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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Peru

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Peru¹ --

1. Indecopi² is an institution with autonomy and technical independence, features that has maintained throughout all these years. Its independence was a key point since its creation.³ In this sense, this document described the legal mechanisms and institutional design that has helped to isolate to the Commission for the Defence of Free Competition of Indecopi in Peru from political pressures and to exercise its autonomy and independence. However, it is also cited certain elements of its design that could be improved in order to further strengthen this autonomy and independence.

1. Indecopi: Organizational Structure

2. Both in legal terms as de facto, Indecopi is characterized by being an independent institution. The Executive Order 1033 establishes that Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. And, it is attached to the Office of the Prime Minister.⁴

3. Indecopi is a multi-purpose agency, its mandate includes dispute resolution and law enforcement in other distinct fields of free competition such as bureaucratic barriers; advertising and unfair competition; consumer protection; antidumping and subsidies; intellectual property (copyrights, trademarks, and patents); and bankruptcy proceedings.⁵ The broad mandate of Indecopi, on the one hand has helped to protect the autonomy and independence of the Agency, since it makes it difficult to capture, but on the other hand demand an important level of coordination and economic resources for its proper operation.⁶

¹ This contribution was prepared by the Economic Studies Management of Indecopi.

² The National Institute for the Defence of Free Competition and the Protection of Intellectual Property (Indecopi, by its acronym in Spanish).

³ In the early 1990s, when Peru's market reform began, the reformers feared that government ministries lacked the political will and the technically proficient professionals to implement the new and in some cases complex policies. They concluded that the agencies charged with these reforms should not be subject to ministerial control, should be able exceed normal civil service pay limits in order to hire qualified staff, and should draw on private sector expertise through volunteer advisory councils. (OECD – ICD, 2004; p. 43). WINSLOW, T. (2004). *Competition Law and Policy in Peru: A Peer Review*. Organisation for Economic Co-operation and Development (OECD) and the Inter-American Development Bank (IDB). October 2004.

⁴ Initially, in the 1990's, Indecopi was attached to the Ministry of Industry.

⁵ It is important to highlight that the topics associated with bureaucratic barriers and unfair competition are normally considered as part of competition policy.

⁶ According to Kovacic & Hyman (2012), a multi-purpose agency has certain advantages in comparison to a single-purpose agency. Agencies multi-purposes like Indecopi can develop synergies and lower the costs associated with coordinating policy between separate institutions with related functions, and at the same time provide safeguard against capture, a multi-purpose agency provides a more elusive target for any

4. One of the mechanisms which in practice allow isolating Indecopi of political pressures lies in its own leadership structure. Like many other agencies, Indecopi has a multi-member board, specified in its law. Five-members composed the Board of Indecopi.⁷ The Chairman of the Board is appointed by the President of the Republic, which is proposed by the Prime Minister. All the members are appointed for a fixed five-year term with the option of a renewable term. Its members come from different areas of the public and private sectors. So, the multi-member board offers to Indecopi greater resistance to capture, and heightened legitimacy.⁸ However, there is always a latent risk of unexpected shifts in its policies, since the Board's mandate coincide with the term of the Government, which also lasts five years and appoints the members of the Board.

5. As a result of the broad mandate that was assigned to Indecopi, its functional branch is made up of "quasi-jurisdictional" bodies with two administrative stances. At the first instance, six Commissions and three Offices.⁹ At the second and last administrative stance, a Tribunal made up of four divisions.¹⁰

6. The Board of Indecopi is who proposes the appointment of the members of the Tribunal to the Prime Minister, whose mandate is for a fixed five-year term, renewable once. To be member of the Tribunal is required minimum five-year experience on issues related to the field of competence of the respective Division of the Tribunal. The members could be only dismissal by serious cause.¹¹ The Board is also responsible to appoint the Technical Secretaries and members of the different Commissions whose terms of appointment and dismissal are the same of the Tribunal.

7. Indecopi account also with an administrative branch, led by a General Management Office and nine administrative offices whose main function is to provide the needed resources for the proper development of the quasi- jurisdictional bodies' task.

industry group. KOVACIC, W., & D. HYMAN. (2012). *Competition Agency Design: What's on the Menu?* Public Law and Legal Theory Paper N° 2012-135. (p. 9).

⁷ Two members are appointed by the Prime Minister, and the remaining are appointed by the Minister of Economy and Finance, the Minister of Foreign Trade and Tourism, and the Minister of Production, respectively.

⁸ It is noteworthy to note that the Board of Directors is the highest authority in the administration. It is headed by the Chairman, who acts as institutional representative of Indecopi. The Chairman's task is to establish general policies, manage the institution's image and lead the task of promotion and communication. This body receives the support of an Advisory Council, made up of outstanding and prestigious experts in the public and private sectors that are linked to the role played by Indecopi. The members of the Advisory Council are appointed for a fixed three-year term and may be ratified by an additional period.

⁹ Bodies that are in charge to promote the standards and laws that permit the proper development of the economic agents in the market, guaranteeing that their actions are focused towards the respect for the rights of consumers, the regulations on fair and honest competition, and every form of intellectual property.

¹⁰ The Tribunal review the appeals filed by the parties against a ruling or resolution that ends at the first instance, solves complaints filed against the Commissions, against the Competition Tribunal or any official who works in them, on alleged deficiencies in the processing of a legal action. Additionally, this Division rules on requests for clarification, extension and amendment. Each Division is empowered to process and resolve proceedings on competition, consumer protection, intellectual property and bankruptcy respectively.

¹¹ Additionally, Indecopi's law mention that are grounds for vacancy: demise, permanent disability, retirement accepted, legal impediment after the designation, unjustified absences to three consecutive sessions or to five no consecutive sessions in a year, and dismissal for serious misconduct.

8. In this sense, the design of Indecopi seeks to preserve the autonomy of its functional agencies vis-à-vis the administration. In view of that, we thought that this conception significantly reinforces the technical and autonomous nature of the decisions being taken by each functional body of Indecopi.

2. The Competition Authority and its Independence

9. Under this scheme, the agency of competition is one of the functional bodies of Indecopi. Being the National Competition Authority in Peru the Commission for the Defence of Free Competition (the Commission) and its Technical Secretariat.¹² It is important to note that in spite of the fact that the Commission is an autonomous legal body and is independent from the Competition Tribunal in their handling of individual cases, they must follow procedural guidelines and mandatory precedents issued by the Tribunal.¹³ In addition, given the internal distribution of the functional bodies, the Commission is an independent party of Indecopi and from its Chairman in handling its formal proceedings, however is subordinate to Indecopi's Chairman on policy issues (such as the desirability of amending the Competition Act).

10. With regard to tasks accomplished by each competition instance in Peru, in general terms the Technical Secretariat is in charge of the investigation of possible wrongdoing and to perform Market Studies, while the members of the Commission decide on issues related to the determination of culpability, the imposition of fines and the actions of advocacy for competition. In the case of the Competition Tribunal, this body review the appeals to decisions of the Commission, and rules on requests for clarification, extension and amendment.

11. In 2008, was issued the new law of Organization and Functions of Indecopi by the Executive Order 1033¹⁴ that strengthened the autonomy of the Commission, and for the rest of commissions, setting a fixed five-year term for the members that made up the Commission¹⁵, renewable once, stating clearly that the dismissal only applied for serious cause.¹⁶ The previous law of Indecopi did not provide for a fixed term for the Commissioners and that were subject to removal without cause. This represents a significant change to isolate the Commission of political pressures.

12. Two additional factors that strengthen the autonomy and independence of the Commission are: first, the period of its tenure, that has not relationship with the period of the presidential mandate as is the case of the Board despite the fact that both have a five-year term; and secondly, by its reputation, throughout all these years Indecopi, and its Commissions are identified by economic agents as "island of efficiency"¹⁷ with authentic autonomy of political power.

13. Although, there may be doubts in regard to the advantages or disadvantages of being attached to the Executive Branch, in technical terms this relationship has not had any major influences in the autonomy of the Commission, by contrast this relationship has been an important means to communicate

¹² The Commission enforces the law in all sectors except telecommunications, where it is enforced by the sectoral regulator, Osiptel (Organismo Supervisor de la Inversion Privada en Telecomunicaciones).

¹³ Whose decisions can be appealed to the Division with Jurisdiction over Defence of Competition of the Tribunal, commonly called the Competition Tribunal.

¹⁴ Executive Order that replaced the Executive Order 25868 from 1992.

¹⁵ The Competition Commission has four-members, all of them part-time.

¹⁶ See footnote -11-.

¹⁷ For example, among other public entities that are considered Islands of efficiency are the Ministry of Economy and Finance, the National Superintendence of Customs and Tax Administration, the Central Reserve Bank of Peru, etc.

the Agency's view regarding legislative proposals that could affect -positively or negatively- the competitive development of various sectors of the Peruvian economy, and to promote its advocacy studies. Last year, the Agency received a strategic support of the Ministries of Economy and Justice to include within the amendment of the Competition Act, the mandatory response to the recommendations made by the Commission in its Market Studies to public authorities, recognizing the importance of the role that plays the Commission to promote the defence of free competition in Peru.

14. the Commission is autonomous in the exercise of its authority to investigate infringements and prosecute violations, however, although rarely, the Congress has made public pressures to initiate ex officio investigations to control prices in sectors such as petrol stations, passenger land transport or medical products, the Commission has explained why cannot initiate investigation by excessive prices. However, under specific circumstances of public interest grounds, the Commission could prioritize certain subjects. It is important to note that as an accountability action, the Commission has an internal policy to publish the results of its actions to the public.

2.1 Budget

15. The self-financing is always considered an important means to insulate the Agency from the political process. In this sense, Indecopi is authorized to collect and retain user fees, fines, and anti-dumping duties, but should follow the guidelines of the National System of Public Budget when formula its annual budget. Exceptionally, in recent years, public financing has never exceeded 15% of Indecopi's budget.

16. The main source of revenues come from fines and anti-dumping duties collected which account for about 45% and 20% respectively. The other part comes mostly from user fees that are charge for intellectual property registrations and bankruptcy work, and from fees paid by private parties who filed complaints with Indecopi. In this regard, the Agency is aware from the temptations or incentives that could arise when an entity is self-financing through fines, but despite the recent increase in the participation of fines within the budget¹⁸, the risk of a perverse behaviour that might undermine public trust in the integrity of a competition agency's decisions is minimal, the increases of the fines within the budget participation is due to the high number of (small) fines that have been imposed in administrative procedures of consumer protection. Procedures that are initiated at the request of consumers, being the average fine small.¹⁹

17. The current budget allocated to the Commission is short, the investigations and handling of cases require substantial human resources that the Agency needs to properly develop its functions. For example, in 2015 Indecopi's budget was USD 48.3 million and about USD 0.9 million was assigned to the Commission and its Technical Secretariat, i.e. 1.9% of Indecopi's Budget.²⁰ In this sense, the multi-purpose mandate of Indecopi has become the main constraint for the proper funding of the Commission, due to the scarce resources that collects Indecopi and because most of the resources are often assigned to intellectual property and consumer protection tasks.²¹

¹⁸ Ten years ago the participation of the fines was less than 15% of Indecopi's revenues.

¹⁹ The number of claims have increased from 6.958 cases in 2010 to 21.297 in 2015.

²⁰ Or 4.8% if it considered the budget of the other branches of Indecopi related to competition activities, such as the branch of the Tribunal in charge of reviewing appeals to decisions of the Commission, and the internal team of the Economic Studies Management that focuses in market assessment activities. Although it is worth to mention that the Tribunal also reviews appeals in proceedings on advertisement, bureaucratic barriers and antidumping.

²¹ The resources allocated to the fulfilment of Indecopi's mandate may depend, among other things, volume of procedures that are handled by each unit, mandates that demand offices at national level or resources

18. In this regard, to strengthen the role and the importance of promoting free competition in the country, the Commission seems to require a separate budget allocation, and a complementary funding through the national budget, since the currently resources allocated to the promotion and enforcement of competition in Peru is lower than other developing countries with comparable or even smaller GDPs.²²

2.2 *Internal staff*

19. The Commission staff are the members of its Technical Secretariat which in fact is who decides with autonomy on its staffing needs, recruitment, career progress of the staff and on the termination of the working relationship. The members are selected on the basis of their experience and knowledge of competition policy. However, in all cases the terms for recruitment and dismissal of staff must follow the Public Service Act. In the case of the members of the Commission, who are appointed by the Board of Indecopi, is possible a multidisciplinary composition, members may have different but complementary expertise, such as competition policy, economics or administrative law.

20. The internal design of the Commission combines lawyers and economist into a single office. Currently, the Commission and its Technical Secretariat has a staff of 26 employees: 14 economists, 11 lawyers and one member that provide administrative support. Includes the four Commissioners that work part-time for the authority. In the case of the second administrative instance, the Competition Tribunal has assigned 11 employees assigned to review the appeals to decisions of the Commission: seven lawyers, three economists, and one member that provide administrative support.²³

21. Although, in recent years the Commission staff has increased²⁴, the 26 employees remain scarce for the proper handling of its formal proceedings, to initiate *ex officio* investigations, and advocacy initiatives.²⁵ It is important to point out that the number of positions allocated to the Commission is set by the internal administration of Indecopi, which in turn requires the authorization of the Ministry of Economy to increase the Commission staff.

22. Finally, the Commission not only is limited by its short budget and staff, also faces problems to retain its staff that has gained some experience, due to offers of high salaries for trained individuals. Despite the efforts of the administration to improve the conditions and work environment of Indecopi and of the Commission staff. The levels of salaries remain unchanged since 2008, when the Government in turn decided to set ceilings on the salaries of several institutions, including Indecopi, that measure is difficult to reverse in the current time due to the important level of deficit fiscal that has inherited the present Government.

already committed in performance-based budgeting programs of the Ministry of Economy, as are the cases of consumer protection and intellectual property.

²² See: OECD-IDB (2007). *Peer Reviews of Competition Law and Policy in Latin America: A Follow-Up*. Argentina, Brazil, Chile, Mexico, Peru. (p. 23).

²³ Though it is worth to mention that the Tribunal also reviews appeals in proceedings on advertisement, bureaucratic barriers and antidumping.

²⁴ In 2003, the Commission had an authorised staff of seven professionals.

²⁵ Further detail on the proceedings and investigations in progress is presented in the Annual Report of Competition of 2015.

Conclusion

23. In general, the Commission enjoys technical autonomy and independence, that not only is set in the law of Organization and Functions of Indecopi, in practice the Commission has developed mechanisms to isolate themselves from political pressures. Its decisions and cases have always been enforced and valued. Being the Competition Tribunal and the Judicial Court Specialized on Competition that have issued opinions under the review of appeals on decisions of the Commission.

24. Although Indecopi is attached to the Office of the Prime Minister, it does not receive pressures from the Executive Branch, in fact, the Commission has received the endorsement from this branch to promote its advocacy initiatives. The constraint to the Commission's independence comes from the economic resources, despite that Indecopi is self-financing with user fees and fines that collects, due to its broad mandate, the budget is insufficient for the proper defence of free competition in the country, requiring an additional source of funding.

25. There is no doubt that the Agency has been able to exert its autonomy in all these years, however there are still certain elements of its institutional design that could be improved in order to further strengthen the autonomy and independence of the Commission.

SUMMARY

Indecopi is a multi-purpose agency, enforcing laws from different bodies, such as free competition, consumer protection, advertising and unfair competition, intellectual property, among others.²⁶ It is governing by a multi-member board that is appointed by the Executive Branch for a fixed five-year term, renewable once. Dismissal could apply in case of a serious cause.

Besides, Indecopi's law stated that Indecopi has an independent legal status of internal public law and enjoys functional, technical, economic, budgetary and administrative autonomy. The broad mandate of Indecopi, on the one hand has helped to protect the autonomy and independence of the Agency in all these years, since it makes it difficult to capture, given that a multi-purpose agency provides a more elusive target for any industry group, but on the other hand demand an important level of coordination and economic resources for its proper operation.

Under this scheme, the agency of competition is one of the functional bodies of Indecopi. Being the National Competition Authority in Peru the Commission for the Defence of Free Competition (the Commission) and its Technical Secretariat. In general terms the Technical Secretariat is in charge of the investigation of possible wrongdoing and to perform Market Studies, while the members of the Commission decide on issues related to the determination of culpability, the imposition of fines and the actions of advocacy for competition. The Competition Tribunal, the second administrative instance of Indecopi, review the appeals to decisions of the Commission, and rules on requests for clarification, extension and amendment.

In general, the Commission enjoys technical autonomy and independence, that not only is set in Indecopi's law, in practice the Commission has developed mechanisms to isolate themselves from political pressures. For example, the members of the Commission are appointed by the Board of Indecopi by a fixed five-year terms, renewable once and dismissal apply only in case of a serious cause. Two additional factors have strengthened the Commission's autonomy in all these years. The fact that the period of tenure of its members has not relationship with the period of the presidential mandate as is the case of the Board of Indecopi, despite that both have a five-year term, and its reputation, Indecopi and its Commissions are identified by economic agents as "island of efficiency" with authentic autonomy of political power.²⁷ That is why its decisions and cases have always been enforced. Being the Competition Tribunal and the Judicial Court Specialized on Competition the only ones that issued opinions under the review of appeals on decisions of the Commission.

Although Indecopi is attached to the Office of the Prime Minister, it does not receive pressures from the Executive Branch, in fact, the Commission has received the endorsement from this branch to promote its advocacy initiatives. The constraint to its independence comes from the economic resources, despite that Indecopi is self-financing with user fees and fines that collects, due to its broad mandate, the budget is insufficient for the proper defence of free competition in the country, requiring an additional source of funding. So, there is no doubt that the Agency has been able to exert its autonomy in all these years, however there are still certain elements of its institutional design that could be improved in order to further strengthen the Commission autonomy and independence.

²⁶ Other areas of enforcement are bureaucratic barriers; antidumping and subsidies; and bankruptcy proceedings.

²⁷ The Commission staff is its Technical Secretariat, which decides on the recruitment policies of its own staff, under the Public Service Law.