



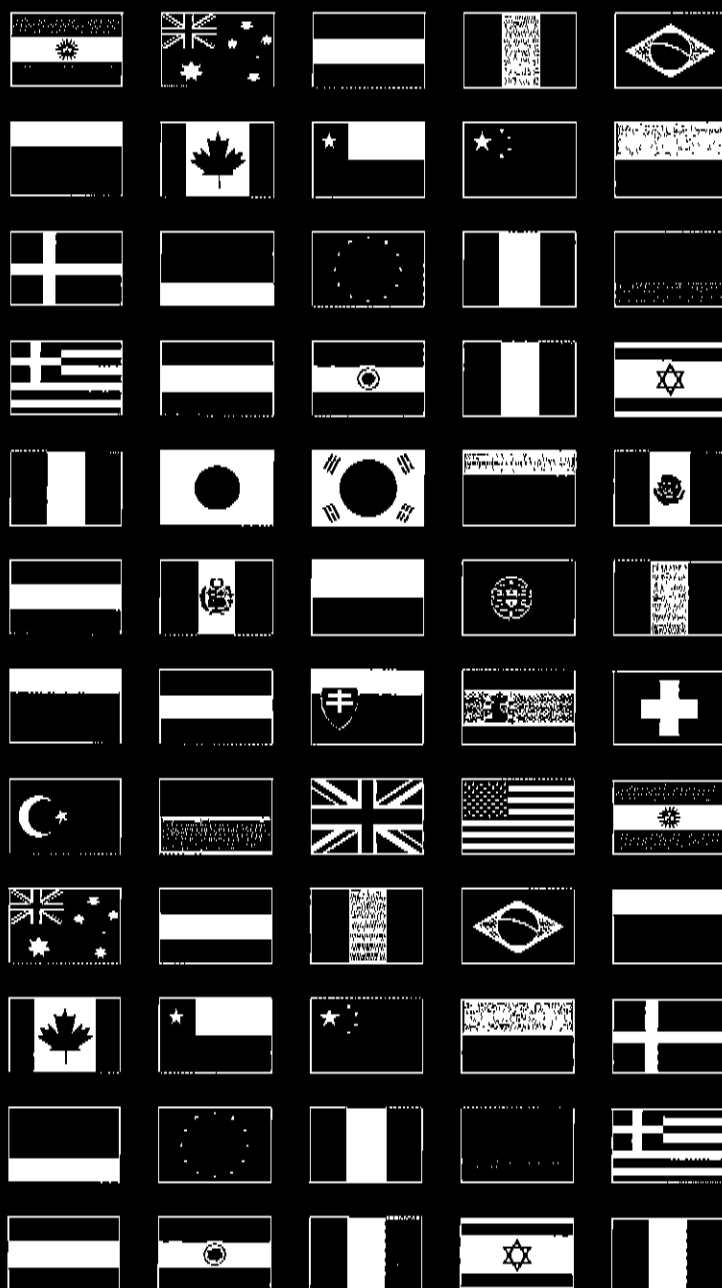
**GCR**  
GLOBAL COMPETITION REVIEW

# Vertical Agreements

The regulation of distribution practices  
in 39 jurisdictions worldwide

# 2011

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## Antitrust law

- 1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main legal source for antitrust regulations in Peru is the Ley de Represión de las Conductas Anticompetitivas (Law of Repression of Anti-competitive Conducts) (LRCA) enacted by Legislative Decree No. 1034 in June 2008. Its rules and regulations are applicable for the analysis of vertical restraints.

In addition, the Free Competition Commission may approve guidelines. Currently no guidelines focus specifically on vertical restraints.

Decisions dealing with antitrust matters are issued under a system of binding precedents that complement the criteria outlined by the law or the Commission's guidelines. Most of the developments in this area were made under the previous antitrust act, Legislative Decree No. 701, in force from 1991 until the enactment of the LRCA in 2008. With exceptions, the criteria developed under Legislative Decree No. 701 still apply and thus we will continue to quote case law decided under such law.

The rules and regulations that govern the organisation and functioning of the competition agency, the Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI) are also relevant in assessing the general framework applicable to vertical policy. These are:

- Legislative Decree No. 1033, Law of Organisation and Powers of the National Institute for the Defence of Competition and the Protection of Intellectual Property;
- Legislative Decree No. 807, on Faculties, Rules and Organisation of the National Institute for the Defence of Competition and the Protection of Intellectual Property; and
- Supreme Decree No. 077-2005-PCM, Regulations for the Organisation and Powers of the National Institute for the Defence of Competition and the Protection of Intellectual Property.

## Types of vertical restraint

- 2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The LRCA does not define 'vertical restraints' nor provide them with a specific characterisation for antitrust purposes. Under current law, vertical restraints can be analysed either as a form of vertical collusion (agreements) or as an abuse of dominant position.

An abuse of dominant position is deemed to have occurred when a firm with dominant position (market power) uses such position to restrict competition, obtaining benefits and harming actual or potential, direct or indirect competitors. According to the LRCA, abuses of dominant position are always of an exclusionary nature and can consist of conduct such as refusals to deal, discrimination practices,

tying, limiting market access or membership to organisations and associations, exclusive distribution or exclusive dealing, non-competition agreements, abuse of judicial and other governmental proceedings (sham litigation) and, in general, of any conduct that may harm or limit competition for reasons other than efficiency.

On the other hand, the LRCA defines vertical collusion as agreements, decisions, recommendations or, in general any kind of concerted practice executed by economic agents operating at different levels of the production, distribution or supply chain, with the purpose of limiting, restricting or harming competition. The LRCA only condemns cases of vertical collusion in which one or more parties have a dominant position (market power). In contrast to cases of horizontal collusion and abuses of dominant position, the LRCA does not list the types of conduct that will constitute vertical collusion in violation of the antitrust rules. The LRCA states that vertical collusion can take any of the forms listed for horizontal agreements or abuses of dominant position. The cases of abuses of dominant position enumerated by the law are already outlined above.

In addition, according to the LRCA, horizontal collusion (and thus vertical collusion) can consist of price-fixing and other horizontal restraints to sale conditions, restraints to output, sales, investments, or technical developments, market sharing, market division, territorial division, agreements on quality control when these do not stem from domestic or international technical regulations and negatively impact on the consumer, boycott and concerted refusals to deal, concerted discrimination practices, tying, agreements regarding memberships and access, exclusive distribution or exclusive dealing, coordinated bidding and other conduct of equivalent effects which seek to obtain benefits for reasons other than economic efficiency.

The figures of vertical collusion and abuses of dominant position established by the law may easily overlap. Few cases have been decided after the enactment of the new law and thus the criteria that the Commission and the Tribunal will apply in order to distinguish between such practices is yet to be seen. The definition of agreement should be crucial for the assessment of vertical restraints since the law seems to imply that it will determine if the challenged conduct is treated as vertical collusion or an abuse of dominant position. However, in a recent decision the Commission has hinted that the existence of an agreement by itself will not determine the characterisation of the practice as vertical collusion or an abuse of dominant position. It seems that market power will also be a matter to consider in characterising the conduct and assessing this distinction. We will return to the topic 'agreements' in question 9.

## Legal objective

- 3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The goal of the LRCA is stated in article 1 as 'to promote economic efficiency in the markets for consumer benefit'. The article makes it a

remarkably clear statement of intent to promote economic efficiency as well as the absence of any non-efficiency goals in the analysis of antitrust practices such as vertical restraints.

#### Responsible authorities

- 4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

INDECOPI is the authority in charge of applying and enforcing anti-trust laws in all sectors except the telecommunications sector, where competence over the matter has been given to the sector regulator (OSIPTEL). Thus INDECOPI is in charge of enforcing most prohibitions on vertical restraints.

INDECOPI is a governmental agency with technical, administrative, economic and budgetary autonomy, which is in charge of both enforcing the laws and regulations that promote competition and protecting intellectual property.

Within INDECOPI, the Free Competition Commission (the Commission) and the Chamber for the Defence of Competition of the Tribunal for the Defence of Competition and Intellectual Property (the Tribunal) are the authorities in charge of applying and enforcing antitrust regulations and prohibitions on vertical restraints.

The Free Competition Commission is composed of four members and decides both antitrust and merger cases. It works with the support of a Technical Secretariat, which acts as its executive body, handling the proceedings, carrying out investigations, gathering evidence and issuing a final report in aid of the Commission's decision.

Decisions delivered by the Commission are subject to appeal before the Tribunal, which is the highest administrative body in the agency and works as a court of appeals. It also works with the support of a Technical Commission.

#### Jurisdiction

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure Internet context and if so what factors were deemed relevant when considering jurisdiction?

The LRCA will apply to all vertical restraints that have or may have anti-competitive effects in Peru even if the challenged conduct has been executed extraterritorially. There are no known prior cases in which Peruvian antitrust laws have been applied to conduct that has taken place out of Peru.

#### Agreements concluded by public entities

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The LRCA applies to all persons, companies, joint ventures and in general, to any private or public entity, private or state-owned which undertakes economic activities. Thus it will apply to public entities if the challenged conduct qualifies as 'economic activity'. It will not apply to public entities in the exercise of their governmental powers and functions.

#### Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Sectors such as telecommunications, energy, banking, insurance, and transportation are subject to specific sector regulation which does not necessarily deal directly with antitrust concerns but may impact the assessment of vertical restraints under antitrust rules. In analysing vertical restraints in these sectors, the competition agencies may have to ponder the impact and effects of the specific laws and regulations of each sector on the challenged behaviour.

#### General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Anti-competitive conduct that derives from the application of laws and regulations is exempted from antitrust scrutiny under the LRCA. In such cases, INDECOPI has no jurisdiction to condemn or reverse the challenged practices. INDECOPI may issue reports analysing the effect of such laws and regulations on competition and on consumer welfare and recommending amendments, when pertinent.

There is no exception for agreements containing vertical restraints having a minor impact on competition or concluded among small or medium-sized enterprises. Although the inclusion of a provision on similar terms was considered in the drafting of the LRCA, it was not approved in the final version of the law.

#### Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

There is no precise definition of 'agreement' in the LRCA. However, the law makes it clear that it will include in this definition not only contracts but decisions, recommendations or in general, any kind of concerted practice.

In recent decisions, the Commission has been consistent with the wide approach to the concept of agreement established by the LRCA, declaring that an agreement can be inferred from negotiations and exchanges of correspondence, even if there is no actual executed version of the agreement. It is relevant to note that, under Peruvian law, contracts are formed when both parties express their consent. Only certain contracts require a prescribed form.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

A written agreement is not necessary in order to engage the antitrust law in relation to vertical restraints. In that sense, the LRCA has included not only formal agreements but also decisions (guidelines with binding effects), recommendations (statements without binding effects) and concerted practices (agreements demonstrated by circumstantial evidence and presumptions) as conducts that could introduce vertical restraints in the market.

Therefore, these restrictions will not only be analysed in cases of formal written agreements but also could take place in cases where the analysis of evidence and proofs would contribute to the identification of the concerted practice. Thus, cases of tacit collusion or conscious parallelism would be analysed by the Commission as conducts that could, but not necessarily, imply the existence of a concerted practice.

Because of the aforementioned, the Commission has been consistent with the wide approach to the concept of agreement established

by the LRCA, declaring that an agreement can be inferred from negotiations and exchanges of correspondence, even if there is no actual executed version of the agreement.

#### Parent and related-company agreements

- 11** In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Vertical restraints between affiliates or subsidiaries (and thus between parent and related companies) will not be deemed 'agreements' (or concerted practices) under Peruvian antitrust law. This does not mean that these kind of vertical restraints are exempted from antitrust scrutiny. In these cases, a group of companies will be treated as a single entity and thus these practices will be analysed under the rules regulating unilateral conduct (abuse of dominant position).

Antitrust regulations do not provide us with the standard to be applied in order to determine whether companies should be considered related or not. General regulations on securities and banking will apply for referential purposes. In these regulations, the existence of a relationship between companies is set on the basis of the concept of 'control', which is defined as the 'preponderant and continuous influence in a company's decision making structure'. Control can be either direct (majority voting power in a shareholders' meetings) or indirect (eg, through agreements, usufructs, trusts, etc).

#### Agent-principal agreements

- 12** In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

There are no specific rules or case law relating to agent-principal agreements. Agent-principal agreements will be assessed under the general rules for vertical restraints described above. Thus, agent-principal agreements can be prosecuted, depending on their characteristics, and on a case-by-case basis, both as abuses of dominant position or vertical collusion.

- 13** Where antitrust rules do not apply (or apply differently) to agent-principal relationships, are there rules (or is there guidance) on what constitutes an agent-principal relationship for those purposes?

There are no specific rules relating to agent-principal relationships. Thus, general rules for vertical restraints, abuse of dominant position and, in general, antitrust law will be applicable to these types of relationships and will be treated on a case-by-case basis.

#### Intellectual property rights

- 14** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Under Peruvian law, owners of intellectual property rights are entitled to exclusivity. Rules regulating IPRs state that the regular exercise of their rights cannot be condemned under antitrust laws. Thus, although there are no special rules for vertical restraints containing provisions granting intellectual property, it can be inferred that agreements involving IPRs may be subject to a higher standard of proof of their anti-competitive effects and intent in order to be condemned.

There are no known cases in which the Commission has decided on the impact of the inclusion of IPRs in the assessment of the anti-competitive nature of a vertical agreement.

#### Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

As noted in question 2, under Peruvian law, vertical restraints can be characterised either as forms of vertical collusion or of abuse of dominant position.

Given that vertical collusion is only prohibited if one or more of the participating parties have a dominant position (market power) in the relevant market, both the analysis of vertical collusions and abuse of dominant position require the assessment of market power.

Dominant position (or market power) is defined by the law as the ability of a firm to substantially restrict, affect or distort prices or other conditions of supply or demand, independently from its competitors, suppliers or clients.

To assess market power, the Commission or the Tribunal will first define the relevant geographical and product market, taking into consideration the existence of substitutes and the area of influence of the firms engaged in the challenged conduct. In assessing market power, the authority will consider market shares, market concentration, technological developments, the characteristics of the market and of supply and demand, the position and conduct of competitors, barriers to entry, and potential competition between others. The Commission has previously used the Herfindahl-Hirschman Index (HHI) to assess market concentration.

No cases of abuse of dominant position or vertical collusions are deemed per se unlawful. The LRCA explicitly states that these practices shall be treated as 'relative bans' which means they are subject to a rule-of-reason analysis. Also, the exercise of market power is not characterised as abusive if the conduct does not potentially or effectively benefit the dominant firm and harm competitors.

The LRCA sets forth the basic criteria for the application of the rule-of-reason analysis. In these cases, the competition authority shall weigh the profit and benefits deriving from the challenged conduct with its potential anti-competitive effects. Pro-competitive justifications and the benefits obtained by the infringer by engaging in the illegal behaviour are also weighed in. In its decision, the Commission or the Tribunal shall prove that the challenged conduct has negative impact on competition in the relevant market and on consumer welfare.

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

As noted above, vertical restraints are subject to a rule-of-reason analysis. The Commission or the Tribunal will consider market shares, market structure and other economic factors when assessing market power and the legality of the challenged conduct. Market structure, market positions, product and service specifications and conduct of other suppliers and buyers should be weighed into this analysis. The extent in which the analysis weighs each of these factors is determined on a case-by-case basis.

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

Since vertical restraints are subject to a rule-of-reason analysis, the Commission or the Tribunal will consider market shares, market structure and other economic factors when assessing market power and the legality of the challenged conduct. Market structure, market positions, product and service specifications and conduct of other buyers should be weighed into this analysis. The extent in which the analysis weighs each of these factors is determined on a case-by-case basis.

**Block exemption and safe harbour**

- 18** Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

No block exemptions or safe harbours defining circumstances in which vertical arrangements are automatically exempted have been approved under Peruvian law. All challenged vertical restraints will be subject to a rule-of-reason analysis.

**Types of restraint**

- 19** How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

There are no specific rules for vertical price-fixing as there is no specific provision relating to this matter and no cases have addressed it directly either. Only horizontal price-fixing is explicitly dealt with as per se illegal.

As with other kinds of vertical restraints, vertical price restrictions (or resale price maintenance) are subject to a rule-of-reason analysis. It is relevant to note that in a recent decision (*Clorox-Quimpac* case, March 2009) which did not directly address the subject, INDECOPI has implied that it will not take vertical agreements involving resale price maintenance lightly, as these can be characterised as agreements which have as their purpose to restrict competition.

- 20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

As further analysed in question 19, no specific decision analysing resale price maintenance restrictions has been issued to date.

- 21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

There are no specific decisions or guidelines addressing the link between resale price maintenance and other forms of restrictions.

- 22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

No decision or guidelines have been issued on the merits involving vertical price-fixing under legislative Decree No. 701 or under current law.

- 23** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Vertical territorial restrictions will be assessed under a rule-of-reason analysis. There is no sufficient case law to define the particular circumstances under which these restraints will be deemed legal.

Notwithstanding the above, it can be expected that agreements which restrict the territory into which a buyer may resell contract products will be subject to a harsh scrutiny under antitrust laws. In a recent decision (*Clorox-Quimpac* case, March 2009) which did not directly address the subject matter, INDECOPI stated that among the principal effects of these agreements is to limit intra-brand competition,

which can hinder market integration. It also asserted that these agreements can facilitate vertical collusion.

It is relevant to note that, as part of analysis of the restriction, the Commission or tribunal may assess if restricting the territory into which a buyer may resell contract products entails discriminatory treatment to competitors. As noted above, discriminatory treatment is characterised both as an abuse of dominant position or a form of vertical collusion and is condemned when it is unjustified and places one or more competitors in a more advantageous position than others. Usual commercial practices, such as sales, discounts and rewards, which can be justified in the context of an exchange or negotiation, will not be deemed illegal if they are applied on a general basis to parties under similar situations.

- 24** Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

As with other vertical restrictions, restrictions to resell will be assessed under a rule-of-reason analysis. There is no sufficient case law to define the particular circumstances under which these specific restraints will be deemed legal. However, it can be inferred from a recent decision (*Clorox-Quimpac* case, March 2009), which did not directly address the subject-matter, that agreements which establish limited distribution chains and among these, those that restrict the customers to whom a buyer may resell contract products, will be subject to strict scrutiny under antitrust laws. INDECOPI has asserted that this type of agreement can prevent access from the relevant product to certain competitors, facilitate vertical collusion and reduce intra-brand competition, thus being necessary to weigh the negative effects on competition with strong pro-competitive justifications.

Also, as with vertical territorial restraints, as part of the analysis of the conduct itself, the Commission and tribunal may analyse whether the restrictions to resell entail discriminatory treatment to competitors. As noted above, discriminatory treatment is characterised as an abuse of dominant position or vertical collusion and is condemned when it is unjustified and it places one or more competitors in a more advantageous position than others.

- 25** How is restricting the uses to which a buyer puts the contract products assessed?

As with other vertical restrictions, restrictions on the uses to which a buyer puts the contract products will be assessed under a rule-of-reason analysis. There is no sufficient case law to define the particular circumstances under which these specific restraints will be deemed legal or illegal.

For the cases of restrictions on territory and on the ability of the buyer to resell the product, these restrictions may entail discriminatory treatment, conduct that is characterised as an anti-competitive practice in the form abuse of dominant position or vertical collusion.

- 26** How is restricting the buyer's ability to generate or effect sales via the internet assessed?

There are no provisions or case law relating to sales via the internet. As with other vertical restrictions, these will have to be assessed under a rule-of-reason analysis.

- 27** Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

There are no specific rules or guidelines regarding internet sales.

**28** Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Under Peruvian law, there are no specific provisions for 'selective' distribution systems. There is no mechanism for pre-approval of these systems. As with other vertical restrictions, these will be assessed in the case of a complaint or investigation, under a rule-of-reason analysis.

There is not enough case law to determine the particular circumstances in which this conduct will be deemed legal or illegal.

Notwithstanding, in establishing a network of selected sales points, a firm needs to take into consideration the provisions against discriminatory treatment that condemn different treatment to equivalent conditions when the difference is unjustified and places one or more competitors in a more advantageous position than others. For example, in a decision concerning the cement market, INDECOPI condemned a cement distributor, who obligated other distributors to enter into exclusive buying agreements for cement and other products as a condition to apply discounts in prices and volumes, charging higher prices to distributors that were not affiliated to its network. This decision has been revoked by the Supreme Court, which determined that the defendant's conduct was not illegal.

**29** Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

As stated above, under Peruvian antitrust law, there is no development of criteria relating to this matter. A selective distribution system is more likely to comply when there are strong pro-competitive justifications, based on the market and product characteristics, to enter into such distribution schemes, and when distributors participating in the system are selected over objective considerations.

**30** In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There are no specific rules or case law regarding internet sales or selective distribution systems. Any restriction of this nature will have to be analysed under the rule of reason.

**31** Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

There is no development of criteria relating to this matter.

It is relevant to note that allegations of an antitrust infringement in connection with actions to prevent sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner, can be raised both in administrative proceedings before INDECOPI (aimed at determining the existence of an infringement to antitrust laws) or as a defence in a contract claim. In both cases, INDECOPI is competent to assess if the agreement is illegal under antitrust laws. Contract claims should be stayed until the rendering of a decision over this matter by the agency.

The decision of the authority regarding the possibility of enforce the terms of these agreements in order to prevent sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner will largely depend on the legality of the provision under antitrust laws since, if the provision or agreement is illegal, it will be unenforceable.

**32** Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

There are no previous decisions in which the possible effects of cumulative selective distribution systems operating in the same market have been analysed.

**33** Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

INDECOPI has issued no previous decision relating to the possible links between selective distribution systems and resale price maintenance policies.

**34** How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Exclusive buying or restricting the buyer's ability to obtain the supplier products from alternative sources has received harsh treatment from INDECOPI. Strong pro-competitive reasons are required to justify such agreements. As mentioned above, in a decision concerning the cement market, INDECOPI condemned a cement distributor who obligated other distributors to enter into exclusive buying agreements for cement and other products as a condition to apply discounts in prices and volumes, charging higher prices to distributors that were not affiliated with its network. This decision has been revoked by the Supreme Court, which determined that the defendant's conduct was not illegal.

**35** How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

INDECOPI has issued no previous decision that directly addresses restrictions on the buyer's ability to sell non-competing products that the supplier deems 'inappropriate'. However, in light of the existing decisions on vertical restraints and exclusive dealing, it can be expected that these will receive harsh treatment from INDECOPI, where strong pro-competitive reasons will be required to justify such agreements. For example, as mentioned above, in a decision concerning the cement market (*Dinos* case, 2005), INDECOPI condemned a cement distributor who obligated other distributors to enter into exclusive buying agreements for cement and other products as a condition to apply discounts in prices and volumes, charging higher prices to distributors that were not affiliated to its network. This decision has been revoked by the Supreme Court, which determined that the defendant's conduct was not illegal.

INDECOPI has explicitly affirmed (*Backus-Ambev* case, June 2005) that these kinds of restraints are subject to the rule of reason. In cases involving exclusive dealing, it has indicated that it will take into consideration the following aspects, which may be applicable to agreements restricting the ability of the buyer to sell non-competing products that the supplier deems inappropriate:

- the degree of foreclosure achieved in the market as a result of the restraint;
- duration of the restraint or contractual relationship;
- pro-competitive justifications; and
- balance between pro-competitive and anti-competitive effects.

**36** Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

There are no specific decisions concerning the buyer's ability to stock products competing with those supplied by the supplier. These restrictions will be analysed under the rule of reason, weighing the pro-competitive justifications against its negative impact on competition.

- 37 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

There are no specific decisions concerning requirements to purchase a certain minimum percentage of contract products. These restrictions will be analysed under the rule of reason.

- 38 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

Restricting the supplier's ability to supply to other resellers is evaluated under a rule-of-reason analysis. It is understood that it can entail a negative impact on competition if the supplier has market power and the conduct provides evidence of an abuse of its position.

This kind of deal has received harsh treatment. Recently, in a case involving the bleach and sodium hypochlorite markets (*Clorox-Quimpac* case, March 2009), the Competition Tribunal confirmed a decision of the Commission that condemned as anti-competitive an exclusive distribution agreement entered into by a monopolist supplier of sodium hypochlorite (a necessary input for bleach production) and a bleach producer. The Competition Tribunal and the Commission considered that, in establishing an exclusive distribution system, the supplier of sodium hypochlorite was creating an additional level in the chain of distribution of this product. Both found that, as a consequence of such agreement, the monopolist supplier of sodium hypochlorite was leveraging its dominant position into the bleach market, making other competitors in such market cope with a double mark-up. In their decisions, the Competition Tribunal and the Commission asserted that the supplier and distributor had entered into long-term agreements for joint business, to which the exclusive distribution was ancillary and analysed the efficiencies alleged by defendants, based on the fact that the exclusive distribution system allowed the supplier to place in advance a large proportion of its production and reduced its transaction costs, but did not consider these arguments to be conclusive, nor strong enough to counter the anti-competitive effects. The decisions did not analyse the anti-competitive advantage or benefit that this practice presumably entailed for the monopolist supplier of sodium hypochlorite.

- 39 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

There have been no prior cases involving franchise agreements. Please refer to question 14 for information on intellectual property rights and antitrust.

- 40 Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed.

Under the provisions against discriminatory treatment by means of vertical collusion or abuse of a dominant position, suppliers and buyers may be obligated to apply similar terms to parties in similar conditions provided that there are no economic justifications for a different treatment.

- 41 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

As we mentioned above, under the provisions against discriminatory treatment by means of vertical collusion or abuse of a dominant

position, buyers may be obligated to apply similar terms to parties in similar conditions provided that there are no economic justifications for a different treatment.

#### Notifying agreements

- 42 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

No, there is no formal procedure for notifying agreements containing vertical restraints. Vertical restraints are not subject to any kind of prior control.

#### Authority guidance

- 43 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

No, there is no formal procedure to obtain guidance from the agency as to this matter. It is possible to hold informal meetings with the members of the Technical Secretariat of the Commission; however, these meetings provide no guarantees against a future investigation or complaint.

#### Complaints procedure for private parties

- 44 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Any individual or firm can request the initiation of formal proceedings by filing a complaint and paying a fee, without the need to provide evidence that it is affected by the anti-competitive conduct.

The Secretariat has power to carry out preliminary investigations. These investigations are unannounced and intended to collect information or identify reasonable indications of breaches of the antitrust rules. In the case of party-initiated proceedings, preliminary investigations cannot exceed a term of 45 days, which starts counting from the filing of the complaint.

The Technical Secretariat will issue a decision initiating the administrative proceedings if it considers that there is an indication of anti-competitive behaviour. In its decision to press charges the Secretariat shall identify the individuals or firms which it believes have incurred antitrust violations, include a succinct explanation of the facts which motivate the opening of the proceedings and the characterisation of the alleged anti-competitive conduct. It will be given notice to the Commission and the defendants for them to file their arguments within 30 business days. This decision can be subject to appeal.

The proceedings that deal with anti-competitive conduct are of an administrative nature and are always initiated and handled as *ex officio* cases. The Technical Secretariat then acts as a prosecutor during the proceedings. The complainant is considered a 'collaborator' of the agency.

The reply period is followed by an evidentiary period consisting of seven months. Within 30 days of the expiration of the evidentiary period, the Technical Secretariat shall issue a report on the case at issue, which will be given notice to the parties in the proceedings. The parties may submit comments and challenge this report, as well as request hearings within 15 days.

The Commission must issue its final decision within 30 business days from when the deadline for the parties to comment on the Secretariat's report expires. The Commission's decision may be subject to appeal before the Tribunal, which must decide on the case within 120 business days.



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**Enforcement**

- 45** How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Competition law and policy was formally introduced to Peru in 1991 with the enactment of Legislative Decree No. 701, and consolidated in 1993 with the opening of INDECOPI. During its first decade, INDECOPI focused mainly on hard-core cartels and manifest abuses of dominant position. Several cases concerning vertical restraints have been analysed as cases of abuse of dominant position. Only a handful of cases have been condemned. With the exception of the sodium hypochlorite case previously mentioned, most of the prior complaints relating to exclusive distribution have been denied because of an absence of market power.

Only recently has INDECOPI focused more of its attention on vertical restraints and vertical collusion. As mentioned before, the LRCA enacted in June 2008 included a definition of vertical collusion as an additional characterisation of anti-competitive behaviour. Also between 2008 and 2009 (yet still under the previous law, Legislative Decree No. 701) the Commission and the Competition Tribunal focused on an exclusive dealing agreement in the sodium hypochlorite market, condemning the agreement as anti-competitive even though there was proof of efficiencies derived from such agreement. The Commission and the Competition Tribunal ruled that there were less restrictive means to achieve the same results.

No decision on vertical restraints has yet been issued under the current law. A series of investigations and decisions are currently pending, which will outline the criteria followed by INDECOPI on this matter. For example, the Commission shall issue by the end of this year or a decision involving restrictive covenants excluding competitors in lease agreements in shopping centres. The case involves extensive discussion on market definition and market power, and pro-competitive justifications relating to market structure. It is highly probable that the Commission will issue a landmark decision with this case.

- 46** What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

In its decision, the Commission will declare the existence or not of a breach to antitrust rules. The Commission has the power to order 'corrective measures' to avoid damage to competition, restore competition or revert the effects on the market of the condemned practice. Among these, the Commission is empowered to declare that a contract or contractual provision is invalid or unenforceable under antitrust law. When possible, severability will apply. This is, the decision will only affect the part of the contract which is incompatible with antitrust regulation and will remain valid and enforceable as to the other provisions contained therein.

- 47** May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The Commission and the Competition Tribunal determine antitrust liability and impose administrative sanctions (fines), which can amount up to 12 per cent of the defendants' sales or gross income for the year prior to the decision of the Commission. Maximum fines have never been imposed by the Commission or Tribunal. At the time of writing, the maximum penalties imposed among several infringers in a single case add up to US\$1 million.

Also, as noted in question 46, the Commission and the Competition Tribunal can order 'corrective measures' aimed at reverting or

avoiding damage to competition. Some of the orders that may be covered by these injunctions are an order to cease a particular action or not to engage in a particular form of conduct, positive actions (where the defendant is forced to act in a certain way), orders to deal, the imposition of certain conditions to the defendant, the unenforceability or invalidity of legal acts, and access or membership to an organisation or association.

Until recently, INDECOPI rarely ordered corrective measures. Under Legislative Decree No. 701, INDECOPI held the position that corrective measures were only justified if they involved substantial benefits to competition, which exceeded the costs of supervision for the agency. Examples of corrective measures ordered under the rule of such law included terminating agreements such as ties and bundling and duties to deal. For example, in a case involving the railway industry, INDECOPI has ordered a corrective measure consisting of a duty to deal, by leasing railway assets to competitors.

Significantly, in precedents decided under Legislative Decree No. 701, INDECOPI classified its corrective measures as either structural – when divestiture is implied in the decision – or behavioural – when the measure referred to a duty to behave in a certain way or to refrain from certain behaviour. With this division, INDECOPI implied that it considered itself empowered to issue divestiture orders as corrective measures. However, competence to dictate such measures was not expressly affirmed and 'structural measures' have never been ordered by INDECOPI.

INDECOPI does not have the authority to award damages. Private parties seeking damages must start civil liability proceedings before the judiciary.

It is relevant to note that with the enactment of the LRCA, criminal law has been left aside as an instrument to discourage anti-competitive practices.

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**Investigative powers of the authority**

- 48** What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

INDECOPI has extensive investigative powers. It can summon and interrogate individual suspects and representatives of firms under investigation. It can also demand the production of documents (broadly defined to include computer records and necessary software) and it can order documents to be 'immobilised' for two to four days. With judicial authorisation, it can remove documents from a company's facilities. INDECOPI can also make unannounced inspections of a company's records, during which it can obtain copies of documents and interrogate company representatives.

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**Private enforcement**

- 49** To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

In accordance with the LRCA, the main cause of action against the breach of antitrust rules are administrative proceedings before INDECOPI. Any individual or firm can request the initiation of formal proceedings by filing a complaint and paying a fee, even non-parties to agreements containing vertical restraints as there are no statutory limitations for standing. There is no requirement such as 'legitimate interest'.

However, these proceedings are not of a private nature and do not aim to compensate private parties with antitrust damages. The goal of the proceedings is to determine administrative liability, by



**Update and trends**

As noted, current antitrust legislation in Peru was approved recently by the enactment of Legislative Decree 1034 in June 2008. No changes to legislation are expected in the near future. However, it is expected that the Commission will issue this year landmark cases relating to vertical restraints (see question 45) and sham litigation.

declaring the existence of a breach (or not) of antitrust rules and to impose administrative sanctions, when pertinent.

As noted before, INDECOPI cannot address private claims and does not aim specifically to address the party's claims. INDECOPI has no authority to award damages. Notwithstanding, the LRCA does provide for damages arising out of anti-competitive conduct. According to such article, any person that has been injured by a breach of antitrust rules and that can prove causation can recover damages under the civil liability rules before civil courts once the administrative proceedings are concluded. If the agency has found that a defendant has engaged in illegal conduct, the finding will be conclusive proof of the violation if a complainant files suit in civil court for damages.

As with most civil law countries, in the Peruvian legal framework, damages are mainly treated as a mechanism to compensate the

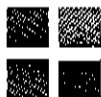
victim and not as a mechanism to deter unlawful actions. Damages are awarded to compensate a particular damage. The principle of full compensation applies, implying that the award must place the victim in a position as close as possible to that in which it would have been in had the damage not occurred. Damages must be limited to compensate the loss actually suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*). There are no punitive damages. In very limited cases, moral damages to individuals are admitted as part of the compensation. There is no rule establishing restrictions for recoverable amounts on damages other than demanding that said damages are proven and have adequate causation with the anti-competitive behaviour.

In practice, there is little enforcement of antitrust damages actions, weakening the competition law enforcement system. The effectiveness of the rules for recovering damages stemming from anti-competitive conduct is a crucial issue to be addressed by competition policy in Peru.

**Other issues**

**50** Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

There are no unique points relating to the assessment of vertical restraints in Peru which have not been covered above.



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