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Colombia

1. Introduction

1. This contribution explores both: the roles of Colombian regulatory agencies and the Competition Authority, and, their relationship when assessing market dynamics within a unitary and decentralized state framework.

2. In accordance with OECD, the independence of regulatory agencies can be assessed by addressing - among other aspects but not limited to -: **(i)** budget independence, **(ii)** conditions for dismissal of the head of the regulatory agency, **(iii)** appointment of members/head of the regulatory agency by the parliament or by the legislature **(iv)** accountability and reporting to executive, legislature, or representatives from a regulated industry, and **(v)** faculties to set tariffs or price-setting by the executive power.¹

- **Role clarity and responsibility:** role clarity, relations with the executive and other public bodies, conflict resolution, outreach, strategic foresight, and information and understanding.
- **Transparency and accountability:** accountability to public bodies, transparency on stakeholder management, feedback to stakeholders, and appeals.
- **Financial independence:** source of funding, identification of needs, length of budget appropriations, budget decision, budget appropriation, financial management, expenditure controls, budget reallocation criteria, external audit, and internal audit.
- **Independence of leadership:** nomination, appointment, board mandates, conflict of interest rules, and termination.
- **Staff behaviour:** recruitment, incentives, integrity and freedom of action, and career development.

3. Colombia's 1991 Political Constitution (henceforth, the "Constitution") switched the role of the State in regards with the provision of public utilities. Before 1991, the Colombian State was expected to directly guarantee the provision of public utilities to all inhabitants, mainly, through State-owned companies. Following 1991, the State moved on from its sole provider-role to a provider/regulator-role based² on neoliberal theories.

¹ OECD (2014). The governance of Regulators: Being and Independent Regulator.

² According to Colombia's 1991 National Constitution, the State power is divided into three main branches: the judiciary, the executive and the legislative. In addition to these branches, there are other independent organisms, such as the Public Ministry, the Comptroller of the General Republic and the National Electoral Council. The Public Ministry has the role of safeguarding and promoting human rights, protecting the public interests and supervising the official conduct of those who perform public functions. The Comptroller of the General Republic has the duty of supervising and controlling the exercise of the functions assigned to the administration. The National Electoral Council has the function of organizing, directing and supervising the elections. The Constitution on its article 365 states that the State holds the right to regulate, command and supervise the provision of public utilities, and that this task was assigned to the President (chief of the executive branch of

4. Given the new role of the State in the field, multilateral organizations, such as the OECD, have looked to promote independency of regulatory agencies, considering their expected positive impacts on the quality of the regulatory output. The Colombian experience could be characterized by regulatory agencies which, to some extent, are accountable to the Executive Branch of the Government.
5. Colombia's competition authority role in relation to the protection of free market competition has gained importance during the last decade, especially through the promotion of competition advocacy. This function has implied the study of projects developed by regulatory agencies with the objective of protecting market competition. Despite the non-binding character of the recommendations made by the SIC in relation to the proposals made by regulatory agencies, these agents have studied and implemented many of the competition advocacy recommendations.
6. The increasing independence of the more recent regulatory agency created to regulate the communications sector will serve as an experiment to determine the relationship between regulatory agencies independence and the recognition of the role played by the competition authority regarding the protection of market competition.
7. To conclude, from the experience on the interaction of the RA's with the SIC, in general terms there is a need of an adequate legal architecture that allows open but independent exchanges among the RA's and the CA's in the direction of finding a balance between objectives and purposes chased by both parties all which are expected to be considered within the proposed regulations. In other words, competition and regulation cannot be understand separately.
8. This contribution is organized as follows: **(i)** in first place, an outlook on Colombian Regulatory Agencies ("RA's") dawn and its current legal framework is described; **(ii)** in second place, is presented an outlook on the Colombian Competition Authority ("CA") and its powers and faculties in accordance with the valid legal framework; **(iii)** an overview on the linkage between the RA's and the CA is shown and, finally, **(iv)** some queries and challenges for further discussion are presented, based on the recent experiences related to the regulatory issuance process since de CA's view.

2. Outlook on Colombian Regulatory Agencies ("RA's")

9. Colombia's 1991 Political Constitution (henceforth, the "Constitution") switched the role of the State in regards with the provision of public utilities. Before the Constitution the State was expected to directly guarantee the provision of such services to all the inhabitants, mainly, through State-owned companies as in many other latitudes around the globe.³ Hence, following 1991 the State moved on from its sole provider-role to a

the State) who had the duty of defining the general policies for the administration and control of efficiency of public utilities.

³ Bel, Germa. (2009). The First Privatization Policy In A Democracy: Selling State-Owned Enterprises In 1948-1950 Puerto Rico. Documents de Treball (IREA), N°. 15, 2009.

Gómez Ibáñez José. Regulating Infrastructure. Monopoly, Contracts and discretion. Harvard University Press. 2003

provider/regulator-role based⁴ on neoliberal theories⁵, this means, as it is stated in article 365 of the Constitution that: **(i)** the State is allowed to provide public utilities as a mean to fulfill its purposes if the private sector does not, and, **(ii)** the State shall only act regulating markets if economic failures are identified (under this standpoint the RA's should act as a substitute of the markets).⁶

10. The new path meant the introduction of private investment in sectors traditionally headed by the State and thus, the beginning of private provision of public utilities in line with the most recent international developments in the field.⁷ However, private participation in the provision of public utilities is constrained to the rules and statements contained within the valid legal framework, generally speaking, to the Laws 142 of 1993 and 143 of 1993 also known as “The Public Utilities Statute” (“PUS”) and “The Electricity Sector Statute” (“ESS”).

11. In addition, Article 370 of the Constitution establishes that the President can delegate the attributions included therein to the RA's (article 68 of the PUS). Therefore, through PUS and ESS, the RA's in Colombia were created under the Independent Agencies of the U.S. model⁸. This means the incorporation of certain entities with high technical capacities and independency with the purpose of seeking social wealth through specific

⁴ According to Colombia's 1991 National Constitution, the State power is divided into three main branches: the judiciary, the executive and the legislative. In addition to these branches, there are other independent organisms, such as the Public Ministry, the Comptroller of the General Republic and the National Electoral Council. The Public Ministry has the role of safeguarding and promoting human rights, protecting the public interests and supervising the official conduct of those who perform public functions. The Comptroller of the General Republic has the duty of supervising and controlling the exercise of the functions assigned to the administration. The National Electoral Council has the function of organizing, directing and supervising the elections. The Constitution on its article 365 states that the State holds the right to regulate, command and supervise the provision of public utilities, and that this task was assigned to the President (chief of the executive branch of the State) who had the duty of defining the general policies for the administration and control of efficiency of public utilities.

⁵ Decker, Christopher. *Modern Economic Regulation: An Introduction to Theory and Practice*. Cambridge University Press, 2015. Part III.

⁶ According to Colombia's 1991 National Constitution, the State power is divided into three main branches: the judiciary, the executive and the legislative. In addition to these branches, there are other independent organisms, such as the Public Ministry, the Comptroller of the General Republic and the National Electoral Council. The Public Ministry has the role of safeguarding and promoting human rights, protecting the public interests and supervising the official conduct of those who perform public functions. The Comptroller of the General Republic has the duty of supervising and controlling the exercise of the functions assigned to the administration. The National Electoral Council has the function of organizing, directing and supervising the elections.

⁷ Citation of one article about the evolution of the role played by the state in relation to the provision of public services.

⁸ Pimiento Echeverri, Julián. *Las comisiones de regulación en Colombia. Anatomía de una institución*. At: <http://dx.doi.org/10.18800/derechopucp.201601.00>.

regulations “isolated”⁹ from the dynamics of the political field.¹⁰ Specifically, article 69 of the PUS established the incorporation of the following RA’s: **(i)** The Commission for the Regulation of the Energy and Gas (“CREG” for its Spanish acronym)¹¹, **(ii)** The Commission for the Regulation of Water Supply and Basic Sanitation¹² (“CRA” for its Spanish acronym), and **(iii)** The Commission for Telecommunications Regulation (today in process of amendment as a result of Law 1978 of 2019)¹³ (“CRC” for its Spanish acronym).

12. Regarding the independency of the Colombian RA’s, the PUS and the ESS state some mechanisms with the purpose of guaranteeing its independency such as: **(i)** financial and administrative autonomy, **(ii)** plurality in decision making, **(iii)** a tight regime on incompatibilities and debarments, **(iv)** a fixed period for the commissioners without the chance to be reappointed. Despite such features all which try to safeguard the RA’s independence, for some academics those aspects reflect a grade of autonomy, but not, a characteristic of independency itself under the precepts (as the OCDE precepts) of what an independent RA means.¹⁴

13. On the other hand, a recent experience illustrates an increasing awareness about the importance of higher levels of independency among regulatory agencies, the other branches government and the agents being ruled. The Law 1978 of 2019 modified the structure of the Communications Regulation Commission (henceforth CRC) integrating the regulators of audiovisual contents and communications. Additionally, the Law also improved the level of independency of the Commission by reducing the influence of the Central Government on the election of its members.¹⁵

⁹ Nonetheless, authors like Hertdog in its paper “Review of economic theories of regulation” presents a wider standpoint in regards with the motivations for regulating network industries such as the public utilities industry. At: https://www.uu.nl/sites/default/files/rebo_use_dp_2010_10-18.pdf

¹⁰ Núñez Forero, Felipe. “Servicios Públicos domiciliarios, telecomunicaciones e infraestructura”. Universidad Externado de Colombia. 2018. Pg. 197.

¹¹ CREG has the duty, among others, of “regulating the activities of the sector of energy and fuel gas with the objective of guaranteeing an efficient energy supply, allowing competition in the sector, promoting the necessary measures to prevent abuses of dominant positions, and looking to gradually liberate the market aiming to attain higher levels of market competition.”

¹² CRA has the responsibility, among others, of “promoting market competition among suppliers of water and basic sanitation, or regulating monopolies offering these services, when competition had not been possible, with the goal of allowing that the operation of the monopolist and competitors be economically efficient, preventing the abuse of dominant positions, and producing quality services.”

¹³ The attributions of the CRC were ruled under Law 1341 of 2009 which corresponds to the general regime for Telecoms in Colombia. Law 1978 of 2019 (which modernizes the Information and Communication Technologies (ICT) sector, distributes competences, creates a single regulator and lays down other provisions) creates a unique regulatory stage in charge of regulating information, communications and technology markets.

¹⁴ Núñez Forero, Felipe. “Servicios Públicos domiciliarios, telecomunicaciones e infraestructura”. Universidad Externado de Colombia. Pg. 206

¹⁵ Law 1978 of 2019 (which modernises the Information and Communication Technologies (ICT) sector, distributes competences, creates a single regulator and lays down other provisions)

3. Outlook on Colombian Competition Authority (“CA”)

14. Superintendence of Industry and Trade (or *Superintendencia de Industria y Comercio* for its Spanish nomination or “SIC” for its Spanish acronym) is the Colombia’s antitrust authority. In accordance with Law 1340 of 2009 and the Decree 4886 of 2011 (the Competition Regime or “CR”) some of the functions of the SIC are: **(i)** Advising the National Government and participating in the definition of public policies in the matters of consumer protection, market competition, intellectual property and protection of personal data; **(ii)** Enforcing of the antitrust regime; **(iii)** Establishing the sanctions for the violation of the antitrust regimen; **(iv)** Studying the impact on competition of specific regulations, prior to their expedition.

15. Generally speaking the SIC was conceived through the Decree 2974 of 1968 within the Colombian administrative structure as part of the executive branch, nonetheless, was until the issuance of the Decree 2153 of 1992 that the SIC adopted most part of the powers and attributions held today. Such amendment of the SIC attributions was the answer to the State’s modernization policy in 1991 promoted under the Government of President Cesar Gaviria Trujillo.

3.1. Competition advocacy

16. The function of competition advocacy had already been defined, prior to the Decree 4886, by the Law 1340 of 2009 which claimed that regulatory agencies had the duty of notifying the SIC of the regulatory projects developed by them and to consider the recommendations made by the Authority. The agencies whose regulatory administrative acts have to comply with the competition advocacy process are the ministries, administrative departments, superintendencies, especial administrative units and public establishments of the national order,¹⁶ and the regulatory administrative acts have to be notified to the Competition Advocacy Group (hereafter, the Group) of the SIC are those that can impact free market competition, that is, those which: first, have the objective or the effect of reducing the number or the variety of market participants in one or several relevant markets, and second, those requiring firms or consumers to behave in a certain way or modifying the conditions under which previous obligations imposed by laws or administrative acts will be enforced, when they have the objective or the effect of restricting firms’ ability to compete, their incentives to do so, or limiting consumers’ choices in the market or the information available to the latter.¹⁷

17. The regulatory agencies are not obliged to follow the advice made by the Group of the Authority; however, regulatory agencies have to elaborate on the reasons for diverging from the recommendations made by the Group.¹⁸ Colombia’s Council of State¹⁹ has established that the non-compliance with the competition advocacy process by regulatory

¹⁶ Decree 1074 of 2015 (by means of which the Regulatory Decree of the Trade, Industry and Tourism Sector is issued). Article 2.2.2.30.2.

¹⁷ Decree 1074 of 2015 (by means of which the Regulatory Decree of the Trade, Industry and Tourism Sector is issued). Article 2.2.2.30.3.

¹⁸ Law 1340 of 2009, Article 7. Congress of Colombia.

¹⁹ According to Colombia’s Constitution, the Council of State is the organ, belonging to the judicial branch, that is in charge of resolve judicial controversies arised between any State entity and any individual or corporation.

agencies would imply the invalidity of the administrative act based on the non-fulfillment of its legal requirements.²⁰

4. Linkage between RA's and CA throughout the execution of sectorial regulations

18. Based on the aforesaid in sections 2 and 3.1 of this contribution we present some examples with the purpose to show how the RA's and the CA operates throughout the regulatory process.

4.1. The case of Basic Sanitation

19. The Commission for the Regulation of Water and Basic Sanitation (henceforth CRA) proposed a resolution allowing the definition of exclusive geographic markets for the delivery of the cleaning service and restricting the offering of lower prices by suppliers, when compared to the highest price defined by the norms. According to the proposal, the assignment of the exclusive geographic markets was going to be determined by the local authority, without resorting to competitive mechanisms. The CRA argued that the intervention was designed mainly to avoid free riding by certain suppliers that were not offering the cleaning service in public areas or that were not complying with their obligations, and to promote further efficiencies in the market (characterized as a natural monopoly).

20. Despite recognizing that the sanitation market had failures, the Competition Advocacy Group of the SIC made recommendations, some of which were followed by the CRA. For instance, the Group recommendation of eliminating the prohibition of offering lower prices made to suppliers was eliminated from the definitive resolution.

4.2. Automatic National Roaming

21. The CRC proposed a resolution eliminating the fee in charge of communication providers using automatic national roaming (henceforth RAN). This fee benefited the communication suppliers that owned the infrastructure being used. The Group recommended the modification or elimination of the proposal arguing that it would allow some agents, especially those with the lower investments in infrastructure, to behave as free riders, discouraging investment in the medium and long term. The CRC acknowledge the negative effect that such a measure could have on market competition and modified the way the article in line with the recommendation made by the Group and by other market agents.

4.3. Renewable Energy auctions of 2019

22. The Ministry of Mines and Energy (the "MME" by its Spanish acronym) enacted the Law 1715 of 2014 with the purpose of establishing the policies to include renewable energy sources to the electricity generation matrix. Pursuant to such Law the MME along with the CREG and the Unit of Mining and Energy Planning ("UPME" by its Spanish acronym) issued several rules with the purpose of launching the so called "Renewables Auction". In regards with the various rules issued by the MME, CREG and UPME, the

²⁰ Council of State, Consultation Room and Civil Service, Opinion of the 4th of July of 2013; Council of State, Administrative Litigation Room, Decision of April 30 of 2018.

Advocacy Group of the SIC made some recommendations focused on: **(i)** the need of guaranteeing to all the market agents equal conditions for their participation in the auction, **(ii)** the need to guaranteeing the mechanisms for an efficient price setting for all the long-term contracts that were signed as a result of the auction, **(iii)** the need of guaranteeing that the tariff schemes associated to the charges collected from the final users of the electricity service (regulated users) avoid any potential exploitive effect in the consumers wealth. As a result of such recommendations, the MME, CREG and UPME incorporated the major part of the recommendations through various amendments to the rule's projects. Is important to notice that on October 22nd UPME carried out the auction awarding 12.000.000.000 Mw approximately (COP\$95 per Kw/h) all which represents almost 10% of the total demand of energy in Colombia.

4.4. Radio exprectrum auction of 2019

23. The Ministry of Information and Communications Technologies (MinTic for its Spanish acronym) (in accordance with Law 1978 of 2019) called and auction with the purpose to award certain number of licenses for using the radio expectrum in the ranges of 700 Mhz, 1900 MHz and 2500 MHz for a period of 20 years. Fulfilling what is stated in Law 1340 of 2009, the MinTic sent to the SIC's Competition Advocacy Group the project of Resolution through which the auction would be called. As a result, the SIC issued various recommendations addressed to: **(i)** clarify the wording of the Resolution in order to avoid misinterpretations and potential anticompetitive effects derived from such circumstance, **(ii)** stablish equal conditions and obligations in regards to the remuneration for the usage of the radio expectrum among the companies awarded, **(iii)** provide public information to the market concerning to certain conditions of the auctions in order to guarantee transparency , and thus, appropriate conditions and incentives for the participation of the market agents.

5. Conclusion

24. The recognition of the role of market competition as a mechanism to attain social wealth and the paradigm shift related to the role of the state regarding the provision of public utilities has required the development of a new role in the market by the State. The new role played by the State in relation to the provision of public utilities has put regulation of the market behavior of private agents at the center of the debate. Colombia has been part this trend, while experiencing the creation of new regulatory agencies, and, lately, an improvement on their levels of independency from the other Branches of the Government and from the other stakeholders.

25. Regarding the relationship between RA's and the CA, in recent years the role of the CA has started to gain in importance due to the promotion of the function of competition advocacy. The Competition Advocacy Group of the CA has been assigned the duty of studying and making recommendations about the market effects of regulations proposed by RAs. Despite the non-binding character of the CA's recommendations, RAs have considered and implemented many of the guidelines, while aiming to attain their specific objectives in relation to the provision of certain goods and services to the economy.

26. Colombia's experience illustrates the importance of an adequate legal architecture that allows open but independent exchanges among the RA's and the CA in the direction of allowing the pursue of public policy objectives, while protecting the principles of a

market economy. To conclude, competition and regulation cannot be understood as substitutes but as two different fields that allow the attainment of a better quality of life to all of Colombia's inhabitants.

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