

# The Standing of Competition Authorities vis-a-vis Civil Society

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Competition enforcement is played out not only in a court of law but also in the court of public opinion. Both “courts” pass judgement on the merits of a case, determine its outcome and who are the winners and losers, and influence the standing, stature and financing of the competition authority. While the legal process of a court of law determines the predictability and reliability of a competition authority, the sustainability of such authority rests on public opinion and the political process. The best competition law, top-qualified agency staff, efficiency-grounded, well-reasoned decisions and a top-notch agency fall short if consumers and civil society at large do not understand, know, believe and demand competition.

Understanding the difference between the nature and sources of a competition authority’s technical (legal/economic) standing and the nature and standing of its political standing is vital to devise adequate institutional strategies. Sometimes the most cost-effective, efficiency-enhancing enforcement action is not politically sustainable and could, in fact, be counterproductive for the agency. Other times, what is politically correct and timely is not necessarily legally viable. On other occasions the newsmaking interest of the press openly collides with the confidentiality requirements of certain investigations, business secrets or prospective actions. Correctly understanding the dynamic, interests and mechanisms of both the political and technical (legal/economic) aspects of a competition authority’s actions involves a careful balancing act. No competition authority is immune from having to ably address the concerns and interest of both the technical and political fronts. While separate and distinct, these two fronts are not independent from each other. They need to be appreciated in their entirety for a competition authority to act effectively, enhancing its stature and, above all, improving the general welfare in a sustainable manner.

There are four major distinctives that characterize the difference between technical and political standing and illustrate the need for different approaches to each. These four distinctiveness are as follows: (i) target/audience, (ii) standards, (iii) players/brokers, and (iv) means.

## **1. Target/audience**

While the target of competition enforcement actions (i.e., businesses) is clearly identified in any given case, their beneficiaries (i.e., consumers and the public at large) are generally not. Thus, businesses affected by competition enforcement are free to directly oppose the competition authority’s actions both on the docket and in the court of public opinion. Being well organized and resourced, as well as knowledgeable about how to influence the political process, businesses tend to have their voice heard and can easily and effectively affect the competition authority’s standing and stature. In the case of Peru, for example, the poultry industry under investigation by Indecopi for alleged price fixing and other competition violations, launched an intensive advertising campaign against Indecopi and was able to effectively influence news coverage. Procter & Gamble took a similar course after Indecopi ruled against its suit to restrict comparative advertising only to objectively verifiable data (in a ruling holding such a test to be effectively a market access barrier). In both cases, several trade associations also piggy-backed on the initiative to criticize Indecopi and placed smaller ads in the major newspapers. These two cases show that well-designed advertising by respected companies and trade associations send a strong message to the market that can

diminish the standing of the competition authority, which normally does not have the funds, flexibility and experience to engage in advertising campaigns.

Consumers, on the other hand, and civil society at large, are not directly engaged or involved in the competition enforcement process. In addition, they generally do not fully understand the implications of competition enforcement, tend to be poorly informed and are unaware of their rights. Thus, the media, and particularly news coverage, tend to influence heavily their opinion making process. The foregoing is particularly critical for a competition authority in the case of economies in transition where a long tradition of government intervention in the economy, price fixing by inefficient entrepreneurs, lack of effective individual rights-based enforcement and absence of a consumer empowerment culture pose a cultural challenge to effective competition law and policy implementation.

The experience of Peru<sup>1</sup> is quite telling in this regard because it shows that an effective trade liberalization, deregulation and privatization process will not be perceived as successful by the local community (i.e., the voters) and thus will create pressures against market regulators, competition authority and the government at large if no greater communication and public education effort is under way. There is nothing illegitimate about foes of competition policy taking out advertisements or building other tools for civil society policy debate. But competition authorities cannot stand on the sidelines of that debate and somehow expect competition policy to prevail.

## **2. The standard: Predictability vs. perceptions?**

Predictability of decision-making is a benchmark criterion for the courts. Predictability is, in turn, based on a correct, consistent and coherent application of the law – competition law being the standard and legal and economic analysis the tool, in this case.

The standing of a competition authority vis-à-vis civil society, however, derives from a more subjective test: perceptions and public opinion. Commonly held personal ideas, popular beliefs and the prevailing market culture influence public perceptions. News coverage, the role of the media more generally and, in turn, as stated earlier, the role of advertising and anti-competition authority lobby-based campaigns determine the stature and standing of the competition authority. Personal experiences and information or the lack of understanding about competition policy or the agency also play an important role in this regard.

Thus, the political and technical (legal/economic) aspects of competition enforcement are subject to two very different standards. While lawyers, economists and competition professionals are well versed in the legal/economic aspects of competition law enforcement, adjudication and implementation, generally few understand and focus on the communicational, PR, political and strategy-based implications of competition policy enforcement.

## **3. The Players**

The players on the technical side of competition enforcement are generally lawyers, (industrial organization) economists, judges and entrepreneurs. The rules of the game are generally known from the outset, and the players tend to know each other through professional affiliations, academic interests or other personal contacts.

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<sup>1</sup> The case of the privatization of the electrical sector in Peru is analyzed In Appendix A.

The players in the court of public opinion are diverse and different. They are not known from the outset and the process is not fixed *ex ante*. Multiple volatile factors can impinge on the outcome, and winners and losers can easily change positions. Political capital is an expendable asset with no guarantee of recovery.

For purposes of this analysis and to assist in devising an effective institutional strategy, I propose to focus on two key subgroups of civil society players: (i) journalists and the press and (ii) citizens who contact the agency. Each of these groups plays a key role in determining the perceptions of the competition authority.<sup>2</sup>

#### a. Press

In the case of Peru, Indecopi used various strategies to disseminate information. For example, it collected and published information on the time that people had to wait in line in different banks, thereby empowering customers with information and creating incentives for banks to begin competing on the basis of faster customer service. It launched a prize for journalists who wrote on competition policy; it trained school teachers and had an effective press office charged with assisting the press 24 hours a day, which included individual consultations, group training, press kits, and executive summaries targeted toward journalists for each legal decision. Some progress has been made. Part of the population is becoming more aware of consumer rights. There are some indications that consumers are becoming more sophisticated. Suppliers are becoming increasingly concerned about quality and service to the customer. There are changes in the information provided through advertisements and labels, and firms increasingly have toll-free phone numbers or customer service offices, and so on.

A few years ago, it was difficult to imagine consumer rights issues on the front pages of the newspapers. Now there are even pages exclusively concerned with these issues. Something similar is happening on the radio and TV. Consumer associations have also become more important.

In the end, although progress has been made, a “cultural” change still has to take place. If not, compliance with market regulation will be limited. Rules and enforcement are not enough, at least not in a reasonable period of time. Agents need information, explanation, and even training to change their parameters of analysis. This includes the State.

Why are dissemination campaigns not sufficient to address this problem? There are two key factors to consider. Agents do not have enough information readily available to understand the rules and the system and to make (informed) decisions. If information is only received through those particular campaigns, or only remains in the hands of a few already “converted” agents, little progress can be expected. Additionally, information reaches the majority of the population through a third party, i.e. the media. If journalists are not knowledgeable about competition issues and do not have incentives to cover these issues in the news, the effect of dissemination campaigns will be severely limited.

Journalists should receive special consideration by a competition authority. For most people, a costly search for information is not justified, and the most

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<sup>2</sup> Research being conducted by the author seeks to provide a detailed and comprehensive matrix of competition-relevant civil society actors, as well as other competition stakeholders. For now, however, the two subgroups discussed in this outline are illustrative.

inexpensive and direct source of information that they receive is through the news. If the issues one wants to disseminate are poorly covered by the media, or, even worse, not covered at all, it is very hard (or prohibitively expensive) to reach the majority of the population with the necessary frequency. The media should be considered a key ally in the dissemination efforts.

However, one has to consider what the incentives are for journalists to cover competition issues. They are usually not very appealing. Articles on competition issues are not particularly effective at generating better ratings or increasing readership. Rather, the issues are complex and technical in nature. All this means that covering these issues has high costs and low benefits for the media. Convincing journalists that these are important issues to discuss may be of help, but one cannot trust that the problem is going to be solved in this way. More ingenious methods should also be used to achieve the goal in the shorter term. A contest designed to recognize and reward high-quality news coverage of competition issues realigns incentives more attractively. It would also create the opportunity to deliver knowledge to journalists, in particular if the prize involves training in competition issues, e.g., an international study tour.

The Peruvian experience shows that competition information has to be available, if not for everybody, for those most directly affected by the competition process – and in language that can be easily understood. In addition, the media needs positive incentives to report on and educate themselves about competition issues.

**b. Citizens who contact the agency**

After an initial adjustment program, generally the benefits of adopting a competition-based economic system take time to be “seen and felt” by the population at large. Over time, reform fatigue tends to affect the political process, and competition policy’s sustainability will depend in part upon popular and elite perceptions regarding value-added. Thus it is imperative to communicate in a timely manner the nature, effects and benefits of the competition process

But this alone is insufficient. No communication campaign will be effective if the public does not perceive improvements in the services and treatment offered. The Peruvian experience shows that any effort to improve the quality of services offered to the public flows directly into a better popular positioning for the particular services at issue and, in this case, competition processes.

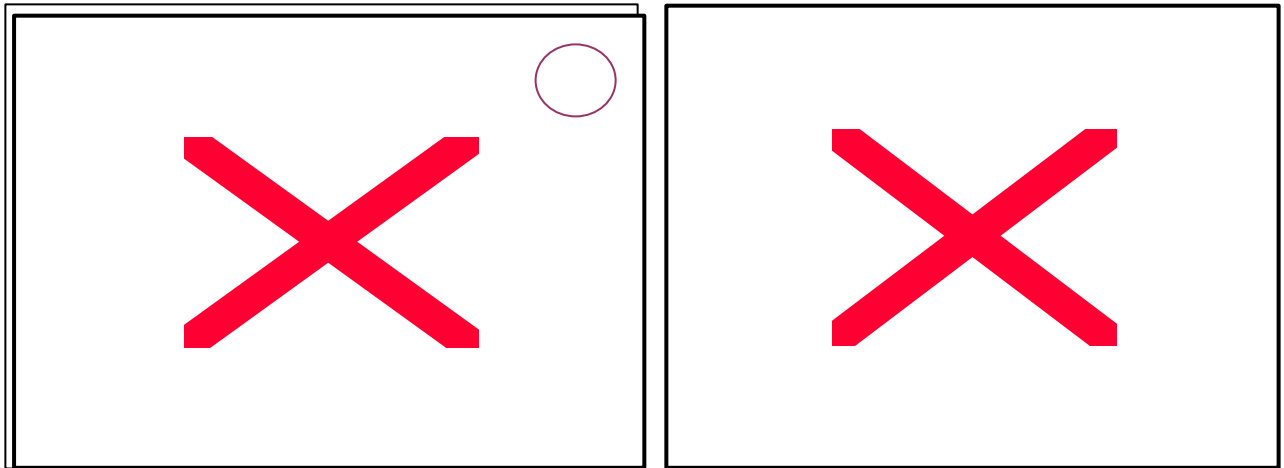
How does the typical citizen relate with the provider of government services? Though many factors influence popular perceptions regarding privatization, competition and the quality of government services, the personal treatment that users receive from government employees is one of the most decisive factors. Each time that a consumer has a complaint but no forum for expressing it, is unable to obtain necessary information, receives incomprehensible data or instructions, confronts endless red tape and bureaucracy, waits excessively before being attended, or is otherwise mistreated, the perception that the State is useless grows stronger.

How can client service by competition authorities be improved? – through the design, implementation and monitoring of a public attention and claims processing system that works efficiently nationwide. This requires viewing the user of government services (especially the user of services provided by regulatory agencies) as a client, just as that same individual is viewed as a

client by the businesses that also provide him or her services. The simplification of government filings and the predictability and transparency of government service provision are the tools of modern public management. Conciliation mechanisms and attention to the specific information needs pin-pointed by the public are components of an efficient system of dispute resolution. In order to be successful in the market, a private business must listen to its clients, keep them informed and guarantee high-quality service. The same is true for the State and public service utilities.

Each time a citizen requires information or contacts the agency, the competition authority has the unique opportunity to sell and position its “gospel” and “convert” one more to its cause. Though difficult to measure, the multiplying effect of providing citizens with effective VIP treatment in terms of goodwill and positive interpersonal communications is significant, perhaps even more than ten times over. This effect is particularly strong in societies like Peru’s, in which the consistency and intensity of opinions formed through personal experience and relationships far surpasses the power of passive news coverage and other impersonal forms of opinionmaking.

For example, Indecopi (whose jurisdiction includes not only competition policy but also consumer protection and intellectual property) launched a public help desk with a call center and toll free number, extending nationwide through fourteen branch offices. In 2000, the service assisted more than seventy thousand individuals and succeeded in settling more than two-thirds of the claims filed. It is in no small part because of efficient programs of this sort that Indecopi benefits from such significant grassroots support, having twice been recognized in independent polls as the most respected institution in the public and private sectors (see Appendix B).



Appendix A:

**Case study: Peruvian Privatization of the Electrical Sector**

En el caso de la privatización eléctrica de 1994, en el Perú, por ejemplo, se contó con un marco legal orgánico que promovía la inversión privada y establecía las bases de un sistema de regulación modernos a cargo de un regulador con facultades legales y financieras, que comenzó a operar en 1996. La privatización eléctrica, a su vez, logró importantes resultados para el erario nacional, captando importantes volúmenes de inversión (aprox. US\$ 2 mil millones de ingresos acumulados al 2001) por parte de operadores de primer nivel internacional que mejoraron significativamente los índices de prestación del servicio eléctrico. Según data oficial, la cobertura creció de 68% en 1994 a 92% en 1996; pérdidas de energía decrecieron de 19% a menos del 14% del total de energía producida; el número de clientes creció en 30% desde 1994; y la venta de energía eléctrica se incrementó de 8.3 mil GW .h en 1993 a 12.4 en 1997.

Y sin embargo, hoy la población estaría dispuesta a volver a estatizar las empresas eléctricas, y tiene una imagen desfavorable del rol del regulador y de la privatización. Ello, entre otras razones, porque no se implementó oportunamente un sistema de atención y comunicación con el público usuario.

¿Le parece mejor que el precio de... sea libre o sea fijado por el Estado?					¿Las siguientes empresas deben seguir siendo privadas o aprobaría usted que se vuelvan a estatizar?				
	Año	Precios libres	Precios fijados por el Estado	No precisa		Año	Deben seguir siendo privadas	Deben volver a estatizarse	No Precisa
La Electricidad	1999	26	72	2	Edelnor	2000	32	49	19
	2000	28	69	3		2001	22	60	18
	2001	24	74	2	Luz del Sur	2000	32	49	19
				2001		22	61	17	

Apoyo Opinión y Mercado, Perú, abril del 2001 (1516 entrevistados)

En términos de opinión pública, una de las lecciones de los noventa está referida, por un lado, a reconocer que la privatización habría permitido el ingreso de nuevos capitales y que habría significado modernidad, tecnología y un mejor servicio a los usuarios, pero que su implementación no habría sido muy auspiciosa. En efecto, según los focus groups realizados por Apoyo prácticamente todos los entrevistados

*“enfatan los aspectos negativos de la manera cómo se implementaron las privatizaciones en el país. Por ello las consecuencias habrían sido esencialmente negativas. En primer lugar, generaron despidos e intensificaron la desocupación. Igualmente, para la mayoría de la población – usuaria de los servicios privatizados – significó un alza de tarifas; en general, fuera del alcance de los sectores populares y de difícil acceso para los sectores medios. El hecho que se generaran monopolios se considera una perversión del sistema que es particularmente resaltado en algunos grupos. Estos aspectos negativos se agudizaron porque el control económico de las empresas quedó en manos de extranjeros sin ningún compromiso con el país y su*

*desarrollo, responsabilidad que recae en el gobierno que debería haber sido quién regule y limite la actividad de estas empresas. “ (Apoyo, “Lecciones de los 90 y expectativas para el 2001-2006”, setiembre del 2001, pág. 18 y siguientes).*

Después de más de un lustro de estar en operación, la percepción de los reguladores también deja mucho que desear. Un estudio cualitativo hecho por Casvalco S.A. el año pasado a nivel nacional a más de 260 líderes de opinión locales arroja que éstos no sólo desconocen el rol de los organismos reguladores sino que tienen poca confianza en la tarea que éstos realizan. El estudio destaca:

*“Para ellos [los entrevistados], estas instituciones [los organismos reguladores] siempre han estado más cerca de las grandes empresas que de los usuarios. (...) Mencionan que lo que más se escucha en sus ciudades son quejas y lamentos por la mala atención e ineficacia de los organismos reguladores. (...) La mayoría de entrevistados refirieron que cuando les ha tocado realizar una denuncia o reclamo, o cuando otras personas lo han hecho, se han encontrado con procedimientos que no ofrecen ninguna garantía de transparencia, ni seguridad de que el reclamo sería adecuadamente resuelto.” (Casvalco, “Actitudes hacia los organismos reguladores”, enero 2001, pág. sin numerar).*

El mismo estudio refiriéndose a la opinión de un periodista arequipeño, bajo el epígrafe “Codearse con la nata” cita:

*“Yo no desconfío de los reguladores porque crea que son corruptos, no. Creo que son físicamente imperceptibles, comprobadamente ineficientes, extremadamente técnicos, burocráticamente lentos, y socialmente insensibles. Les gusta mucho codearse con la nata y dar disposiciones en un lenguaje que seguramente les infla exponencialmente el ego cuando las terminan, aunque nadie las entienda. ¿Cómo puede usted entonces confiar en una institución a la que no ve, a la que no puede llegar y a la que no entiende?”*

y citando a un periodista trujillano el informe de Casvalco resalta la “cultura del formulario” que caracteriza a la burocracia reguladora:

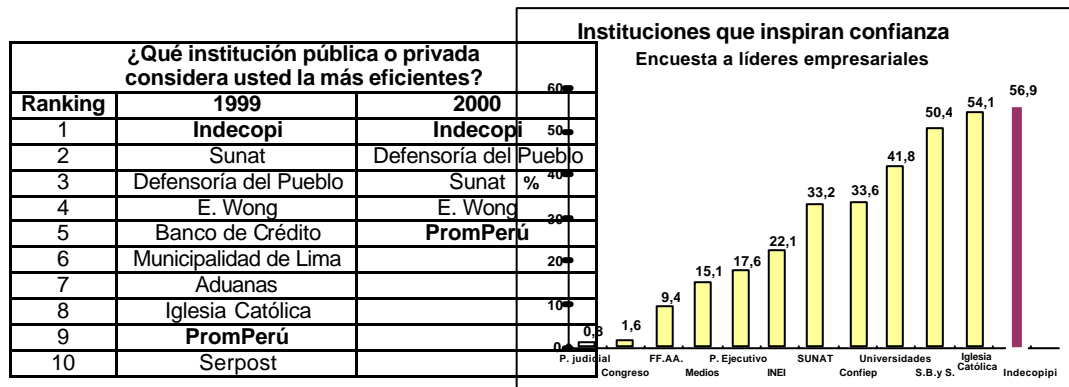
*“Los reguladores... viven la cultura del formulario ... o sea, descargue en el papel, envíelo y olvídese, si tiene suerte le contestamos y si no tururú...”*

El propio estudio de Casvalco S.A antes citado, denota, sin embargo, una buena percepción de las plataformas de atención al ciudadano administradas por PromPerú y por Indecopi:

***“Algunas de las personas consultadas dijeron tener algunas buenas referencias del Servicio de Protección al Consumidor en Piura, Trujillo, Arequipa y Cusco; del Servicio de Protección al Turista en Cusco, Puno y Trujillo...”***

## Appendix B

En el 2000 Indecopi fue considerada por segundo año consecutivo como la entidad más confiable y eficiente del país por la prestigiosa *Encuesta del Poder* que publica anualmente Apoyo, gozando de reconocimiento y respaldo popular.



Fuente: Encuesta del Poder, 1999-2000  
Revista Debate, Apoyo Comunicaciones S.A.