
Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

Friday, 12 July, 2019

Competition Issues in the Health Sector
Specifically Looking into Pharmaceuticals and Health-Care Services

Contribution by INDECOPI – Peru

This material has been reproduced in the language and form as it was provided. The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

Competition issues in the health sector, specifically looking into pharmaceuticals and health-care services

-- PERU¹ --

1. INTRODUCTION

The National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI) is a body that is in charge of promoting competitiveness, using procedures to secure intellectual property rights, facilitate transparency and suitability in consumer relations, eliminate barriers to access to markets that are illegal or irrational, and defend the competitive process against anticompetitive and unfair behaviors that unduly restrict it.

Regarding its internal structure, INDECOPI has two branches – a functional branch and an administrative branch. The functional branch is devoted to law enforcement through INDECOPI’s administrative bodies. At first instance, the functional branch comprises nine administrative bodies, each called a “Commission”. Each Commission is related to a field falling within the mandate of INDECOPI and is served by a staff headed by a Technical Secretary.

The Technical Secretariat of the Commission for the Defense of Free Competition (hereinafter, the Technical Secretariat) is the body with technical autonomy to initiate investigation proceedings and to propose sanctions to anti-competitive conducts. The Technical Secretariat also conducts market studies. The Technical Secretariat evaluates, investigates and prepares decision resolutions disposing of complaints that have been filed or proceedings that have been initiated ex-officio. The Technical Secretariat enjoys full autonomy in the adoption of its decisions and in how it prioritizes its investigations and administrative proceedings.

¹ The document was prepared by Jesús Espinoza, Technical Secretary and Arturo Chumbe, lawyer at the Technical Secretariat of the Commission for the Defense of Free Competition.

On the other hand, the Commission for the Defense of Free Competition (hereinafter, the Commission) is a body with technical and operational autonomy in charge of deciding whether investigated conducts are anticompetitive and of applying the corresponding sanctions. It has the autonomy to decide on the cases filed by the Technical Secretariat and to impose administrative sanctions (fines). The Commission is a collegiate body comprising four members. Both, the Technical Secretariat and the Commission are the bodies that deal with competition in Peru.

In the next pages, main important cases related to the health sector will be summarized in order to show INDECOPI engagement to combat and repress of anticompetitive conducts.

2. MAIN ACTIVITIES RELATED TO THE HEALTH SECTOR

2.1. Medical oxygen cartel case

In 2010, the Commission sanctioned three oxygen producers because they agreed to share the market for the sale of this product to EsSalud, the Peruvian institution of social security in health. The sanction imposed was against Aga S.A., Messer Gases del Perú S.A. and Praxair Perú S.R.L., and fines were US\$ 7,392,471, approximately.

The Commission determined that these three companies agreed to stop competing and share the market between 1999 and 2004. As a result, Aga S.A. has been supplying the northern part of the country, Messer Gases del Perú S.A. the downtown area and Praxair Peru S.R.L. the capital city of Lima and south areas.

Due to the importance of medicinal oxygen for life and health, the type of this infringement, the continued nature and duration of the conduct, as well as its national scope, the Commission described this restrictive practice of competition as very serious. In 2013, the Second Instance confirmed the sanctions imposed by the Commission.

On November 2015, a first instance court confirmed the decision of the Tribunal of INDECOPI against Messer Gases del Peru S.A., Praxair Peru S.A. Linde Gas and Peru S.A. (Formerly Aga SA). This decision was also confirmed by the Appeals Court of the

Judiciary on January 2017. Currently, this decision is pending review by the Supreme Court.

2.2. Drugstore chains case

In 2016, the Commission sanctioned, in the first administrative instance, five drugstore chains for arranging prices for medicines and nutritional supplements. Additionally, he ordered them to develop corrective measures to avoid re-offending these practices that affect free competition in the market and, consequently, consumers. These are the chains Albis S.A., Farmacias Peruanas S.A., Eckerd Peru S.A., Mifarma S.A. and Nortfarma S.A.C. These were fined with a total fine of US \$ 2,641,992.95, approximately, for horizontal collusive practices in the modality of concerted fixing of retail prices.

Additionally, the Commission ordered as a corrective measure that the drugstores apply, for three years, a program of actions to avoid the recurrence of anti-competitive behavior. Through this program, the personnel involved in the formation of drug prices should be trained on the rules of free competition. Likewise, the infringing companies must identify the risks of non-compliance with these rules and propose measures to counteract them. The fulfillment of these actions is continuously reported to INDECOPI.

During the procedure it was established that the five chains of drugstores mentioned coordinated to increase the prices of 36 pharmaceutical and related products, of different brands and on specific dates, from January 2008 to March 2009. The agreement to increase prices would have negatively impacted consumers because in the period under investigation, 88% of the expense of Peruvians in medicines was made in private pharmacies or drugstores, while the remaining 12% did so in public entities such the Peruvian Health Ministry and in private clinics. In that same period, the five drugstore chains accounted for 72% of the sale of pharmaceutical products.

The cartel was identified through the monitoring of market prices and inspection visits carried out in the facilities of pharmacy chains and their suppliers. These actions allowed the Technical Secretariat of the Commission to obtain communications and electronic files on the coordination to increase the price of the 36 pharmaceutical and related products.

In 2018, the second administrative instance of INDECOPI confirmed the sanction imposed by the Commission to the Nortfarma S.A.C., the only company that appealed the first administrative decision. This decision was confirmed by the first Judiciary instance.

Finally, about the corrective measures ordered by the Commission, it was informed by the sanctioned companies that an annual training on competition regulations was carried out as well as the respective evaluations to their main executives.

On the other hand, about the identification and mitigation of risks of non-compliance with competition regulations, established by the Commission, each sanctioned company appointed a specialist in charge to identify areas where there is a risk of non-compliance with competition regulations and to propose measures to prevent those risks. In particular, the specialist will be responsible for applying a Compliance Program in the company. For this, an e-mail will be assigned to receive information from employees about possible anticompetitive infringements. And the specialist will advise the Technical Secretariat about the information received from employees, if the case, as well as the actions implemented or to be implemented to detect anticompetitive conducts.

2.3. Hemodialysis private services

In 2016, the Commission sanctioned 34 companies that provide hemodialysis service, after verifying that they colluded to set prices within the framework of five selection processes, convened by Peruvian State, between 2010 and 2012. During the investigation conducted by the Technical Secretariat, it was established that 34 of the 39 companies investigated submitted quotations with agreed reference values superior to those paid by the Peruvian State, with the purpose of raising the current benchmark value. This situation was reinforced with additional actions by these companies, which, when they did not see their reference values, refused to participate in the selection processes convened, in order to force the Peruvian State to propose new selection processes and adopt the values that had been established.

The accused companies exercised their right of defense, arguing that their actions should not be classified as a price fixing since the Peruvian State is in charge of establishing the referential value. In addition, they affirmed that the alleged accusation is not linked to the price for providing the service or its components, but to contributions or the cost structures that support them.

In this regard, the Commission considered that all conduct developed by competing agents that seek to influence, jointly, in the determination of the price of goods or services offered in the market, such as the consensus of the quotation values. required by a state entity, constitutes a price setting that must be sanctioned, according to Peruvian Competition Act. Therefore, the Commission imposed a total fine of US\$ 1,967,723, approximately. In 2018, the second administrative instance confirmed the sanction imposed by the Commission. Currently, this case is appealed before the Judiciary instance.

3. Conclusion

During last years, INDECOPI has an important and active role and initiated relevant cases related to the health market, with the aim of repressing conducts that affect the competitive process, directly, and consumers, indirectly. When evidence is gathered, the Technical Secretariat started the corresponding administrative proceeding against the involved agents. For example, INDECOPI sanctioned: three oxygen producers for sharing the market for the sale of this product with fines of US\$ 7,392,471, approximately; five drugstore chains for arranging prices for medicines and nutritional supplements with fines of US \$ 2,641,992.95, approximately; and 34 companies that provide hemodialysis service for having colluded to set prices within the framework of five selection processes with fines of US\$ 1,967,723, approximately.

This is a proof of the engagement of the Technical Secretariat for the Commission for the Defense of Free Competition in its labor of watching over all markets of the Peruvian economy, in particular, the health market.