributions

- Independent classification as alleged prohibition.
- Settle the existence of a dominant position to be modified.

Notwithstanding the foregoing, Indecopi's taken positions to rule on the described behaviors in this chapter have been argued. On one hand, it can be mention Indecopi's identification and estimation of possible detrimental effects from vertical restraints of competition, particularly in the sodium hypochlorite case[146]. On the other hand, most current debate focused on defining the relevant market for exclusivity agreements, since the narrow the market, the greater the possibility of vertical restraints to significantly affect competition, which occurred in Jockey Plaza shopping center[147] case.

BACA, Jorge. (2012). Op. Cit., pp. 242-243.

147 On this regard, it may be seen FALLA, Alejandro y DRAGO, Mario. (2012). Op. Cit., pp. 172-176. See also chapter *"La Exclusividad en el Alquiler de Espacios dentro de un Centro Comercial"* - FERNÁNDEZ-BACA, Jorge (2012). Op. Cit., p. 273.

CONCLUSIONS

Competition is a dynamic process through which companies or economic agents compete in the market to better meet consumers' needs and expectations. On this regard, competition is considered to be a means to achieve a higher purpose, which is consumer's welfare through market functioning.

Peruvian regulations on free competition defense and protection aimed to avoid companies to concentrate market power for reasons other than increasing efficiency and to use illegally acquired market power. It also seeks to avoid concentration of power market through companies' mergers and purchases, generating serious risks for competition. These regulations offered protection of the competitive process in order to achieve consumer's welfare.

Indecopi, since the beginning of its duties in 1993, has managed to protect the competitive process, not only by facing important challenges regarding interpretation of regulations on competition protection for complex cases, such as those relating to acts of abuse of dominant position requiring the evaluation of its effects in the market, but also defending the exercise of its legal powers to investigate veiled anticompetitive behaviors, such as cartels of competitors.

Indecopi's decisions regarding acts of abuse of dominant position demonstrate a balance between (i) self-determination of dominant companies' business policies, recognized in a social market economy such as Peru, which is reflected in the decisions involving, for example, denial to hire or the use of differentiated prices and/or discounts; and (ii) protection of the competitive process, by sanctioning dominant companies behaviors which invalidly excluded other economic agents from the market.

Indecopi has been careful to manage its sanctioning powers on acts of abuse of dominant position; being lengthy when defining the existence of a dominant position in the market, as not to unduly extend limitations imposed by the prohibition of acts of abuse of dominant position to companies or entities that do not hold substantial market power. Reasons and justifications raised by operators holding a dominant position have also been evaluated in a reasonable and balanced manner to support that their behavior cannot be considered as an act of abuse.

By constantly applying regulations that prohibit acts of abuse of dominant position, Indecopi identified new types of behaviors of dominant economic agents that can damage the competitive process. From this experience, prohibited behaviors included in the proposed regulation posed by Indecopi were enriched, giving rise to a new law on defense of competition, Legislative Decree 1034.

Indecopi managed, with the gained experience, to properly elucidate the scopes of prohibition of abuse of dominant position, by excluding regulation in force, where after an extensive discussion, the so-called acts of exploitative effect that may well adversely affect the consumer are not made through a competition restriction.

On the other hand, Indecopi has severely treated cartels of competitors, qualifying them as a *per se* or automatic illegal practice. The reason why are drastically treated is that they collude to act as if they were a single economic agent by pretending to compete, considered as "market fraud". The severity of cartels treatment is reflected, without doubt, on the economic sanctions imposed by Indecopi, which have been much higher than those corresponding to cases of abuse of dominant position.

Indecopi's gained experience in sanctioning cartels was fully used through the regulatory development process, which gave rise to the Legislative Decree 1034, as it states the absolute prohibition of cartels of competitors.

Notwithstanding this, Indecopi has also sought to generate balance, by considering that cartel behaviors may be exceptionally exempt from *per se* illegality, as complementary or accessory of other most relevant legal agreements, mainly of integration, which objective is to achieve greater efficiency in a particular productive or business activity. With this exception, some companies' integration agreements are allowed to compete more aggressively with other competitors. This exception has also been referred to in Legislative Decree 1034.

In addition, based on its work of cartels persecution, Indecopi has managed to validate two very important aspects for the exercise of its legal powers. First, to use circumstantial or presumption evidence to demonstrate the existence of cartels of competitors, as there is no direct evidence to demonstrate this illegal behavior. Second, to use its broad powers of investigation to obtain evidence, respecting the right of defense of those investigated. Indecopi performance in both areas has successfully passed the judicial review.

In this way, Indecopi has earned credibility in the execution of its functions, which is crucial to ensure its legitimacy. Indecopi's work is internationally recognized as a "better practice" regarding the investigation and sanction of cartels due to its sophistication degree and its technical quality.

As Indecopi's experience on vertical cartel behaviors is not as extensive as in the other two previously discussed areas, it has also served to improve the existing regulation. On one side, it was possible to classify these behaviors in a different section of Legislative Decree 1034, independent from competitors' treaties and agreements. On the other hand, this classification was considered as a condition to modify this behavior, in which one of the participants holds a dominant position, as only in this case, vertical restraints can be detrimental to competition.

Finally, the following are related to the main future challenges of Indecopi:

- Firstly, Indecopi has tools to identify markets or situations in which there exits at least a reduced probability in which economic operators affected by acts of abuse of dominant position file a complaint, and in which prejudice of consumers' welfare may be high. Both conditions have to be met; we consider that it would justify Indecopi to act ex officio, as it tends to do in investigations against cartels of competitors.
- Secondly, when settlement cases among competitors are based on the analysis of companies' behaviors in the market as main or only source of settlement evidence, we consider being essential for Indecopi to submit settlement hypothesis to a more demanding counterfactual analysis, to fully rule out alternative explanations offered by the investigated party.
- Thirdly, we consider that in the future Indecopi can make the most of the provisions contained in Legislative Decree 1034 on undertaking to cease infringing conduct and, above all, requests of sanction exemption in return for offering crucial evidence to sanction offenders (known as repentance programs). There have been significant results to sanction severe anticompetitive behaviors in other countries.

APPENDIX

APPENDIX N° 1
PUBLISHED WORKS ON CARTELS CONTROL IN PERU[148]

- Boza, Beatriz. (1998). "Por qué no es Conveniente para el Perú contar con una Política General de Fusiones". En: AA.VV. (1998). *Políticas de Competencia y el proceso de Reformas Económicas en América Latina*. Lima, Indecopi.
- Carrano, Italo. (1998). "La Ley Antimonopolios y Antioligopolios del Sector Eléctrico ¿Deben Controlarse las Fusiones y Adquisiciones en el Mercado de la Electricidad?". En: *Boletín Latinoamericano de Competencia.* No. 4. Comunidad Europea, ver: http://ec.europa.eu/competition/publications/blc/.
- Carrillo, Diego. (2011). "*El Moderno Control de Fusiones Económicas en la Defensa de la Libre Competencia: una Necesaria Revisión de los Argumentos que se Oponen a su Implementación en el Perú".* Tesis para optar el título profesional de abogado por la Universidad de Lima.
- Carrillo, Diego. (2012). "El Control de Fusiones Económicas o de cómo existe aún el arte de mantener el equilibrio". En: *Thémis.* No. 61. Lima.
- Diez Canseco, Luis; Falla, Alejandro; Quintana, Eduardo y Távara, José. (2012). "Mesa Redonda: Control de Fusiones y Concentraciones Empresariales en el Perú". En; *Ius et Veritas.* No. 44. Lima, Tarea Gráfica Educativa.
- Drago, Mario. (2012). "Medicinas que no Curan: El Problema de la Inefectividad de los Remedios en las Concentraciones Empresariales". En: *Thémis.* No. 61. Lima.
- Durand, Julio. (2006). "El Control de Fusiones como Defensa de la Libre Competencia". En: C*oyuntura.* No. 6. Lima, CISEPA.
- Durand, Julio. (2007). "Construyendo un Sistema de Control de Fusiones para Evitar Distorsiones en la Libre Competencia". En: *Derecho & Sociedad.* No. 28. Lima, Editora y Comercializadora Cartolan.
- Fernandez, Francisco. (2008). "El Sistema de Control de Concentraciones Empresariales en la Nueva ley de Defensa de la Competencia". En: *Advocatus.* No. 17. Lima.
- Gallardo, Jose. (2004). *Concentraciones Horizontales en la Actividad de Generación Eléctrica: el Caso Peruano*. Lima, OSINERGMIN.

148 This bibliographic listing based on the Appendix of DIEZ CANSECO, Luis; FALLA, Alejandro; QUINTANA, Eduardo and TAVARA, José. (2012). Op. Cit. includes an exhaustive list of works on this matter written in Peru, which we have enriched with several additional references of Peruvian authors, in order to be reviewed by the reader and as the topic of control of structures is not developed in this book.

- Lama, Hector. (2007a). "El Control Previo de Fusiones". En: A*ctualidad Jurídica.* No. 165. Lima.
- Lama, Hector. (2007b). "El Origen y Control de las Concentraciones Económicas". En: *Revista Jurídica del Perú.* No. 76. Lima.

- Phumpiu, Paul; Rebaza, Alberto y Távara, José. (2004). "¿Por qué existe aún el Control de Fusiones en el Mercado Peruano?". En: Themis. *La Evolución de la Libre Competencia en el Perú*. Lima, Themis.
- Quintana, Eduardo. (1999). "¿Rezando entre Tinieblas?: el Credo del Control de Concentraciones Empresariales". En: *Thémis.* No. 39. Lima.
- Quiroga, Maria del Rosario y Rodriguez, Miguel. (1997). *La concentración de empresas* y *la libre competencia*. Lima, M.J. Bustamante de la Fuente y Cultural Cuzco Editores.
- Rebaza, Alberto. (1997). "El Control de Adquisiciones y Fusiones en la Nueva Ley Antimonopolio del Sector Eléctrico: una Raya más al Tigre del Intervencionismo". En: *Thémis.* No. 36. Lima.
- Rojas, Juan Francisco. (2006). "El Control de las Concentraciones Empresariales en la Perspectiva del Derecho de la Competencia". En: Otero Lastres, J.; Rojas Leo, J.; Ramírez Otero, L; y otros. (2006). *Temas actuales de derecho de la empresa.* Lima, Palestra Editores.
- Ruiz, Gonzalo. (1998). "Control de Concentraciones versus Regulación de Conductas ¿Complementos o Sustitutos?". En: *Boletín Latinoamericano de Competencia*. No. 5. Comunidad Europea, ver: http://ec.europa.eu/competition/publications/blc/.
- Salas, Ursula. (2002). *"El Control Previo de Fusiones en el Perú en el Marco de la Libre Competencia"* Tesis para optar el título profesional de Abogado por la Universidad de Lima.
- Salinas, Sergio. (2006). "La Ley Antimonopolio y Antioligopolio en el Sector Eléctrico: ¿Sobreregulando el Mercado?". En: *Ius et Veritas.* No. 33. Lima, Tarea Gráfica Educativa.
- Santivañez, Roberto. (1999). "Concentración en el Sector Eléctrico ¿es Posible un Control Previo?". En: *Ius et Veritas.* No. 18. Lima, Tarea Gráfica Educativa.
- Sarango, Luis Alberto. (2010). *"Control o no Control de Fusiones en la Industria Regulada: Extendiendo el Caso del Sector Eléctrico al Mercado de Gas Natural"* Tesis para optar el grado académico de Magister en Derecho de la Empresa con mención en Regulación de Servicios Públicos por la Pontificia Universidad Católica del Perú.
- Tavara, Jose y Luis Diez Canseco. (2003). "Estabilizando el Péndulo: Control de Fusiones y Concentraciones en el Perú". En: *Thémis.* No. 47. Lima.
- Tovar, Teresa. (2005). "A Propósito del Control de Fusiones: Algunas Lecciones de la Experiencia Norteamericana". En: *Ius et Veritas.* No. 30. Lima, Tarea Gráfica Educativa.

APPENDIX N°2
CONSIDERED RESOLUTIONS
Abuse of the Position: Negative and Unjustified Treatment

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°002/99-INDECOPI/CLC	19.03.1999	Alejandro Alfageme Rodríguez Larraín Rufino Cebrecos Revilla Luis Morales Bayro César Guzmán-Barrón Sobrevilla Alejandro Falla Jara
Resolution N°0216-1999-TDC-INDECOPI	16.06.1999	Alfredo Bullard González Hugo Eyzaguirre del Sante Liliana Ruiz de Alonso Ana María Pacón Lung
Resolution N°011-2000-INDECOPI/CLC	09.10.2000	Geoffrey Cannock Torero Carlos Adrianzén Cabrera César Guzmán-Barrón Sobrevilla Thilo Klein José Luis Sardón Taboada
Resolution N°0869-2002/TDC-INDECOPI	11.12.2002	Juan Francisco Rojas Leo Julio Durand Carrión Santiago Francisco Roca Tavella Luis Bruno Seminario De Marzi Lorenzo Zolezzi Ibárcena
Resolution N°022-2001-INDECOPI/CLC	11.07.2000	César Guzmán-Barrón Sobrevilla Geoffrey Cannock Torero Carlos Adrianzén Cabrera Thilo Klein José Luis Sardón de Taboada
Resolution N°0870-2002/TDC-INDECOPI	11.12.2002	Juan Francisco Rojas Leo Julio Durand Carrión Santiago Francisco Roca Tavella Luis Bruno Seminario De Marzi Lorenzo Zolezzi Ibárcena
Resolution N°064-2006-INDECOPI/CLC	04.09.2006	Luis Felipe Arizmendi Echecopar Elmer Cuba Bustinza Eloy Espinosa-Saldaña Barrera José Abraham Llontop Bustamante Jorge Rojas Rojas David Ritchie Ballenas

Resolution N°1122-2007/TDC-INDECOPI	02.07.2007	Rosa María Graciela Ortiz Origgi Juan Ángel Candela Gómez de la Torre Juan Luis Avendaño Valdez Luis José Diez Canseco Núñez José Luis Fernando Piérola Mellet
Resolution N°045-2009-CLC	25.06.2009	Paul Phumpiu Chang Lorena Masías Quiroga Fabián Novak Talavera
Resolution N°009-2010-CLC	04.02.2010	Elmer Cuba Bustinza Joselyn Olaechea Flores Raúl Pérez-Reyes Espejo

Abuse of the Position: Discrimination

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°003-93-CLC	31.08.1993	Armando Cáceres Valderrama Alejandro Alfageme Rodríguez Larraín David Fischman Kalincausky Rufino Cebrecos Revilla
Resolution N°004-98-CLC	30.09.1998	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro César Guzmán Barrón Sobrevilla Ítalo Muñoz Bazán Armando Cáceres Valderrama Rufino Cebrecos Revilla
Resolution N°0078-1999-TDC	05.03.1999	Alfredo Bullard González Hugo Eyzaguirre del Sante Luis Hernández Berenguel Liliana Ruiz de Alonso
Resolution N°051-2006-CLC	10.07.2006	Luis Felipe Arizmendi Echecopar Elmer Cuba Bustinza Eloy Espinosa-Saldaña Barrera Jorge Rojas Rojas David Ritchie Ballenas José Llontop Bustamante
Resolution N°454-2007-TDC	30.03.2007	Rosa María Graciela Ortiz Origgi Juan Ángel Candela Gómez de la Torre Juan Luis Avendaño Valdez Luis José Diez Canseco Núñez

Abuse of the Position: Legal Processes Abuse

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°057-96-INDECOPI/CLC	08.04.1995	Alejandro Alfageme Rodríguez-Larraín Cesar Guzmán Barrón Sobrevilla Rufino Cebrecos Revilla Armando Cáceres Valderrama Ítalo Muñoz Bazán
Resolution N°037-2005-INDECOPI/CLC	04.07.2005	Luis Felipe Arizmendi Echecopar Elmer Cuba Bustinza Eloy Espinosa-Saldaña Barrera Jorge Rojas Rojas David Ritchie Ballenas José Llontop Bustamante
Resolution N°0407-2007-/DC-INDECOPI	22.03.2007	Rosa María Graciela Ortiz Origgi Juan Ángel Candela Gómez de La Torre Juan Luis Avendaño Valdez Luis José Diez Canseco Núñez
Resolution N°026-2010-INDECOPI/CLC	03.05.2010	Paul Phumpiu Chang Elmer Cuba Bustinza Joselyn Olaechea Flores Raúl Pérez-Reyes Espejo
Resolution N°1351-2011/SC1-INDECOPI	27.07.2011	Héctor Tapia Cano Juan Ángel Candela Gómez de la Torre Alfredo Ferrero Diez Canseco Virginia Rosasco Dulanto

Abuse of the Position: Exploitation Conduct Effects

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°003-93-INDECOPI/CLC	31.08.1993	Armando Cáceres Alejandro Alfageme Rodríguez Larrain David Fischman Rufino Cebrecos
Resolution N°004-98-INDECOPI/CLC	30.09.1998	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro César Guzmán Barrón Sobrevilla Ítalo Muñoz Bazán Armando Cáceres Valderrama En discordia: Rufino Cebrecos Revilla
Resolution N°1003-96-INDECOPI/TRI	19.06.1996	Jorge Fernández-Baca Llamosas Rómulo Alegre Valderrama Fernando Ballón-Landa Córdova Amanda Velásquez de Rojas Rodolfo Castellanos Salazar
Resolution N°054-2003-INDECOPI/CLC	10.12.2003	Martín Reaño Azpilcueta Luis Felipe Arizmendi Echecopar Francisco Avendaño Arana Ana Cecilia Mac Lean Martins
Resolution N°052-2007-INDECOPI/CLC	14.09.2007	Luis Felipe Arizmendi Echecopar Eloy Espinosa-Saldaña Barrera Joselyn Olaechea Flores Paul Phumpiu Chang
Resolution N°0027-2008/SC1-INDECOPI	16.10.2008	Juan Angel Candela Gómez de la Torre Miguel Antonio Quirós García Raúl Francisco Andrade Ciudada Alfredo Ferrero Diez-Canseco
Resolution N°005-2010/ST-CLC-INDECOPI	15.04.2010	Miguel Ángel Luque (ST)
Resolution N°0708-2011/SC1-INDECOPI	16.03.2011	Héctor Tapia Cano Juan Ángel Candela Gómez de la Torre Alfredo Ferrero Diez Canseco María Soledad Ferreyros Castañeda

Horizontal Cartel Behaviors: Price Fixing

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°047-95-INDECOPI/CLC	23.11.1995	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro César Guzmán Barrón Sobrevilla Ítalo Muñoz Bazán
Resolution N°001-97-INDECOPI/CLC	15.01.1997	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro César Guzmán Barrón Sobrevilla Ítalo Muñoz Bazán Armando Cáceres Valderrama Rufino Cebrecos Revilla
Resolution N°276-97/TDC-INDECOPI	19.11.1997	Alfredo Bullard González Hugo Eyzaguirre del Sante Jorge Vega Castro José Antonio Payet Puccio
Resolution N°003-97-INDECOPI/CLC	11.02.1997	Alejandro Alfageme Rodríguez-Larraín Ítalo Muñoz Bazán Luis Morales Bayro César Guzmán-Barrón Sobrevilla Rufino Cebrecos Revilla
Resolution N°206-97/TDC-INDECOPI	13.08.1997	Alfredo Bullard González Hugo Eyzaguirre del Sante Jorge Vega Castro José Antonio Payet Puccio
Resolution N°025-2002-INDECOPI/CLC	11.12.2002	César Guzmán-Barrón Sobrevilla Carlos Adrianzén Cabrera Alfredo Ferrero Diez Canseco Mario Gallo Gallo José Luis Sardón de Taboada Edgar Zamalloa Gallegos
Resolution N°0224-2003/TDC-INDECOPI	16.06.2003	Juan Francisco Rojas Leo Julio Durand Carrión Santiago Francisco Roca Tavella Luis Bruno Seminario De Marzi Lorenzo Antonio Zolezzi Ibárcena
Resolution N°069-2010-INDECOPI/CLC	06.10.2010	Paul Phumpiu Chang Joselyn Olaechea Flores Raúl Pérez-Reyes Espejo

Horizontal Cartel Behaviors: Market sharing

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°004-97-INDECOPI/CLC	21.02.1997	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro Armando Cáceres Valderrama Rufino Cebrecos Revilla César Guzmán Barrón Sobrevilla
Resolution N°255-97/TDC-INDECOPI	22.10.1997	Alfredo Bullard González Hugo Eyzaguirre del Sante Jorge Vega Castro Luis Hernández Berenguel Gabriel Ortiz de Zevallos
Resolution N°020-97-INDECOPI/CLC	25.08.1997	Alejandro Alfageme Rodríguez Larraín Luis Morales Bayro Armando Cáceres Valderrama Rufino Cebrecos Revilla César Guzmán Barrón Sobrevilla
Resolution N°0082-1998/TDC-INDECOPI	25.03.1998	Hugo Eyzaguirre del Sante Liliana Ruiz de Alonso Luis Hernández Berenguel Gabriel Ortiz de Zevallos
Resolution N°051-2010-INDECOPI/CLC	13.08.2010	Paul Phumpiu Chang Elmer Cuba Bustinza Raúl Pérez-Reyes Espejo
Resolution N°056-2011-INDECOPI/CLC	11.10.2011	Paul Phumpiu Chang Joselyn Olaechea Flores Elmer Cuba Bustinza Raúl Pérez-Reyes Espejo

Horizontal Cartel Behaviors: Specifications

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°085-2009-INDECOPI/CLC	22.12.2009	Paul Phumpiu Chang Elmer Cuba Bustinza Joselyn Olaechea Flores Raúl Pérez-Reyes Espejo
Resolution N°3240-2010/SC1-INDECOPI	16.12.2010	Juan Luis Avendaño Valdez Héctor Tapia Cano Raúl Francisco Andrade Ciudad Juan Ángel Candela Gómez de la Torre Alfredo Ferrero Diez Canseco

Vertical Cartel Behaviors (exclusive rights)

Resolution	Date	Commissions / Members / Technical Secretary
Resolution N°005-2003-INDECOPI/CLC	14.05.2003	César Guzmán-Barrón Sobrevilla Alfredo Ferrero Diez-Canseco Mario Gallo Gallo Luis Felipe Arizmendi Echecopar Edgar Zamalloa Gallegos
Resolution N°0355-2000/TDC-INDECOPI	23.08.2000	• Hugo Eyzaguirre del Sante • Liliana Ruiz de Alonso • Gabriel Ortiz de Zevallos • Mario Pasco Cosmópolis
Resolution N°005-2008-INDECOPI/CLC	22.02.2008	Paul Phumpiu Chang Luis Felipe Arizmendi Echecopar Fernando Cáceres Freyre Joselyn Olaechea Flores
Resolution N°068-2009/SC1-INDECOPI	24.02.2009	Juan Ángel Candela Gómez de la Torre Miguel Antonio Quirós García Raúl Francisco Andrade Ciudad Alfredo Ferrero Diez Canseco
Resolution N°059-2011-INDECOPI/CLC	15.11.2011	Paul Phumpiu Chang Joselyn Olaechea Flores Elmer Cuba Bustinza Raúl Pérez-Reyes Espejo

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Resolution 0082-1998-TDC/INDECOPI
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Resolution 051-2006/CLC-INDECOPI
Resolution 051-2010/CLC-INDECOPI
Resolution 052-2007-INDECOPI/CLC
Resolution 054-2003-INDECOPI/CLC
Resolution 056-2011/CLC-INDECOPI
Resolution 057-95-INDECOPI/CLC
Resolution 057-96-INDECOPI/CLC
Resolution 064-2006-INDECOPI/CLC
Resolution 068-2009/SC1-INDECOPI
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