

# Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries:

**ARGENTINA, BRAZIL, CHILE, COLOMBIA, EL SALVADOR, HONDURAS, MEXICO, PANAMA AND PERU**



**FOLLOW-UP TO THE NINE PEER REVIEWS  
OF COMPETITION LAW AND POLICY OF  
LATIN AMERICAN COUNTRIES:**

**Argentina, Brazil, Chile, Colombia, El Salvador,  
Honduras, Mexico, Panama and Peru**

**-- 2012 --**



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## FOREWORD

The OECD has been active in promoting competition policy in countries across Latin America and the Caribbean (LAC) for many years. The partnership between the OECD and the Inter-American Development Bank (IDB) has advanced these efforts. The annual Latin American Competition Forum (LACF) is the cornerstone of this collaboration on competition matters. It is a unique forum which brings together senior officials from countries in the region, to promote the identification and dissemination of best practices in competition law and policy. Ten meetings have been held to date.

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Peer reviews are a core element of the OECD's activities. They are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all. There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process. They are also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

The OECD and the IDB therefore include peer reviews as a regular part of the joint Latin American Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted at the LACF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted at the OECD's Competition Committee. The Forum reviewed El Salvador in 2008, Colombia in 2009, Panama in 2010, and Honduras in 2011. A follow-up of the nine peer reviews was conducted in 2012 as part of the 10th Anniversary of the LACF. The OECD and the IDB, through its Integration and Trade Sector (INT) are delighted that this successful partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the governments of Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru for their co-operation in the follow-up of their respective peer reviews at the tenth LACF meeting, held in the Dominican Republic, on 18-19 September 2012. Finally, we would like to thank Enrique Vergara and Hilary Jennings who prepared the report, the Dominican Republic's competition authority for hosting the 2012 LACF, and the many competition officials whose written and oral submissions to the Forum contributed to its success.

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## TABLE OF CONTENTS

### OVERVIEW

1. Government-related activities: the role of the competition agency in policy formation .....	9
1.1 Participation by the competition authority in economic and regulatory reform process.....	9
1.2 Advocacy through sector studies .....	11
1.3 Promoting entry of foreign competitors.....	12
2. Agency-related activities: case selection/prioritisation.....	13
2.1 Prioritisation of case work and non-case work .....	13
2.2 Recommendations about prioritisation in the peer review .....	15
2.3 Regular long-term operational planning .....	16
2.4 Improving the efficiency and effectiveness of investigations .....	17
3. Overall assessment of the peer review .....	20

### COUNTRY REVIEWS

CHILE .....	21
PERU.....	27
MEXICO.....	31
BRAZIL .....	37
ARGENTINA .....	41
EL SALVADOR .....	45
COLOMBIA .....	49
PANAMA .....	53
HONDURAS.....	57

<b>APPENDIX: QUESTIONNAIRE</b> .....	61
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<b>BIBLIOGRAPHY</b> .....	67
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<b>NOTES</b> .....	69
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## **FOLLOW-UP TO THE NINE PEER REVIEWS OF COMPETITION LAW AND POLICY OF LATIN AMERICAN COUNTRIES**

### **Overview**

A central feature of the annual Latin American Competition Forum (LACF), organised by the Organisation for Economic Co-operation and Development (OECD) and the Inter-American Development Bank (IDB), is the peer review of a country's competition law and policy. In this voluntary process, countries submit their competition law and policy for substantive review by their international peers, with the aim of identifying recommendations to strengthen the institutions and improve economic performance. Thus far, nine Latin American countries have been evaluated in this way: Chile in 2003 and 2010, Peru and Mexico<sup>1</sup> in 2004, Brazil in 2005 and 2010, Argentina in 2006, El Salvador in 2008, Colombia in 2009, Panama in 2010 and Honduras in 2011.

The process is wide-ranging, because the review is not confined to current legislation on competition and cases resolved by the competition authority; it also includes interviews with competition policy stakeholders, notably from across relevant government departments, the private bar, consumer groups, academia and the media. All of this information is analysed and compiled in a report, which is then reviewed at the LACF by competition authorities from other countries in the region. The report contains recommendations to improve the competition framework and the application of competition policy in its two major areas: enforcement of the law, and competition advocacy. The peer review thus serves as a powerful internal management tool for competition authorities and it provides solid background support when arguing for legislative change to improve a country's competition law and its overall competitive environment.

Apart from assessing the benefits of the peer review for the participating country's competition agencies, it is also of major interest to the sponsoring entities, the OECD and IDB, to identify whether the recommendations made in each review have proved useful to the countries concerned, if they have been implemented; and, where they have not been implemented, to find out why not. The results of this work were first evaluated in 2007, in a follow-up to five peer reviews: Argentina,

Brazil, Chile, Mexico and Peru. That exercise was intended as a general review of all the recommendations made for each country. It also drew together cross-country conclusions in the following thematic areas: structure and independence of the competition agency, budget and resources, cartel policy, merger review procedures, preparation of internal guidelines, investigation procedures, judicial review, relations with regulated sectors and competition advocacy.

The present report has a more specific focus than its 2007 predecessor. Although it includes an analysis of the peer reviews of the nine countries, it concentrates on two themes. First, the impact of the authority's work in pro-competitive regulatory reforms, and second its case prioritisation and selection criteria.

To prepare this report, a questionnaire (reproduced in the annex) was sent to the competition authorities in the nine countries previously peer reviewed. The questionnaire, in part, assumed that specific recommendations may not have been made on the two themes in all cases, and so the questions were couched in more general terms. This was notably the case for recommendations on prioritisation because the topic has only recently emerged as a focus for national competition authorities. A final question was added on the main benefits of the peer review. The replies received from each of the countries will be reproduced in full in a separate document.

This report summarises the questionnaire responses and reflects on the original peer review recommendations. The first section discusses the thematic conclusions arising from a global analysis of the responses. The second summarises the responses on a country-by-country basis. The replies for the first topic were processed in a different order than they appeared in the questionnaire, to make them easier to understand.

Two general reflections can be made at this point. The first relates to the increasing significance attached to the role and impact of the competition authorities in promoting policy-making based on sound competition principles, and the importance of prioritising cases to better target resources and impact. Proof of this is the fact that most of the specific recommendations made in these areas can be found in the latest peer reviews. The second point to note is that the two topics are closely related to the impact of the competition authorities' work, which requires the authorities to have sufficient credibility and a track record of case enforcement and advocacy activities.



## **1. Government-related activities: the role of the competition agency in policy formation**

### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The economic and regulatory reform process involves, in the first place, the privatisation of certain economic activities which were traditionally performed by the State, especially natural monopolies in infrastructure and utilities. On the other hand, this process of economic reform also covers the liberalisation of those markets whose rates and tariffs were regulated. Finally, deregulation is a key factor, since the removal of any regulation that affects the efficiency of markets will lead to a higher level of competitiveness, higher productivity, more efficiency and lower prices overall.

The questions asked on this topic reflected the fact that most of the nine countries previously peer reviewed had a history of entrenched protectionism and an interventionist culture. Although many had introduced economic reforms aimed at liberalising and deregulating, or privatising, certain sectors, particularly in the 1990s, more reforms were needed to improve the competitiveness and efficiency of certain industries and markets. Competition authorities could potentially have a major impact on the remaining processes of privatisation, liberalisation and deregulation, either participating in them or, simply, through the introduction of competitive principles in certain economic sectors. This role could take a number of different forms. It could involve advocacy activities, through sector studies for example, or collaboration with sector regulators on the design or reform of regulatory frameworks. Competition agencies can also issue binding or non-binding opinions or recommendations on the competitive impact of existing or proposed regulations as part of the legislative process.

The effectiveness of competition authority recommendations on these reforms depend, in part, on the state of development of the economic system in each country, as well as the age and reputation of the competition agency and its status within the government machinery. In some countries (e.g. Chile) the competition authority was already in place when the privatisation, liberalisation and deregulation reforms of the 1980s began, which accounts for the influence it had in the development of Chile's infrastructure sectors. In other countries, such as El Salvador and Honduras, the competition authority was established at the same time as the reforms or even afterwards. In this regard, it would seem that the more independent the competition authority is from the government, the more time it needs to invest in its reputation and intra-governmental advocacy activities to achieve a degree of influence and impact on the economic reforms. Colombia and

Brazil are examples of competition agencies that are a part of the Executive, which facilitates the participation of Colombia's Superintendency of Industry and Trade (*Superintendencia de Industria y Comercio* – SIC), and Brazil's Economic Monitoring Secretariat (*Secretaria de Acompanhamento Econômico* – SEAE) in government discussions on economic reforms. This raises a question as to whether there is a trade-off between the independence of competition authorities on the one hand to take on cases, decide them and then enforce remedies if need be independently of government control, and integration of the agency into the government system to be better-placed to engage and influence policy-making.

The responses to the questionnaire indicate that, by and large, the peer reviews did not specifically address mechanisms for integrating the competition agencies into the economic reform processes. However, Mexico (1998 and 2004) and Brazil (2005 and 2010) noted that explicit recommendations were made and implemented, and point to the level of importance and influence that the Federal Competition Commission (*Comisión Federal de Competencia* – CFC) in Mexico and the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica* – CADE) and the SEAE (attached to the Ministry of Finance) in Brazil have in the reform process. These institutions participate actively in coordination mechanisms<sup>2</sup> with other government agencies, particularly sector regulators, thereby enabling them to participate in economic reform processes as they are designed and implemented.

Thus, it is not surprising that most of the surveyed countries do not have any participation in the privatisation and liberalisation processes. Some of them have some role in deregulation processes and many of them have adopted actions in order to incorporate competition principles in certain economic activities, especially those which are regulated. In this matter, all of the peer reviews enthusiastically recommended strengthening activities to promote competition and incorporate pro-competitive principles into the legislative and regulatory processes in which agencies should be involved, particularly in regulated industries. On this point, the competition authorities' replies revealed the major importance they attach to advocacy activities.

For example, most competition laws specifically empower the enforcement authority to issue opinions or recommendations on the competitive effect of laws, regulations, decrees, international treaties and regulations generally. In exercising these powers, competition agencies have issued opinions and recommendations on a wide range of markets, with varying degrees of success. In some cases the government has adopted them, and in other cases not, but in nearly all countries they are non-binding. One exception is Mexico, where the 2009 competition law reform made the CFC's opinions and recommendations on regulations binding, and

government bodies are now required to give reasons if they do not implement the recommendations made. The CFC also publishes and disseminates its opinions and recommendations, making the process more transparent and harder for the target body to dismiss. This approach could be adopted by countries where the relevant government authorities have been reluctant to take the suggestions of the competition agencies into consideration, and are able to do so because the opinions are non-binding.

Even where there is a statutory provision enabling the agency to issue opinions or formulate recommendations on existing or draft legislation and regulations, it does not follow that there is necessarily a formal review mechanism in place. Most of the country responses to the questionnaire referred to the existence of a statutory power but did not specify whether competition assessment is a systematic and formal mechanism or part of a wider regulatory impact assessment process. Most of the experiences describe informal mechanisms. Initiatives worth highlighting include: on-going engagement between the Superintendency in El Salvador and other government departments to discuss how competition can benefit their functions; participation by Panama's competition authority in the consultative committees of various ministries; and the advocacy work done in Congress by Mexico's CFC.

Apart from the power to issue opinions or recommendations on laws and regulations, competition authorities usually provide training to staff in strategic governmental institutions. El Salvador, for example, is implementing a programme to train the government body responsible for reviewing all draft laws and regulations on how to do competition assessments of legislation and to encourage referrals to the Superintendency. A number of countries have targeted public procurement frameworks and public procurement officials to combat possible collusion in government tenders.

## **1.2      *Advocacy through sector studies***

A recurring theme was how regularly competition agencies use sector studies as a means of developing specific recommendations to government and other regulatory authorities. These studies are also used to inform antitrust investigations and assist in developing knowledge of different sectors, which can be particularly useful in merger reviews. The responses suggest that the recommendations made on the basis of sector studies have generally been more effective than those made directly on laws or regulations.

Sector studies provide the agencies with a better understanding of how different markets function and an evidence-base from which to formulate

recommendations on legislative and regulatory reforms in the sector in question. It is therefore not surprising that studies departments or divisions have been gaining importance in the organisational structure of the different competition agencies.

Most of the agencies reviewed can point to achievements in terms of promoting competition as a result of sector studies. El Salvador in relation to the electricity and pharmaceuticals sectors; Brazil on the efficient use of the telecommunications spectrum; Chile in relation to the unblocking of mobile phones; Peru in the notaries market; Argentina in the television programme distribution sector; Honduras with the deregulation of prices in the pharmaceutical sector; Panama in the hydrocarbons market; and Mexico in terms of external trade, telecommunications, financial services, the pharmaceutical sector and air transport. Colombia was the only competition authority to report not yet having made recommendations to the government or regulators based on the results of its sector studies, but it expected to do so in the near future in the electricity and health sectors.

### ***1.3 Promoting entry of foreign competitors***

The minimum efficient scale for a firm to compete effectively has resulted in many markets becoming highly concentrated. This problem is particularly acute in smaller economies with a consequent risk of eliciting anti-competitive conduct — both unilaterally, such as abuse of a dominant position, and collectively, through cartel activity.

For this reason, the entry of potential competitors is important for maintaining competitive disciplines. Market entry conditions, however, should be considered not just from a domestic perspective, through the potential legal, structural and artificial barriers prevailing in the country. It is also necessary to evaluate the potential for foreign firms to enter the relevant market.

For these reasons, the elimination and reduction of tariff and nontariff barriers is significant in the promotion of competition. Nonetheless, this objective often clashes with the vested interests of particular industries, trade associations or trade unions, and may delay the adoption of measures necessary for eliminating or reducing such barriers.

Interaction between the competition authority and the government agency responsible for reviewing tariff and nontariff measures is crucial in this area. The experience of the countries consulted is quite varied, ranging from those in which the competition authority's opinion is not sought (El Salvador, Peru, Chile and Argentina) to those in which the authority participates in the decisions (SEAE in

Brazil, SIC in Colombia and CFC in Mexico), as well as those authorities which are not required to issue an opinion but which, in practice are either consulted or invited to participate in certain processes (Honduras and Panama).

Similarly, potential distortions to foreign trade arising from practices such as government subsidies and dumping trigger corrective government intervention in line with WTO rules and relevant free-trade agreements. The competition agency can also play an important role in these investigations to ensure that the anti-dumping measures adopted are both correct and necessary. The questionnaire replies indicate that only Brazil, through the SEAE, Chile through the Office of the National Economic Prosecutor (*Fiscalía Nacional Económica* – FNE) and Peru through the National Institute for the Defence of Competition and Protection of Industrial Property (*Instituto Nacional de Defensa de la Competencia y la Protección de la Propiedad Intelectual* – INDECOPI) participate in these investigations.

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 *Prioritisation of case work and non-case work***

Unlike sector regulators, which have a clearly defined scope of intervention, competition authorities have to assess the behaviour of economic agents across most sectors of the economy. In this open-ended task, adequate prioritisation and selection of the investigations to be conducted by an agency are not just good practice, they are crucial for an agency to operate efficiently in light of an increasing caseload.

To this end, there is an increasing interest nationally and internationally in criteria and practices to enable the authorities to focus on cases that have the greatest impact on consumers and the economy. Measures include the *de minimis* rule, case settlement mechanisms, the establishment of requirements and conditions for complaints to be deemed admissible, higher merger notification thresholds, and the possibility of negotiating conditions or remedies in merger processes, as well as providing the agency with effective powers to obtain evidence (e.g. leniency programmes and unannounced inspection powers).

Such practices make it possible to reallocate resources towards key cases and sectors. Recent experience has shown that the prosecution of cartels has become the priority for most competition agencies — particularly in the enforcement area. Many jurisdictions have introduced immunity and leniency programmes, as well as stronger investigatory powers such as dawn-raids and wire tapping.

Prioritisation is also essential in the other major area of work of any competition agency, namely advocacy. As noted above, there is broad scope for competition authorities to intervene in the economic reform processes implemented by governments. Although competition authorities issue opinions and formulate recommendations on draft laws and on economic regulations generally, often these recommendations are not implemented by the relevant government body, and the authority must work harder to ensure its opinions are taken into account. For this reason, advocacy activities need to be rationalised, prioritising initiatives with the greatest impact on consumers and the economy, and defining concrete and effective strategies to ensure that the recommendations are considered and implemented by the target audience. The same can be said of advocacy activities aimed at creating a competition culture. Once the agency has established a reputation and competition principles are well-established in the country, the next step is to target strategic sectors.

Most of the authorities surveyed stated that they have a number of case selection and prioritisation criteria, including the importance of the sector to be investigated, its significance for consumers, and the feasibility of obtaining evidence to support an investigation. Nonetheless, while these case selection and prioritisation criteria are explicit in some situations, they are usually not published. In other words, they are for the agency's internal use only.

Nearly all of the agencies consulted identified budgets and staffing as constraints on fulfilling their statutory functions and being able to adequately select and prioritise their investigations. Although budgets have increased in some countries (Chile, Colombia and Mexico), they are still considered insufficient.

In terms of prioritisation on areas other than applying competition law, the replies to the questionnaire were not as clear as those relating to enforcement. Many of them described what they did in terms of advocacy, stating that this was a very important task in the agency's daily work, for which many of them have specialist divisions or departments, but without giving details of the proportion of the agency's total resources allocated to this function.

## 2.2 *Recommendations about prioritisation in the peer review*

An increasing body of work is being developed internationally to identify criteria and good practices to assist competition authorities in targeting cases with the greatest impact on consumers. For example, the International Competition Network (ICN) has set up a working group on agency effectiveness, which has produced a chapter on strategic planning and prioritisation.

In their replies to the questionnaires, most of the authorities stated that the peer reviews covered in this follow-up did not make specific recommendations on case selection and prioritisation. In fact, Mexico's response was the only exception, noting that the peer review recommended that the agency target its work on sectors in which regulation and privatisation were still important issues and to focus on conduct related to collusion and exclusion. The responses did however highlight that more, perhaps indirect, recommendations were made in the case of other countries, such as Chile where the 2007 follow-up urged it to target collusive boycotts. Argentina was advised to work on the prosecution of cartels, reducing inefficiency in its investigations and merger control. Panama was encouraged to use settlements to conclude investigations. Honduras was advised to adopt a strategic plan for prioritising its investigations.

In all of these cases, the authority in question has taken steps to implement and put the recommendations into practice. In Mexico, significant advocacy work has been done in key sectors such as telecommunications (interconnection services, spectrum tenders, and evaluation of fixed and mobile telephony conditions), transport, finance, health and public procurement. Chile reports progress over the last few years in its policy to prosecute cartels, including the approval of a major legislative reform to introduce an immunity and leniency programme together with improved investigatory powers. Argentina stated that it has developed a draft legislative amendment to create an immunity and leniency programme, as well as new requirements on complainants, and it is also analysing the possibility of raising the merger notification threshold. Lastly, Honduras has received assistance to set up a strategic plan to better enable the agency to prioritise effectively.

In cases where the peer reviews did not make explicit recommendations on prioritisation, some competition authorities described the criteria they use to prioritise their work. An interesting case is the Economic Law Secretariat (*Secretaria de Direito Econômico – SDE*) of Brazil, which defines its objectives annually. For this purpose, it analyses all on-going investigations, and reviews their relevance, taking account of the priorities of government policies and the sectors of the economy it considers most sensitive. INDECOPI in Peru has also done some notable work in this area, with its economic investigations department developing a

methodology to identify sectors displaying conditions that could facilitate the presence of anti-competitive practices.

### **2.3 Regular long-term operational planning**

Effective management of the competition agency requires it to develop and circulate a long-term work plan among its staff, which firstly defines the institution's mission, from which its vision, strategic objectives, annual targets, and performance indicators are then developed. As noted above, the number of functions and tasks to be assigned to a competition authority is wide ranging, so it is essential for the different priorities to be supported by proper strategic planning.

Exemplary work has been done in this regard by the United States Federal Trade Commission (FTC). Three years ago it published a document entitled *The Federal Trade Commission at 100: Into Our 2nd Century*,<sup>3</sup> which discusses the type of institution it aspires to be when it reaches its 100th birthday in 2014. For these purposes, it asked a series of questions to reflect on its mission, structure, resources, relations with stakeholders, and how to measure its effectiveness.

While acknowledging that none of the agencies consulted in this exercise has the experience of the FTC, their operational plans could take inspiration from this type of self-assessment. This would facilitate an assessment of whether the work of the competition agency has produced results and has ultimately made markets more competitive.

Only Panama and Honduras replied that explicit recommendations had been made on this subject in the peer reviews — the last countries to undergo peer reviews, in 2010 and 2011 respectively. Both countries are working on these recommendations, although Panama has found it hard to implement them owing to budgetary constraints. Honduras is receiving technical assistance from UNCTAD.

Countries that did not receive specific recommendations in this area stated that they did undertake strategic planning, but generally on an annual basis, except for INDECOPI in Peru, which has a five-year strategic plan for 2012-2016, and the Competition Superintendency of El Salvador, which introduced five-year work plans as soon as it was established. In some instances, the planning processes of the competition agencies, such as Chile and Colombia, are closely linked to or conditioned by overarching government plans set by their respective ministries.



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## 2.4 *Improving the efficiency and effectiveness of investigations*

The last group of questions on case prioritisation and selection concern more specific recommendations for introducing certain tools to enable an agency to prioritise its actions more effectively, particularly in the enforcement area.

The questionnaire asked the various agencies whether the peer reviews had recommended introducing measures to improve the efficiency of investigations in the following, or other areas: case settlement mechanisms; measures to expedite complaints from private parties, the adoption of higher merger notification thresholds; and the approval of immunity and leniency programmes, as well dawn-raid powers.

The conclusions that can be drawn from the replies given are reviewed below:

### 2.4.1 *Introducing a case settlement mechanism.*

A large part of competition policy is enforced by punishing anti-competitive violations, for which a process must be followed, either judicial or administrative or both, in which the parties are ensured the rights and guarantees of due process. Nonetheless, litigation is costly, particularly for large cases where the agency is often confronted by several defendants (particularly in the case of cartels), which requires the agency to assign a large proportion of its resourcing, both budget and staff, to deal with the case proceedings.

For these reasons, the incentives to use alternative case settlement mechanisms are on the increase. It is highly efficient for an authority to be able to reach agreements with the investigated parties and resolve the competition problem that gave rise to the case. This can be done not only in cases of abuse of dominance, but also in cases of collusion, particularly those in which an immunity and leniency programme has been used, because it is unlikely to be in the interests of the parties to continue with a procedure in which the agency has sufficient evidence to successfully prosecute the case.

Only Mexico and Honduras replied that they had received a specific recommendation on this topic. In the case of Mexico, the recommendation was made in the 2004 peer review and included the 2009 legal reform on unilateral conduct and mergers. Honduras intends to introduce settlements in the near future. Although most of the other agencies surveyed did not explicitly state that they had received a recommendation in their respective peer reviews, many commented on the mechanisms that had been introduced for settling cases through agreements with the investigated parties. From the replies analysed on this point, it is interesting to

note the experience of El Salvador, which used to have this legal power before it was repealed in the 2007 reform, and today they are thinking of reintroducing it. Colombia was advised in the peer review that in its case the settlement mechanism had been over-used. In Brazil, CADE has established a committee to advise its Commissioners on negotiating and designing settlements.

#### 2.4.2 *Handling and expediting complaints from private parties*

In general, competition authorities act either in response to a complaint by private parties or on their own initiative. Nonetheless, many of the complaints received by the agencies have insufficient merits, or else relate to problems that are not concerned with competition. The point is that many agencies are obliged to consider all complaints from private parties and initiate an investigation process that often does not lead to practical results. This diverts the use of the agency's resources, which are always scarce. It is therefore very important to introduce measures to streamline complaint procedures and make them more expeditious, enabling the agency to quickly close down those lacking in merit.

For this purpose, a number of alternatives can be considered, such as the requirement for background information to support the complaint, the obligation of the complainant to ratify the complaint, and requirements regarding the description of the market in which the alleged conduct takes place.

It was clear from a number of responses that the peer review recommendations did not go into detail on how to expedite complaints, although many of the reviews did draw attention to the need for countries to improve the efficiency of their investigative processes. For instance, in the case of Argentina the Peer Review suggested considering ways of dealing with private complaints that clearly do not describe possible violations of the competition law through summary processes. For Peru, the report said that INDECOPI should consider whether there are other means it can use to maximise its cost-effectiveness while fulfilling its responsibilities to resolve formal complaints.

#### 2.4.3 *Adopting sufficiently high merger notification thresholds*

In jurisdictions with compulsory merger notification regimes, the threshold above which the competition authority must be informed of the transaction has become a crucial issue for competition agencies. This is because many of them have been overwhelmed by the number of transactions notified, most of which do not pose a threat to competition.

Good international practices have recently recommended abandoning the market share notification threshold, due to the difficulty of defining the relevant

market on which the relevant percentages should be calculated. Accordingly, a monetary criterion for defining the thresholds has gained support. This consists of the valuation of the assets of the merged firms, or other variables such as annual sales. Nonetheless, this can also be complex to determine.

Revising merger review procedures has featured heavily in the countries' reform agendas. A number of the peer reviews recommended raising the notification thresholds to make the merger regime more efficient. In the case of Brazil, the new competition law eliminated the market share criterion in line with the peer review recommendation. Colombia, likewise, was advised to remove the market share criterion, and it also implemented the recommendation to apply merger standards to vertical and conglomerate mergers. Argentina is considering a proposal to raise the notification threshold. El Salvador, on the other hand, is considering reducing its threshold because of the relatively small size of its economy. Panama is working on the recommendation that it introduce a mandatory merger notification regime. Possibly the most problematic case is Honduras where all mergers are notified, and it was advised to set thresholds, which it is working on with the assistance of the World Bank. Mexico stated that a recommendation from 2004 was adopted in the 2011 law reform explicitly defining the mergers that need to be notified. The cases of Peru and Chile are special because they do not have compulsory notification systems.

#### 2.4.4 *Leniency programmes and dawn-raid powers*

Immunity and leniency programmes and investigatory powers, particularly those enabling the agency to conduct dawn-raids on business premises and to confiscate the documents and computers of executive staff, are the most effective tools for prosecuting and investigating cartels. Nowadays, it is extremely difficult, if not impossible, to investigate any collusion case without these tools. Moreover, experience has shown that it is extremely complicated to prove any collusion case on the basis of indirect evidence alone.

Accordingly, these tools make it possible to prioritise the authority's work, targeting it firstly on the most serious cases — cartels — and, secondly, on those in which there is high probability of obtaining the evidence needed to substantiate the alleged infringement and secure a successful prosecution.

Eight of the nine countries currently have immunity and leniency programmes as well as dawn-raid and seizure powers. Most introduced, or are in the process of introducing these tools following the recommendations made in their respective peer reviews (Chile 2003, Mexico 2004, Argentina 2007, El Salvador 2008 and Colombia 2009). Brazil already had a leniency programme, while Panama's peer

review recommended that to make its leniency programme effective, it needed to improve its anti-cartel enforcement work. In Peru, a leniency programme was formally included in the new competition law in 2008, as the previous statute did not specify the conditions that defendants must meet to qualify for immunity. The exception is Honduras, and its 2011 peer review recommended that it introduce a leniency programme.

### **3. Overall assessment of the peer review**

The last part of the questionnaire asked each of the nine countries to identify in what way the peer review had been particularly useful and to highlight ways in which the peer review process could be improved.

As the replies submitted in this part varied widely, each country's reply is reported in the next chapter.

## CHILE

-- Follow-up to 2003 OECD-IDB Peer Review and  
2010 OECD Accession Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation of the competition authority in economic and regulatory reform process***

One of the issues highlighted in the 2003 peer review of competition law and policy in Chile was the work done by the competition bodies (the Office of the National Economic Prosecutor (FNE) and the Tribunal (TDLC)) in the infrastructure sectors. Accordingly, one of the key recommendations made in the report was to integrate competition into a wider range of government policy-making in order to extend efforts made in the infrastructure sectors. Specifically, the peer review recommended increasing the amount and visibility of competition advocacy outside the infrastructure monopoly sectors, so that the FNE or the Tribunal become central to the government's consideration of the wide range of regulatory matters that affect competition and to which competition principles should be applied.

The 2007 follow-up review made recommended an increased role for the FNE in systematically reviewing proposed and existing regulations. The FNE set up a new unit for this purpose in 2010, but resource constraints resulted in this being done less systematically, and reviews are now mostly conducted at the request of Congress or as the result of a sector study.

The FNE notes that its enforcement work involves the review of existing laws and regulations. It is on this basis that when seeking injunctions from the Tribunal, it often requests the Tribunal to recommend regulatory reforms to the government. The latter, although a formal mechanism, has not been particularly effective in securing pro-competitive legislative change. At a more informal level, the FNE's opinions to Congress have been taken into consideration more frequently.

Competition advocacy is a priority for Chile's competition authorities. In July 2012 it published the fourth document in its Advocacy Materials series. The guide

on competition in the public sector recommends that public services should consider the effects on competition of their decisions and activities.

### **1.2      *Advocacy through sector studies***

The competition agency highlighted the importance of sector studies for gaining a better understanding of markets. It states that they are either conducted internally or through external consultants. As in most of the other countries consulted, these studies are used both to promote competition and to investigate violations of the law, mostly in response to requests made by the Tribunal in the context of non-litigious procedures carried before it.

The recommendations made in the studies serve as a basis for initiating contacts with regulators with the aim of reviewing or revising sector regulations. The reports submitted by the FNE to the Tribunal can include recommendations for regulatory changes. The Tribunal has the statutory authority to propose amendments to or the repeal of legislation which restrains competition, although it has had limited success.

Recommendations made to the government and sector regulators have had varying degrees of success. The FNE has had some success with proposals on sector regulations, notably in the telecommunications sector, where it recommended that the legal barrier be removed in order to unblock mobile telephones and enable consumers to choose between providers. As noted above, the Tribunal's formal recommendations on legislative change have only rarely been accepted. It was successful in reducing barriers to entry in relation to new regulations for interconnecting electricity grids. The formal process has been less successful than expected.

### **1.3      *Promoting entry of foreign competitors***

The competition authorities do not participate in government processes to eliminate or lower tariff and nontariff barriers. In general, these decisions form part of the macroeconomic policy of trade liberalisation which has been implemented by through a number of free trade agreements, in which the FNE had been invited to participate in the competition chapters.

In relation to anti-dumping investigations, the FNE director, the National Economic Prosecutor, chairs the commission on international trade distortions, thereby ensuring that competition principles are taken into account in these processes.

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 *Prioritisation of case work and non-case work***

Prioritisation and selection criteria are used by the FNE when it acts on its own initiative, both with regard to which cases to pursue, and which tools to use, for example, taking enforcement, undertaking advocacy or carrying out sector studies. Prioritisation is based on a number of indicators, including the social welfare implications of the anti-competitive conduct, the degree of impact on consumers in the affected market, potential for collaboration with strategic partners, the tools available, and the strength of the evidence in each case. The agency has recently prioritised work on horizontal agreements and cartels, as evidenced by a 40% increase in cases in this area in 2011, compared to 2010.

The prioritisation criteria are set out in an internal document but are not published. The key elements have been discussed publicly in speeches and interviews, and are referred to in the annual report presented by the FNE at the annual Competition Day seminar.

The budget restrictions affect the number and scale of cases investigated. The prioritisation process includes a general rule that limits the number of cases that the professional staff should be handling at any one time.

### **2.2 *Recommendations about prioritisation in the peer review***

In line with the recommendation in the 2007 follow-up report, which was supported by the 2010 OECD Accession Review, the FNE has targeted its enforcement efforts on horizontal agreements and cartels, and collusive boycotts in particular. The FNE has made significant progress in developing its anti-cartel work in recent years. This has led to a steady increase in successful convictions and fines imposed. This was complemented by a major legal reform in 2009, which introduced a leniency programme (*delación compensada*), as well as strengthening the FNE's investigatory powers and introducing plea bargaining, which has been used successfully and investigations are on the increase.

### **2.3 *Regular long-term operational planning***

The peer reviews did not make any recommendations on this topic. Nonetheless, a number of government provisions have required the agency to produce annual strategic plans. The FNE is obliged to set out a mission statement and detail its strategic objectives, performance indicators and tools as part of its reporting requirements to various government institutions, such as the Office of the Secretary General of the Presidency, the Ministry of Finance and the Office of the

Comptroller General of the Republic. The FNE has an internal oversight management unit to monitor progress in fulfilling its targets and to ensure the agency's internal objectives are aligned with wider government objectives.

#### **2.4 *Improving the efficiency and effectiveness of investigations***

The recommendations and comments of the peer review suggested reducing “red-tape” involved in current proceedings which tend to be slow and costly. These comments related to both the litigation process (which has many stages and can be very lengthy) and the non-litigious or consultative procedures.

Following the 2003 peer review, two mechanisms were introduced to expedite the procedures. The first was a conciliation process introduced in 2004. Second, a reform introduced in 2009 authorised the FNE to enter into out-of-court settlements subject to TDLC approval. Both mechanisms have been implemented successfully, with good results in a number of cases.

In line with recommendations to focus on streamlining internal procedure and making them more efficient, the FNE has committed with the Ministry of Finance to shorten investigation times and speed up the investigations that take longest. The target is to reduce the number of on-going cases opened before 2011 by 74% in 2012.

Chile has a voluntary merger control regime. Mergers only come to the attention of the TDLC if the parties, the Prosecutor's Office or a third-party stakeholder refer the operation to it. On this point, the 2003 peer review of recommended that Chile consider introducing a compulsory merger notification system. When the system was reviewed for accession in 2009 it was considered that the absence of such a system had not impaired the effectiveness of merger reviews, and that the voluntary system in force in Chile followed the 2005 Merger Recommendation.<sup>4</sup>

The 2003 peer review noted the limitations inherent in Chile's competition law that hindered successful cartel investigations. Market concentration in small economies such as Chile makes tacit agreements more likely, but it is difficult to obtain the necessary evidentiary proof.

Legislative changes were introduced in 2009 to strengthen the FNE's powers to obtain information and detect cartels in a timely manner which are crucial for robust cartel prosecution. A provision on immunity and leniency was introduced, complementing the already existing provision on settlements. Immunity in cartel cases has been granted in two cases to date (refrigerator compressors and urban



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passenger transport). Seizure and wiretapping powers were implemented, which have been used in investigations into collusion in urban passenger transport and poultry markets.

### **3. Overall assessment of the peer review**

The peer review provided a valuable tool to analyse and evaluate competition policy in Chile over a period of almost 30 years. The main recommendations on publishing guidelines on how the competition authorities assess conduct and improving the decisions made by the Resolutive body have had a positive impact. In addition, the recommendation on targeting efforts on collusive agreements identified a major weakness in the competition system. Measures taken to address these limitations through legislative reforms to provide the necessary tools have made effective cartel enforcement a priority.

Chile suggests that future peer reviews could incorporate topics that have recently emerged as a necessary consideration for more effective competition regimes. Agency effectiveness, which was not routinely discussed when Chile was reviewed in 2003, is one such topic.



## PERU

-- Follow-up to the 2004 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The Institute for the Defense of Competition and Intellectual Property (INDECOPI) is not involved in defining or reforming regulatory frameworks or privatisation measures. Indeed, the privatisation agency (PROINVERSIÓN) has not regularly consulted with INDECOPI. However, as a result of a separate law applicable to mergers in the electricity sector, which includes acquisitions of state assets that are being privatised, the electricity sector is the one area in which INDECOPI has an important role in the privatisation process.

Nonetheless, INDECOPI has used sector studies to make recommendations on economic reforms, particularly on infrastructure projects. In addition, the transport regulator (OSITRAN) is required to consult INDECOPI on the competitive conditions in the market if it wishes to set rates in concession contracts, and any other service not included in the original concession.

Advocacy is a very important activity for INDECOPI, which is authorised to recommend the implementation of pro-competition measures to the legislative, political and administrative authorities. It cites a number of successful interventions, such as the Association of Port Operators, Tourism Agencies and Laboratories (*Asociación de Operadores Portuarios, Agencias de Turismo y Laboratorios*).

In addition to the Competition law, Peru has several laws related to market access which tackle unauthorised and unwarranted barriers to market entry. These are enforced by a separate commission within INDECOPI, the Elimination of Bureaucratic Barriers Commission. Such enforcement means that INDECOPI has sometimes been able to compel the kind of procompetitive regulatory reform most competition authorities can only advocate. INDECOPI therefore has an important

role in reviewing existing legislation for anti-competitive restraints. INDECOPI reported that in 2011 it resolved 285 cases, including the analysis of regulations of ministries, municipalities and other entities. Although it does not have a formal role in the process of drafting or reviewing laws and regulations, INDECOPI regularly makes recommendations to Congress, which seeks its opinion on the effects of certain laws in specific markets.

### **1.2      *Advocacy through sector studies***

Sector studies are an important part of INDECOPI's work, and they are used, as noted above, to promote legislative amendments in order to improve competitive conditions in specific markets. Examples include a study into competition in the electricity market for final consumers not subject to price regulation. The sector regulator introduced fee and access conditions in line with INDECOPI's recommendations.

The studies performed by the Economic Research Department serve both for investigations and for advocacy purposes work. For example, a study on the level of competition in the notaries market is being considered by the Ministry of Economy and Finance in its reform proposals. It also informed INDECOPI's case requiring notaries to publish a price list for consumers.

### **1.3      *Promoting entry of foreign competitors***

The free competition authority does not participate in processes undertaken by the government to eliminate or lower tariffs, since these are the responsibility of the Ministry of Economy and Finance in coordination with the Ministry of Foreign Trade and Tourism. Nor does it participate in processes to eliminate or reduce non-tariff barriers, where the work is done by the respective sector authorities. It does however supervise the export control and elimination of non-tariff barriers. Two proceedings were issued in 2011. On the other hand INDECOPI does participate in anti-dumping investigations, through its Anti-dumping and Countervailing Duties Commission (*Comisión de Fiscalización de Dumping y Subsidios*), which is responsible for making Peru's anti-dumping and safeguard determinations. This has the potential for competition considerations to be given at various stages of anti-dumping proceedings, to minimise the anti-competitive effects of antidumping on consumers and the economy.

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 *Prioritisation of case work and non-case work***

The INDECOPI Commission for the Defence of Free Competition prioritises and selects its cases according to the following criteria: (a) the nature of the good or service, in other words the significance of the market for consumers; and (b) the harmful effects of the practice on the market. These criteria are not published.

Human resources and the budget constraints limit both the number of preliminary investigations that can be conducted and the number of cases that are resolved. The decision as to which enforcement and non-enforcement activities to focus on is also assessed according to these criteria. No fixed budget is assigned for non-enforcement activities.

The peer review did not make recommendations on case selection and prioritisation. The Economic Research Department has developed a methodology based on comparative studies and consultations with other competition authorities – in the United Kingdom and the Netherlands- to identify the sectors most susceptible to anti-competitive practices. Using ISIC codes, 16 sectors were chosen as a starting point for further analysis of potential anti-competitive practices.

### **2.2 *Regular long-term operational planning***

Although no recommendations were made on this issue, INDECOPI has a five-year strategic plan, in which each area, including the Commission for the Defence of Free Competition, has targets within the annual work plan. The strategic plan specifies three major targets for the 2012-2016 period: (a) resolving complaints formulated by private parties on a timely, predictable and reliable basis; (b) strengthening prevention and enforcement of the law in areas of free competition, consumer protection and intellectual property; and (c) disseminating and promoting the use of INDECOPI services.

### **2.3 *Improving the efficiency and effectiveness of investigations***

The peer review did not make direct recommendations on the four specific topics mentioned in the questionnaire to improve investigations. INDECOPI has, however, been working on two related recommendations. The first of these is clarification of the legal standards applicable to cartels and other horizontal agreements, stating that the latest legal amendment established the *per se* rule for hard core cartels, and the rule of reason for analysing other horizontal practices. The second recommendation was to introduce merger control with a system of compulsory pre-merger notification, with special emphasis placed on thresholds to

be used. This has not yet been implemented but is currently being discussed in Congress.

### **3. Overall assessment of the peer review**

The peer review was a valuable tool for promoting reforms aimed at strengthening INDECOPI. In particular the respondents state that the Recommendation on protecting the autonomy, credibility and technical capacity of the different areas of INDECOPI made it possible to promote legislative changes to increase the transparency and objectivity of the processes for selecting and dismissing first- and second-instance decision makers, and establishing specific qualification requirements.

The Recommendation to amend the funding system for INDECOPI to make it independent of the amount of fines imposed, given the perverse incentives that this involves, is still under consideration.

## MEXICO

-- Follow-up to the 2004 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The two reviews (1998 and 2004) of Mexico's competition law and policy have helped strengthen the role of the Federal Competition Commission (CFC) in the process of economic reforms. In this sense, the competition authority is aware that many competition problems are a consequence of the regulatory system.

The 2004 report recommended that the CFC become more active in establishing a comprehensive competition policy. In particular, it recommended that the CFC become more active in commenting on proposals to the Federal Regulatory Reform Commission (Comisión Federal de Mejoras Regulatorias – COFEMER), which is the institution that reviews all regulatory proposals made by the federal government. Accordingly, the CFC has increased its participation in regulatory processes, signing an agreement in 2005 with the COFEMER to ensure that competition principles are taken into account in regulatory processes. In fact, COFEMER issued a new manual for regulatory impact assessment in 2010 that includes questions to assess if regulatory proposals harm the competitive process in markets. The CFC also increased its role in the design of privatisation processes and regulatory frameworks by issuing opinions on market structure and regulations for key infrastructure sectors.

Since its creation in 1993, the CFC has had the authority to issue non-binding opinions on draft laws, regulations or standards, and this extends to public policies and administrative acts. With the aim of ensuring its opinions are taken into account, in 2006 the law was amended to enable the CFC to make binding recommendations on regulations. Nevertheless, they have been issued in few cases and with extreme care so as not to damage its relationship with the government. The CFC now carries out on-going monitoring of legislative initiatives in Congress, as well as the

Executive's second regulative initiatives. The CFC is perceived as an active pro-competition lobbyist by Congress and the government. All of this has been possible because the CFC is viewed as a highly technical and independent institution.

The CFC has carried out significant work in advocating competition in Mexico, both to provide stakeholders with a better understanding of the benefits of competition, and to remove entry barriers in key regulated sectors of the economy (e.g. telecommunications, financial services and transportation). The financial sector is the clearest example of pro-competitive reforms adopted on the basis of CFC recommendations with amendments to the private pension system and the financial sector's regulatory framework. The CFC's on-going communications with Congress eased the passage of significant competition law reforms in 2006 and 2011.

The CFC has used different means to advocate for competition principles in government policy-making and address the prevalence of anti-competitive restraints in regulated sectors. The CFC has found that publishing its opinions on laws and regulations has made regulators more inclined to take them into account. It has also established coordination mechanisms with other regulators. It has issued over 150 opinions since 2004.

One intra-governmental advocacy programme is based on the OECD's competition assessment toolkit methodology. A Mexico-OECD Co-operation Project to Strengthen Competitiveness in Mexico was launched in 2007. The competition pillar of the project has reviewed existing laws, regulations and policies in key economic sectors at the federal, state and municipal levels.

## ***1.2 Advocacy through sector studies***

Sector studies are used by the CFC both in its enforcement work and in advocacy activities. The toolkit project developed with the OECD produced a series of studies, some of which have led to legislative reforms. Reforms were successfully implemented in the following sectors: foreign trade (simplified customs procedures and tariff structure), telecommunications (reduced interconnection fees), banks (facilitating customer mobility and a more transparent role for the Bank of Mexico in setting interchange fees), pharmaceutical sector (opening the market to generic medicines) and air transport (more competitive allocation of slots).



### **1.3 Promoting entry of foreign competitors**

Unlike most other countries consulted, the CFC participates actively in government projects to eliminate or lower tariff and nontariff barriers. It participates in the Foreign Trade Commission (*Comisión de Comercio Exterior – COCEX*) attached to the Ministry of the Economy — a consultative body for all issues relating to foreign trade in Mexico. The CFC uses its participation to ensure that COCEX decisions and recommendations take competition principles into account. COCEX recently adopted a set of guidelines proposed by CFC aimed at improving the efficiency of allocating import and export quotas.

The CFC does not have powers to conduct anti-dumping investigations, which are the responsibility of the International Trade Practices Unit (*Unidad de Prácticas del Comercio Internacional – UPCI*) attached to the Ministry of the Economy. Although it does not participate directly in these investigations, the CFC occasionally provides comments within COCEX, some of which have contributed to the elimination of unnecessary barriers to foreign trade

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 Prioritisation of case work and non-case work**

Mexico's CFC was reviewed against the OECD's Competition Authority Capability Assessment Framework in 2009. The CFC introduced a prioritisation methodology based on the recommendations of the review to allocate resources more efficiently. In addition, there was a budget increase in 2012, part of which was used to create a dedicated planning, prioritisation evaluation unit. The CFC sets annual priorities but does not publish them.

Despite a 30% budget increase in 2002 for its human resources, the CFC considers its budget and staffing insufficient given the size of the Mexican economy. To address these constraints, the CFC has made more use of prioritisation tools to pre-screen cases and assign its resources as efficiently as possible.

The CFC includes advocacy work in its annual prioritisation planning.

### **2.2 Recommendations about prioritisation in the peer review**

The 1998 peer review recommended that the CFC focus on sectors in which regulation and privatisation were still major problems. To some extent these recommendations have been implemented or followed by the agency, with priority accorded to markets based on their importance to either the economy or consumers and taking into evidence of competition problems. Over the last three years, the

CFC has targeted its work on applying the law and promoting competition in a number of strategic sectors, notably telecommunications (interconnection fees, spectrum), transport (post and railways), finance (reforms to the transparency law and the management of financial services and credit instruments Act) and health. The CFC's enforcement and advocacy work in the health sector focused on improving procurement processes in the provision of pharmaceutical products to the Mexican Institute of Social Security. This has led to similar projects with other government agencies and four state agencies.

### **2.3 *Regular long-term operational planning***

Although no recommendations were made on this topic, a new General Directorate for Planning and Evaluation (*Dirección General de Planificación y Evaluación* – DGPE) was created in 2012 to implement the CFC's strategic plan. Its role will be to analyse the strengths and weaknesses of the current competition policy, integrate international best practices into the agency's work, define goals, and set a workplan and performance indicators for the agency. It will also be responsible for aligning the agency's strategic planning with national objectives for economic development.

### **2.4 *Improving the efficiency and effectiveness of investigations***

The 2004 peer review made specific recommendations on each of the four topics indicated. The 2011 law reform introduced settlement mechanisms in unilateral conduct cases and commitments for merger reviews. The peer review recommended starting a dialogue with the Mexican Bar Association, in part to assist with the handling of complaints from private parties. Measures were also introduced to improve access to public information through the introduction of an on-line search engine and the CFC began to issue a number of guidance documents. Other initiatives to improve the CFC procedures were introduced, such as oral hearings, while a training programme for the judiciary aimed to improve the track record of CFC decisions before the courts.

An amendment to the competition law in 2011 clarified the circumstances in which pre-merger notification filing is not required for restructuring transactions by foreign firms with Mexican subsidiaries.

Finally, the 2006 law reforms and the statutes of 2007 authorised the Commission to establish immunity and leniency programmes. The 2011 reforms extended the scope of the leniency programme to include individuals, not just firms.

### 3. Overall assessment of the peer review

Mexico is one of the countries to have made the most use of the inputs provided by the OECD's peer reviews. The CFC has used them to thoroughly evaluate its competition law and policy and has adopted many of the recommendations.

The 2006 and 2011 amendments to the competition law were the main outcome of the peer reviews. Many of the amendments in the 2006 reform were based on the 2004 peer review. These included strengthening and simplifying the CFC's procedures, introducing the power to issue binding opinions on regulations, and strengthening sanctioning powers.

Importantly, the 2011 amendment to the law introduced the power to conduct unannounced dawn-raids. Prior to this the CFC had to announce searches in advance, reducing the effectiveness of its cartel detection work.

The 2011 legal reforms incorporated a number of the recommendations from the 2004 review that had not been included in previous reforms. These amendments align Mexico's competition law with international best practices by providing the CFC with improved instruments to investigate and sanction violations, additional measures to improve transparency and legal certainty, and simplifying its internal procedures.

The CFC did not identify ways in which the peer review could have been improved.



## BRAZIL

-- Follow-up to the 2005 and 2010 OECD-IDB Peer Reviews --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The Economic Monitoring Secretariat (SEAE), which belongs to the Ministry of Finance, actively promotes and advocates competition principles in the drafting of laws and regulations affecting economic reforms. In this sense, the surveyed country has said that it has been convenient for the competition system to locate advocacy in a government agency, because it is easier to convince other government bodies about the benefits of competition.

The peer review recommended setting up mechanisms to enable the SEAE to participate in procedures for defining standards and regulations. This recommendation was explicitly included in the new 2011 competition law reform, Law No. 12.529, and the SEAE now participates in the legislative-making process by issuing opinions for changes to draft laws in the case of regulated sectors.

The new competition law also authorised the SEAE to issue opinions on legislative proposals before Congress. This function is normally carried out at the invitation of the Ministry of Finance. The new law also gave SEAE a role in reviewing existing laws and regulations at the federal, state, municipality and federal district levels, in line with the 2010 peer review recommendations.

The SEAE has had a team in place since 2005 working on improving international competitiveness on trade issues. It participates in international trade negotiations, prepares impact studies on anti-dumping and safeguard measures, as well as entry conditions for foreign competitors. It also conducts price monitoring of the main national indices.

Competition advocacy is a core function of SEAE which was reinforced by the new competition law, as highlighted above. SEAE notes that it has a higher degree of success in influencing changes to proposed legislation the earlier it is involved in the process. This has been SEAE's experience in its contribution to reviews of technical standards proposed by the Brazilian Association of Technical Rules.

CADE has also developed its advocacy functions by setting up a Working Group for Regulated Markets to encourage more systematic contact with the sector regulators. It has organised workshops with regulators in the telecommunications, electricity, transport and aviation sectors.

### **1.2      *Advocacy through sector studies***

The new competition law requires the SEAE to carry out studies to evaluate competition in various sectors of the Brazilian economy, either on its own initiative or at the request of CADE, the Consumer Rights Department or the Ministry of Justice. It also produces a monthly newsletter monitoring the indices for particular sectors.

SEAE describes sector studies as a powerful tool for promoting competition. The agency cited studies on fertilisers and wheat crops carried out in 2011. It has also conducted studies at the request of other bodies on specific aspects of international trade.

Under the new law, the SEAE has conducted studies to advise the sector regulators. Its telecoms studies on the efficient use of spectrum and network neutrality have been used to advise the Brazilian Telecoms Regulatory Agency and the Ministry of Justice in the development of related regulation.

SEAE noted that it is unable to assess the effect of the recommendations in its studies requested by other agencies. The response to the questionnaire did not state whether studies are also used for enforcement work to identify anti-competitive practices in particular markets.

### **1.3      *Promoting entry of foreign competitors***

As mentioned above, the SEAE participates actively in international trade issues taking part in negotiations on tariff and nontariff barriers and conducting studies on the impact of anti-dumping measures. In particular, the SEAE has played a key role in forums organised within the Southern Common Market (MERCOSUR), to discuss a common external tariff, nomenclature and classification of goods.

In 2011, it issued numerous technical reports following requests made by various industrial sectors (metallurgical, pharmaceutical and health) to temporarily lower tariffs on a number of products.

The SEAE also issues specialist opinions in anti-dumping investigations. It has carried out analyses in several cases where requests were made to suspend anti-dumping duties and countervailing measures on public interest grounds, with respect to products such as supercalendered paper, PVCs and polypropylene resins. For these purposes, the SEAE acts as the Executive Secretariat of the Technical Group for the Evaluation of Public Interest.

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 *Prioritisation of case work and non-case work***

Until the entry into force of the 2011 competition law, which consolidated the antitrust enforcement functions into one agency (CADE), the Brazilian competition system divided responsibilities between the three agencies. The Economic Law Secretariat (SDE) was the chief investigative body in matters related to anti-competitive practices. CADE was the administrative tribunal, making final rulings in connection with anti-competitive practices and merger review. Both SEAE and SDE issued non-binding opinions in merger cases.

SDE did not apply fixed criteria in prioritising its antitrust case work. Various elements were taken into account when selecting its investigations, including the importance of the sector for the economy, the impact of the conduct on consumer welfare, and the availability and possibility of obtaining evidence to progress the investigation. The SDE set its priorities on an annual basis. It reviewed all on-going investigations to assess their continued relevance, taking into account wider government policy priorities and the sectors SDE identified as a priority.

There are no prioritisation criteria for mergers, but over the years the Brazilian competition system has sought to introduce more objective criteria in its definition of mergers in order to reduce the number of cases being reviewed that have little or no probability of harming competition. Legislative amendments, issuing undertakings and the introduction of a fast track procedure were all mechanisms introduced to reduce the number of mandatory notifications. This was part of a prioritisation process necessitated by the overly broad wording of the law.

Staffing is the greatest constraint faced by the two organisations in being able to select and prioritise their cases. The problem is particularly acute in the case of the CADE (20 staff reviewed 700 mergers in 2011).

The SDE allocated fixed resources to its law enforcement work, although it did undertake advocacy work. CADE's budget was targeted on merger control and antitrust decisions.

## **2.2 *Regular long-term operational planning***

Although no recommendations were made on this subject, long-term targets are set annually based on the assessment of the previous year's activity.

## **2.3 *Improving the efficiency and effectiveness of investigations***

Specific reforms introduced in the 2000 law included the creation of a leniency programme and the ability of the competition authorities to carry out dawn raids and inspections. More recently, a reform introduced in 2007 authorised CADE to enter into settlements in cartels cases. The 2010 review encouraged CADE to make more use of its settlement powers. In recognition of the value of this tool, CADE created a unit that specialises in settlement design and negotiation.

The 2010 peer review noted the need to reduce the backlog of investigations and conduct cases and to shorten the time required for the final disposition of cases. It noted that the consolidation of the three agencies should assist in this regard but recommended that formal procedures at the investigation stage be as efficient as possible.

The changes to the merger review system address the shortcomings in the notification process and should promote efficiency and effectiveness. The new law consolidated merger review responsibilities into one agency, introduced a pre-merger notification system and new notification thresholds. This enables prioritisation of the mergers that are likely to have a significant effect on competition and enables more resources to be devoted to illegal conduct cases.

## **3. Overall assessment of the peer review**

Brazil highlighted the usefulness of the recommendations on reforming its merger review process for improving its competition regime.

Brazil suggested that future work could focus on settlements, which is a relatively new field for CADE and could assist with improving its settlement process.

It also mentioned that in future it would be helpful to review the structure and procedures of Brazil's new institutional model following the merger of the enforcement functions.



## ARGENTINA

-- Follow-up to the 2006 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The National Commission for the Defence of Competition (CNDC) highlighted the importance the government attached to the peer review. This in turn contributed to strengthening the competition culture in Argentina. The CNDC was subsequently awarded an autonomous budget by the Ministry of Economy and Finance in 2007, which enabled it to improve the internal organisation of its activities.

The CNDC emphasised the significance of its advocacy activities within government. Its opinion has been sought on several draft laws in recent years, including the 2009 law regulating audiovisual communication services. Some of the clauses in the legislation specifically refer to the CNDC, giving it binding powers to grant new licenses.

The agency stated that no formal peer review recommendations were made on its participation in the processes for the review or creation of laws and regulations. However, the competition law gives the agency the authority to issue non-binding opinions on the competitive effects of laws, regulations, circulars and administrative acts. In addition, the CNDC has signed a collaboration agreement with the Centre for Planning and Development Studies, within the Economic Research Institute of the Faculty of Economic Science of the University of Buenos Aires (FCE-UBA) to conduct a retrospective analysis of legislation and regulations governing the telecommunications and audiovisual services sector.

## 1.2 *Advocacy through sector studies*

Sector studies assist the CNDC in its enforcement work, by identifying possible violations of the competition law. They are also a means for promoting pro-competitive laws or regulatory amendments. An example is the 2007 sector study on the distribution of television programmes in Argentina, which served as a basis for the 2009 Audiovisual Communication Services Law. A current study on the hydrocarbons sector has informed the adoption of targeted interim measures in a conduct investigation.

The CNDC is attached to the Domestic Trade Secretariat and is dependent on it to take forward any CNDC Recommendation directed at the Secretariat or other Ministries. This has not deterred the CNDC from making recommendations. For example, in 2009, it advised the Ministry of Industry to reduce the tariff classification for stainless steel, and in 2012, it made a recommendation on phone number portability between different mobile phone companies.

## 1.3 *Promoting entry of foreign competitors*

The competition authority does not intervene, nor is its opinion sought, in proposals to eliminate or reduce tariff and nontariff barriers, which are under the jurisdiction of the foreign trade authorities. Furthermore, the CNDC is not involved in anti-dumping investigations, which are the responsibility of the Unfair Competition Directorate, attached to the Under-Secretariat for Trade Policy and Management of the Industry and Trade Secretariat of the Ministry of Industry.

## 2. **Agency-related activities: case selection/prioritisation**

### 2.1 *Prioritisation of case work and non-case work*

The CNDC uses a number of criteria to prioritise its work, including the potential harm to consumers, the complexity of the case analysis, a preliminary assessment of the evidence available to the agency, and the feasibility of obtaining new evidence. These criteria are established on a case-by-case basis and are not published.

The budget and staff turnover are the main constraints when selecting and prioritising cases for analysis. This has made it difficult to undertake *ex-officio* investigations. The cost and work involved in dealing with litigation and merger review also undermines effective prioritisation because it is important to assign the best trained staff to these tasks. However, CNDC's budget increases since 2007 are remarkable. In fact, following the recommendations of the Peer Review, the CNDC budget increased 249% during the period 2007-2011, from US\$ 880,839 to US\$

3,076,950; this allowed new positions to be created in the agency, leading to more organised and efficient work. In addition, the increased budget has allowed staff contracts to be extended and salaries to improve.

In terms of prioritisation in the advocacy area, the CNDC has created an investigations and audit unit to strengthen this function. However, as yet there are no full time staff in the unit, which has limited its role to awareness raising seminars and workshops.

The peer review recommended strengthening cartel prosecution activities. Accordingly, the CNDC has prepared a draft amendment to the Law on the Defence of Competition (Law No. 25.156), to introduce a procedure for exclusions from sanction and reductions in the fines imposed. This draft amendment is currently with the Domestic Trade Secretariat and the legislative process is still pending.

Other cartel-related initiatives relate to competition advocacy. The CNDC has given a number of talks in business chambers and associations to raise awareness among their members and institutions of the damage that cartels cause. Transnational cartels that were uncovered through leniency programmes in other jurisdictions are monitored to evaluate whether such conducts could be occurring in Argentina.

## **2.2 *Regular long-term operational planning***

The questionnaire did not touch on this issue.

## **2.3 *Improving the efficiency and effectiveness of investigations***

The peer review also recommended enhancing the efficiency of investigations into anti-competitive conduct. In response, the CNDC has adopted measures such that if the complainant fails to ratify the complaint and the CNDC lacks evidence to proceed with the investigation, the case will be closed. These measure also aim to improve resource allocation.

On mergers, a proposal to raise the notification threshold is under consideration, as recommended in the peer review. The CNDC is also making efforts to shorten the time taken to review both complex and simple transactions.

## **3. Overall assessment of the peer review**

The CNDC credits the peer review with securing it an autonomous budget and enabling it to distribute its resources more effectively on the basis of each unit's

specific needs. Secondly, the recommendation on implementing a leniency programme has been crucial in the preparation of a proposal to this effect.

The CNDC suggests that follow-up mechanisms could be introduced to support the implementation of the recommendations. For example, it suggests that the OECD and the IDB could encourage Argentina's political bodies to send the draft leniency programme proposal to Congress, to get the legislative process started.

## EL SALVADOR

-- Follow-up to the 2008 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The 2008 peer review focused mainly on enforcement work, since the agency had only been in operation since 2006. On advocacy, the review recommended coordinating competition policies with those of the consumer protection agencies, where the Superintendency forms part of the National Consumer Protection System, encompassing 34 institutions.

In fact, El Salvador's competition law contains several provisions enabling the Superintendency to promote competition in the economic reform process. It repealed all legal provisions granting competition powers to the sector regulators; these are now the exclusive preserve of the competition agency. Another provision in the law assigns the Superintendency a role in promoting competition principles in the economic reform process. Its Board of Directors is authorised to issue opinions on draft laws, ordinances and regulations, as well as on public procurement processes that could restrict competition. Although these opinions are non-binding, they have been taken into consideration in several instances, notably in public/private partnership regulation, government procurement reforms, the Cutuport concession and in a new pharmaceutical law. Lastly, the law requires the Superintendency to notify regulators of competition problems stemming from sector regulation brought to light during competition investigations.

The Superintendency is implementing a project with the Office of the Legislative Secretariat of the Presidency (*Secretaría Legislativa de la Presidencia*), to train its staff in conducting competition assessments of draft laws and regulations to identify anti-competitive restraints and request a formal opinion from the Superintendency where necessary.

The Superintendency also issues binding opinions when it is required to pronounce on mergers that are reviewed by other sector authorities, for example in the financial, telecommunications, electricity, air transport and ports sectors.

The Superintendency has been an active competition advocate. It organises training programmes for Congress, the Supreme Court, the Office of the Attorney General, and public procurement regulators and staff. It has carried out numerous studies giving rise to recommendations to regulators and it has issued guidelines and manuals on the significance of public procurement for the economy and the effects of bid-rigging. The results of these advocacy activities have been particularly effective since its direct engagement of government bodies has resulted in regular requests for follow-up opinions. Examples include a request for an opinion from the Institute of Social Services on whether to fix the price for the procurement of pharmaceuticals. The Institute followed the Superintendency's recommendation to avoid price fixing. In another example, as a result of a study on fertilisers, the Ministry of Economy requested an opinion on the labelling of fertilisers to assist trade officials in their negotiations on a Central American technical norm for fertilisers.

## **1.2      *Advocacy through sector studies***

The Superintendency places a high value on sector studies, because they afford it a better understanding of how different markets operate, which is particularly important since the law does not exempt any sector from the competition law. This work is done by the Economic Intendency (*Intendencia Económica*) or the Advocacy Intendency (*Intendencia de Promoción*). Even though the purpose of the studies is not to identify anti-competitive conduct, they serve to monitor how markets operate and detect potential competition problems.

The results of the studies prepared by the Superintendency are communicated to the corresponding government or regulatory bodies. The Superintendency uses the Technical Committee of the Consumer Protection System, which includes government bodies and agencies, as a forum to discuss its recommendations. A number of its recommendations to government bodies have been successful. On the basis of a study on the electricity market, a recommendation to move to a cost-based system was adopted by the electricity regulator. The agency's three market studies on pharmaceuticals informed a new law in the sector, with six out of nine recommendations being taken on board. The Ministry of Economy implemented a recommendation from the liquefied petroleum gas study to refocus the existing government subsidy.

### **1.3 Promoting entry of foreign competitors**

The Superintendency does not participate in processes to eliminate tariff and nontariff barriers, but it has been consulted in specific cases such as technical standards, and it is invited by the Ministry of the Economy to participate in negotiations for free-trade agreements. The agency does not participate in anti-dumping investigations.

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 Prioritisation of case work and non-case work**

When defining case selection and prioritisation criteria, the agency distinguishes between *ex-officio* investigations and those launched following complaints from private parties. The latter must be admitted at least on a preliminary basis. In the case of *ex-officio* investigations, it seems that the prioritisation criteria depend largely on whether sufficient information and evidence can be collected to warrant opening an investigation, although the reply is not clear on this point. There are no explicit prioritisation criteria.

The budget and human resources are insufficient, while the lack of discretion to dismiss complaints is an added constraint in its ability to initiate *ex-officio* cases.

When allocating its resources, the Superintendency takes account of the agency's three major areas: investigation of anti-competitive practices, economic studies (mergers, sector studies and opinions) and advocacy.

### **2.2 Recommendations about prioritisation in the peer review**

No recommendations were made.

### **2.3 Regular long-term operational planning**

No recommendations were made on this subject. However, the Superintendency has used five-year operational plans since it was set up. The plan articulates strategic objectives and sets specific numerical goals for different activities.

### **2.4 Improving the efficiency and effectiveness of investigations**

The peer review underscored the need to implement a leniency programme, which was authorised in the law, so as to improve the effectiveness of anti-cartel efforts. The Superintendency noted that this has been included in a draft reform to

the law in which the leniency programme is being clarified in order to make it operational.

Case settlement mechanisms were removed from the law in 2007. The peer review recommended that these be reinstated and this is under consideration given the value of the mechanism as an efficient way to resolve cases.

Measures to reform the competition law with a view to expediting complaints are also under consideration. Today the Superintendency must investigate all of those complaints that formally meet the legal requirements; the proposed reform would empower the Superintendency to qualify them and to initiate, if required, an *ex officio* investigation.

In addition, in contrast to many other jurisdictions, the agency is considering lowering its merger notification thresholds because the current thresholds are too high for a small economy like El Salvador. Merger that fall below the threshold could be anti-competitive and harmful to consumers.

### **3. Overall assessment of the peer review**

The Superintendency emphasised the importance of the peer review recommendation to focus efforts on fighting cartels, particularly in the case of collusive tenders in public procurement processes as a means of developing an effective anti-cartel programme. The recommendation on improving and strengthening coordination with the consumer protection agency has enabled the Superintendency to form part of the National Consumer Protection System. El Salvador indicated that the peer review would have benefited from a more comprehensive review of advocacy powers and roles, instead of focusing primarily on enforcement matters.



## COLOMBIA

-- Follow-up to the 2009 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic reform and regulatory process***

The peer review noted that the Superintendency of Industry and Trade (SIC) did not have a role in the privatisation process, although it was consulted on the telecommunications regulation. Nonetheless, the SIC is part of the Executive branch, under the Ministry of Commerce, Industry and Tourism (MIC) and it has been involved, for example, in negotiations for free trade agreements since the 1990s. Moreover, like many of the countries reviewed, the competition authority has the statutory power to issue opinions on the potential competition effects of proposed regulatory changes.

The peer review did not recommend defining a formal role for the SIC in the legislative process, because Law 1340 of 2009, which was enacted at the same time as the peer review was conducted, introduced a formal procedure for mandatory prior consultation of the SIC by sector regulators. If the agency's recommendations are not followed, even though they are non-binding, the regulators must clearly state their reasons, which they have done on 17 occasions. Since 2009, the SIC has issued 75 technical opinions evaluating the anti-competitive effects of regulatory proposals in various markets such as financial services, energy, gas, sanitation, communications and aeronautics. The agency also meets with the respective regulator to explain in more detail why a given regulation or standard has adverse effects on competition. The SIC created a Competition Advocacy Group to carry out these functions.

The peer review recommended that the SIC undertake more advocacy work on competition. The SIC has implemented several initiatives including issuing draft guidelines on various topics: the application of the law to trade and professional associations, collaboration between competitors, mergers, and competition

advocacy. A number of consultations on the draft guidelines have been held for regulators, the private bar and business representatives.

### **1.2      *Advocacy through sector studies***

Prior to the 2009 peer review, sector studies carried out by the SIC were used as an internal tool, primarily to define markets in investigations and merger cases. In line with the peer review's emphasis on the SIC increasing its advocacy efforts, the agency will start to use sectoral studies to support its recommendations for regulatory reforms. Two studies finalised recently will be sent to the electricity regulator and the Ministry in charge of healthcare to recommend changes to their respective regulatory frameworks. The SIC expects to publish 17 studies this year, analysing a range of markets such as retail trade, barriers to entry in financial markets and fuel pipeline transportation. Another unit, the Group for Economic Studies, was created in April 2012 to provide empirical support to the investigation teams. This group will also carry out economic studies in a range of markets including electricity, financial markets, coffee and tobacco.

### **1.3      *Promoting entry of foreign competitors***

The Superintendency has no powers with respect to trade remedies, such as antidumping or countervailing duties. It participates in the Customs, Tariffs and Foreign Trade Affairs Committee, which analyses processes to eliminate tariff and nontariff barriers, although the SIC's opinion is non-binding. Experience has demonstrated that the SIC's participation in this Committee has been very irregular, since sometimes it was invited and sometimes not. In any case, the SIC's opinions are informal and are not recorded.

## **2.      *Agency-related activities: case selection/prioritisation***

### **2.1      *Prioritisation of case work and non-case work***

The SIC states that it informally applies a sort of *de minimis* rule and a statute of limitations as a means of case selection and prioritisation. It does not use explicit criteria.

The SIC's budget and staff resources have both grown considerably in recent years. This is not least because since 2008, and re-confirmed by the new law in 2009, the fines imposed by the SIC are returned to the agency as part of its budget. Nevertheless, the SIC still considers its resources insufficient to fulfil all of its statutory functions, especially now that competition enforcement is centralised in the SIC.

## **2.2 *Recommendations about prioritisation in the peer review***

The peer review noted that the SIC is able to abstain from processing “insignificant” complaints. The new law also provides for a new procedure that will speed review of *de minimis* mergers. The peer review recommended an increased emphasis on cartel enforcement.

## **2.3 *Regular long-term operational planning***

No recommendations were made on long-term operational planning. The Superintendency, as part of the government, has to operate within the guidelines of the National Development Plan, which contains the sector policies and plans that the government wishes to promote during the four-year presidential term. It is in this context that the SIC defines its annual activity plan.

## **2.4 *Improving the efficiency and effectiveness of investigations***

In relation to case settlement mechanisms, the peer review advised the SIC to clarify the rules governing the settlement procedure, suggesting that the mechanism had been overused.

The peer review did not make any recommendations for expediting complaints lodged by private parties. Nevertheless, the SIC reported that it has substantially improved its efficiency rate in this respect over the last year.

Law 1340/09 of 2009, approved prior to the finalisation of the peer review report, introduced substantial changes to Columbia’s merger control regime, streamlining the rules and establishing a fast-track procedure. The peer review highlighted some weaknesses with the new regime, in particular the 20% market share threshold criterion, which has resulted in the SIC analysing a large number of transactions. The review also recommended clarifying whether the merger control process was also applicable to vertical and conglomerate mergers. In response, the SIC has issued opinions and draft guidelines indicating that all mergers between firms in the same value chain must be notified.

Law 1340/09 authorised the SIC to create a leniency programme which the SIC proceeded to do. The SIC is currently promoting the programme with various stakeholders. The agency already has unannounced inspections and seizure powers.

## **3. Overall assessment of the peer review**

The Superintendency points to the peer review recommendations on competition advocacy as providing the incentive to upgrade its communication

strategy in line with the suggestions made. A number of new information channels have been developed to inform the public and engage the business sector on the benefits of competition.

The peer review also helpfully identified the need to clarify whether the merger control procedure applied to vertical and conglomerate mergers. As a result, the SIC has launched a public consultation on a draft merger evaluation guideline it has produced.

The SIC pointed out that the peer review's observations on the application of a *per se* rule to all types of conduct did not take into account that although the law prohibits conduct on the basis of its object, in practice, the SIC also analyses the effects of the conduct in question. The SIC also considered that it would be useful if the peer reviews could make more recommendations on the economic analysis used in antitrust cases and merger reviews carried out by the agency.

## PANAMA

-- Follow-up to the 2010 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The peer review did not produce new ideas on how the competition agency could participate in the economic reform process. It noted that the Consumer Protection and Defence of Competition Authority (ACODECO) regularly attends the Ministerial consultative committees as an observer. Here it can indicate whether a violation of the competition law is occurring and advise on how to resolve it. ACODECO has cultivated good relations with the Ministry of Trade and Industry (MCI), which seeks its advice on reducing regulatory barriers, and on the competition chapters of free trade agreements. At MCI's request, the agency participated actively in the design of tendering process for the new container operator at the Pacific port of the Panama Canal. ACODECO's intervention helped to reduce regulatory barriers by including objective participation conditions in the tender documents.

The promotion of competition is a priority for ACODECO and it carries out its statutory advocacy functioning in two ways. First, by publicising the importance of competition among a large number of stakeholders (economic agents, firms, education institutions, consumers, etc.). Second, by recommending the adoption or modification of procedures or requirements in economic sectors.

An important part of the competition advocacy programme consists of undertaking sector studies, through which recommendations are made to the government and regulatory agencies. Also, an official of ACODECO works in the Congress, allowing the Agency to know the content and development of the legal initiatives that might have an impact on competition processes.

## 1.2 *Advocacy through sector studies*

As noted above, sector studies form part of the competition advocacy programme. Since 2006, the agency has produced 26 studies in different sectors, covering issues such as entry barriers in distribution, supermarkets, international trade, professional services, milk, transport, rice, pay-per-view television and oil.

Based on the results of the studies, ACODECO can make recommendations to the government or regulatory authorities, for which purpose it regularly attends the Ministerial consultative committees. Some of these recommendations have been included in economic reform processes, such as the reform of the hydrocarbons market.

The agency survey did not specify whether or how sector studies were also used in investigations into violations of the law.

## 1.3 *Promoting entry of foreign competitors*

With regard to ACODECO's participation in processes to eliminate tariff and nontariff barriers, the agency replied that the government could regulate retail and wholesale prices in exceptional circumstances (products with *ad valorem* import duties above 40%), after consulting ACODECO, although the latter's opinion is not binding. ACODECO does not participate in anti-dumping investigations, which are the responsibility of the MCI.

## 2. **Agency-related activities: case selection/prioritisation**

### 2.1 *Prioritisation of case work and non-case work*

ACODECO's reply on this point described the investigation procedure, rather than specifying the prioritisation criteria used. This description sets detailed how a complaint is handled, which involves a preliminary analysis enabling the agency to decide which cases will ultimately be investigated. Apart from this process to expedite complaints, the agency stated it did not have explicit prioritisation criteria. In any case, prioritisation is conditioned by the legal system, because ACODECO must present all of its investigations before the civil tribunals, which is costly and time consuming. During the session of the LACF, ACODECO expressed that they are working on a project whose goal is to create special courts, the so-called administrative tribunals, to face this problem.

Despite budget constraints, ACODECO considers that its case selection process has been relatively effective, because it focuses on investigating high-impact cases, even though they have to present all of their cases before civil courts.

It still identified a need for more financial resources to adequately fulfil its competition functions.

## **2.2 *Recommendations about prioritisation in the peer review***

The peer review stated that negotiated settlements should be used more frequently, to make the competition system more efficient and expeditious. The questionnaire response also referred to the peer review recommendation that the National Assembly increase ACODECO's budget to enable it to hire extra staff. On this point, the agency noted that the budget allocated to consumer protection policy, which is also implemented by ACODECO, the competition budget has not been increased in recent years.

## **2.3 *Regular long-term operational planning***

The peer review recommended that ACODECO put a long-term operational plan in place, to enable it to set priorities and allocate resources more effectively. Publication of the strategic plan would also make the public aware of the agency's criteria. This recommendation has not been fully implemented due to budget constraints.

## **2.4 *Improving the efficiency and effectiveness of investigations***

As noted above, the agency already had authority to use case settlement mechanisms, which the peer review recommended it make more use of.

Although the peer review did not recommend how to expedite complaints made by private parties, account should nonetheless be taken of its comments on the complaints investigation procedure, which includes a preliminary analysis phase to enable the agency to reject complaints that lack merit.

ACODECO is developing a proposal to amend and raise its merger notification thresholds up to US 50.000.000.

Lastly, the peer review did not make any recommendations in relation to a leniency programme and dawn-raid and seizure powers, since the agency already had those powers. It did however note for them to be effective ACODECO should increase its anti-cartel efforts.

### **3. Overall assessment of the peer review**

ACODECO particularly valued the peer review recommendations relating to competition advocacy, and the need to increase its media coverage and obtain a larger budget.

In relation to issues that the peer review did not cover or recommend, the agency suggested including a section in the peer reviews to provide cross-country comparisons to detail other countries' experiences, notably how they have obtained budgetary increases and how they determine case selection criteria.



## HONDURAS

-- Follow-up to the 2011 OECD-IDB Peer Review --

### **1. Government-related activities: the role of the competition agency in policy formation**

#### ***1.1 Participation by the competition authority in economic and regulatory reform process***

The peer review did not provide new ideas on how the competition agency could participate in economic reform processes, although the Commission for the Defence and Promotion of Competition (*Comisión de Defensa y Promoción de la Competencia* – CDPC) has sought to monitor the development of these processes and issue opinions, either on its own initiative or when consulted.

The law also explicitly gives the CDPC wide-ranging powers to issue opinions or recommendations on draft laws, regulations, decrees, executive agreements, resolutions and international treaties. It points to the recommendations it made on the new draft telecommunications law.

Without prejudice to that power, the peer review explicitly recommended that the CDPC should have a formal role in legislative processes that might affect competition. This has already started to be implemented with the appointment of one of the commissioners to serve as a counterparty vis-à-vis the National Congress to facilitate closer communication and coordination.

With regard to retrospective analyses of laws and regulations, the agency referred to an internal document which it has prepared on competitive restraints in the regulations governing professional associations.

Promoting competition is also a CDPC priority, and is explicitly recognised in the law. The CDPC's activities have focused on advising ministries, particularly the Ministry of Industry and Commerce, as well as the legislature and judiciary. At the same time, it has an educational role with various stakeholders to explain the benefits of competition. In this regard, the CDPC has sent Congress a number of recommendations in various sectors such as pharmaceuticals, energy, liquid fuels,

and credit cards. These have not produced results except in the case of pharmaceutical products, where the Secretariat for Industry and Trade deregulated prices following the CDPC's the recommendation.

### **1.2 *Advocacy through sector studies***

Conducting sector studies is one of the CPC's key tasks. Even though the agency started out in late 2006 it has already published over 20 studies into a wide range of sectors. In most cases it used external consultants to do the studies because agency staff is concentrated in investigatory functions, particularly relating to mergers.

The CDPC formulates recommendations based on the results of its studies, but these have generally not been acted upon, except in the pharmaceutical sector. The agency did not indicate whether the sector studies were also used in investigations of legal infringements.

### **1.3 *Promoting entry of foreign competitors***

The CDPC does not formally participate in processes to remove tariff and nontariff barriers, but it has been invited to participate in negotiations on the competition chapters in free trade agreements.

It does not participate in anti-dumping investigations, which come under the responsibility of the Ministry of Industry and Commerce.

## **2. *Agency-related activities: case selection/prioritisation***

### **2.1 *Prioritisation of case work and non-case work***

The CDPC has criteria for selecting and prioritising its cases. These include various elements such as the availability and existence of evidence, the importance of the sector for the economy, the size and structure of the affected market, consumption levels of the affected product, the existence of market failures and the maturity of the market. These criteria are explicit but they have not been published.

The agency referred to serious budgetary and staffing constraints in fulfilling its functions, which prevents it from selecting and prioritising its investigations more effectively.

Its annual work plan assigns resources more or less equally between the enforcement and advocacy functions.

## **2.2** *Recommendations about prioritisation in the peer review*

The peer review expressly recommended that the CDPC introduce prioritisation principles and criteria, which should be published once they had been duly internalised in the organisation. For these purposes, work is proceeding on medium and long-term strategic planning with support from UNCTAD.

## **2.3** *Regular long-term operational planning*

The peer review recommended that the CDPC put a medium and long-term work plan in place, which would enable the agency to define priorities, allocate its resources more effectively and improve interaction with its stakeholders. As noted above, this recommendation is currently being worked on with support from UNCTAD.

## **2.4** *Improving the efficiency and effectiveness of investigations*

The peer review specially recommended introducing case settlement mechanisms, and the agency included the recommendation in a proposal to be sent to Congress to reform the competition law.

The peer review did not make any explicit recommendations on to how to expedite complaints made by private parties. The review did note that more use should be made of the preliminary analysis stage that enables the agency to declare dismiss complaints that lack merit.

The peer review recommended defining and clarifying merger notification thresholds, since all merger operations are currently notified, which imposes a very heavy workload on the agency. It also suggested eliminating the market share threshold when moving to the second phase. The CDPC has received assistance from the World Bank for this purpose.

Lastly, the peer review recommended introducing a leniency programme and dawn-raid and seizure powers over the next three years, as well as making effective use of the confiscatory powers currently granted by the law, which at the time of the report had not been used for a number of reasons (lack of technological equipment and evidence, among others). The leniency programme is also one of the subjects to be included in the legal reform proposal to be sent to Congress.

## **3. Overall assessment of the peer review**

The CDPC highlighted the value of the peer review in targeting the technical assistance it has received from the World Bank and UNCTAD.

In relation to issues that were not covered or the subject of recommendations in the peer review, the agency suggest including an analysis on the economic and legal foundations of the decisions adopted by the CDPC. It also notes that the peer review recommendation addressed to the government to consolidate all appeals against the same CDPC resolution is unlikely to be implemented as it would entail a major revision of current legislative and administrative procedures.

## APPENDIX: QUESTIONNAIRE

### *I. Government-related activities: the role of the competition agency in policy formation.*

In relation to the first theme, the economic history and context of each country is key. Almost all of the reviewed countries had an entrenched, protectionist and interventionist culture. Even though almost all of these countries introduced economic reforms, including privatisation and liberalisation programmes, in the early 1990s, much remained to be done in terms of privatisation, deregulation or, simply, introducing competition principles into certain economic activities.

#### *Questions:*

- a) Did the peer review provide new insights into the way that the Competition Agency could participate in these processes of economic reforms? If not, how has the Agency sought to involve itself in this process?*
- b) Is Competition Advocacy a priority for your agency?*

*Please briefly explain your experience in advocacy to Government or regulators, including the results of such work. Please also provide any additional comments that you would like to make.*

One avenue available to a Competition Agency for advocating to Government on policy formation is sector studies. In fact, carrying out such studies allows the Agency to have a strong vision of different economic sectors, permitting the authority to make solid recommendations to the government in related activities.

*Questions:*

- a) *What importance does your Agency give to sector studies as an advocacy tool and as a proportion of its overall activity i.e. in relation to enforcement work?*
- b) *Does your Agency give recommendations to the Government or regulators based on the results of these studies?*
- c) *What have been the results?*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

Issuing opinions and recommendations on anti-competitive restraints in proposed or existing legislation or regulations is a key component of intra-governmental advocacy.

*Questions:*

- a) *Did the peer review make recommendations that your Agency have a formal role in reviewing proposed legislation for anti-competitive restraints? How has this been implemented? If not, has the Agency established informal mechanisms to identify and make recommendations on proposed legislation?*
- b) *Has your Agency undertaken retrospective analysis of existing legislation or regulations? Please describe.*
- c) *How successful has this type of advocacy been? What have been the most effective mechanisms to convey the Agency's opinions and commentary to Government?*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

As many markets around the world, especially in small economies, are highly concentrated (with consolidation leading to the possibility of monopoly power and the potential to abuse this power), foreign entry is often the primary source of potential competition.

*Questions:*

- a) *When the Government considers eliminating or reducing tariff and non tariff barriers, does it ask the Agency's opinion?*
- b) *Does the Agency participate in antidumping investigations?*
- c) *What have been the results?*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

## **2. Agency-related activities: case selection/prioritisation**

### **2.1 Prioritisation of case work and non-case work.**

*Questions:*

- a) *Describe in general how you decide on case prioritisation and selection.*
- b) *Do you have explicit prioritisation criteria? Are they published?*
- c) *Is the agency budget and staffing a constraint on the number or scale of cases you undertake? Please provide details.*
- d) *Do you consider work on matters other than competition law enforcement (for example advocacy) when setting priorities, or do you allocate a fixed resource for these other activities?*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

## 2.2 *Recommendations about prioritisation in the peer review.*

### *Questions:*

- a) *Did the peer review make any recommendations on case selection and prioritisation?*
- b) *If so, please describe what happened with the recommendations: steps taken or contemplated to change Agency practice to implement it.*
- c) *If the recommendations have not been fully implemented, describe those parts that have not been implemented and give the reasons why, in your opinion, they have not been implemented.*
- d) *In case the peer review made no recommendation on case selection and prioritisation, please describe what is actually done by your Agency in this context.*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

## 2.3 *Regular long-term operational planning.*

### *Questions:*

- a) *Did the peer review recommend undertaking long term operational planning?*
- b) *If so, please describe what happened with the recommendation, including: what are the steps taken or contemplated to change agency practice to implement it?*
- c) *If the recommendation has not been fully implemented, describe those parts that have not been implemented and give the reasons why, in your opinion, they have not been implemented.*
- d) *If the peer review made no such recommendation, please describe the measures employed to facilitate and implement regular long-term planning.*

*Please briefly explain your experience and provide any additional comments that you would like to make.*



## 2.4 *Improving the efficiency and effectiveness of investigations to assist with prioritising activities and resources.*

*A number of tools and powers can facilitate an Agency's ability to undertake priority investigations/activities more effectively, and progress or conclude investigations more efficiently.*

*Did the peer review make any recommendations aimed at improving the efficiency and effectiveness of investigations, in the following, or other, areas? If so, what were the results?*

- a) Introducing a case settlement mechanism*
- b) Handling and expediting complaints from private parties*
- c) Adopting sufficiently high merger notification thresholds*
- d) Introducing leniency programmes and dawn-raid powers for cartel cases.*

*Please briefly explain your experience and provide any additional comments that you would like to make.*

## 3. Overall assessment

Overall, what was the main benefit of the peer review for the application of competition law and for the promotion of competition principles in your country?

- a) Please provide at least **two** examples of particularly useful outcomes from the review.*
- b) Please provide at least **two** ways in which the peer review turned out not to be so useful, or in which the review process could have been better.*



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## NOTES

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- 1 Mexico's competition policy was also reviewed in 1998, by the OECD Competition Committee, as part of a broader study on regulatory reform. The recommendations on competition made by that study are useful for the purposes of this follow-up.
  - 2 In Mexico, the CFC signed an agreement with the Federal Regulatory Reform Commission (*Comisión Federal de Mejoramiento Regulatorio – COFEMER*) allowing it to review all regulatory proposals put forward by the federal government. In Brazil, a Regulated Markets Working Group was set up between the different regulatory authorities.
  - 3 Available online at [www.ftc.gov/os/2009/01/ftc100rpt.pdf](http://www.ftc.gov/os/2009/01/ftc100rpt.pdf).
  - 4 In addition, it is worth mentioning that the 2009 legal amendments broadened the scope of the FNE's powers with regard to merger control, empowering the FNE to initiate proceedings concerning future transactions, a power formerly limited to closed mergers. Finally, in 2012 an advisory committee on competition policy proposed to the President of the Republic the introduction of a pre-merger mandatory notification system for transactions reaching certain thresholds. (The report is available here: <http://www.economia.gob.cl/wp-content/uploads/2012/07/INFORME-FINAL-ENTREGADO-A-PDTE-PINERA-13-07-12.pdf>)