

# 8 Transparent governance

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Transparency is one of the elements that fosters trust, reduces conflicts of interest and limits the possibility of new social conflicts arising. This chapter covers the practices and organisational structures that OEFA has in place regarding the appointment of officials, funding schemes and its relationship with other institutions, which aim at increasing the transparency and accountability of the agency. Moreover, this section includes an assessment of the governance structures and policies in place and offers recommendations to further improve the performance of OEFA.

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*Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management. The execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded (OECD, 2014<sup>[1]</sup>), (OECD, 2018<sup>[2]</sup>).*

Senior management of enforcement and inspection institutions should be appointed in a transparent way, based on professional competence, and minimising political interference. Chief executives and other senior managers in charge of inspection and enforcement structures should be selected for their professional competence, specifically as managers. To this aim, selection and appointment processes should be transparent, including clear criteria, open advertisement, balanced selection committee rather than appointment by one sole senior political official without scrutiny to minimise political interference.

Key decisions, changes in processes, procedures and structures should require collegial decisions and/or external scrutiny, avoiding excessive instability and discretionary managerial power. Strategic focus requires that senior managers have only limited powers to impose changes single-handedly to inspection institutions. Significant changes should require decisions by a collegial body—preferably an external, independent board.

Stakeholders should be consulted and represented in the governance of inspection and enforcement institutions, e.g. through a management board or similar structure. Consultation of stakeholders should be the norm at least for strategic decisions. This can be done through formal ad hoc consultations and/or through permanent representatives in a board-type structure.

Inspection and enforcement structures should have missions, powers, procedures and funding mechanisms that exclude, to the extent possible, conflicts of interest and conflicting goals. There are many ways in which mandates and missions, or funding mechanisms can create conflicts of interest for inspection and enforcement. For example, when funding is linked to the number of inspections, or when an agency provides payable, competitive services and has simultaneously regulatory enforcement powers, amongst others.

Decisions at all levels should be made based on transparent criteria and processes, allowing for consistency in enforcement decisions, and accountability. The aim is not only to ensure consistency between different officials, regions, amongst others, but also accountability.

Strategic decisions and changes should continue to require political approval from the legislative and executive branch. However, operational decisions should be made “at arm’s length” and shielded from political interference. Strategic decisions include defining the institution’s goals and objectives, performance indicators, risk and compliance strategies, methodological documents, structure, high-level resource allocation, and terms of reference of staff. The executive or legislative branches of government, as appropriate, should approve the latter. Operational decisions, which implement these strategic decisions, should be left strictly to the professional staff and management, without interference from political office-holders or other parties.

## Management of OEFA

OEFA reports to the Ministry of the Environment and quarterly and annual statistical reports are duly published (OEFA, n.d.<sup>[3]</sup>), (OEFA, n.d.<sup>[4]</sup>). The Ministry of the Environment approves the National Plan of Environmental Action and the Multiannual Strategic Plan of the Environment Sector and OEFA is responsible for the preparation of the Institutional Operational Plan and Strategic Institutional Plan of the agency.

The relevant legislation and institutional regulation (e.g. SINEFA Law and OEFA Functions Organization Regulation<sup>1</sup>) foresee the appointment rules for OEFA’s management. The President of the Board of Directors is appointed by means of a Supreme Resolution based on a proposal from MINAM.<sup>2</sup> The

appointment of OEFA's management is to be done in a transparent way, based on professional competence, following a public call for tenders, and minimising political interference. Senior management is appointed by resolution of the Board of Directors, following a competitive recruitment process. In practice, members of OEFA's leadership—i.e. the President and the members of the Board of Directors, as well as Directors—demonstrate competence, understanding of their mission and commitment to transformation of the institution.

OEFA's Board of Directors approves collegially the institutional policy, strategic plan, supervision and enforcement rules on processes and procedure (see in particular Art. 9 of the Functions Organization Regulation) to avoid excessive instability and discretionary managerial power.

The current members of the Board have academic and consulting background. However, there is no legal requirement to have stakeholder representatives from the public and private sectors, civil society, or academia in the governance of OEFA, such as in the capacity of members of an advisory body, different from the board. *Ex ante* public consultation on regulations prepared by OEFA is carried out as foreseen by the relevant regulation (Art. 21ff of the Regulation on Transparency, Access to Environmental Public Information and Citizen Participation and Consultation in Environmental Matters<sup>3</sup>). In 2018, feedback on draft regulations appeared to be regularly received from the private sector, the civil society and the general public (78 comments on a total of eight drafts, based on data provided by OEFA). As mentioned in Chapter 4 on Risk focus and proportionality, all legal acts, regulations and instruments prepared and adopted by OEFA are made accessible to the public for *ex ante* consultation. The online publication is often followed by Commentators' meetings. Responses to comments provided are publicly available through the comments' matrix published online.

Systematic engagement with stakeholder groups in the governance of OEFA – even only in an advisory capacity – in addition to *ex ante* consultation would be beneficial. Indeed, this would be an important step forward to build trust among the different actors, ensure that their needs and views are heard and considered (not only when preparing a draft, but during regular operations of the agency), and to overall increase the transparency and independence of the institution and of the environmental enforcement system more broadly.

## Measures to avoid conflicts of interest and conflicting goals

The gradual consolidation and transfer of functions into OEFA as the main inspection and enforcement authority in charge of protecting the environment and as the governing body of the entire system reflects the political will to avoid conflicting powers and missions between different public institutions in charge of the same regulatory area.

One of the stated objectives of the reform process is also to separate for the same regulatory sector (i.e. environment) licensing powers from inspection and enforcement powers. In this sense, licensing powers will remain in the ministries and OEFA will consolidate the inspection and enforcement efforts. While a number of countries have pursued similar reforms, there is no strong evidence that this separation is beneficial from an effectiveness perspective. It could conceivably be beneficial in particular cases, when licenses are strictly revenue generating (e.g. mining concessions), and there would be a risk of conflicting purposes between licensing (revenue) and inspections (safety, environmental protection). In many cases, dividing licensing and inspections has led to increased fragmentation, reduced availability of professional competences at the licensing stage, and made information sharing and management more difficult. The institution in charge of safety inspections can issue safety-focused licenses, as the two processes are aligned and not in conflict.

The objective of separating licensing from inspections is thus not reflected in the OECD Regulatory Enforcement and Inspections Toolkit (OECD, 2018<sup>[2]</sup>), nor in this Review criteria. Rather, the review team noted that environmental licensing and permitting appears still far too pervasive, which is likely to contribute to high administrative burden and informality (see Chapter 3 on Selectivity).

OEFA receives funding from the budget allocated by the government and from the Regulatory Contribution paid by companies operating in the energy and mining sectors, which represents approximately 80% of the resources, according to OEFA<sup>4</sup>. The corresponding fee is calculated through a transparent and published methodology approved by Supreme Decrees No. 096 and 097-2016-PCM<sup>5</sup> and on the basis of the monthly turnover of the regulated entity, after deduction of relevant taxes (in particular the Tax on general sales). The payment digital.

Additionally, OEFA is partly funded by imposed fines (up to approximately 7% of its total budget, as reported by OEFA). The SINEFA Law, Art. 27.c establishes this mechanism. International experience has shown that the use of penalty fines to fund enforcement institutions bring strong perverse incentives. This applies even when fines only represent a relatively minor part of the total financial resources. First, this methodology does not ensure a stable, long-term funding, as the volume of income collected from fines is not (or should not be) predictable.<sup>6</sup> Second, it incentivises the institution to find as many violations as possible, and to impose fines in all cases, thus contradicting objectives of risk-proportionality and compliance promotion. On the contrary, if compliance is maximised, violations will fall—and if sanctions are risk-proportional, fines will not be imposed in all cases.

OEFA argues that the functional and administrative management of the institution has been designed to ensure that such perverse incentives do not occur in practice—i.e. first instance decisions can be reviewed by three levels of independent tribunals and the rate of decisions upheld by the judiciary are of over 90%. Nonetheless, international experience strongly suggests that this practice is not appropriate and another funding source should be used, to avoid such bias in incentives. This recommendation does not only apply to OEFA, but to any other inspection and enforcement authority in Peru.

On the positive side, OEFA seems to benefit from long-term support from the government, translating into an adequate and generally stable budget allocation. However, this may not necessarily be true for all EFAs.

OEFA has been developing processes, guidelines and criteria to ensure consistency and independence from political interference in planning and operations—e.g. PLANEFA and corresponding guidelines, regulation and guidelines on inspections, methodology to assess non-compliances, and calculation methodology for fines, amongst others,

There are however several areas of potential improvement:

- The criteria triggering 'special' inspections based on requests from other authorities could be further clarified, as interference in OEFA's operational decisions could take place.
- Prioritisation criteria and data analysis need to be improved, to promote data-driven planning and reduce the influence of the political salience of complaints.
- While there is a well-established procedure for businesses to report emergencies, the subsequent assessment process to decide whether a 'special' inspection is needed remains uncertain. Moreover, reports on emergencies may come from other sources, and the relevant reporting procedures are often unclear. Instances were reported where there was in fact no real emergency, whereas staff were already sent on site because of lack of proper prior assessment. Clear and specific criteria for assessing emergencies could help avoid or reduce such instances. This would also help limit the risk of excessive executive discretion on this matter.

## Assessment

Governance structures and strategic decision-making processes of OEFA support transparency and accountability. However, OEFA could benefit from systematically including representatives of different stakeholder groups (private sector, civil society, amongst others,) in the governance of the agency, particularly when it comes to discussing strategic priorities and transformations.

Although OEFA's funding comes primarily from the governmental budget and regulatory contributions from companies in specific regulated sectors, all other funding mechanisms should exclude conflicts of interest and incentives. It is preferable to avoid using fines as a source of funding.

OEFA has displayed significant efforts to develop processes, methods and criteria for consistency and independence of operational decisions. These efforts should be continued. In particular, mechanisms for "special" inspections should be made more transparent.

## Recommendations

- Consider stakeholders' systematic engagement in the governance of OEFA. This would be an important step forward to build trust among the different actors, ensure that their needs and views are heard and considered, and to overall increase the transparency and independence from political influence of the institution and of the environmental enforcement system more broadly. Options that might be considered include setting up an advisory body, strengthening the participation of stakeholders in the preparation of regulatory instruments and in asking for feedback on public reports.
- Fines, ideally, should be excluded as a source of funding to avoid any bias in incentives for the agency. The Government of Peru may consider withdrawing allocation of fines to fund the agency from the legislative framework.
- An assessment system of intervention requests from other authorities should be developed and used. It is important to consider reforms to the legal framework, which obliges to systematically trigger an inspection in the face of such requests. Criteria for both cases should be very clear to ensure transparency and accountability.

## References

- OECD (2018), *OECD Regulatory Enforcement and Inspections Toolkit*, OECD Publishing, Paris, [2]  
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 on 15 October 2019).

## Notes

<sup>1</sup> *Reglamento de Organización y Funciones del OEFA*, approved by Supreme Decree No. 013-2017-MINAM, [http://www.oefa.gob.pe/?wpfb\\_dl=26390](http://www.oefa.gob.pe/?wpfb_dl=26390).

<sup>2</sup> There are currently three members in OEFA's Board of Directors, in addition to its President (see: <https://www.gob.pe/institucion/oefa/funcionarios>). However, the relevant legislation and regulation however provide for an additional member of the Board, also appointed on the basis of a proposal from MINAM.

<sup>3</sup> *Reglamento sobre Transparencia, Acceso a la Información Pública Ambiental y Participación y Consulta Ciudadana en Asuntos Ambientales*, approved by Supreme Decree No. 002-2009-MINAM, <http://www.minam.gob.pe/disposiciones/decreto-supremo-n-002-2009-minam/>.

<sup>4</sup> This funding mechanism is established by law (Law No. 30011, amending SINEFA Law, <http://www.minam.gob.pe/disposiciones/ley-n-30011/>).

<sup>5</sup> See: <http://www.minam.gob.pe/disposiciones/decreto-supremo-no-096-2016-pcm/>; and <http://www.minam.gob.pe/disposiciones/decreto-supremo-no-097-2016-pcm/>.

<sup>6</sup> If it becomes predictable, as seen in some countries, it means that the institution is setting a “fines target”, and inspectors “find” violations on its basis. This is a practice contrary to the core principles on enforcement and inspections promoted by the OECD.



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