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OECD-IDB PEER REVIEWS OF COMPETITION LAW AND POLICY: ECUADOR



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Foreword

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

The OECD and the IDB have collaborated on a series of reviews of competition law and policy regimes in LAC since 2003. Peer reviews are a core element of the OECD's activities and 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 essential part of this process, as well as an important tool in strengthening competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance. This is consistent with the policies and goals of the OECD and the IDB to support pro-competitive policy and regulatory reforms, which will promote economic growth in LAC markets.

Peer reviews are a regular part of the LACCF. In 2007, the LACCF assessed the impact of the first four peer reviews conducted at the LACCF on Brazil, Chile, Peru and Argentina, and the peer review of Mexico, which was conducted at the OECD's Competition Committee. The Forum then 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 LACCF's 10th anniversary. In 2014, Costa Rica became the 10th country to have its competition regime peer reviewed and in 2018 Peru, the 11th. In 2019, El Salvador underwent peer review at the LACCF meeting in Honduras, the latest country to be reviewed before Ecuador.

The OECD and the IDB would like to thank the government of Ecuador for volunteering to be peer reviewed at the 18th LACCF meeting on 29 September 2020. The report was prepared by Felipe Irrarrazabal (Director CentroCompetencia, Universidad Adolfo Ibáñez and former National Economic Prosecutor, Chile), Despina Pachnou (Competition Expert, OECD) and Jordi Calvet-Bademunt (Competition Analyst, OECD), with the assistance of Rosario Montiel (economist). The project team received inputs from Pedro Caro de Sousa and Iratxe Gurpegui, from the OECD Competition Division. Antonio Capobianco, Acting Head of the OECD Competition Division, provided overall guidance. Lynn Robertson, of the OECD Competition Division, oversaw the process and planned the discussion at the LACCF, with the assistance of Claudia Gemmel and Angélique Servin. Tom Ridgway edited the report for publication, and Paulina de la Vega translated it into Spanish.

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Abbreviations and acronyms

| Abbreviation | Full name | Name in Spanish |
|---------------------|--|--|
| ANT | National Transit Agency | Agencia Nacional de Tránsito |
| ARCH | Hydrocarbon Regulation and Control Agency | Agencia de Regulación y Control Hidrocarburífero |
| ARCOTEL | Telecommunications Regulation and Control Agency | Agencia de Regulación y Control de las Telecomunicaciones |
| ARCSA | National Agency for Health Regulation and Surveillance | Agencia Nacional de Regulación, Control y Vigilancia Sanitaria |
| CAN | Andean Community of Nations | Comunidad Andina de Naciones |
| CN | Cervecería Nacional | Cervecería Nacional |
| CNDC | National Commission for the Competition Defense, Argentina | Comisión Nacional de Defensa de la Competencia, Argentina |
| CNMC | National Commission of Markets and Competition, Spain | Comisión Nacional de los Mercados y la Competencia, España |
| CNT | National Telecommunications Corporation | Corporación Nacional de Telecomunicaciones |
| COFECE | Federal Commission on Economic Competition, Mexico | Comisión Federal de Competencia Económica, México |
| COFJ | Organic Code of the Judiciary | Código Orgánico de la Función Judicial |
| COGEP | General Organic Code of Processes | Código Orgánico General de Procesos |
| COIP | Criminal Code | Código Orgánico Integral Penal |
| CONF | Organic Financial Monetary Code | Código Orgánico Monetario y Financiero |

| Abbreviation | Full name | Name in Spanish |
|---------------------|---|--|
| COESCCI | Organic Code of the Social Economy of Knowledge, Creativity, and Innovation | Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación |
| CORDICO M | Information and Communication Council of Ecuador | Consejo de Regulación y Desarrollo de la Información y Comunicación |
| CPCCS | Council for Citizen Participation and Social Control | Consejo de Participación Ciudadana y Control Social |
| CRPI | First Instance Resolution Commission | Comisión de Resolución de Primera Instancia |
| DNRI | National Direction of International Relations | Dirección Nacional de Relaciones Internacionales |
| DPE | Ombudsman Office | Defensoría del Pueblo de Ecuador |
| FAS | Federal Antimonopoly Service, Russia | Servicio Federal Antimonopolio, Rusia |
| FNE | National Economic Prosecutor's Office, Chile | Fiscalía Nacional Económica, Chile |
| HCC | Hellenic Competition Commission | Comisión de Competencia Helénica, Grecia |
| ICC | National Intendancy for Investigation and Control of Economic Concentrations | Intendencia Nacional de Investigación y Control de Concentraciones Económicas |
| INPD | National Intendancy for Investigation and Control of Unfair Practices | Intendencia Nacional de Investigación y Control de Prácticas Desleales |
| IEPS | Institute of Popular and Solidarity Economy | Instituto de Economía Popular y Solidaria |
| IESS | Ecuadorian Institute of Social Security | Instituto Ecuatoriano de Seguridad Social |
| IGG | General Management Intendancy | Intendencia General de Gestión |
| IGT | General Technical Intendancy | Intendencia General Técnica |
| IIAPMAPR | National Intendancy of Investigation and Control of Abuse of Market Power, Restrictive Agreements and Practices | Intendencia de Investigación de Abuso de Poder de Mercado, Acuerdos y Prácticas Restrictivas |

| Abbreviation | Full name | Name in Spanish |
|---------------------|---|--|
| INAC | Intendancy of Competition Advocacy | Intendencia Nacional de Abogacía de la Competencia |
| INAF | National Administrative and Financial Intendancy | Intendencia Nacional Administrativa Financiera |
| INDECOPI | Institute for the Protection of Competition and Intellectual Property, Peru | Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, Perú |
| INEC | National Institute of Statistics and Census | Instituto Nacional de Estadística y Censos |
| INJ | National Legal Intendancy | Intendencia Nacional Jurídica |
| INMOBILIAR | Public Sector Real Estate Management Service | Secretaría Técnica de Gestión Inmobiliaria del Sector Público |
| KC | Kimberly Clark | Kimberly Clark |
| KCE | Kimberly Clark Ecuador | Kimberly Clark Ecuador |
| LAC | Latin American and Caribbean | Latinoamérica y el Caribe |
| LOC | Organic Communication Law | Ley Orgánica de Comunicación |
| LORCPM | Organic Law of Regulation and Control of Market Power | Ley Orgánica de Regulación y Control del Poder de Mercado |
| LOT | Organic Law of Telecommunications | Ley Orgánica de Telecomunicaciones |
| LOTAIP | Organic Law of Transparency and Access to Public Information | Ley Orgánica de Transparencia y Acceso a la Información Pública |
| LOTTTSV | Organic Law of Land Transport, Traffic, and Road Safety | Ley Orgánica de Transporte Terrestre, Tránsito y Seguridad Vial |
| MIES | Ministry of Economic and Social Inclusion | Ministerio de Inclusión Económica y Social |
| OEIs | Institutional Strategic Objectives | Objetivos Estratégicos Institucionales |
| PGE | General State Budget | Presupuesto General del Estado |
| POA | Annual Operational Plan | Plan Operacional Anual |
| RLORCPM | Regulation of the LORCPM | Reglamento para la Aplicación de la LORCPM |
| SBE | Superintendance of Ecuadorian Banks | Superintendencia de Bancos del Ecuador |

| Abbreviation | Full name | Name in Spanish |
|---------------------|---|---|
| SCPM | Ecuador's Competition Authority (Superintendance of Market Power Control) | Superintendencia de Control de Poder de Mercado |
| SENADI | National Service of Intellectual Rights | Servicio Nacional de Derechos Intelectuales |
| SEPS | Superintendence of Popular and Solidarity Economy | Superintendencia de Economía Popular y Solidaria |
| SERCOP | National Public Procurement Service | Servicio Nacional de Contratación Pública |
| SGCAN | General Secretariat of the Andean Community Of Nations | Secretaría General de la Comunidad Andina de Naciones |
| SIC | Superintendence of Industry and Commerce, Colombia | Superintendencia de Industria y Comercio, Colombia |
| SIPLASE | Planning, Monitoring and Evaluation System | Sistema de Planificación, Seguimiento y Evaluación |
| SRI | Internal Rents Service | Servicio de Rentas Internas |
| TDCA | Contentious and Administrative District Tribunal | Tribunal Distrital de lo Contencioso Administrativo |
| TDLC | Free Competition Defense Court, Chile | Tribunal de Defensa de la Libre Competencia, Chile |
| TIA | Tiendas Industriales Asociadas | Tiendas Industriales Asociadas |

Executive summary

Context and institutional setting

One of the last countries in Latin America to pass a law on competition, Ecuador tried six times to introduce a law before approving the Organic Law of Regulation and Control of Market Power (LORCPM) in 2011. The law is based heavily upon Spanish legislation. It established Ecuador's Competition Authority (*Superintendencia de Control del Poder de Mercado* or SCPM), which has been active since 2012 and has broad powers, similar to those of long-established competition authorities.

Over the last two years, Ecuador has carried out significant efforts to meet international good practices, mainly through actions of SCPM. Among other achievements, a fast-track procedure has been introduced for mergers that do not seem to have potential to harm competition, the leniency programme has been updated, the quality and focus of market studies has improved, and outreach activities are more targeted. Further, Ecuador has enhanced its co-operation with the international competition community, as evidenced by the voluntary undertaking of this peer review.

SCPM is an administrative body. SCPM's president (*Superintendente*) is appointed by Ecuador's Council for Citizen Participation and Social Control, out of a shortlist of three candidates nominated by Ecuador's president. SCPM's president can be removed, among others, through an impeachment process initiated by parliamentarians. No technical or non-political body, such as a court, is involved in this process. Ecuador should be vigilant that there is no impeachment process against SCPM's president on political grounds.

SCPM investigates and resolves competition issues and is responsible for promoting competition within Ecuador. SCPM directorates carry out investigations. SCPM's First Instance Resolution Commission (*Comisión de Resolución de Primera Instancia* or CRPI), composed by three commissioners appointed by SCPM's president, adopts decisions that are subject to internal appeals before SCPM's president, as well as before the judiciary. The CRPI does not have the time, personnel or resources to study cases in depth to ensure that its decisions are fully informed.

Furthermore, stakeholders have expressed concerns about CRPI's independence from SCPM's president, which manages SCPM's investigation units. Ecuador should ensure that CRPI is empowered and independent from SCPM's president and other officials within the agency.

SCPM's annual budget is relatively low by international standards and has been decreasing since 2014, mainly due to the government's austerity policy. Further, the budget is also decreased in the course of the fiscal year almost every year since SCPM's creation, as part of horizontal cuts requested from public sector entities by Ecuador's government. Lack of resources reduces the investigations and advocacy activities that the agency can carry out. Ecuador should increase SCPM's budget to align it to international standards and ensure that mid-year budget reductions are only done when strictly necessary, and that they are proportionate and non-discriminatory.

Less than half SCPM's employees (48%) are assigned to the agency's core competition activities, while the rest (52%) are administrative support staff. This is partly explained, according to stakeholders, by the fact that Ecuadorian regulation imposes a certain number or percentage of support staff. In addition, the allocation of the employees working on competition per directorate is suboptimal. Out of the employees working on competition, only 11 work on the investigation of anti-competitive conducts (five on restrictive agreements and six on abuse of dominance) and nine on merger control, whereas 18 work on advocacy. The staff allocation should be re-balanced, with more people assigned to enforcement and, in particular, cartel investigations. In addition, the number of economists should be increased, as they are currently under-represented, and a chief economist should be appointed to co-ordinate the economic approach of SCPM.

In addition, SCPM's employee turnover is high. This may prevent it from building knowledge and expertise, and improving its performance. High turnover seems to be due to two reasons. First, SCPM's president may remove his subordinates on his own volition, without submitting to any termination procedures or policies. This has happened frequently in the past. In addition, for senior positions, salaries are not competitive. Remuneration for senior positions should be re-considered to improve SCPM's attractiveness as an employer, and SCPM should introduce credible career plans.

Legal framework and enforcement

Anticompetitive practices

LORCPM prohibits restrictive agreements and abuses of a dominant position and includes provisions on unfair competition. SCPM may start investigations *ex officio*, at the request of another public body, or following a complaint by the prejudiced party or any other person that proves a legitimate interest.

The article on restrictive agreements includes a long non-exhaustive list of prohibited behaviours and prohibits tacit collusion. The list should be clarified, simplified and harmonised across the examples of illegal conduct. The part of the article that prohibits tacit collusion should be deleted, as this normally falls outside the remit of competition law.

During the six-year period between 2014 and 2019, SCPM initiated 30 ex officio investigations on restrictive agreements. During the same period, SCPM initiated three times as many investigations on abuse of market power. Only 12 final decisions were adopted on restrictive agreements, 11 of which concerned bid rigging. SCPM should focus on investigating horizontal hard-core restrictions, such as price fixing or market sharing, instead of abuse of dominance or other conducts. Horizontal restrictions not only cause great consumer harm, but also are clear infringements where, if the facts are proven, there is no need for sophisticated economic analysis.

LORCPM prohibits the abuse of market power and the abuse of economic dependence. The provision concerning abuse of market power lays down a long non-exhaustive list of specific conducts, containing duplications and redundancies. This list should be clarified, simplified, and harmonised across the various examples of illegal conduct. The provision governing abuses of economic dependence does not attach sanctions to it. This provision should be deleted, since the behaviours it describes could already be covered in the provision concerning the abuse of market power.

From 2014 to 2019, SCPM initiated a large number of investigations on abuse of market power and abuse of economic dependence, but only issued three final decisions; two of them were overturned by the courts. A large number of ex officio investigations were closed because of lack of merit. SCPM should avoid starting investigations that, at initial review, seem without merit and should close early those that seem unlikely to succeed. In addition, as indicated above, SCPM should focus on horizontal hard-core restrictions.

LORCPM prohibits acts of unfair competition (i.e. acts contrary to honest uses or customs in economic activities) that impede, restrict, or distort competition, threaten economic efficiency, or the general welfare or the rights of consumers or users, if the perpetrator has market power.

The resources dedicated to the enforcement of unfair competition rules are significantly more than the resources devoted to investigating anti-competitive practise and mergers. This share should be rebalanced, with more resources allocated to the investigation of antitrust cases, and fewer to unfair competition. Alternatively, Ecuador should consider whether it is practical to entrust the review of unfair competition cases, whether or not the perpetrator has market power, to a separate agency. In that case, Ecuador should consider whether to remove unfair competition from the LORCPM.

LORCPM classifies infringements as minor, serious, and very serious. The maximum fine depends on the seriousness of the infringement, and SCPM has discretion to set fines within limits set in the law. Fines imposed so far seem not to have had sufficient deterrent power, in spite of the fact that the LORCPM leaves room to impose significant fines. SCPM should ensure that fines have sufficient deterrent effects and, if necessary, impose higher fines.

SCPM has a leniency programme. The programme was introduced in 2016 and was amended and improved in 2019. Only two leniency applications have been presented since it was introduced, due to the reputational damage that an admission of cartel membership involves; the lack of significant enforcement by SCPM (which reduces its deterrent power), and a notable precedent, in the Kimberly-Clark case, where confidential information coming from a leniency application was declassified and sent to the General Secretariat of the Andean Community of Nations for investigation.

Undertakings may propose commitments to stop investigations against them, consisting in an obligation to cease and desist and pay an amount to offset the damages caused. From 2014 to 2019, 56 commitments were submitted and 35 were accepted. Neither LORCPM nor RLORCPM restrict the use of commitments to specific infringements. SCPM has applied commitments to several cartel cases.

Although the commitment mechanism has several obvious benefits, like saving SCPM's time and resources, it also has downsides. Importantly, the use of commitments by SCPM seems to lower incentives to comply with the law or, in cartel cases, the use of leniency. This is due to SCPM's low enforcement rate combined with low commitment payments in exchange for SCPM's stopping an investigation. The use of commitments also means fewer opportunities for courts to review competition cases, and impedes –or delays– the development of legal precedents, which are crucial in a country with a relatively short history in competition law enforcement. For these reasons, SCPM should use commitments carefully, for instance, reserving them for infringements with lower impact on competition.

Mergers

LORCPM establishes compulsory merger notifications for transactions that exceed certain thresholds. First, LORCPM requires that a merger be notified if the turnover of the group of participants exceeds a certain turnover. A transaction needs to be notified even if there is only one participant with significant turnover in Ecuador (e.g. a large company acquiring a small business). However, to ensure that there is sufficient local nexus, a turnover threshold should require that at least two participants in the transaction (in the case of acquisition of joint control, it could be the acquirers) and/or the acquired business meet the required local turnover threshold.

Secondly, LORCPM requires that merger be notified if the transaction gives the merged economic operators a 30% or more market share for a product. SCPM should consider the suitability of market share thresholds, as there are doubts as to whether market share thresholds are clear or sufficiently objective.

LORCPM currently establishes a deadline of only eight calendar days from the date of the merger agreement to notify the transaction. The deadline should be longer to provide merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger on condition that the merger is not implemented prior to notification and clearance.

Ecuador's merger review relies on a dominance test, i.e. SCPM must assess whether the merger creates, strengthens or alters market power. However, across the globe, there has been a move away from the dominance test and towards the substantial lessening of competition test. A move towards SLC would allow the Ecuador merger control system to look at anti-competitive effects of mergers below the threshold of dominance, and address coordinated effects. Ecuador's rules on mergers do not refer to conglomerate mergers.

SCPM has been gaining experience through the review of a steady flow of merger notifications. The outcomes of merger review seem aligned with good international practices, if slightly stricter, in terms of the percentage of mergers authorised subject to conditions and prohibited transactions.

Mergers are reviewed in one phase only. There is a fast-track procedure introduced in 2020 for mergers that do not seem to have potential to harm competition, which goes in the right direction. Ecuador should consider including a two-phase system as well, in line with international good practices.

Judicial review

SCPM decisions can be challenged before the regional Administrative and Contentious District Courts (TDCA). TDCAs' decisions may be challenged before the National Court of Justice, the highest court in Ecuador. Courts seem to face two main challenges: delays in deciding on the cases and judges' lack of competition expertise. Capacity building of judges in competition law is crucial for Ecuador, where competition and its enforcement are recent, and the competent courts are courts of general jurisdiction. Judges may not have specialised knowledge of competition law nor had an opportunity to gain this knowledge through studies or case experience in their career.

Advocacy and promotion of competition

SCPM has multiple tools to promote competition. First, it carries out market studies and special reports, which are similar to market studies. The distinction between these two types of report reports is arguably redundant and can be abolished. During the early years of SCPM, a large number of market studies and special reports concerned a wide variety of economic sectors and topics but most of them were not of high quality or depth, while few were only transcripts of existing regulations. More recent market studies are deeper, richer and more focused: they identify their objectives, contain regulatory and economic analysis, present useful conclusions and provide recommendations. SCPM is encouraged to continue to improve its market studies.

SCPM still does not have criteria to guide the selection of markets. It should decide and publish such market study selection criteria, aiming at identifying markets whose characteristics may suggest competition problems or regulatory inefficiencies, or that have a greater importance for the economy. The publication of the criteria would increase SCPM's transparency and predictability.

In addition, SCPM can issue non-binding opinions on laws, regulations, circulars and administrative acts, to promote competition considerations. SCPM can also issue petitions to public authorities to implement actions to ensure that the LORCPM is effective. These are general observations through which SCPM tries to ensure that public authorities do not hinder competition. Contrary to opinions, petitions are not necessarily about a specific regulation. Up until April 2020, SCPM has issued one opinion and six petitions.

Third, SCPM can issue guidelines and instructions, in which it clarifies its approach to rules and practice. However, there is a duplication of roles with the Regulation Board, a body in charge of issuing general rules on competition (as well as on other areas). SCPM has adopted 14 guidelines, over 40 administrative instructions on internal procedures and a number of manuals for different sectors. These manuals were sent to the Regulation Board for approval, which has not replied so far. The Regulatory Board did, however, issue two guidelines concerning the supermarket sector, also addressed by one of SCPM's manuals.

Fourth, SCPM conducts outreach activities. Until 2018, SCPM held a great number events, on a case-by-case basis. These activities dealt with topics more typical of a consumer-rights organisation and caused a certain degree of confusion about SCPM's powers. In 2019, the new SCPM's president decided to discontinue most of the promotion activities. Currently, SCPM holds few events, campaigns and training and they appear much more targeted. It is important that SCPM develops a strategy for its promotion activities and continues to carefully consider which activities bring real added value.

Institutional co-operation

SCPM has entered into agreements with: public bodies, such as the Judicial Council, the Constitutional Court, the State Attorney, the Central Bank, or the Financial Super-Intendancy; academic institutions; and business bodies, such as chambers of commerce and even individual businesses.

In addition, SCPM has signed international agreements with 12 competition agencies. The co-operation activities set out in these agreements include the exchange of information, technical assistance, and the possibility to carry out capacity-building activities. SCPM has also engaged in informal co-operation activities without a signed agreement.

The adoption of an inter-institutional agreement requires that its viability be duly justified and that it be authorised by SCPM's president. Stakeholders have noted that, in the past, SCPM's reasons for signing certain inter-institutional agreements have been unclear. Therefore, guidelines on the adoption of inter-institutional agreements would be useful.

Further, Ecuador is a member of the Andean Community of Nations (CAN), and, hence, CAN's competition rules apply in the country. CAN's General Secretariat (SGCAN) has the power to reach decisions and sanction companies for anticompetitive practices on a regional level. In practice, the relationship between Ecuador and CAN in competition enforcement has been confusing. The CAN has no clear rules defining the SGCAN's and national competition authorities remit. SCPM has not signed a co-operation agreement with the SGCAN. As a result, there is confusion over which agency is responsible for which case. A co-operation agreement would be useful to limit overlapping investigations.

1. Context and foundations

1.1. Country context

1.1.1. Geography and population

The Republic of Ecuador is located in north-western South America. With the Pacific Ocean to the west, it borders Colombia to the north and Peru to the southeast. The Ecuadorian territory was a Spanish colony until 1820, when it became independent as part of Gran Colombia. In 1830, it became a sovereign state, as Gran Colombia dissolved. The country has a total area of 256 370 km², consisting of four main regions: Costa, Sierra, Amazonía, and the Galápagos Islands. The capital city Quito is also the largest and is in the Sierra region. Ecuador's 2018 census recorded a population of 17 084 358.

1.1.2. Economy

Ecuador has a developing economy, highly dependent on commodities (mainly agriculture, fishing, mining, and, more recently, petroleum). The country's official currency has been the United States dollar since 2000, a decision taken to control the high levels of inflation. Ecuador's GDP in 2018 was estimated in USD 71.9 billion in constant prices with an annual growth rate of 1.4%, and USD 108.4 billion in current prices.¹ This is equivalent to a real GDP per capita of USD 4 226 and a PPP-based USD 10 449. This places Ecuador within the lowest half of real GDP and GDP per capita (PPP) in the Latin American and Caribbean region. 23.2% of Ecuador's population was living below the poverty line in 2018,² a relatively favourable number for the region; school enrolment rate was 103%,³ which is less than the Latin America and the Caribbean (LAC) average, and life expectancy was 76.8 years,⁴ which is higher than the global and LAC average.

¹ International Monetary Fund (October 2019). "World Economic Outlook Database."

² World Bank, World Development Indicators (2018). Poverty headcount ratio at national poverty lines (% of population) – Ecuador. Available at <https://data.worldbank.org/indicator/SI.POV.NAHC?locations=EC>.

³ World Bank, World Development Indicators (2018). School enrolment, primary (% gross) – Ecuador. Available at <https://data.worldbank.org/indicator/SE.PRM.ENRR?locations=EC>.

⁴ World Bank, World Development Indicators (2018). Life expectancy at birth, total (years) – Ecuador. Available at <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=EC>.

Industrial and durable consumer goods are imported, a primary products exported, with a negative current account balance of USD 1.487 billion in 2018.⁵ The main export product is oil, which has accounted for approximately half of total exports in 2018, followed by bananas, shrimp, and tuna.⁶

The Ecuadorian economy is considered to be highly concentrated and dominated by around ten economic groups. The 2010 National Economic Census, the most recent carried out by the National Institute of Statistics and Census (INEC), showed that 1% of businesses with the highest sales made 86% of the country's total sales. Moreover, large companies (200 employees or over) accounted for 0.2% of the total of Ecuador's firms, but invoiced 44.1% of total sales. In contrast, small companies (under 200 employees) represented 95.4% of the country's companies, but accounted for only 16.4% of total sales. Additionally, large companies were responsible for only 24.4% of Ecuadorian's employment, while small companies accounted for 44.4%. In terms of geographical spread, 72% of the country's total sales were concentrated in the provinces of Guayas (Sierra) and its capital Guayaquil and Pichincha (Costa) and Quito, its capitals.

Chambers of commerce have historically been extremely active and influential in economic matters in Ecuador. The Chamber of Commerce of Guayaquil was founded in 1889; this city is a business hub. The Chamber of Industries and Production of Ecuador, on the other hand, has its headquarters in the capital Quito, where the powers of the Ecuadorian state are concentrated.

1.1.3. State expenditure

Historically, the Ecuadorian state has had an active role, not only as a regulator but also as an executant of public services and infrastructure projects. Much of the state's finances come from oil. Petroleum reserves were discovered in 1967 and

⁵ International Monetary Fund (October 2019). "World Economic Outlook Database." Current account balance.

⁶ According to the World Integrated Trade Solution, in 2018 the top five exported products by Ecuador were: crude petroleum oils and oils obtained from bituminous (USD 7,853,414 million), frozen shrimps and prawns (USD 3,234,716 million), bananas (USD 3,218,215 million), prepared or preserved tuna, skipjack and bonito (USD 1,109,984 million), and petroleum oils except crude (USD 946,464 million). The top five imported products by Ecuador were: petroleum oils except crude (USD 2,358,355 million), aromatic hydrocarbon mixtures (USD 1,558,457 million), other medicaments of mixed or unmixed products (USD 515,295 million), automobiles (USD 508,455 million), and oil-cake and other solid residues of soya-bean (USD 464,746 million).

transformed the economy, which was initially agricultural. In consequence, Ecuador experienced a boom between 2001 and 2014 (Figure 1). During this time, the Ecuadorian economy experienced average annual growth in real GDP of 4.4%.⁷ and its social indicators improved remarkably, like poverty, inequality, infant mortality rate, school enrolment rate, among others. This growth was driven mainly by government spending, which represented 21.2% of GDP in 2006 and doubled to 43.6% by 2014.⁸ Between 2011 and 2014, Ecuador became the first- and second-ranked country in the LAC region for public spending as a percentage of GDP, alternating with Venezuela.

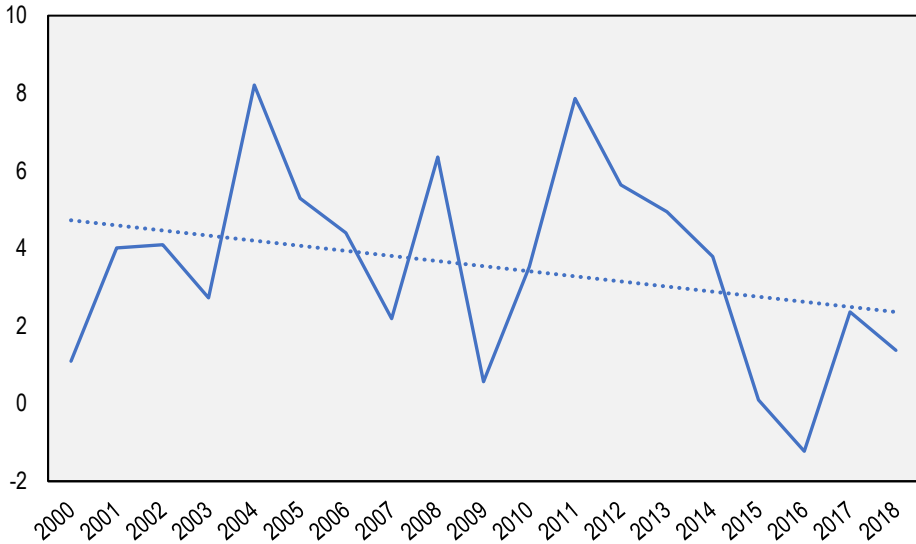
In 2014, oil prices began to fall, and the government undertook aggressive indebtedness to maintain public spending, with a negative effect on public investment and economic activity. While in 2013 the government gross debt was 19% of the GDP, in 2016 it reached 43%.⁹ As of 2018, this debt comes up to 46% of the GDP. The effects of the Covid-19 crisis are yet to be seen, but the recession is already strengthening, and the economic projections are worrying.¹⁰

⁷ International Monetary Fund (October 2019). “World Economic Outlook Database.” Gross domestic product in constant prices.

⁸ International Monetary Fund (October 2019). “World Economic Outlook Database.” Government total expenditure as a percentage of GDP.

⁹ International Monetary Fund (October 2019). “World Economic Outlook Database.” Government gross debt as a percentage of GDP.

¹⁰ April 2020 World Economic Outlook Database from the International Monetary Fund estimates a decrease of -6.3% in the real GDP for 2020, a doubling of the unemployment rate between 2018 and 2020, and a considerable increase in the current account deficit as a percentage of GDP, from -1.4% in 2018 to -5.7% in 2020.

Figure 1. Ecuador real GDP growth, percentage, 2000-2018

Source: OECD, using International Monetary Fund data.

1.1.4. Political context

In 2017, Lenín Moreno won the presidential elections against Guillermo Lasso, with 51% of the votes. Moreno stood as the continuation of *Revolución Ciudadana* (Citizen Revolution), a political project initiated in 2007 by the government of Rafael Correa, which moved government policy away from the market economy. Moreno undertook to open cross-party dialogue, fight corruption and implement austerity measures in public spending.

In Ecuador, 20 constitutions have been promulgated since 1830. This has seen no Constitution last more than 23 years (the 1906 Constitution), with the average duration being ten years. The current constitution came into force in October 2008 under the government of former president Rafael Correa, after a drafting process by a constituent assembly between 2007 and 2008; it was submitted to a referendum and approved with 63.93%. The 2008 constitution is characterised by its length and its many guarantees to protect fundamental rights.

The next scheduled elections, both for the presidency and National Assembly, will be held in February 2021.

1.2. Competition-law framework and the origin of the law

1.2.1. History before competition law

One of the last countries in Latin America to pass a law on competition,¹¹ Ecuador tried six times to introduce a law before one was finally approved in 2011.¹² That law established a competition agency, with broad powers, similar to those of long-established competition authorities. The law, which is heavily based upon the Spanish legislation, prohibits cartels and abuses of a dominant position, has a notification system for merger operations, and includes provisions on unfair competition.

The long history of efforts to introduce a competition law and create a competition agency in Ecuador are linked to the country's changing constitutions.¹³ In the 1990s, regulation for certain strategic markets, such as telecommunication and energy, required sectoral regulators to consider competition as a factor.¹⁴ The first

¹¹ See "Competition in Latin America and the Caribbean": 10 years of the OECD-IDB Latin American Competition Forum in <https://www.oecd.org/competition/latinamerica/LACF10thAnniversaryBrochureES.pdf>. In this document, competition law in the region is classified into 4 categories. First, the preliminary stage, which includes Argentina (law of 1923, 1946 and 1980), Brazil (1962), Chile (1959 and 1973), Colombia (1959) and Mexico (1934). Second, an intermediate stage of modernization of existing laws (regarding the same countries listed above). Third, the introduction of modern laws, where Ecuador appears with its 2011 law, together with Barbados (2002), Bolivia (2008), Costa Rica (1994), El Salvador (2004), Guyana (2006), Honduras (2006), Jamaica (1993), Nicaragua (2006), Panama (1995), Peru (1991), the Dominican Republic (2008), Trinidad and Tobago (2006), Uruguay (2007) and Venezuela (1991). Fourth, comes the consolidation of the existing regimes, incorporating international best practices in Brazil, Chile, Colombia, Mexico and Panama.

¹² The processing of the Organic Law of Regulation and Control of Market Power (LORCPM) before the National Assembly is available on its website <https://leyes.asambleanacional.gob.ec/>. This site provides the original project, as well as the amended versions for the first and second debate before the Plenary.

¹³ The following opinion columns published in Ecuadorian newspapers illustrate the challenges faced to adopt a competition law in Ecuador. One of the columns mentions the opposition of the industrial chambers. David Ochoa, "Poder de mercado: prohibido olvidar," *La República*, 17 September 2011, <https://www.larepublica.ec/blog/opinion/2011/09/17/poder-de-mercado-prohibido-olvidar/>. "Lista la nueva ley antimonopolio," *El Comercio*, June 29, 2011, <https://www.elcomercio.com/actualidad/negocios/lista-nueva-ley-antimonopolio.html>.

¹⁴ The 1992 Special Telecommunications Law established a competition regime for the sector, in order to avoid monopolies, restrictive agreements, abuses of a dominant position, and unfair competition. One of the objectives of the Law of Modernization of the State, Privatizations and Provision of Public Services by the Private Initiative of 1993 was the provision of public

specific competition norm established in Ecuador was in the 1979 Constitution, which, in addition to making express reference to the market economy, stated in Article 45 that: “Any form of abuse of economic power, including unions and groupings of companies that tend to dominate national markets, eliminate competition or arbitrarily increase profits, is prohibited, and the law represses it.”

In Article 244 of the 1998 Constitution, it is established that: “Within the social market-economy system, the State will be responsible for: [...] Promoting the development of competitive activities and markets. Promoting free competition and punish, in accordance with the law, monopolistic and other practices that impede and distort it.”

The first initiative of a piece of legislation was presented to parliament in 1999 with the Law for the Promotion and Defence of Economic Competition. This was approved by the parliament in 2002, but, according to Ecuador’s Competition Authority (Superintendencia de Control del Poder de Mercado or SCPM), was vetoed by the executive on the grounds that further preparation and examination was required.¹⁵

In 2005, the Andean Community of Nations (CAN) issued Decision 608, which establishes rules aimed to protect and promote of competition in the Andean Community.¹⁶ Since it then lacked competition legislation, Ecuador chose to apply the CAN rules. CAN Decision 616, issued in 2005, allowed CAN Decision 608 to come into force in Ecuador. Nevertheless, the rules were not widely applied, given the absence of a strong and specialised national competition agency.¹⁷

services and economic activities by the private initiative through de-monopolization, competition and the delegation of services. The Electricity Sector Regime Law of 1996 constitutes the National Electricity Council (Conelec) as the regulatory body for the sector, conferring on it, inter alia, the power to dictate regulations that prevent practices that competition.

¹⁵ The official letter of November 13, 2002 establishing the reasons for the veto, was not found and consequently could not be reviewed.

¹⁶ CAN is a regional organisation currently composed of Bolivia, Colombia, Ecuador, and Peru created with the aim of achieving comprehensive, balanced and autonomous development of South America. It was established when the Cartagena Agreement entered into force on May 26, 1969.

¹⁷ During this initial period, Ecuador investigated two cases, both on unfair competition: the Olanzapine case and the Sildenafil case. The first case was not sanctioned, and a fine amounting to USD 550 000 was applied to the investigated laboratory. The Kimberly-Clark case is the one in which the CAN is relevant.

A bill for a new competition law was presented to parliament in 2005, but political turmoil, which resulted on the removal of the president, Lucio Gutiérrez, halted the process indefinitely.

In 2008, the National Assembly approved a new constitution for Ecuador. A lengthy document of 444 articles, it set out a large number of rights and guarantees structured around the concepts of “good living” and a “social economic system based upon solidarity”. The constitution does not refer to the market economy, but does make express reference to competition and monopolies. Article 284 states that the economic policy will “promote the fair and complementary exchange of goods and services in transparent and efficient markets.” Furthermore, Article 304 establishes that one of the objectives of trade policy will be to: “Promote the development of economies of scale and fair trade” and to: “Avoid monopolistic and oligopolistic practices, particularly in the private sector, and others that affect the operation of markets.” Lastly, Article 335 provides that: “the State will define a price policy aimed at protecting national production, establish sanction mechanisms to avoid any practice of private monopoly and oligopoly, or abuse of a dominant position in the market and other unfair competition practices.”

The 2008 Constitution also created two additional state powers, in addition to the three traditional powers: executive, legislative and judicial. One is the so-called ‘electoral power’, which intends to guarantee political rights expressed through voting. The other one is the ‘power of transparency and social control’, which was created to control entities and organisations in the public and private sector, and encourage citizen participation in public decision-making. SCPM falls under this second new power. Despite these efforts, during the fact-finding for this peer review, interviewees have pointed out that the executive power remains the most powerful in practice, and Ecuador continues to be a country with a powerful presidential system.

In 2009, Presidential Decree 1614 was issued under the presidency of Rafael Correa, making binding the rules set out in CAN Decision 608. This decree designated the Ministry of Industry and Productivity (MIPRO) as the enforcement agency, with an Undersecretariat for Competition as the investigating agency; this operated for two years. The first competition case sanctioned in Ecuador was Swiss & North Group vs. Pfizer, an investigation of abuse of a dominant position in the sildenafil production market; a similar case was investigated in the olanzapine production market.

Also in 2009, a bill called Organic Antimonopoly Law was presented to the Commission for Economic, Productive, and Micro-Enterprise Development of the National Assembly. The bill’s aim was the creation of a competition agency, the Ecuadorian Competition Council, within the Super-Intendancy of Companies. The

project did not receive sufficient votes in the first debate before the Plenary of the National Assembly, however, and was subsequently archived.

1.2.2. Adoption of competition law

Only when the National Institute of Statistics and Census (INEC) published the results of the 2010 National Economic Census did the government give fighting business concentration and anti-competitive practices greater importance. It presented, as an urgent bill, the Organic Law for Market Power Regulation and Control (LORCPM) to the Specialised Commission of the National Assembly. LORCPM was adopted in 2011,¹⁸ and a year later, the Regulation (the bylaws) of LORCPM (RLORCPM) was issued through Presidential Decree 1152.

LORCPM was adopted after light scrutiny and without much debate in the National Assembly. Presented by the government on 29 August 2011, it was approved after four parliament sessions on 13 October 2011.¹⁹

The fact that the law's name mentions market power and that abuse of market power appears first in the competition law, before restrictive agreements, reflects the original objective of the law, namely, to control the market power of large companies, rather than prosecute cartels and collusion.

LORCPM is structurally similar to the Spanish Competition Defence Law, and the provisions of CAN Decision 608. LORCPM creates the Super-Intendancy of Market Power Control (SCPM) as the national competition agency under the new state power of transparency and social control.

1.2.3. Reforms to competition law

Since it entered into force, LORCPM has undergone two reforms. In 2014, the Organic Monetary and Financial Code – a deposit-protection code of conduct – established SCPM's obligation to notify the Super-Intendancy of Banks (for banks) or the Super-Intendancy of Popular and Solidarity Economy (for co-operatives) of any investigation involving financial institutions and co-operatives, respectively. In 2016, the Organic Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCCI) modified Article 27 of LORCPM to make it consistent with

¹⁸ LORCPM was published in the Supplement Official Register No. 555 on October 13, 2011.

¹⁹ LORCPM bill was discussed in the National Assembly in one week. The debates were held on September 2, 7, 8 and 9, 2011, and the law was published on October 13, 2011. The OECD team did not have access to the content of the discussions that were took place in the National Assembly, if there were any. The law history is relevant as it can be used to interpret the law, pursuant to Article 18 of the Ecuadorian Civil Code.

the provisions on intellectual and industrial property contained in COESCCI. There are currently no proposals to modify LORCPM.

1.3. Policy goals

1.3.1. Objectives and lack of prioritization

LORCPM's objectives, which are specified in Article 1 and 4, appear ambitious and possibly even contradictory. Neither the law, the jurisprudence nor the doctrine have established which objective should prevail.

Article 1 of LORCPM states that the objectives of Ecuadorian competition law is the “establishment of a social, solidarity and sustainable economic system” through preventing and punishing infringements and controlling mergers, in order to achieve: 1) market efficiency; 2) fair trade; 3) general welfare; and 4) the well-being of consumers and users.²⁰

Similarly, Article 4 of LORCPM establishes the “guidelines and principles for application” of the Ecuadorian competition regime. These include: 1) defence of the general interest of society; 2) promotion of economic de-concentration to seek “efficiency in the market”; 3) promotion and strengthening of fair trade; 4) “equitable distribution of development benefits”; and 5) “the need for transparent and efficient markets”.²¹

²⁰ Article 1 of LORCPM states that: “*The purpose of this Law is to avoid, prevent, correct, eliminate and sanction the abuse of economic operators with market power; the prevention, prohibition and sanction of collusive agreements and other restrictive practices; the control and regulation of merger operations; and the prevention, prohibition, and punishment of unfair practices, seeking efficiency in markets, fair trade, and the general welfare of consumers and users, for the establishment of a social, solidarity, and sustainable economic system.*”

²¹ Article 4 of LORCPM states that “*In accordance with the Constitution of the Republic and the current legal order, the following guidelines will be applied for the regulation and formulation of public policy in the matter of this Law: 1. The recognition of the human being as subject and end of the economic system. 2. The defence of the general interest of society, which prevails over the private interest. 3. The recognition of the structural heterogeneity of the Ecuadorian economy and of the different forms of economic organisation, including popular and solidarity organisations. 4. The promotion of economic deconcentration, in order to avoid private monopolistic and oligopolistic practices contrary to the general interest, seeking efficiency in the markets. 5. The right to develop economic activities and the free participation of economic operators in the market. 6. The establishment of a regulatory framework that allows the exercise of the right to develop economic activities, in a system of free competition. 7. The promotion and strengthening of fair trade to reduce distortions in*

Both the competition law and the current constitution are ambitious and do not prioritise between possibly contradictory goals. This means that the authorities and courts applying the law hold important discretion over how the rules are applied to specific cases. Until now, SCPM has not prioritised its actions or published strategic priorities in terms of law enforcement.

SCPM should determine which enforcement and advocacy actions are a priority for it, and focus on conduct that has a risk of greater consumer harm, and sectors that are critical for Ecuador's economy or where there are clear market developments (e.g. digital platforms and e-commerce, use of personal data).

SCPM should consider publishing its objectives annually for the following year. Clear and transparent objectives and priorities are important for the accountability of SCPM's actions and for the generation of public trust in the agency.

1.3.2. Social economy based upon solidarity

The 2008 Constitution states: "The economic system is social and based upon solidarity."²²

There is no precise legal definition of what is meant by a "social economy based upon solidarity" nor how it differs from a market economy. Stakeholders have told the OECD that it implies greater participation and intervention by the state in the market, when compared to a market economy.²³ Broadly speaking, it means that the

intermediation. 8. The development of mechanisms that guarantee that people, people and nationalities achieve self-sufficiency in healthy food through the redistribution of resources such as land and water. 9. The equitable distribution of development benefits, incentivize production, productivity, competitiveness, develop scientific and technological knowledge; and, 10. The need for transparent and efficient markets. For the application of this Law, the principles of non-discrimination, transparency, proportionality and due process will be observed."

²² Article 283.

²³ See for example Art. 334 of the 2008 Constitution regarding State intervention: "*The State will promote equitable access to factors of production, for which it will be responsible: 1. Avoid the concentration or hoarding of factors and productive resources, promote their redistribution and eliminate privileges or inequalities in access to them. 2. Develop specific policies to eradicate inequality and discrimination against women producers, in access to factors of production. 3. Promote and support the development and dissemination of knowledge and technologies oriented to production processes. 4. Develop policies to promote national production in all sectors, especially to guarantee food sovereignty and energy sovereignty, generate employment and added value. 5. Promote public financial services and the democratization of credit.*" Art. 335. - "*The State will regulate, control and intervene, when necessary, in economic exchanges and transactions; and it will sanction the exploitation,*

state does not only regulate but also protects means of production like small businesses and provides itself (rather than outsource) strategic goods and services for its citizens. It also implies protection for national investments (in preference to international investments), the possibility for the state to actively participate in sectors it defines as strategic,²⁴ and an emphasis on distributive aspects and fair trading.²⁵

The concept of “good living” (*buen vivir* in Spanish) at the constitutional level is also striking.²⁶ Under this concept, the state must direct its actions to improve the physical and spiritual conditions of Ecuadorians and intervene in the country’s economic structure.

usury, hoarding, simulation, speculative intermediation of goods and services, as well as all forms of damage to economic rights and public and collective goods.”

²⁴ See Art. 313 and Art. 316 of the 2008 Constitution: “*The State reserves the right to administer, regulate, control and manage the strategic sectors, in accordance with the principles of environmental sustainability, precaution, prevention and efficiency. The strategic sectors, of decision and exclusive control of the State, are those that due to their importance and magnitude have decisive economic, social, political or environmental influence, and should be oriented to the full development of rights and social interest. Strategic sectors include energy in all its forms, telecommunications, non-renewable natural resources, transportation and refining of hydrocarbons, biodiversity and genetic heritage, radio-electric spectrum, water, and others determined by law.*” Art. 316.- “*The State may delegate participation in the strategic sectors and public services to mixed companies in which it has a majority shareholding. The delegation will be subject to the national interest and will respect the terms and limits established in the law for each strategic sector. The State may, exceptionally, delegate to private initiative and to the popular and solidarity economy, the exercise of these activities, in the cases established by law.*”

²⁵ See Art. 336 of the 2008 Constitution: “*The State will promote and ensure fair trade as a means of access to quality goods and services, which minimizes the distortions of intermediation and promotes sustainability.*” According to SCPM, the concept of “fair trade” has not been explicitly developed in its decisions or its relationship with Ecuadorian competition law. However, “fair trade” has been one of the foundations for many of the actions of the Intendancy of Advocacy such as manuals, workshops, seminars.

²⁶ See Art. 277 of the 2008 Constitution: “*For the achievement of good living, the general duties of the State shall be (...): 4. Produce goods, create and maintain infrastructure, and provide public services.*”

2. Institutional setting

2.1. Super-Intendancy of Market Power Control (SCPM)

2.1.1. Introduction

The Super-Intendancy of Market Power Control (SCPM) is the Ecuadorian competition agency and part of the Transparency and Social Control Function, the new state power created by the 2008 constitution. SCPM is an administrative body, which both investigates and resolves competition issues. It is also responsible for promoting competition within Ecuador.

SCPM's president (Superintendente) is appointed by the Council for Citizen Participation and Social Control (CPCCS) – also part of the Transparency and Social Control Function – from a shortlist of three candidates nominated by Ecuador's president.

SCPM is a legally independent body, with legal status, a specific budget from the state, and administrative, budgetary, and organisational autonomy. It has broad powers, including conducting investigations on any infringement of competition law and reviewing mergers. Furthermore, SCPM investigates and decides cases of unfair competition and does advocacy.

SCPM's main offices are located in Quito. It also has a Regional Office in Guayaquil, which is made up of an advocacy unit and an investigation and control unit, and three Technical Offices, located in Cuenca, Loja, and Portoviejo. The Regional Office co-ordinates and supervises the Technical Offices and reports directly to the General Technical Director.

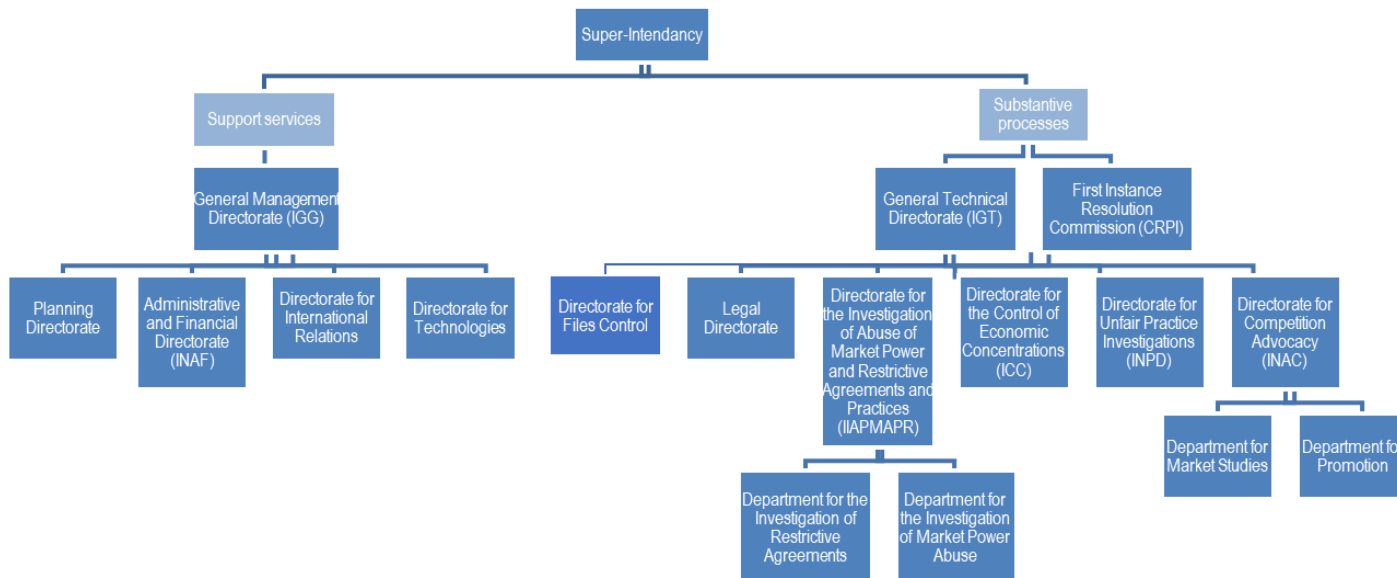
2.1.2. Internal structure

SCPM is made up of three main units: the General Management Directorate (Intendencia General de Gestión or IGG), in charge of administrative work; General Technical Directorate (Intendencia General Técnica or IGT), in charge of infringement investigations; and First Instance Resolution Commission (Comisión de Resolución de Primera Instancia or CRPI), whose role is to decide on cases. SCPM has no chief economist.

In 2019, SCPM employed 194 civil servants, of which 101 were administrative staff and lawyers working in the IGG. The remaining 93 work on the investigation of cases under the IGT.

SCPM's structure is complex. The IGG in particular has many departments and numerous employees (Figure 2). In discussions with the OECD, SCPM employees stated that the organisational structure can be modified with the approval of the Ministry of Finance and the Ministry of Labour.

Figure 2. SCPM's organigram



Note: This is a simplified organigram; the official SCPM version is available at www.scpm.gob.ec/sitio/la-institucion.

Source: OECD, using SCPM data.

The IGT investigates the three types of conduct prohibited by Ecuadorian competition law (abuse of market power, restrictive agreements, and unfair competition) and reviews mergers. Investigations into abuses of market power (monopolies) and restrictive agreements (cartels) are undertaken by the Directorate for the Investigation and Control of Abuse of Market Power and Restrictive Agreements (Intendencia Nacional de Investigación y Control de Poder de Mercado, Acuerdos y Prácticas Restrictivas or IIAPMAPR). There is also the Directorate for Control of Economic Concentrations (Intendencia Nacional de Control de Concentraciones Económicas -ICC), the Directorate for Unfair Practices (Intendencia Nacional de Investigación y Control de Prácticas Desleales), and finally, the Directorate for Advocacy (Intendencia Nacional de Abogacía de la Competencia), which undertakes market studies and other actions to promote competition.

2.1.3. Decision-making body

Investigations are carried out by SCPM directorates and, once completed, CRPI adopts decisions. CRPI's decisions are subject to appeals before SCPM's president, as well as before three external instances: civil courts, the National Court of Justice, and the Constitutional Court.

Neither LORCPM nor the RLORCPM regulate in detail the CRPI. CRPI has three commissioners, appointed by SCPM's president, who also elects which of the three is president. The president summons and directs CRPI sessions and must provide SCPM's president with a monthly report on the cases the body has dealt with.

Stakeholders have told the OECD that CRPI must meet once a week and may also hold extraordinary meetings. Once CRPI receives the file, one of the commissioners is put in charge of the case (rapporteur). The rapporteur is in charge of notifying the parties involved, ensuring compliance with the procedural timeframes, and preparing the file, which consists of all documents relevant to decide on the case. CRPI decisions are adopted by majority, that is, they require at least two out of three votes. This procedure is regulated by the document, CRPI Internal Regulations, first issued in 2013 and amended twice in 2019.

The current commissioners are two lawyers (including the president) and an economist, in office since August 2019. The Commission also has a secretary, a support attorney, and an administrative assistant.

Stakeholders have noted concerns about the commissioners' independence from SCPM's president. The president elects the commissioners and can freely remove them as well. Further, there is no regulation to ensure CRPI's independence. Hence, commissioners may have incentives to act in line with the interests of SCPM's president. This can be problematic, given that the president directs SCPM's investigative bodies, the directorates, and CRPI is the decision-making body.

Regulation should be enacted to protect the CRPI's independence, ensuring that members of the CRPI can only be removed on justified and reasonable grounds.

LORCPM is strict about the terms and deadlines of the investigations (especially with notifications in merger operations) and it has been noted that CRPI commissioners may not have either the time, personnel or resources to study cases in depth and so make fully informed decisions. Stakeholders have noted a general acceptance of the directorates' recommendations, which may be due to the lack of time and resources impeding an in-depth review of the files. CRPI should be granted more resources and time to enable it to fulfil its mandate.

2.1.4. Appointments and dismissals

SCPM's president

SCPM's president is the Superintendent. There have been three presidents since the post was created in 2012. The first president was Mr Pedro Páez, who completed his five-year term under President Correa in 2017. Afterwards, the position was held –albeit temporarily– by Mr Christian Ruiz, until the appointment of the current president, Mr Danilo Sylva, as permanent in November of 2018.

The president's appointment process is regulated by the Constitution and LORCPM²⁷ and consists of five phases. First, the President of Ecuador presents three candidates. Pursuant to LORCPM, candidates need to be Ecuadorian, have a master's or doctoral degree in subjects related to economic competition, and at least ten years of professional experience. Second, the Council for Citizen Participation and Social Control (CPCCS) checks that the candidates meet the requirements and have no disqualifying impediments or conflicts. Third, the names of the candidates are published. Fourth, within five days of publication, citizens may lodge challenges, individually or collectively, before the CPCCS for lack of probity or suitability, non-compliance with requirements, or the existence of disqualifications listed in the constitution. Any challenge must be reasoned and accompanied by supporting documentation. The Plenum of the CPCCS decides within five days. Fifth, SCPM's president is appointed by the CPCCS, for a period of five years, renewable once for another five years.

Stakeholders have noted that the process for appointing SCPM's president is overly complex and can make applying for the role less attractive.

²⁷ See Art. 213 of the 2008 Constitution and Art. 43 of LORCPM.

Grounds for dismissal of SCPM's president are established in LORCPM and are: a final criminal conviction; emergence of a subsequent incompatibilities (such as non-compliance with the requirements while in office); mental or physical incapacity; and impeachment following the procedure set out in the Ecuadorian constitution.²⁸

To initiate the impeachment process, at least a quarter of the members of the National Assembly must request the dismissal of SCPM's president and allege a breach of the constitution and the law. This is regulated in the constitution and the Organic Law of Legislative Function.²⁹ Dismissal requires a decision by a majority of National Assembly members.

This system could make the dismissal process political: the decision to initiate the process and dismiss SCPM's president rests in the National Assembly. SCPM's president can provide verbal or written evidence to defend himself during the impeachment process, but the initiation of the process and the decision adopted by the Assembly cannot be challenged (unless a breach of constitutional right is alleged). No technical or non-political body, such as a court, is involved. The low number of National Assembly representatives required to begin the process makes it possible for an impeachment process to be launched easily, or be used for political motives. Ecuador should be vigilant that there is no impeachment process against SCPM's president on political grounds.

According to Article 47 of the LORCPM, public officials leaving the SCPM may not exercise professional activities in areas related to competition enforcement for a year. Administrative personnel that did not have access to case-related information are exempted.

Second and third level authorities

SCPM's second- and third-level managers are selected from a three-candidate list provided by SCPM's president. SCPM's National Department of Human Resources chooses the most appropriate candidate, in view of the candidates' profiles. The Department considers criteria such as academic background and professional experience.

SCPM's president may freely remove second and third-level professionals of their duties. In the past, this has happened very frequently – in four years, 104 second and third level officials have been dismissed. This may have been negative for SCPM, as the significant turnover of SCPM employees prevents SCPM from building knowledge and expertise and improving its performance over time. Institutional

²⁸ See Article 45 of LORCPM.

²⁹ See Article 131 of the 2008 Constitution.

memory can be lost when key positions are changed, particularly if knowledge management and archiving are not robust.

Table 1. Dismissal of SCPM employees by level

| Level | Title | 2019 | 2018 | 2017 | 2016 |
|--------------|--------------------------------------|-----------|-----------|-----------|-----------|
| Second | General Intendancy | 1 | 4 | 2 | 4 |
| Third | First Instance Resolution Commission | 4 | 0 | 0 | 1 |
| | National and Regional Intendancy | 7 | 12 | 3 | 6 |
| Fourth | Directors | 11 | 17 | 19 | 13 |
| Total | | 23 | 33 | 24 | 24 |

Source: Information provided by SCPM to the OECD

2.1.5. SCPM's resources

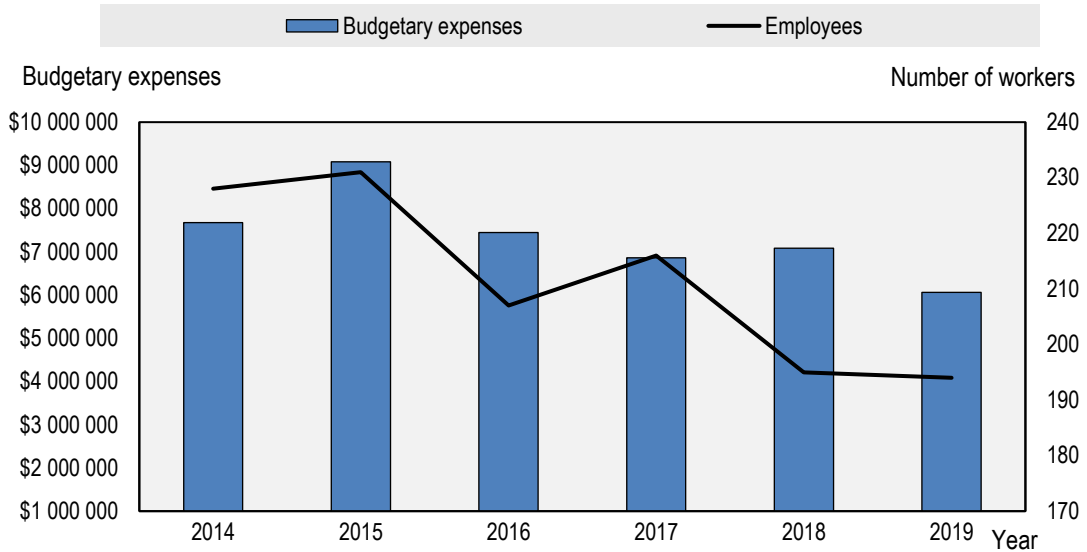
Budget

SCPM, as part of its processes, collects fees (for merger notifications) and fines (for infringements of the competition law). These fees and fines are not included in SCPM's budget, but as with all resources collected by public entities in Ecuador, are transferred to the treasury's single account and become part of the general state budget (PGE).

SCPM's annual budget depends on the Ministry of Economy and Finance; it is part of Transparency and Social Control Function and is determined by the Organic Code of Planning and Public Finance. The resources assigned to all the institutions that make up the Transparency and Social Control Function make up only 0.77% of the national budget. SCPM carries out an institutional budgetary projection every fiscal year, including the necessary expenditure for its management, and sends it to the Ministry of Economy and Finance, which determines the maximum budget limits. The ministry then validates and consolidates the projections of all public-sector institutions, which it sends to the National Assembly for approval of the general state budget, according to the country's economic situation.

As Figure 3 illustrates, SCPM's budget has been decreasing since 2014, mainly due to the government's austerity policy, and has caused a reduction in the institution's employees.

SCPM officials expressed concern to the OECD about the difficult economic situation that the country is facing, which may lead to even larger budget reductions for SCPM in the coming years (or months).

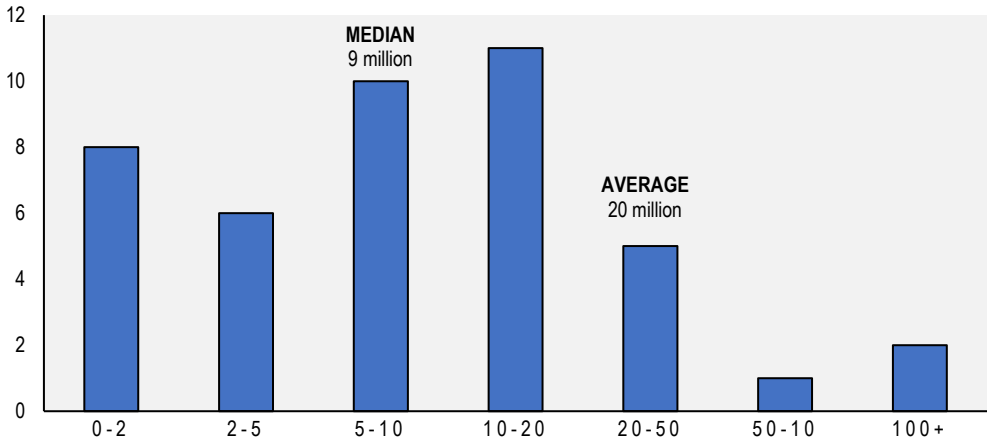
Figure 3. Evolution of SCPM employees and budget

Source: OECD with data provided by SCPM.

SCPM's budget is relatively low for international standards. According to OECD's CompStats³⁰, the median value of competition authorities' budgets is EUR 9 million (approximately, USD 10.6 million).³¹ The average budget is even higher, EUR 20 million, but that amount is somewhat skewed by a number of larger authorities. Further, between 2015 and 2018, the average budget of competition authorities, in nominal terms, increased by approximately 1%, when exchange-rate effects were eliminated.

³⁰ OECD's CompStats include data about 55 jurisdictions. In the Americas: Argentina, Canada, Chile, Colombia, Costa Rica, El Salvador, Mexico, Peru, and United States. In the Asia-Pacific region: Australia, Brazil, Chinese Taipei, India, Indonesia, Japan, Korea, and New Zealand. In Europe: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Romania, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom. In other regions: Egypt, Israel, Kazakhstan, Russian Federation, South Africa, Turkey, and Ukraine. The information of OECD CompStats is compiled in the publication OECD (2020), OECD Competition Trends 2020, available at: <http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>.

³¹ Conversion made on 3 September 2020.

Figure 4. Distribution of the competition authorities' budgets

Note: Based upon the 43 authorities in the CompStats database that provided budget data for four years for solely competition activities.

Source: OECD CompStats Database.

Historically, the Ministry of Economy and Finance has allocated a lower budget to SCPM than that requested. For example, in 2019, SCPM was assigned only 60% of its requested budget of USD 10 million. In response to this reduction, SCPM had to carry out an adjustment process taking into account the guidelines issued by the Ministry of Economy and Finance, the need to guarantee salary payments of SCPM employees, and pay operational and management expenses (such as rent, maintenance of goods, equipment and vehicles, insurance, and IT and internet systems).

The budget, allocated by the Ministry every year in January, may also be modified during the year. In practice, this has happened (downwards) almost every year since SCPM's creation, as part of horizontal cuts requested from public sector entities in Ecuador by the government. These mid-year modifications oblige SCPM to reduce its expenditure, whose level has been already been calculated based upon the approved budget law (and which is usually less than the amount requested). In other words, the budget is reduced twice. These reductions, especially those that occur mid-fiscal year, prevent SCPM from planning properly.

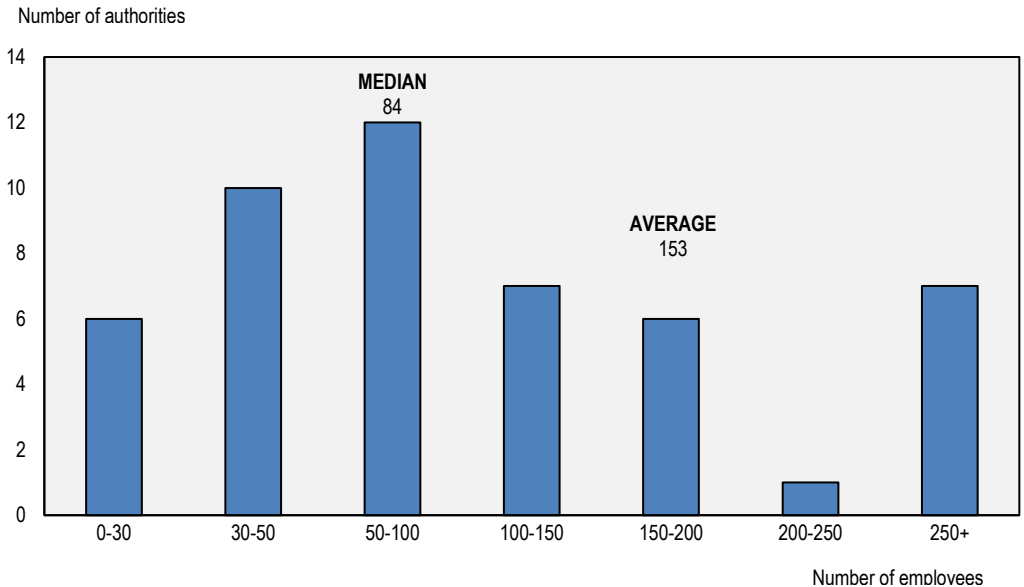
Ecuador should increase SCPM's budget to align it to international standards. In addition, Ecuador should ensure that mid-year budget reductions are only done when strictly necessary, and that they are proportionate and non-discriminatory.

Once SCPM's budget allocation has been established, an annual operational plan (POA) is proposed. The POA is analysed and approved by SCPM's president for expenses, according to the institutional needs. In 2019, the allocated budget was USD 6 060 374, of which 66% was for personnel wages, 32.6% for goods and services expenditures, and 0.77% for other activities. These expenses can be modified during the year due to unplanned budgetary needs. SCPM does not require any further authorisation to pay expenses from the assigned budget; they are, however, audited by the General Comptroller of the State, to ensure the proper use of public resources.

Employees: number and education level

SCPM currently has 194 full-time employees. However, less than half (48%) are assigned to the agency's core competition activities; the rest (52%) are administrative support staff (see Table 2). Stakeholders say that support staff numbers are so high partly due to the rigidities of Ecuadorian regulation, which prevents certain activities from being outsourced. For example, SCPM employs 16 drivers, a number that cannot be decreased by SCPM. This is problematic, since it means that staff expenses cannot be used in an efficient manner.

The number of employees at SCPM seems to be in line with international standards, if we deduct the excess of support staff. According to OECD's CompStats, the median number of employees in competition authorities is 84 and the average, also skewed due to large competition authorities, is 153.

Figure 5. Staff numbers in competition agencies, 2018

Note: Based on the 49 jurisdictions that provided data for all four years.
 Source: OECD CompStats Database.

However, the allocation of the employees working on competition by directorate appears suboptimal. The Directorate for Abuse of Market Power and Restrictive Agreements (IIAPMAPR) has 11 employees (five on restrictive agreements and six on abuse of dominance) and the Directorate for Economic Concentrations (ICC) 9, whereas the Directorate for Advocacy (INAC) has 18. This is problematic. The core activity of SCPM should be prosecuting cartels, and merger review is essential for any jurisdiction that has a merger control system. Both activities should be prioritised over advocacy, which means that IIAPMAPR (in particular in relation to cartels) and ICC should be assigned more human resources than they currently have. SCPM is aware of the lack of resources, particularly in the case of IIAPMAPR.

Table 2. SCPM staff and salaries 2019

| Classification | Area or unit | Lawyers and economists | Others | No graduate education | Total personnel per unit | Total personnel | Salary expenditure (USD) | |
|---|--|------------------------------------|-----------|-----------------------|--------------------------|-----------------|--------------------------|-----------|
| Value-added operations (competition) | First Instance Resolution Commission | 6 | 0 | 0 | 6 | 93 | 2 093 379 | |
| | General Technical Directorate | 1 | 0 | 0 | 1 | | | |
| | Directorate for Unfair Practices | 8 | 0 | 1 | 9 | | | |
| | Directorate for Files Control | 3 | 1 | 0 | 4 | | | |
| | Directorate for Abuse of Market Power and Restrictive Agreements | 11 | 1 | 1 | 13 | | | |
| | Directorate for Economic Concentrations | 6 | 2 | 1 | 9 | | | |
| | Legal Directorate | 9 | 1 | 1 | 11 | | | |
| | Directorate for Advocacy | 7 | 10 | 1 | 18 | | | |
| | Regional Office | 12 | 10 | 0 | 22 | | | |
| | Support operations (administrative and financial) | SCPM's President's Office | 3 | 3 | 1 | 7 | 101 | 1 944 882 |
| | | General Administration Directorate | 6 | 51 | 37 | 94 | | |
| Total | | 72 | 79 | 43 | 194 | 194 | 4 038 261 | |

Source: OECD, using data provided by SCPM

In terms of professions, 24% of SCPM's employees are lawyers, 13% are economists, and 41% hold other graduate diplomas, mainly international relations, business administration and accounting; 22% have no graduate studies (see Table 3). The core-business team at SCPM is made up of 45% lawyers, 23% economists, 27% other areas, and 5% have no university education. Support staff include 4% lawyers, 5% economists, 53% other areas, and 38% have no higher education.

Table 3. SCPM public servants' studies

| Classification | Studies level | Lawyers | Economists | Others | Total |
|-------------------------------|-----------------------|---------|------------|--------|-----------|
| Total | Only undergraduate | 23 | 16 | 53 | 92 |
| | Master's or doctorate | 23 | 10 | 26 | 59 |
| | No university studies | | | 43 | 43 |
| Value-added Operations | Only undergraduate | 22 | 14 | 15 | 51 |
| | Master's or doctorate | 20 | 7 | 10 | 37 |
| | No university studies | | | 5 | 5 |
| Support Operations | Only undergraduate | 1 | 2 | 38 | 41 |
| | Master's or doctorate | 3 | 3 | 16 | 22 |
| | No university studies | | | 38 | 38 |

Source: OECD, using data provided by SCPM.

Forty-seven percent of staff have an undergraduate degree, while 30% also have a master's or a doctorate.

Three facts stand out from the data presented in Table 3. First, the high percentage of people with no higher-education studies who are part of SCPM staff. Second, the total of the number of economists (26) and lawyers (46) in SCPM is low compared to the total number of professionals from other careers (79). Third, the predominance of lawyers over economists, in a ratio of 92 lawyers to 52 economists. Further, as indicated above there is no chief economist to provide economic insights and co-ordinate the economic approach of SCPM. SCPM's economists should be increased and a chief economist appointed.

According to SCPM, currently no external advisers can be hired as a result of circulars MEF-VGF-2020-0003-C of 16 April 2020 and MEF-SP-2020-0002 of 20 April 2020, issued by the government in the wake of the Covid-19 pandemic, prohibiting new hires, with few exceptions.

Salaries and career paths

SCPM salaries are determined by the Public Sector Remuneration Scale of the Ministry of Labour, which classifies all public employees into more than a dozen pay grades, and so are equivalent to the wages of other public institutions. For example, the salary received by SCPM's president is equal to the salary of a minister of state.

The wages of entry-level employees in the public sector are competitive when compared to the private sector. As employees increase their expertise and experience and move up the hierarchy, the pay gap between the public and the private sector increases, in favour of the latter. Mid-level positions, for example, earn slightly less than their private-sector equivalents, while for senior positions, wages are uncompetitive compared to the private sector. In addition, over the past five years, as a result of state budgetary cuts, higher pay-grade salaries at SCPM have been decreasing, even in nominal terms. This is problematic, as it makes more difficult keeping talent within SCPM and attracting it from the outside. The lower salary does not seem to be compensated by an attractive career plan.

The above may result in SCPM's high employee turnover. On average, SCPM employees spend 43 months at the institution; highest pay-grade positions last on average only 18 months (Table 4). This has left the agency with a relatively inexperienced workforce and hindered the growth of institutional experience and knowledge.

Remuneration for senior positions should be re-considered to improve SCPM's attractiveness as an employer, and SCPM should introduce credible career plans.

Table 4. Average employed duration at SCPM, by contractual categories

| Contract category | Average duration (months) |
|--|---------------------------|
| Highest pay-grade | 18 |
| Permanent | 55 |
| Provisional | 28 |
| Occasional services | 20 |
| Work code (assistants and drivers) | 69 |
| Total average time for SCPM workers | 43 |

Source: OECD, using data provided by SCPM.

2.1.6. *SCPM's prioritisation and planning*

SCPM systematically identifies priorities for its future actions, using an internal planning tool called the Planning, Monitoring and Evaluation System (SIPLASE). The tool defines SCPM's tactical and operational objectives and establishes indicators and goals for their monitoring and evaluation. These objectives must be in line with the National Development Plan, which establishes the framework for public policies, programmes and projects as well as the preparation and execution of the national budget.

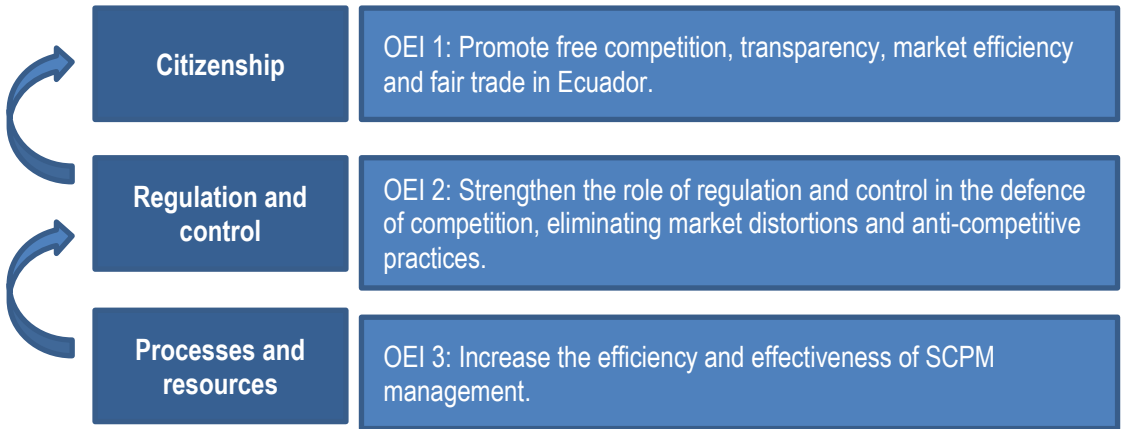
SIPLASE has four planning levels: 1) strategic institutional planning, which is elaborated every four years in accordance with the National Development Plan and determines the longer-term institutional strategic objectives (OEI);³² 2) tactical planning, led annually by the General Technical and General Management Intendancies; 3) specific planning, led annually by the CRPI and the National and Regional Intendancies; and 4) operational planning, which is elaborated annually by the Directorates, including IGT, and Regional Offices and involves the elaboration of the annual operating plan (POA).

SCPM's OEIs for the years between 2018 and 2021 note that the country's austerity programme has led to the agency's assigned budget being "insufficient, limiting the fulfilment of goals". Despite this, the document evaluated the level of compliance with the OEIs for the previous four-year period (2014-2017) at 97.83%. The current OEIs establish three main strategies and goals (Figure 6); none refer to increasing the number of cartel investigations or prioritising specific markets.

³² See SCPM's OEIs for the period 2014-2017, available at <https://www.scpm.gob.ec/images/planificacion-institucional/Plan-Estrategico-SCPM-2014-2017.pdf#>.

See SCPM's OEIs for the period and for the period 2018-2021, available at https://www.scpm.gob.ec/images/planificacion-institucional/PLAN-APROBADO_v2_2018-2021.pdf.

Figure 6. SCPM’s institutional strategic objectives (OEIs) for the period 2018-2021

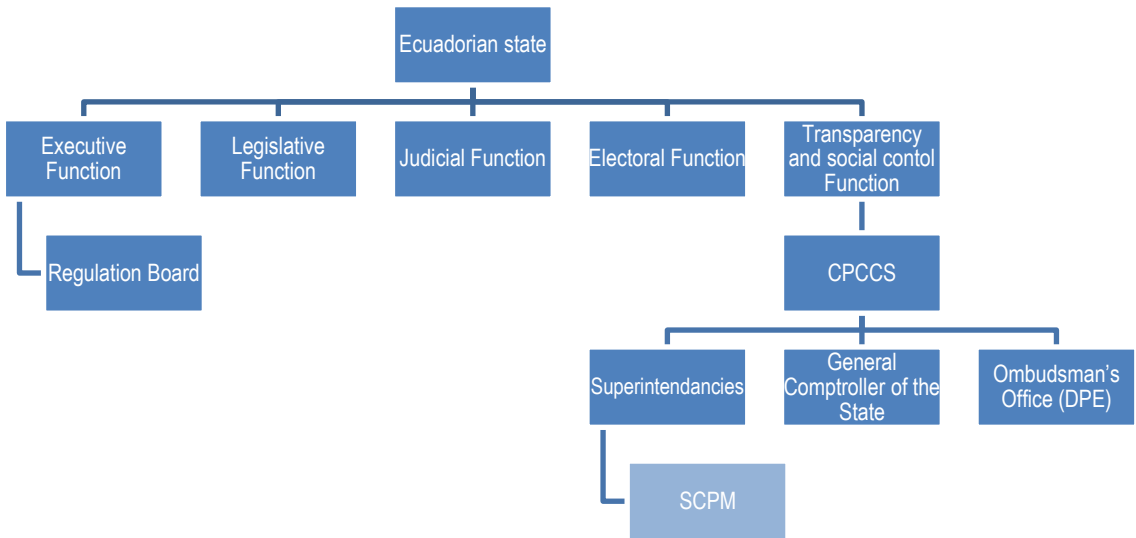


Source: SCPM Institutional Strategic Plan 2018-2021.

SCPM told the OECD that it had three priorities: 1) producing “serious and reliable” analytical studies; 2) increasing operational efficiency; and 3) enhancing the “creation of precedents in competition law”. The last priority seems particularly important as it implies a commitment by the agency to carry out investigations and take decisions that are procedurally flawless, analytically robust and well-reasoned, to be able to withstand legal challenges. As explained in Section 3, this is crucial: only few cases have been completed successfully within the SCPM and been confirmed by courts. This lack of successful enforcement has had an impact: during fact-finding, private sector stakeholders indicated that companies do not take competition law risks seriously enough.

2.1.7. SCPM’s interactions with other public bodies

SCPM engages with multiple public institutions in the exercise of its functions, including, importantly, the Regulation Board, CPCCS, the General Comptroller of the State, and SERCOP.

Figure 7. Functions of the Ecuadorian state and other institutions

Source: OECD

Regulation Board

The Regulation Board is part of the executive branch; it oversees policy and regulations within the remit of LORCPM. It has three main members: 1) the highest authority of the Technical Secretariat for Planning; 2) the Minister of Economy and Finance; and 3) the Minister of Industries and Productivity. SCPM's president may be present at the Regulation Board meetings, but cannot vote.

The Board may issue general rules on competition. LORCPM establishes that SCPM's president can also prepare and approve general technical competition regulations and instructions on competition law and issue general decisions, guidelines and internal regulations concerning SCPM's functioning.³³ Board regulations, however, override SCPM regulations. SCPM must inform the Regulation Board about the application and correct use of the general rules issued by the Regulation Board, every six months or when the Board requires it.

³³ See Article 44, numbers 6 and 16.

The Regulation Board was set up to separate the regulation-drafting role (vested in the Regulation's Board) from the competition-law enforcement one (vested in SCPM). Further, it was thought it would ensure the coherence of the legal framework, as the Board is responsible for any and all state regulation, except for LORCPM and RLORCPM.

However, the Regulation Board has not been functioning correctly, and its relationship with SCPM has been almost inexistent. In fact, there has only been one meeting in the last two years. The Board lacks competition specialists and its members participate in approximately 80 other collegiate bodies and are overwhelmed. Further, in fact-finding, stakeholders suggested that the Board's reliance on the executive branch could threaten the autonomy of SCPM, which depends on the Board's regulations.

The most important powers granted to the Regulation Board are stated in Article 42 of the RLORCPM:

- Issue normative acts for the application of the law, which may not alter the law or the RLORCPM;
- Issue the criteria to define relevant markets;
- Issue criteria for the evaluation of the practices mentioned in the law;
- Authorise state aid;
- Determine the criteria for the application of the *de minimis* rule regarding restrictive agreements and practices;
- Set the turnover-threshold requiring that a transaction be notified before SCPM;
- Set the amount which, if exceeded, requires the notification of State aid to SCPM;
- Co-ordinate and promote international co-operation;
- Issue recommendations on price policies aimed to help the population, as well as for the protection of national production and its sustainability;
- Enter into co-operation agreements with the regulatory and control agencies or public bodies competent to issue sectoral regulations;
- Establish the methodology to calculate the fines and commitments payments.

The LORCP duplicates functions across SCPM and the Regulatory Board regarding the issuance of competition-related regulations; RLOCPM does not settle this duplication of roles. Several stakeholders highlighted the need to clarify the powers of both SCPM and the Regulation Board. It seems reasonable to either designate SCPM as the sole issuer of new regulations related to competition, leaving the Regulation Board as the body for complaints about norms dictated by SCPM, or, if a more comprehensive measure is chosen, simply remove the Regulatory Board's ability to set rules.

Council for Citizen Participation and Social Control (CPCCS)

The Council for Citizen Participation and Social Control (CPCCS) is an autonomous entity that leads the Transparency and Social Control Function of the Ecuadorian Republic. It is responsible for appointing the directors in the Ombudsman's Office, the General State Comptroller's Office, and the Ecuadorian Super-intendancies. CPCCS is charged with the appointment process of SCPM's president from a list of three candidates elected by the president.

CPCCS was created by the 2008 Constitution as a way to prevent political influence in the appointment process of high-level civil servants. The mechanism was supposed to see appointments made solely on candidates' merits. Stakeholders have noted, however, that since its creation the CPCCS has become a partisan entity.

National Public Procurement Service

The National Public Procurement Service (SERCOP) is the governing, technical and regulatory body for public procurement in Ecuador. It has autonomy and is governed by the Organic Law on Public Procurement.

Due to the leading role that the state plays in the Ecuadorian economy, as noted in Section 1.1, SERCOP handles particularly large budgets. During 2019, it dealt with an amount equivalent to 5.5% of GDP.³⁴ Approximately 3 500 contracting entities use the technological contracting platform managed by SERCOP. In addition, SERCOP currently has around 75 000 active suppliers.

Article 41 of the RLORCPM states that SCPM "may implement systems and mechanisms for monitoring the contracting and subcontracting processes carried out by economic operators contracting with the State, in order to monitor the observance and application of the principles, rights and obligations enshrined in the Law."

³⁴ This data was delivered by SERCOP officials during the fact-finding process.

This allows control by SCPM of purchases made by the state and administrated by SERCOP as well as ex post investigations into possible anti-competitive behaviour.

Based on complaints from third parties or ex officio, SERCOP can review the contracting processes, using risk-matrix software with a series of variables such as the duration or prices. When suspicious practices that appear anti-competitive are detected, SERCOP first asks the contracting entity for justification. If the explanation is not satisfactory (or if is not delivered at all), SERCOP then recommends that the contracting entity suspend the procurement (or declares the process void). The procurement process is then suspended until it has been thoroughly reviewed. Second, SERCOP makes a confidential complaint to SCPM, so that the competition agency can initiate an investigation if it deems it necessary.

Stakeholders have indicated that enforcement in the context of public procurement could be improved. It seems that not many investigations result from SERCOP's complaints. This situation could likely benefit from more co-operation between SERCOP and SCPM, in particular so that SCPM receives data from the SERCOP on procurement on a regular and frequent basis, and SCPM trains SERCOP's officials on competition law, in accordance with the OECD Recommendation on Fighting Bid Rigging in Public Procurement.³⁵ SCPM could rely on recommendations on competition and procurement authority co-operation made by the OECD Secretariat in in-country competition reviews of procurement rules and practices.³⁶

³⁵ In particular recommendation II which stipulates that competition authorities should:

“1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;

2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and

3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct”.

³⁶ See www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm.

General Comptroller

The General Comptroller of the State audits the proper management of public resources spent by SCPM and more generally, ensures that public institutions comply with their respective regulations and carry out their activities within the framework of the law.

In the context of competition policy, the General Comptroller may require SCPM to provide reasons for choosing not to appeal against unfavourable (for SCPM) court decisions, like first-instance judgments setting aside SCPM's decisions. Therefore, to avoid being criticised for failing to take action to defend the public interest, SCPM tends to lodge all appeals, even if these have little chance of success, for example in cases when the first-instance court found procedural defects in investigations, which no SCPM argument on appeal can convincingly explain or remedy .

SCPM and the General Comptroller should clarify that SCPM should make the ultimate judgement of whether an appeal is appropriate and whether lodging it is a good use of its resources.

2.2. The substantive legal framework

2.2.1. Scope of the competition law

Article 2 of LORCPM states that “[a]ll economic operators, whether natural or legal, public or private, national and foreign, for- or non-profit, who currently or potentially carry out economic activities, are subject to the provisions of this Law.” This includes trade associations, state-owned companies and state authorities.³⁷

So far SCPM has imposed no sanctions on state-owned companies or on state authorities, although it has investigated (for example, the telecommunications company CNT) and carried out market studies that include companies of this nature (such as national airline TAME EP).

³⁷ Regarding trade associations, the law establishes in its Article 77 specific rules for charging a fine to such entities. If the trade association does not pay the fine, SCPM may demand payment of the total fine from any of the economic operators that are members of the trade association. However, it is also provided that the payment of the fine addressed to a trade association shall not be required of companies that demonstrate that they have not applied the decision or recommendation that triggered the fine, that they were unaware of it or that they “*actively distanced themselves*” from the association before investigation.

LORCPM also applies to economic operators that operate outside the Ecuadorian territory if their actions, activities, or agreements produce or could produce harmful effects in Ecuador.

Ecuadorian law foresees administrative, not criminal, sanctions for competition law infringements.

2.2.2. Abuse of market power

Articles 9 and 10 of LORCPM prohibit the abuse of market power and the abuse of market power in a situation of economic dependence, respectively. Both Article 9 and Article 10 are based on Article 7, which defines market power as the “ability of economic operators to significantly influence the market” and act independently without being restricted by other market operators, whether competitors, suppliers or customers.

Abuse of market power (Article 9 of LORCPM)

The first paragraph of Article 9 of LORCPM establishes a general prohibition for the abuse of a market power that sets out that abuse occurs when one or more economic operators, based on their market power, affect, restrict, falsify or distort competition, economic efficiency, or general welfare. Thus, there are two conditions for sanctioning: first, market power, and second, its abuse. The mere existence of market power – as a structural element – does not constitute an infringement.³⁸

The second paragraph of Article 9 establishes a list of 23 specific conducts that constitute abuse of market power according to Ecuadorian competition law.³⁹ This

³⁸ This is set out in Article 7: “*Obtaining or strengthening market power does not harm competition, economic efficiency or general welfare. However, obtaining or reinforcing market power in a way that prevents, restricts, falsifies or distorts competition, threatens economic efficiency or the general welfare or the rights of consumers or users does constitute conduct subject to control, regulation and, if applicable, the sanctions established in this Law.*”

³⁹ The 23 abusive behaviours listed in Article 9 are: “1) *The behaviours of one or several economic operators that allow them to affect, effectively or potentially, the participation of other competitors and their ability to enter or expand in a relevant market, through any means outside their competitiveness or efficiency.* 2) *The behaviours of one or several economic operators with market power, which allow them to increase their profit margins by unjustified extraction of consumer surplus.* 3) *The behaviours of one or several economic operators with market power, in conditions in which due to the concentration of the means of production or commercialization, those behaviours affect or may affect, limit or prevent the participation of their competitors or harm direct producers, consumers and/or users.* 4) *The setting of predatory or exploitative prices.* 5) *The unjustified alteration of the levels of production of the*

list is non-exhaustive and, hence, other types of conduct can constitute an infringement as well, provided that the conditions of the general clause (market power and its abuse) are met. For certain stakeholders, the list is overly long and contains duplications and redundancies. Many behaviours out of the 23 on the list have never been invoked in a specific case.

Further, the language used by LORCPM for the listed conducts is not consistent. For some conducts it requires that they be “unjustified” (e.g. increasing margins), but for some others it does not (e.g. exploitive prices). It is unclear what

market or of the technical or technological development that negatively affects economic operators or consumers. 6) The unjustified discrimination of prices, conditions, or modalities of pricing. 7) The application, in commercial or service relationships, of unequal conditions for similar services that unfairly place some competitors at a disadvantage compared to others. 8) The conditional sale and the tied selling, unjustified. 9) The unjustified refusal to satisfy the purchase or acquisition demands, or to accept offers to sell or provide goods or services. 10) The incitement, persuasion or coercion of third parties not to accept, limit or prevent the purchase, sale, mobilization or delivery of goods or the provision of services to others. 11) The fixing, imposition, limitation, or unjustified establishment of conditions for the exclusive purchase, sale, and distribution of goods or services. 12) The establishment of unjustified cross-subsidies, particularly aggravated when these subsidies are regressive. 13) The subordination of acts, agreements, or contracts to the acceptance of obligations, supplementary or conditioned benefits that, due to their nature or arrangement for commercial use, are not related to their object. 14) The unjustified refusal of access for another economic operator to networks or other infrastructure in exchange for reasonable remuneration; as long as said networks or infrastructure constitute an essential facility. 15) The implementation of exclusionary practices or exploitative practices. 16) The conditional discounts, such as those conferred through the sale of membership cards, loyalty or other types of conditioning, that imply any payment to access the discounts as mentioned above. 17) The abuse of an intellectual property right, according to the provisions contained in international instruments, conventions and treaties adopted by Ecuador and in the law that governs the matter. 18) The unjustified implementation of legal actions that result in the restriction of access or the permanence in the market of current or potential competitors. 19) Establish, impose, or suggest exclusive distribution or sale contracts, non-competition clauses or the like, that are unjustified. 20) The unjustified fixing of resale prices. 21) Subject the purchase or sale to the condition of not using, acquiring, selling or supplying goods or services produced, processed, distributed or marketed by a third party. 22) Those behaviours that impede or hinder the access or permanence of current or potential competitors in the market for reasons other than economic efficiency. 23) The imposition of unjustified conditions on suppliers or buyers, such as the establishment of excessive and unjustified payment terms, the return of products, especially when they are perishable, or the demand for contributions or supplementary benefits of any kind that are not related to the main provision or related to the effective provision of a service to the provider.”

the reason behind this difference is. The list should be clarified, simplified and harmonised across the various examples of illegal conduct.

Article 78 of LORCPM classifies infringements of LORCPM between minor, serious, and very serious, for purposes of determining the fine. This article establishes the abuse of market power typified in Article 9 as a very serious infringement when 1) it produces highly harmful effects for the market and consumers and 2) the market share of the infringing operator is close to monopoly or enjoys special or exclusive rights. When neither of these two conditions is met, the abuse of market power corresponds to a serious infringement.

Abuse of economic dependence (Article 10 of LORCPM)

Article 10 of LORCPM prohibits the exploitation of economic dependence of clients or suppliers. Four conditions need to be met for the article to come into play: market power, economic dependence, absence of equivalent alternatives for the client or supplier, and abuse or exploitation.

Article 10 presents a list of four specific cases of abuse of market power in a situation of economic dependence, all in vertical relationships.

According to Article 10 of LORCPM, abuse can consist of:

- “1) The rupture, even partial, of an established commercial relationship without prior written notice, unless it is due to serious breaches by the supplier or buyer of the agreed conditions or in case of force majeure.*
- 2) Obtaining or trying to obtain, under threat of a rupture of commercial relations or any other type of threat, prices, payment conditions, sales modalities, additional charges and other commercial co-operation conditions not included in the original general conditions of sale.*
- 3) The use of market power to generate or maintain the position of economic dependence of one or more operators and obtain additional advantages.*
- 4) The imposition, directly or indirectly, of non-commercial prices or other conditions or services.”*

Despite these prohibitions, abuse of market power in case of economic dependency is not listed as a sanctionable infringement by Article 78. No SCPM or other Ecuadorian official was able to explain why this is the case. Article 6 of the RLORCPM unsuccessfully tried to remedy this omission by establishing that the sanctions established in letters “b) or c) of Article 79 apply” “to the abuse of market power in a situation of economic dependency”. However, the constitutionality of establishing sanctions by regulation as opposed to by law is debatable.

It would be best to delete Article 10, since the behaviours it describes could already be covered in Article 9. Stakeholders told the OECD that there has been a lack of clarity from the agency about whether a violator of Article 10 must dominate the market or only the victim. This should be clarified, were the article kept, in the sense that a dominant market position should be required.

2.2.3. Restrictive agreements

General prohibition

Article 11 of LORCPM begins with a general prohibition about cartel-like behaviours:

“Any collective agreement, decision or recommendation, or concerted or consciously parallel practice, and in general all acts or conduct carried out by two or more economic operators, in any way manifested, related to the production and exchange of goods or services, whose object or effect is or may be to prevent, restrict, or distort competition, or negatively affect economic efficiency or general welfare, are prohibited and will be sanctioned in accordance with the rules of this law.”

Article 11 then lists 21 specific behaviours that can constitute restrictive agreements; therefore, it is as complex as article 9 on market power abuse. Like in the case of abuse of dominance established in Article 9, the law sometimes seems to require that conducts are unjustified and sometimes does not. The list should be clarified, simplified and harmonised across the examples of illegal conduct.

The main specific prohibitions of restrictive agreements and practices are outlined below:

- Fix prices, or other commercial or transaction conditions, or exchange information with the same object or effect.
- Restrict the production, distribution or commercialisation of goods or services.
- Split clients, suppliers, or geographical areas.
- Bid rigging.
- Impose discriminatory prices, conditions, or negotiation terms.
- Conditional sales and tied sales.

- Unjustifiably deny the admission of economic operators to an association, union or similar entity.
- Boycotts aimed at limiting market access or competition from other companies.
- Fixing resale prices.
- Create barriers to entry and / or exit in a relevant market.⁴⁰

⁴⁰ The specific prohibitions of restrictive agreements are the following, according to Article 11 of LORCPM: “1. Set in a concerted manner or manipulate prices, interest rates, rates, discounts, or other commercial or transaction conditions, or exchange information with the same object or effect. 2. Distribute, restrict, limit, stop, establish obligations or concertedly control the production, distribution or commercialization of goods or services. 3. The agreed distribution of clients, suppliers, or geographical areas. 4. Distribute or restrict sources of supply. 5. Restrict technological development or investments. 6. The acts or omissions, agreements or concerted practices and, in general, all the conduct of suppliers or bidders, whatever the form they take, whose object or effect is to prevent, restrict, falsify or distort competition, either in the presentation of offers and bids or seeking to ensure the result for their benefit or that of another supplier or offeror, in a tender, contests, auctions, public auctions or others established in the regulations governing public contracting, or in private contracting processes open to the public. 7. Unjustifiably discriminate prices, conditions, or modalities for negotiating goods or services. 8. The concerted application, in commercial or service relationships, of unequal conditions for equivalent benefits, which unfairly place some competitors at a disadvantage compared to others. 9. Agree to dissuade an economic operator from certain conduct, retaliate against it or compel it to act in a certain sense. 10. The agreement of the quality of the products when it does not correspond to national or international technical standards. 11. Arrange the subordination of the conclusion of contracts to the acceptance of additional benefits that, by their nature or arrangement for commercial use, are not related to the purpose of such contracts. 12. The conditional sale and the tied sale, unjustified. 13. Refuse in a concerted and unjustified way to satisfy purchase or acquisition demands or offers to sell and provide products or services, or to negotiate with current or potential suppliers, distributors, intermediaries, purchasers or users. 14. Unjustifiably deny the admission of economic operators to an association, union or similar entity. 15. The boycott aimed at limiting market access or the exercise of competition by other companies. 16. Suspend concertedly and vertically the provision of a monopolistic service in the market to a provider of public or private goods or services. 17. The concerted and unjustified fixing of resale prices. 18. Build barriers to entry and / or exit in a relevant market. 19. Establish, impose, or suggest exclusive distribution or sale contracts, non-competition clauses or the like, that are unjustified. 20. Those behaviours that impede or hinder the access or permanence of current or potential competitors in the market for reasons other than economic efficiency. 21. The

Article 11 prohibits, among other conducts, consciously parallel practices. SCPM interprets this as a prohibition of tacit collusion. The reference to consciously parallel practices should be deleted, as tacit collusion normally falls outside the remit of competition law.

The LORPM uses the European definition of cartels as conducts having the “object or effect” of restricting competition, which allows SCPM to sanction cartels without the need to prove anti-competitive effects. This is in line with OECD Council’s Recommendation concerning Effective Action against Hard Core Cartels,⁴¹ which advises that hard core cartels be considered illegal “regardless of the existence of proof of actual adverse effects on markets.” Article 8 of the RLORCPM contains a normative presumption that cartels are anticompetitive.

Although the list of possible conducts in violation of competition is long, so far there are no cases with sanctions regarding many of the conducts in Article 11, for example, numbers 10, 11, 12, 14, 17, 18, 19, 20, and 21 of Article 11.

Exemptions

Article 12 of LORCPM establishes an exemption to the prohibition concerning restrictive agreements. The exemption applies where agreements comply with all the following conditions:

- The agreements improve the production or commercialisation and distribution of goods and services or foster technical and economic progress
- They allow consumers a fair share of the resulting benefit.
- They do *not* impose on the economic operators concerned restrictions which are not indispensable to the attainment of the objectives above.
- They do *not* afford such economic operators the possibility of eliminating competition in respect of a substantial part of the products and services in question.

The exemptions do not require prior authorisation from SCPM and businesses have no obligation to notify the agency of their use. There have been no investigations

agreements between suppliers and buyers, regardless of what the law establishes, that may occur in public purchases that direct and concentrate contracting to unfairly favour one or more economic operators.”

⁴¹ The Recommendation was adopted in 2019 and is available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.

so far into exemptions, so there is little evidence about how widespread exemptions might be and if there was any misuse.

De minimis

Article 13 of LORCPM sets up the *de minimis* rule, which states that Article 11 does not apply to behaviours by economic operators, which cannot significantly affect competition due to their small size or scale of operation. The *de minimis* rule has so far not been applied by SCPM.

According to LORCPM, the criteria for the application of the *de minimis* rule must be determined by the Regulation Board.⁴² Article 9 of RLORCPM indicates that the *de minimis* rule is not applicable to cartels.

Sanctions

Article 78 of LORCPM establishes that restrictive agreements and practices set out in Article 11 as very serious infringements when they involve companies or economic operators that are real or potential competitors (horizontal agreements), and as serious infringements when the companies are not competitors (non-horizontal agreements).

2.2.4. Mergers

LORCPM has 10 articles on mergers and its RLORCPM 18 articles. In addition, regulations, such as the determination of notification thresholds, are issued by the Regulation Board. Over the nine years of its existence, SCPM has been consistent in its reviews of mergers, a long-term stability that has created precedents and brought predictability to the market. Private-sector stakeholders have said that the Directorate for Investigation and Control of Economic Concentrations (ICC) has functioned correctly. SCPM approved a technical guide for analysing mergers in 2013; it is not currently available on the website of the agency, which is currently considering publishing a new version.

⁴² Resolution N° 003 of the Regulation Board and Resolution N° 010 of the Regulation Board make a distinction concerning the *de minimis* rule depending on the nature of the agreements. For horizontal agreements, the *de minimis* rule applies if the combined market share does not exceed 14%. For vertical agreements, the *de minimis* rule applies if the market share of each participant does not exceed 15%. Specific rules apply if there are parallel agreements with cumulative effect.

Definition of merger

Article 14 of LORCPM defines a “merger” as a change or takeover of one or more companies or economic operators. The forms of concentrations covered by the law include:

“the change or takeover of one or more companies or economic operators, through the performance of acts such as: a) The merger between companies or economic operators. b) The transfer of all the effects of a merchant. c) The acquisition, directly or indirectly, of the property or any right over shares or capital shares or debt securities that give any type of right to be converted into shares or capital shares or to have any type of influence in the decisions of the person who issues them, when such acquisition gives the acquirer control of, or substantial influence over it. d) Joint management. e) Any other agreement or act that transfers in fact or legal form to an economic person or group the assets of an economic operator or grants it decisive control or influence in the decision-making of ordinary or extraordinary administration of an economic operator.”

The rules on mergers do not refer to conglomerate mergers, and consequently have been applied only to horizontal and vertical operations.

Notification thresholds

Article 16 of LORCPM establishes two thresholds requiring the notification of a merger; meeting any of these thresholds will trigger the obligation to notify. The thresholds are the following:

- 1) Total turnover in Ecuador of the group of participants exceeds, in the accounting year preceding the operation, an amount to be established by the Regulation Board in current Unified Basic Remuneration (USD 400 in 2020) (see Table 5). These amounts vary depending on the sector (see Table 5). A transaction needs to be notified even if there is only one participant with significant turnover in Ecuador (e.g. a large company acquiring a small business).
- 2) The operation gives the merged economic operators in the same sector a 30% or more market share for a product.⁴³

⁴³ From 2014 to 2019, 23% of the mergers were notified because they met the 30% market requirement.

Table 5. Turnover limits for merger operations

| Company type | Unified Basic Remuneration (RBU) | Amount (USD) |
|--|----------------------------------|--------------|
| Financial institutions | 3.2 million | 1.28 billion |
| Insurance and reinsurance entities | 214 000 | 85.6 million |
| Economic operators in any other sector | 200 000 | 80 million |

Source: Resolution N°009, dated on September 25, 2015. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-No.-009-Umbrales-de-Concentracion-.pdf>

The law also establishes how turnover is calculated.

SCPM may also request ex officio or at the request of an interested third party that a concentration be notified even if these criteria are not met. Parties may notify a transaction to SCPM voluntarily for information purposes. This has happened in the past, as indicated in Section 3.3.

Stakeholders in the private sector stated that the thresholds for mandatory notification of mergers were too low since reaching 30% of the relevant market in Ecuador was relatively simple. According to them, this results in the notification of many operations that are harmless to competition, and long and time-consuming work for ICC to review them and reply.

The OECD Recommendation on Merger Review advises countries to use clear and objective criteria to determine whether and when a merger must be notified, and there are doubts as to whether market share thresholds are clear or sufficiently objective.⁴⁴ Ecuador should balance the advantages of this type of thresholds (notably, the ability to trigger the notification of potentially problematic mergers concerning companies with low turnovers), with their lack of certainty (given that they require a complex and non-objective analysis, i.e. market definition and the calculation of shares, to determine whether a transaction must be notified).

In the case of the turnover threshold, according to international good practices, an obligation to notify must only exist if the transaction has a sufficiently material impact in the reviewing jurisdiction. If the local turnover of only one participating undertaking is sufficient to trigger merger notification, then a very significant number of merger transactions which have no or very little impact on competition in the

⁴⁴ See www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm. On the use of market shares, see the executive summary of the Roundtable on Jurisdictional nexus in merger control regimes (2016) www.oecd.org/competition/jurisdictional-nexus-in-merger-control-regimes.htm.

country would have to be notified.⁴⁵ For this reason, Ecuador’s turnover threshold should be changed to require that at least two participants in the transaction (in the case of acquisition of joint control, it could be the acquirers) and/or the acquired business meet the required local turnover threshold.⁴⁶ International good practices do not address how high the threshold should be, but Ecuador could consider the thresholds set by countries with a similar economy.

Exemptions from notification

According to Article 19 of LORCPM, the acquisition of any title without voting rights, and the acquisition of companies liquidated or without activity in the country during the previous three years are exempt from mandatory notification. Article 13 of the RLORCPM adds three other exceptions: 1) the temporary purchase of titles acquired for resale; 2) acquisitions of failing firms with prior public authorisation by the authority reviewing and approving the insolvency; and

⁴⁵ See the executive summary of the Roundtable on Jurisdictional Nexus in Merger Control Regimes (2016): “*For example, it is clear that a transaction in which only one of the companies has a link to the jurisdiction can be said to have some sort of local nexus. However, since the objective of notification thresholds is to ensure that only those mergers which are likely to have a material impact on competition in the jurisdiction concerned are reviewed, it is arguable that merger control should be triggered only by the presence in the jurisdiction of at least each of two participating undertakings; if the local turnover of only one participating undertaking was sufficient to trigger merger notification, then a very significant number of merger transactions which have no or very little impact on competition in the country would have to be notified.*”

Thus, the level of local nexus required is intrinsically linked to the potential that the transaction has to have a sufficiently material impact in the reviewing jurisdiction. International best practices do not address the relationship between materiality and local nexus in detail, which leaves the issue to the local jurisdiction’s discretion as long as the minimum requirements set in recommendations regarding local nexus are met.”
[https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN3/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN3/FINAL/en/pdf).

⁴⁶ See the Recommended Practices for Merger Notification and Review Procedures of the International Competition Network (2018): “*Determination of a transaction’s nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction.*”
https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

3) acquisitions under the application of seizure procedures or other administrative proceedings.

Deadline for notifications

When a transaction meets either of the two thresholds, the notification must be filed within eight calendar days from the date of the conclusion of the agreement, pursuant article 16 of the RLORCPM. This period is considered too short.⁴⁷

The deadline should be longer to provide merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger, as per the OECD Recommendation on Merger Review,⁴⁸ on condition that the merger is not implemented prior to notification and clearance, as, in that case, Ecuador's gun jumping rules would apply.

Previous consultation

If economic operators are uncertain about whether or not to notify a transaction, they can request SCPM's view. In 2013, SCPM issued Technical Guidelines for the Analysis of Economic Merger Operations to inform interested economic operators, and the wider business community, about the main aspects of the law and the procedure for analysing concentration operations.⁴⁹

Concurrent competences of other public authorities

Sectoral regulators must obtain the authorisation of the concentration by SCPM to complete their review of the concentration. This is the case of the Telecommunications Regulation and Control Agency (ARCOTEL), the Super-Intendancy of Popular and Solidarity Economy (SEPS), the Super-Intendancy of Companies, Securities and Insurance (SUPERCIAS) and the Super-Intendancy of Ecuadorian Banks (SBE). Where the thresholds are not met and SCPM has not

⁴⁷ In particular, the text refers to the fourth article of the magazine "Estudios de Derecho de Competencia Ecuatoriano", "El régimen de Control de Concentraciones en el Ecuador", written by Diego Pérez, Luis Marín Tobar y Mario Navarrete. Available at <https://www.competenciaecuador.com/publicaciones>.

⁴⁸ OECD Council's Recommendation on Merger Review advises countries to "[p]rovide, without compromising effective and timely review, merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger."

⁴⁹ These guidelines are currently being revised and have been removed from SCPM's website.

required a notification, companies may obtain SCPM's notification by voluntarily notifying the concentrations. Voluntary notifications are allowed by the RLORCPM.

SCPM has signed co-operation agreements for information exchange with ARCOTEL and SEPS to expedite authorisations. From 2016 and up to February 2020, SCPM issued decisions on 10 cases in the telecommunications sector, of which 5 were pre-notification consultations, 3 voluntary notifications and 2 mandatory notifications.

Documents to be filed by the merging parties

Economic operators that must notify a concentration need to provide the agency with all the documents listed in Article 18 of the RLORCPM and pay a fee.⁵⁰ Accompanying documents include a description of the parties, the proposed economic operation, the definition of the relevant markets, turnover of the participants, market shares, and the supply-and-demand structure. A copy of the legal act for the concentration and a sworn statement that the information is true and that the calculations have been made in good faith must also be included.

Merger review procedure

The merger review procedure consists of four phases.

1. The Directorate for Investigation and Control of Economic Concentrations (ICC) receives the filing, along with the accompanying documents.
2. SCPM verifies that the notification complies with LORCPM and its implementing regulations.
3. The investigation phase begins. As a rule, ICC has 50 calendar days to present a non-binding investigation report from the date of the notification to the CRPI. If the fast-track procedure applies, ICC has 15 days.
4. The CRPI makes a final decision within a maximum period of ten calendar days (both in the regular and the fast-track procedure). This is very limited time to carefully assess the evidence and the Directorate's assessment, especially given the limited resources of CRPI.

⁵⁰ Article 29 of the RLORCPM, Resolution N° SCPM-DS-2013-002, and Resolution N° SCPM-DS-59-2016.

Mergers cannot be implemented until they are authorised by SCPM. Implementation before that moment constitutes a serious infringement. If the entity resulting from the concentration executes acts or contracts the infringement is considered a very serious infringement.

Thus, in the regular procedure, SCPM has a total of 60 calendar days (of which 50 for ICC's review and ten for CRPI's decision) to decide on the proposed transaction. This period can be suspended, to allow time to respond to SCPM's information requests for up to 60 calendar days. In practice, SCPM does suspend the review process for parties in the proceedings and third parties to provide the required information.⁵¹ In addition, the 60-day review period (or longer if suspended) can be extended once, up to an additional calendar 60 days, if it is needed, pursuant to Article 21 of LORCPM. This means that the maximum time-period for SCPM to approve a merger is 180 days. If SCPM does not issue a decision before the deadline, the operation is considered tacitly authorised.⁵²

Until recently, SCPM reviewed all mergers under this procedure, and hence, the agency was bound by the same deadline, regardless of their complexity. In April 2020, a fast-track procedure was introduced allowing for an abbreviated and simplified review of concentrations that do not seem to have the potential to harm competition.⁵³ This is decided prior to the investigation phase, in view of structural variables (i.e. market shares and Herfindahl-Hirschman index) or if one of the undertakings risks bankruptcy. In this procedure, SCPM has a total of 25 days to decide on the proposed transaction (of which 15 for ICC's and ten for CRPI's decision).

The introduction of the fast-track procedure goes in the right direction, as OECD Council's Recommendation on Merger Review encourages countries to "provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance."

It would be advisable that Ecuador complements the fast-track procedure with the adoption of a two-phase system. Under this system, a first phase (or phase I) is used to consider whether a merger raises competition concerns. Non-problematic mergers can be authorised under phase I (conditionally or unconditionally). If a

⁵¹ El régimen de Control de Concentraciones en el Ecuador. Diego Pérez, Luis Marín Tobar y Mario Navarrete. Estudios de Derecho de la Competencia, Tomo 1. IEDC, 2018.

⁵² Article 23 of LORCPM. The tacit authorisation mechanism has operated only once, in the BSN Medical Germany Holding case. The authority later found that this operation did not produce harmful effects.

⁵³ Resolution SCPM-DS-2020-18 introduced the fast-track procedure.

merger is considered potentially problematic, an in-depth review is carried out in a second phase (or phase II). After phase II, mergers may be authorised (with conditions or unconditionally) or prohibited.

Merger review methodology, decisions and remedies

Ecuador's regime relies on a dominance test. According to Article 15 LORCPM, SCPM must assess whether the merger creates, strengthens or alters market power. However, the vast majority of competition authorities across the world use the substantial lessening of competition (SLC) test.⁵⁴ The SLC test focuses on the effects of the merger on the market (whether prices are likely to rise post-merger) and on the loss of competition among firms, rather than on structural issues such as market shares, which is the focus of the dominance test.

A move towards SLC would allow the Ecuador merger control system to look at anti-competitive effects of mergers below the threshold of dominance, and address coordinated effects. Namely, SLC could allow looking at coordinated effects and cover conglomerate mergers, while a dominance test would usually cover a merger's unilateral effects, i.e. the strengthening of the merged entity's market position.

Currently, to carry out its assessment, SCPM must analyse the market share of the merging parties and their competitors in the relevant market. To determine the relevant market, the ICC applies Article 5 of LORCPM, which refers to the relevant product or service market, and the relevant geographic market.

The product or service market includes the goods or services at stake as well as its substitutes. For the substitution analysis, SCPM evaluates, among other factors, the preferences of customers or consumers, the characteristics, uses and prices of the possible substitutes, replacement costs, as well as the technological possibilities and the time required for the replacement.

Resolution N°11 of the Regulation Board establishes demand-side and supply-side substitution analysis as the preferred method for determining relevant markets.

⁵⁴ See the executive summary of the Roundtable on Standard of Merger Review (2009): “many jurisdictions have changed and others are contemplating changing the legal standard for the review of mergers from a standard based on the creation or strengthening of a dominant position to an SLC standard. No country reported changing over the last twenty years from the SLC standard to the dominance standard” www.oecd.org/competition/abuse/46503256.pdf.

The resolution also establishes the obligation to use at least one quantitative method, for both supply-side and demand-side substitution.⁵⁵

Quantitative methods for analysing demand substitution – all goods that consumers identify as substitutes for the product in question – are price and cross elasticity of demand, the small but significant non-transitory increase in prices (SSNIP) test, and price correlation. The quantitative methods for analysing supply substitution – all the goods offered by potential competitors that could manufacture and commercialise them without making significant adjustments of assets, costs or risks – are supply-side substitution (SSS) and nearly universal substitution (NUS). Complementary quantitative methodologies, such as Herfindahl-Hirschman market concentration index (HHI), and the Melnik, Shy and Stenbacka dominance index, are used when a more extensive analysis is necessary. The entry of potential competitors and contestability of the market are also considered, and, if necessary, the potential existence of buyers with the capacity to exercise demand power.

According to Article 5 of LORCPM, the geographic market comprises the set of geographic areas where alternative sources of supply of the relevant product are located. To determine supply alternatives, SCPM will evaluate, among other factors, transportation costs, sale modalities, and existing trade barriers.

Once the relevant market is defined, SCPM must determine any unilateral and co-ordinated effects potentially resulting from the notified concentration. It then considers any efficiencies that the merger may generate and weighs the competition risks against the efficiencies generated by the merger.

If a concentration creates, modifies, or strengthens market power, SCPM may prohibit the operation or require remedies to allow it, which may include: 1) structural remedies; 2) behavioural remedies; 3) mixed remedies; and 4) others.

Typical structural remedies would be divestiture of production plants, productive assets, intangible assets, or long-term licensing for the use and exploitation of a brand. Behavioural remedies can be communications to clients, limits on marketing spending, granting access to distribution channels to third-party economic operators, extending the validity of contracts and terms and conditions with clients, maintaining price levels for providing services, and liberalising prices established in franchise contracts. Remedies that are neither structural nor behavioural are, for example, making the operation conditional upon the decision of

⁵⁵ Article 6 and Article 11 of the Resolution N°11 of the Regulation Board, dated on 16 September 2016. See, www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-011-Expedici%C3%B3n-de-Metodos-de-determinaci%C3%B3n-de-Mercados-Relevantes.pdf.

another regulator, granting benefits to SMEs, worker share participation in a company, and requiring notification to SCPM before entering new markets.

The regulations also state that remedies imposed by SCPM must be implemented within 90 days of the decision; if not put in place within the term the concentration is rejected. Time extensions are allowed, which is particularly important in the case of structural remedies that may need more than 90 days to be implemented.

Sanctions

Article 78 of LORCPM establishes specific sanctions for non-compliance and violations of the merger rules. Following the general outline of the law, it classifies such infringements as minor, serious, and very serious.

Minor infringements include the notification of the merger after the deadline established in the law. Serious infringements include the “execution of a merger subject to control, before having been notified to SCPM or before it has been authorised”. Finally, very serious infringements include the “execution of acts or contracts carried out by the economic operator [...] before having been notified to SCPM or before it has been authorised.”

The difference between serious and very serious infringements appears unclear. It is serious to implement the operation, but very serious to implement acts and contracts related to the merger. It could be argued that the difference is a matter of degree, and that “acts or contracts” implies a higher level of execution, but the test to differentiate between the two levels of seriousness remains opaque.

2.3. Enforcement powers and procedures

2.3.1. Investigation powers

Powers of SCPM and SCPM’s president

LORCPM establishes the powers of the Super-Intendancy and SCPM’s president. The list of powers is long and exhaustive. They are presented on Table 6 below.

Table 6. Comparison of faculties between the Super-Intendancy and the SCPM's president

| Nature of the powers | Article 38 of LORCPM: SCPM SCPM, through its organs, shall exercise the following powers | Article 44 of LORCPM: SCPM's president Attributions and duties of SCPM's president, in addition to those determined in elsewhere in this Law |
|--|--|--|
| <i>Enforcement</i> General co-operation | 1) Carry out market studies and investigations. SCPM may demand any documents from individuals and public authorities that it deems necessary as well as their co-operation. | 5) Request or practice ex officio the necessary evidence and procedures for its investigations. |
| <i>Enforcement</i> General procedure | 2) Carry out administrative investigations that end with measures or sanctions for breaches of the law. | 2) Decide on appeals against decisions issued by the Directorates or by the CRPI. 3) Exercise its public powers. 20) Comply with and enforce the provisions of LORCPM and other applicable rules, as well as the country's international agreements in this field. 21) Exercise other powers and fulfil the duties indicated by the laws. |
| <i>Enforcement</i> Turnover | 3) Determine the turnover of firms in the context of investigations, markets studies and other tasks under its remit. | |
| <i>Enforcement</i> Hearings | 4) Hold hearings with the alleged perpetrators, whistle blowers, victims, witnesses and experts, receive a statement and order face-to-face meetings, for which SCPM may request the assistance of the police. | |
| <i>Enforcement</i> Expert opinions | 5) Examine and commission any expert opinions deemed necessary on books, documents and other elements necessary for the investigations, control stocks, verify origins and costs of raw materials or other goods, in accordance with LORCPM. | 13) Hire staff to carry out specific or extraordinary work that cannot be carried out by SCPM's permanent staff, in accordance with the regulations of the National Public Procurement System and the Organic Law on Public Service. |
| <i>Enforcement</i> Inspections | 6) Undertake inspections, formulate questions and request any information deemed pertinent to the investigation. | |
| <i>Enforcement</i> Seals | 7) Place seals where deemed appropriate in order to protect evidence. | |
| <i>Enforcement</i> Sanctions | 8) Apply sanctions as established in LORCPM. | 1) Analyse and decide, in a motivated manner, on the infringements established in LORCPM and apply the corresponding sanctions. 18) Exercise and delegate coercive action in accordance with the Civil Procedure Code and other applicable rules. |
| <i>Advocacy</i> Opinions | 9) When deemed pertinent, issue non-binding opinions on competition laws, regulations, circulars and administrative acts. | |
| <i>Advocacy</i> Reports | 10) Issue reports and analyse notifications in accordance with this Law. | 9) Submit an annual report to the National Assembly, in which SCPM explains its work and how it complies with LORCPM. |

| Nature of the powers | Article 38 of LORCPM: SCPM, through its organs, shall exercise the following powers | Article 44 of LORCPM: SCPM's president Attributions and duties of SCPM's president, in addition to those determined in elsewhere in this Law |
|--|---|--|
| | 11) Issue general or sectoral recommendations on competition. | |
| <i>Advocacy</i> International | 12) Act in co-ordination with competent agencies in the negotiation of international treaties, agreements or conventions in matters pertaining to regulation and competition. | |
| <i>Enforcement</i> Actions to public entities | 13) Require public institutions to take appropriate actions to guarantee the full and effective application of LORCPM. | |
| <i>Enforcement</i> Tribunals | 14) Act before the courts and inform and request the intervention of the state attorney general, where needed. | |
| <i>Enforcement</i> Inspections | 15) Carry out inspections. Where the inspection takes place in the residence of a natural person a judicial order is necessary. | |
| <i>Enforcement</i> Agreements with other entities | 16) Sign agreements with decentralised autonomous governments to set up offices to receive complaints. | |
| <i>Advocacy</i> Agreements with consumer associations | 17) Sign agreements with user and consumer associations to promote community participation in the promotion of competition and market transparency. | |
| <i>Enforcement</i> Concentrations | 18) Examine and investigate mergers to confirm their compliance with the law, and, where they need to be prohibited, dictate the necessary legal measures. | 4) Answer queries on the obligation to notify mergers, on regulated sectors and on public aid. |
| <i>Enforcement</i> Concentrations | 19) Authorise, reject or impose remedies on merger in accordance with LORCPM and its regulations. | |
| <i>Enforcement</i> Claims | 20) Respond to inquiries and resolve complaints made with respect to economic operators whose actions could infringe LORCPM. | 15) Answer queries on the application of LORCPM concerning specific cases. The reply to the query is binding on the person who enquires. |
| <i>Advocacy</i> Barriers | 21) Promote measures aimed at eliminating barriers to competition, in accordance with the guidelines established by law. | |
| <i>Enforcement</i> Suspension of practices | 22) Order the suspension of the practices and conducts prohibited by LORCPM. | |
| <i>Advocacy</i> Registry | 23) Establish and maintain an updated registry of economic operators and their participation in markets. | 7) Maintain and co-ordinate the registries established in LORCPM. |
| <i>Advocacy</i> Barriers | 24) Propose the removal of regulatory or de facto barriers to entry to markets that exclude or limit the participation of economic operators. | |

| Nature of the powers | Article 38 of LORCPM: SCPM SCPM, through its organs, shall exercise the following powers | Article 44 of LORCPM: SCPM's president Attributions and duties of SCPM's president, in addition to those determined in elsewhere in this Law |
|---|---|---|
| <i>Advocacy</i> New regulations | 25) Present technically justified proposals to the competent bodies, for the regulation of different economic sectors. | |
| <i>Advocacy</i> Support and advise | 26) Support and advise public-administration authorities at all levels of government, so that in fulfilling their powers, they promote and defend the competition in markets. | |
| <i>Advocacy</i> Simplified procedures | 27) Propose and monitor the simplification of administrative procedures to promote free participation of economic operators under the same conditions in different markets. | |
| <i>Advocacy</i> Research | 28) Promote study and research of competition and its dissemination. | |
| <i>Advocacy</i> Co-operation | 29) Co-ordinate necessary actions and sign co-operation agreements with public and private entities, in order to promote the free participation of economic operators in different markets. | |
| <i>Enforcement</i> Internal regulation | 30) Prepare and promulgate SCPM's internal regulations. | 6) Prepare and approve general technical regulations and specific instructions within the scope of LORCPM. 16) Issue general resolutions, guides and internal regulations for the correct functioning of SCPM. |
| <i>Internal</i> Personnel | | 8) Appoint the necessary personnel, in accordance with the law, for the performance of the functions of the Super-Intendancy. 10) Determine and reform the organic and functional structure of SCPM in accordance with LORCPM. 11) Manage and supervise the administrative tasks, human resources, budget and finances of SCPM. 12) Prepare, approve and execute the annual budget of the Super-Intendancy of Market Power Control, in accordance with LORCPM. 14) Be accountable for his/her management and the Super-Intendancy's functioning in accordance with the Constitution and LORCPM. 17) Delegate the exercise of its powers to the officials of the Super-Intendancy, as established in the applicable Regulation. |

Note: This table transcribes the powers of SCPM (Article 38 of LORCPM) and SCPM's president (Article 44 of LORCPM). The order of the list of SCPM follows the law, while the order for SCPM's president section is altered. The classification of each attribution was made by the OECD for the purpose of facilitating the comparative analysis.

Source: OECD, based on LORCPM.

Information requests and statements

According to Article 48 of LORCPM, SCPM may require economic operators to provide information, data or documents before beginning a case or at any time during the procedure. Information requests can be made to investigated parties, but also to third parties, both public and private. SCPM evaluates freely the content and evidentiary value of the documents it receives.

According to Article 49 of LORCPM, SCPM may also take and record statements from a person related to the investigation in the presence of a private attorney or a public defender provided by the state.

The law does not appear to allow an economic operator to oppose requests for information if it considers it excessive, unrelated to the investigation or asking for sensitive information. This opens the door to burdensome and otherwise disproportionate requests and may even facilitate fishing expeditions. It also causes concerns as regards the protection of confidential information.

Burden of proof

In general, the law places the burden of proof on SCPM, which has the obligation to prove, based on the evidence in the investigation file, the facts that could constitute a violation of the law. There is one exception: under Article 11 (cartels), the burden of proof is reversed if an economic operator or person denies or hinders access to information or delivers fraudulent or misleading information to an SCPM investigation. In order for this reversal to come into force, SCPM must prove that the economic operator denied access to information or sent false information.

Administrative inspections and dawn raids

In 2016, SCPM issued Instructions for Dawn Raids and Custody Maintenance in which inspections were classified into two categories.

1. **Administrative inspections**, carried out in public or private buildings after their owners have voluntarily consented to SCPM access, with or without prior notice, and not requiring a court order. According to SCPM, the parties' authorisation is verbal and recorded in the video that the agency films. In order to carry out an administrative inspection, it is not necessary to have a court order, unless when these are carried out at the home address of a natural person (Article 38 of LORCPM). Administrative inspections can be pre-procedural (carried out before the start of the investigation) or procedural (carried out during the investigation or evidentiary phase).

Lack of collaboration or obstruction can be sanctioned as a minor infringement under Article 78 of LORCPM.

2. **Dawn raids**, procedures carried out on private property of individuals or companies, without the inspected parties' consent. Dawn raids require court orders (Article 51 of the LORCPM). The SCPM must seek the order by a judge in the area where the raided property is located. The order must be delivered in writing within 24 hours of the request. SCPM has reported some difficulties in receiving these orders. Lack of knowledge of competition law has led to some judges requesting that the authorisation request be made by the state attorney general's office and not by SCPM. According to SCPM, there is no judicial protocol or procedure that guarantees that the judge shall keep the request confidential. Besides, stakeholders reported that dawn raids only take place if SCPM has an open investigation already.

According to international good practices, such as the OECD Council's Recommendation concerning Effective Action against Hard Core Cartels, agencies should have the power to conduct unannounced inspections at business and private premises, and access and obtain all documents and information necessary to prove the conduct. It seems clear that administrative inspections cannot be qualified as 'unannounced', given that they require the consent of the owner of the building. Dawn raids could, but it is crucial that judges respect the confidentiality of the process and do not inform the person to be inspected.

No specific legal mechanism exists to challenge authorisations for dawn raids. In practice, if companies or individuals consider that the raid was illegal, they can challenge the evidence collected by SCPM and request that it not be considered. SCPM resolves these challenges through a decision.

During inspections and raids, SCPM may examine and, if necessary, take copies of relevant documents and take voluntary statements from people in the premises. Communications between lawyers and their clients are privileged and cannot be seized. Ecuador's constitution recognises the right against self-incrimination in article 77, and therefore no-one may be compelled to give evidence against themselves. The right against self-incrimination applies to both criminal and administrative procedures.

Both administrative inspections and dawn raids can be carried out in all SCPM investigation procedures, including cases of abuse of market power, restrictive agreements, and unfair competition. In practice, most of the 20 dawn raids carried out by SCPM in the period between 2014 and 2019 were related to restrictive agreements.

2.3.2. Investigation procedure

Ex officio, request or complaint: procedural beginnings

According to Article 53 of LORCPM, SCPM may start investigations *ex officio* (if it suspects that a behaviour breaches the law), at the request of another public body, or following a complaint by the prejudiced party or any other person that proves a legitimate interest. The law does not define what legitimate interest means.

Investigations are subject to a statute of limitations of four years, from the time the infringement was known or, in the case of single continuing infringements, from the day they ceased.⁵⁶

During the period 2014 to 2019, SCPM opened 188 cases *ex officio*, mostly abuses of market power cases. However, SCPM reported to the OECD that it has lacked – since its creation – an overall strategic vision for *ex officio* cases, meaning that it has not necessarily focused on the most important sectors or infringements, or cases likely to succeed.

The law establishes the information necessary for a valid initial complaint: the name of the complainant and those responsible for the infringement; alleged infringement; complainant's relationship with the alleged perpetrator; goods and services affected; and any other evidence.⁵⁷ SCPM verifies that the requirements for a valid complaint are met. It seems, in view of these requirements, that complaints by anonymous sources are not possible. This seems confirmed by the fact that complaints must prove a legitimate interest. Excluding anonymous complainants unnecessarily limits the pool of potential whistle-blowers, as some people may not be willing to make a complaint if they need to provide their name. The OECD Recommendation concerning Effective Action against Hard Core Cartels encourages Members to implement an effective cartel detection system by facilitating the reporting of information on cartels by whistle-blowers who are not leniency applicants, providing appropriate safeguards protecting the anonymity of the informants.⁵⁸

The SCPM need to inform the Super-Intendancy of Banks or the Super-Intendancy of Popular and Solidarity Economy of investigations against a bank or a co-operative, respectively, both for their knowledge as well as to enable inter-institutional co-operation if necessary.

⁵⁶ Article 70 of LORCPM.

⁵⁷ Article 54 of LORCPM.

⁵⁸ See www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm

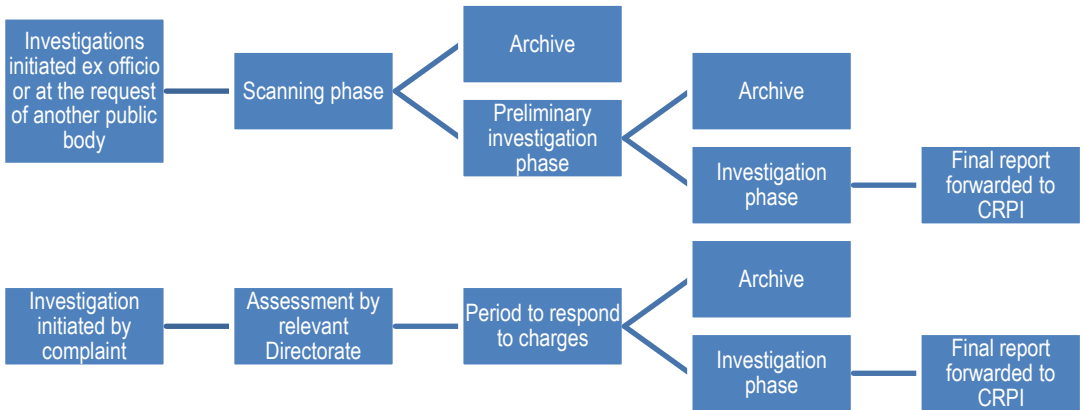
Procedural stages

LORCPM establishes deadlines for each stage of the investigation, in Articles 55, 56, 58, 59, and 61. These deadlines may be too short for complex cases and can lead to SCPM being unable to collect the necessary evidence and to carry out a careful analysis. The main procedural stages are presented in Figure 8.

Investigations initiated *ex officio* or at the request of another public body begin with a scanning phase, which lasts for 30 days and aims to determine if the allegations of anti-competitive behaviour meet the criteria set out in LORCPM. A report is issued at the end of this period recommending to terminate or to continue with the investigation. If the investigation goes on, Directorate starts the preliminary investigation phase to collect evidence and information about the alleged anti-competitive practices and the identification of the alleged perpetrators. This phase can last up to 180 days and is completed with a report that either terminates the investigation or opens the investigation phase.

At the opening of the investigation phase, the investigative team must notify the investigated entity of the investigation. The investigation phase lasts for 180 days, extendable for another 180 days. This phase culminates with a preliminary report which outlines the alleged infringements. The report is sent to alleged perpetrators who may provide their replies within 15 days. After this, a period of 60 days, extendable to 90, starts, at the end of which the Directorate issues a final report. This report is forwarded to CRPI, which reviews, analyses the evidence, and makes a final decision.

In the case of complaints, these are reviewed by the relevant Directorate, which verifies whether the requirements established in Article 54 of LORCPM are met. If they are met, the allegations are transferred to the investigated parties so that they can provide their comments within 15 days. Once that period has expired, the Directorate terminates the investigation or starts the investigation phase and follows the same steps as outlined above, in investigations *ex officio* or at the request of another public body.

Figure 8. SCPM's investigation process

Source: OECD, with SCPM website data.

Interim measures

SCPM can order interim measures, if this is necessary to maintain competitive conditions and avoid that the investigated anti-competitive behaviour leads to irreversible damage before the case is decided. LORCPM gives examples of interim measures, including stopping the conduct, imposing conditions, or suspending the effects of legal acts. SCPM imposed interim measures in 29 cases between 2014 and 2019, involving, for example, the temporary freeze of sale conditions, imposition of monthly notifications to SCPM of pricing changes, prohibition of payment delays, or adoption of technical measures, like interoperability of different banks' ATM (Automated Teller Machine) network or secure connection to POS (Point of Sale) credit card terminals and signature of service-level agreements for that purpose.

Interim measures are powerful and intrusive tools and, therefore, SCPM must carefully analyse the impact of adopting any of these measures before doing so. Implicitly acknowledging the intrusiveness of interim measures, LORCPM establishes that measures adopted before an investigation begins expire if the investigation does not start within 15 days from their adoption.

2.3.3. Sanctions and remedies

Article 78 of LORCPM classifies infringements as minor, serious, and very serious. The maximum fine depends on the seriousness of the infringement. SCPM has discretion to set fines within these limits.

Table 7. Levels of infringements

| | Minor | Serious | Very serious |
|------------------------------|--|---|--|
| General | c) Non-compliance with Article 73 corrective measures d) Breaching an SCPM decision f) Not allowing an inspection attempted in accordance with LORCPM g) Submitting a false complaint to harm competition h) Obstruction of SCPM's inspection work | e) Sham litigation f) Failure to comply with corrective measures for abuses or cartels g) Not having fulfilled agreed commitments h) Providing SCPM with misleading or false information | d) Failure to comply with a SCPM decision of abuse, anti-competitive behaviour or merger control |
| Abuse of market power | | b) Abuse of Article 9 market power that is not very serious. | b) Abuse of Article 9 market power that produces extremely harmful effects or when the perpetrator's market share is almost monopolistic or the perpetrator enjoys special or exclusive rights |
| Agreements | | a) Non-horizontal agreements (between non-competitors) | a) Horizontal agreements (between competitors) |
| Concentration | a) Notifying a merger after the deadline b) Not making a notification of a merger requested by SCPM | d) Execution of a merger before it has been notified or authorised | c) Execution of acts or contracts by the entity resulting from a merger, before it has been notified or authorised |
| Unfair competition | | c) Distortion of competition through unfair acts | |
| Others | e) For administrative bodies and civil servants, accepting challenges which aim to hinder competition or the application of LORCPM | | |

Note: The letters for each behaviour correspond to those in Article 78 of LORCPM. They are presented in a different order than the alphabetical order to facilitate the comparison between minor, serious and very serious.

Source: OECD elaboration based on LORCPM.

To determine the exact amount of a fine, the following criteria are taken into consideration:

1. size and characteristics of the affected market;
2. market shares of economic operators;
3. scope of the infringement;
4. duration and effects of the infringement;
5. profits obtained; and
6. aggravating and mitigating circumstances.

In Articles 81, LORCPM provides a non-exhaustive list of aggravating circumstances:

1. repeated offence;
2. instigator;
3. coercion; and
4. lack of collaboration or obstruction of the inspection work.

Article 82 provides a non-exhaustive list of mitigating circumstances:

1. implementing actions to end the infringement;
2. non- application of the conduct;
3. implementing actions to remedy the damage caused by the conduct;
4. active and effective collaboration with SCPM during the investigation.

Article 79 of LORCPM sets out legal caps on fines:

1. For minor infringements, fines may not exceed 8% of the total turnover of the offending company or economic operator in the year preceding the fine's imposition.
2. For serious infringements, fines may not exceed 10% of the total turnover of the offending company or economic operator in the year preceding the fine's imposition.
3. For very serious infringements, fines may not exceed 12% of the offending company or economic operator in the year preceding the fine's imposition.

If turnover cannot be calculated, then the fine is based upon a sliding scale of Unified Basic Remuneration (RBU),⁵⁹ according to whether it is minor, serious or very serious.⁶⁰

If the profits the perpetrators have obtained from their unlawful conduct exceed the caps established in the law, the fine must be equal to the profits obtained.

In the case of recidivism fines may exceed the legal caps of 8%, 10% and 12%, as well as the cap concerning the profits obtained thanks to the infringement.

During the fact-finding process, SCPM asserted that the fines it has so far imposed have not had sufficient deterrent power. There are few exceptions to this general rule, such as the fine imposed to Conecel, which was ultimately annulled (see Box 1, in Section 3.1). Large fines are critical to deter companies from breaching the law. If fines are not high enough and, in addition, resources to investigate infringements are limited, companies have no incentives to avoid or stop anti-competitive conducts.

LORCPM, however, leaves enough room to impose significant fines. In addition, Article 73 establishes that SCPM can issue remedies to prevent, correct or reverse conducts contrary to the law, such as requesting the parties to: stop the anti-competitive practice; implement actions or contracts to restore the competitive process; and not enforce anti-competitive clauses in contracts.

SCPM should seek to impose sanctions that are sufficiently serious to act as a deterrent. The OECD Recommendation concerning Effective Action against Hard Core Cartels encourages Members to provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels and incentivise cartel members to defect from the cartel and co-operate with the competition agency. The Recommendation encourages using a combination of sanctions (civil, administrative and/or criminal, monetary and non-monetary) for an adequate deterrent effect.⁶¹

Article 79 establishes further powers and allows SCPM to “order the divestment, break-up or spinning-off of companies in the cases in which it determines that that is the only way to re-establish competition.” There appears to be no further regulation

⁵⁹ Unified Basic Remuneration (RBU) is a fluctuating measure determined by the Ecuadorian authority.

⁶⁰ Article 79 of LORCPM.

⁶¹ See www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm.

about this sanction in LORCPM, and it has never been used. Considering its severity, SCPM should define when and in which type of cases this sanction might be used.

A fine of up to RBU 500⁶² may be imposed on each of the legal representatives or directors of a legal person that has committed very serious infringements, provided that they were involved in the agreement or decision. The amount of the fine depends their degree of participation in the offending conduct.⁶³

A fine of up to RBU 500 may also be imposed on economic operators that fail to reply to the requests for information sent by SCPM. Operators must provide full, accurate and timely information.

2.3.4. Commitments

Undertakings may propose commitments to stop investigations against them. Such proposals can be made during the investigation phase, before SCPM issues a decision. The commitments consist in an admission of liability, and an obligation to cease and desist and pay an amount to offset the damages caused. The payment is not considered a fine, but rather a reparatory payment to Ecuadorian society. Individuals harmed by the infringement can sue for damages in the courts.

Commitments are regulated in detail in the Ecuadorian legislation, both in LORCPM (five articles) and the RLORCPM (eight articles). In addition, RLORCPM establishes in Article 42k, that the Regulation Board is in charge of establishing “the methodology for calculating the amount of fines and commitments.” However, the details to set commitments’ amount have been established by SCPM in the “Instruction for the management and execution of the commitments in SCPM,” amended by Resolution N° SCPM-DS-041-2016.⁶⁴

Neither LORCPM nor RLORCPM restrict the use of commitments to specific infringements. SCPM has, for example, applied commitments to several cartel cases. SCPM may also accept partial commitments (i.e. from only one of the investigated parties and only regarding certain facts under investigation). In these cases, SCPM should continue the investigation for the rest.

⁶² In June 2020, RBU 500 was the equivalent of approximately USD 200 000.

⁶³ Similarly to what happens with trade associations, no fines will be imposed on representatives or directors who have not attended the meetings or voted against, according to Art. 79 of LORCPM.

⁶⁴ Issued by Resolution N° SCPM-DS-041-2016, which was published on November 27, 2017. <https://www.scpm.gob.ec/images/resoluciones-despacho/2016/SCPM-DS-041-2016.pdf>

Article 90 of LORCPM sets up the conditions under which a commitment can be accepted. SCPM considers two requirements:

1. That all or part of the investigated economic operators admit all or some of the facts of the complaint or charges; this must be substantiated by evidence gathered through the investigation or documents provided by the applicant.
2. Offer corrective measures to ensure that the alleged anti-competitive practice ends and a guarantee of no recidivism.

Once commitments have been presented by a party, SCPM may suspend the investigation for up to 120 days and has 45 days to approve, modify, or reject the proposed commitment. SCPM has to notify the other parties being investigated of the proposed commitments. SCPM requires that parties provide true and relevant evidence about the infringement to agree to a commitment.

If the commitment is accepted, SCPM closes the investigation. If the commitment proposal is rejected, the investigation continues from the stage it was suspended, as if the commitment proposal had never been made.⁶⁵ The decision that rejects a proposal can be challenged by the party who proposed it in accordance with Articles 66, 67 and 68 of LORCPM. SCPM may also modify the commitments made by the party; in such case, it must grant a period for the party to review and either accept or reject the changes. The investigation is closed if the modifications are accepted and continues if they are rejected. The whole process cannot take more than 120 days, under articles 115 and 118 of the RLORPM.

The agency's decision accepting commitments must present the reasons and contain the following information: identification of the commitment; parties involved; compliance deadlines; implementation monitoring measures; and other agreed conditions. This decision must be published in a public version containing no confidential or reserved information.

As the law permits partial commitments, the investigation continues for the parties that have not offered and agreed to a commitment. Arguably, in such cases, if new information arises against the party that has agreed to a commitment, SCPM may be entitled to a new investigation for the new issues.

⁶⁵ Still, in practice, companies may prefer not to provide information if they feel commitments will likely not be accepted. Companies may fear that, in practice, the information provided has an impact on the investigation. SCPM should be careful not to disincentivise the programme while respecting the legal requirements to accept commitments.

Operators who submit a commitment must make a so-called reparatory payment. This is calculated based on two variables. First, the seriousness of the infringement (whether it is a serious or very serious infringement). Second, the moment in the investigation when the commitment was presented. That is, whether the commitment proposal was presented before any investigation took place; during the scanning phase; during the preliminary investigation phase; during the investigation phase; or during the decision phase.⁶⁶ Commitments proposed early in the process give rise to lower payments, in order to incentivise early co-operation with SCPM, prevent the waste of SCPM's resources and encourage the stopping of unlawful conducts as early as possible. Therefore, there are ten different possibilities to calculate the correction amount (two levels of seriousness and five stages of investigations).

Discounts are applied to the reparatory payments depending on which operator presented its proposed commitments first. The first should get up to a 40% discount, the second 10%, and the third 3%.

Article 92 of LORCPM establishes that if the conditions of a commitment are breached, SCPM will initiate the process for the application of sanctions provided for in this law” and “will adopt corrective measures”, notably fines.

If market conditions change substantially, an economic operator that has made a commitment may request a review of its commitment, and SCPM has 30 days to issue a reasoned decision.

From 2014 to 2019, a total of 56 commitments were submitted, and 35 were accepted. In practice, the two most common behaviours subject to commitments are unfair practices (especially acts of deception and deceptive advertising) and restrictive agreements (especially cartels in public procurement).

The commitment mechanism has several obvious benefits. It saves SCPM time by closing investigations and allowing it to concentrate its efforts on other cases. In addition, it allows SCPM to receive evidence of wrongdoing – often difficult to uncover – from investigated parties.

Commitments has downsides, however. It can be difficult to assess the proposal for a commitment if, for example, it is presented at the beginning of the investigation and the agency does not know enough about the facts. With limited

⁶⁶ Reading the law and its regulation, it is not that clear that the commitments operate if there is no investigation at all. In contrast, the leniency program is applied precisely when there is no investigation.

knowledge of the actual economic and legal aspects of the infringement, it is difficult to evaluate the commitments proposed by the investigated party.

Commitments may also imply that SCPM stops the investigation entirely, if all parties involved offer them. In turn, this means fewer opportunities for courts to review competition cases, and impedes – or delays – the development of legal precedents on competition law, which are critical to create legal certainty and clarity, especially in a country like Ecuador with a young agency working with a relatively new law.

Further, the widespread use of commitments, along with the insufficient resources for SCPM to investigate infringements, can incentivise companies to adopt anti-competitive conducts if reparatory payments are not high enough to deter infringements.

Finally, commitments may also reduce the incentives for economic operators to apply to the leniency programme. Economic operators may prefer to simply wait for an investigation to be initiated by SCPM, and only then offer a commitment rather than make a leniency application. This may be the case in Ecuador, according to SCPM and private sector stakeholders.

For these reasons, SCPM should use commitments carefully. Commitments should be targeted more at closing cases with lower impact on competition, so as to free resources to investigate higher priority cases. Better enforcement, in general, and higher commitments payments, in particular, would help with law compliance and maintain the attractiveness of the leniency programme.

2.3.5. *Leniency*

According to Articles 83 and 84 of LORCPM, SCPM has the faculty to grant immunity or fine reductions to individuals and legal persons that have taken part in a restrictive agreement through the leniency programme.

The first leniency regulation was issued in 2016⁶⁷ and incorporated a marker system, some protections for confidential information, and a Chinese-wall system between the leniency and investigation processes. The regulation was amended in 2017 to incorporate the automatic rejection of the commitments presented by economic operators that had previously been revealed as alleged Article 11 violators within the leniency programme.

⁶⁷ Issued by Resolution N° SCPM-DS-027-2016 which was published on August 1, 2016 and amended by Resolution N° SCPM-DS-010-2017 which was published on April 7, 2017. Neither is available on SCPM's website.

In 2019, the 2016 regulation was replaced by the current regulation⁶⁸. The publication of this new regulation had three objectives. First, SCPM had observed that in the previous programme third parties – such as the General Secretariat of SCPM and the CRPI – were involved in the leniency application process, which endangered the Chinese-wall system. Second, the former leniency programme only had a single analysis phase during which the applicant provided all the available evidence – the programme did not provide time for discussion and complementing the evidence provided. Third, the former programme allowed CRPI to declassify confidential information at any time during the process and at the express request of the Director for Investigation of Abuse of Market Power and Restrictive Agreements.

The new 2019 leniency programme establishes a clear five-stage process: 1. evaluation of the request for fine exemption or reduction; 2. meetings with the applicant to agree on the conditions of co-operation; 3. co-operation agreement between the applicant and SCPM; 4. report on the leniency benefits to be granted; and 5. decision to grant fine exemption or reduction. The programme also specifies the information that operators must submit and provides standard forms. A clear process improves the comprehension of and the access to the programme.

The new programme also includes a marker system protecting an applicant's place in the queue and allowing it to gather the necessary information and evidence in order to qualify for immunity; it also includes the possibility to provide verbal as well as written applications. Further, the programme establishes a stronger Chinese-wall system, so that if the leniency application fails, the investigation is not tainted. In particular, the new regulation eliminates the intervention of the General Secretariat of SCPM.

Importantly, the new regulation establishes that SCPM must have express authorisation of the applicant to release information about or documentation from the leniency file to an international agency. According to stakeholders, these changes were recognition of the errors made in the Kimberly-Clark case, in which confidential information coming from a leniency application was declassified (see Box 7, in Section 3.2).

Under the leniency programme, the first individual or legal person to enter the programme is granted full immunity, on condition that the information provided by the applicant provides sufficient evidence to allow SCPM to carry out an inspection or verify the existence of the conduct. The immunity is extended to legal representatives, directors and to those who were part of the acknowledged collusive

⁶⁸ Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/08/Resoluci%C3%B3n-No-SCPM-DS-2019-38.pdf>.

agreement. The above is in line with international good practices, such as the OECD Council's Recommendation concerning Effective Action against Hard Core Cartels.

A leniency application may be submitted after a dawn raid has been conducted, as long as this is done before the issuance of the investigation results report.

Article 84 states that fines can be reduced for additional participants in the restrictive agreement (i.e. the second and subsequent applicants), if they provide evidence on the alleged infringement that adds significant value to the evidence already available to SCPM. The second applicant benefits from a 30-50% fine reduction, the third 20-30%, and following applicants less than 20%.

Both fine exemption and reduction require that the applicant:

1. co-operates fully with SCPM throughout the entire investigation procedure;⁶⁹
2. terminates its participation in the alleged violation when it provides the evidence except where SCPM decides that its continued participation will improve the investigation's effectiveness;
3. has destroyed no evidence or disclosed to third parties its intention to submit the request;
4. has taken no measures to compel other companies or economic operators to participate in the infringement.

Since the introduction of LORCPM, only two leniency applications have been presented. Stakeholders told the OECD of three possible reasons for the programme's lack of success. First, there is a risk of reputational damage. Second, SCPM's widely known lack of resources and its difficulty in opening new investigations. Third, due to the Kimberly-Clark case, insufficient trust as to whether the information provided will be kept confidential.

A well-functioning leniency programme – which is clear and protects confidential information – is extremely important to detect infringements. This is particularly the case for authorities that lack the resources to carry out many investigations, and it seems that Ecuador's new leniency programme goes in the right direction.

⁶⁹ The duty of co-operation of the applicants to the leniency program is also in Article 104 of the RLORCPM.

2.3.6. Making decisions public

LORCPM includes a specific provision on making decisions public. Article 87 states that the sanctions imposed by SCPM, including the amount, name of perpetrator and the infringement must be published.

Article 2 of the RLORCPM establishes that SCPM's opinions, guidelines, guides, technical criteria and market research will be published on its website and may be disseminated and compiled, without prejudice to reserved or confidential information.

Despite these provisions, according to multiple stakeholders, SCPM does not publish the majority of its decisions. SCPM's website contains only a small number of the agency's total decisions. Furthermore, even when a decision is published, it may make broad statements but not provide the specific information that supports the findings, or only refer to undisclosed internal documents.

According to certain stakeholders, the agency's opacity could be due to the time-consuming process of deciding what is confidential and reserved and, then, the redaction of those sections.

The current management of the agency recognizes the importance of publicising its decisions. SCPM is currently digitalising its decisions, which is a positive development. SCPM should publish all information that supports its findings, with the exception of reserved and confidential information. All decisions, once digitalised, should be published on the authority's website.

2.3.7. Confidentiality

The definitions of confidential and public information are given in Articles 5 and 6 of the Organic Law of Transparency and Access to Public Information (LOTAIP), which establishes that all the information is public, except that expressly declared confidential or reserved.

Article 47 of LORCPM states that any person taking part in ongoing investigations or having access to files because of their position, work or profession, is obliged to keep their content confidential and secret. The violation of this duty by SCPM officials is considered as cause for dismissal, and can lead to civil and criminal liability. Information may only be disclosed to the judiciary where so requested or in the context of case proceedings.

Article 3 of the RLORCPM states that information and documents obtained by SCPM during investigations should be classified as confidential, either by SCPM's own initiative or upon request of the involved party.

In 2017, SCPM issued “Instructions for Information Classification within Investigation and Sanction Files,” classifying the information into three categories: reserved, confidential and administrative. Reserved information is not confidential, but when disclosed may jeopardise or compromise the existence of an economic, social, health, governance or security asset, or threaten a SCPM investigation. Only the parties directly involved in an administrative investigation or sanction process can access it. Confidential information is the data the disclosure of which would cause severe damage and grant third parties unfair advantages or benefits in terms of competition. Administrative information is produced or derived from the internal or administrative management of SCPM.

SCPM places non-public information into restricted-access folders to ensure it is not seen by other economic operators or SCPM staff not working on the case.

2.4. Restrictions on competition and State aid

2.4.1. Restrictions on competition

According to Article 28 of LORCPM, the Regulation Board may impose restrictions on competition by reasoned decision in the following cases:

1. for the development of a state monopoly in the public interest;
2. for the development of strategic sectors in accordance with the constitution;
3. for the provision of public services in accordance with the constitution;
4. for the technological and industrial development of the national economy;
5. for the implementation of affirmative-action initiatives in favour of the popular and solidarity-based economy.

The decision of the Regulation Board’s decision should be justified, and significant specific and concrete benefits should be generated for the general interest and for consumers and users.

2.4.2. State aid

State aid is defined as aid that: 1) gives an economic advantage to one or more operators that they would not have obtained in the normal exercise of their activities, and 2) is only available to specific economic operators or sectors.

The law establishes ten broad situations that can justify state aid, including aiding a priority consumer sector; repairing damage caused by exceptional events; favouring certain regions; implementing strategic projects of national interest;

promoting food production to ensure food sovereignty; and promoting the preservation of cultural heritage.

Aid can be granted through direct subsidies or indirectly through benefits such as privileged access to lines of public financing; purchase of public land at below-market prices; loans or credits on advantageous terms; guarantees; free or below market-price service provision; and infrastructure work that exclusively benefit certain economic operators or sectors.⁷⁰

SCPM must be notified of both competition restrictions and state aid, and is in charge of monitoring and examining them in light of LORCPM and assessing their compliance with their stated purpose.⁷¹ This examination is carried out by the Directorate for Advocacy (INAC).

The Regulation Board has yet to set the minimum amount of public aid below which SCPM does not control public aid, although this is mandated by Article 42 of the RLORCPM.

2.4.3. *Set prices*

Article 32 of LORCPM establishes that the executive branch may in exceptional cases set prices if it is necessary for the benefit of the population or the protection of national production.

2.4.4. *SCPM's role*

If SCPM rules that a competition restriction, state aid or pricing policy does not comply with its stated purpose, is applied in an abusive manner or is contrary to LORCPM, it must urge its deletion or modification.⁷²

The instruments in this section have yet to be used by SCPM.

⁷⁰ Article 29 of LORCPM and Article 34 of the RLORCPM.

⁷¹ Article 30, 31, and 52 of LORCPM, and Article 33 of the RLORCPM.

⁷² Article 31 and 32 of LORCPM, and Article 33 of the RLORCPM.

2.5. Judicial review

2.5.1. Possible fora

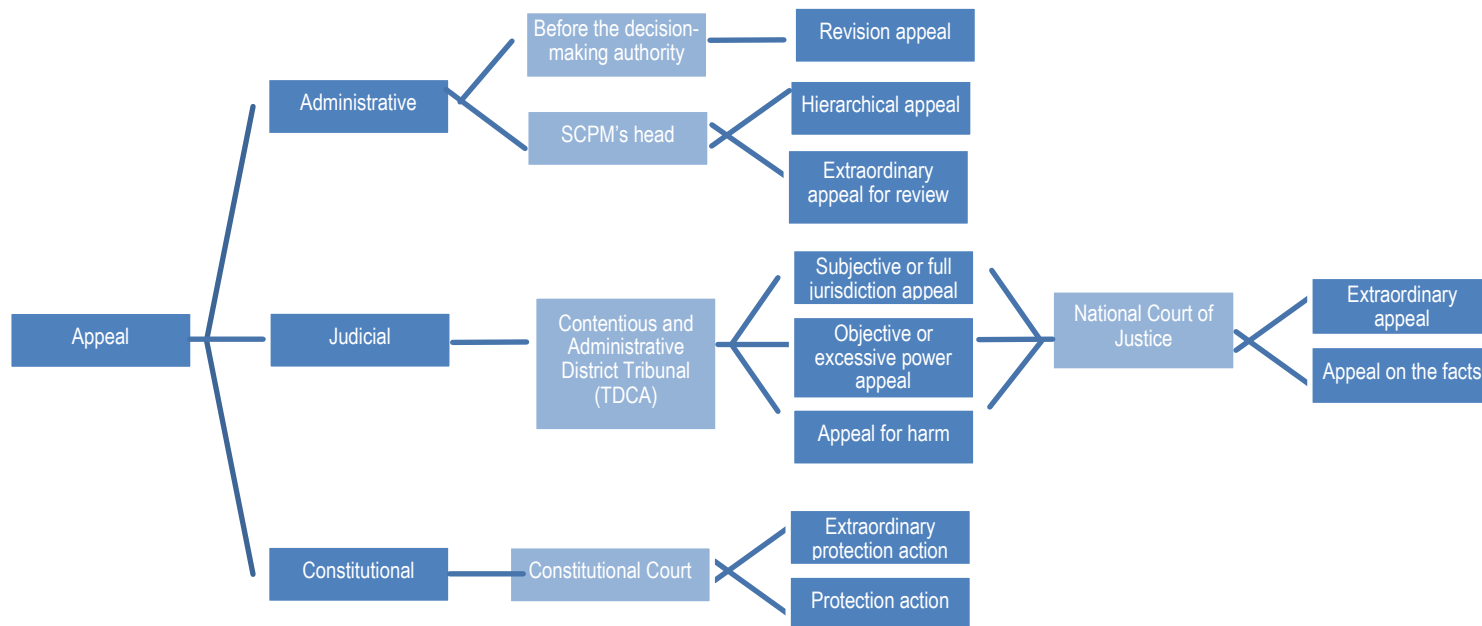
SCPM's administrative acts are presumed lawful and should be complied with as soon as issued.⁷³ The constitution does allow these administrative acts to be challenged, however, both through administrative and judicial means. While administrative means do not need to be exhausted to begin a judicial challenge, it is not possible to have concurrent administrative and judicial appeals.⁷⁴

Figure 9 illustrates the legal challenges allowed in Ecuadorian law and to which of these SCPM's decisions may be subject.

⁷³ Article 65 of LORCPM.

⁷⁴ Article 300 of the COGEP and Article 217 of the COA.

Figure 9. Possible challenges to SCPM decisions



Source: OECD, using INJ data.

2.5.2. Administrative appeals

Alternatives

LORCPM allows for three possible administrative recourses to reverse an SCPM decision: revision appeal, hierarchical appeal and extraordinary appeal.

According to SCPM's Legal Directorate data, during the period 2014 to 2019, there were 161 administrative appeals, of which 10 went to court. Of the 161, 86% were hierarchical appeals and 14% extraordinary appeals.

Table 8. Administrative appeals, 2014-2019

| Appeals | Total | Of which legal appeals |
|---------------------------------|------------|------------------------|
| Replacement appeal | 1 | 0 |
| Hierarchical appeal | 137 | 5 |
| Extraordinary appeal for review | 23 | 5 |
| Total | 161 | 10 |

Source: OECD, using SCPM's Legal Directorate data

Revision appeal

The revision appeal (*recurso de reposición*) is lodged before the same authority that issued the appealed administrative act. The appeal seeks to revoke, set aside or amend an administrative act, and must be lodged within 20 days of the notification of the administrative act. It must be resolved by the agency within 60 days.⁷⁵

Hierarchical appeal

The hierarchical appeal (*recurso de apelación o jerárquico*) is lodged before SCPM's president, and seeks the elimination and replacement of the appealed act or decision. It asks a higher authority to reassess the factual and legal elements and refine or review the results of the first instance. The appeal must be lodged within 20 days of the notification of the administrative act and resolved by the agency within 60 days.⁷⁶

⁷⁵ Article 66 of LORCPM.

⁷⁶ Article 67 of LORCPM.

Extraordinary appeal for review

The extraordinary appeal for review (*recurso extraordinario de revisión*) is also placed before SCPM's president. The objective of this extraordinary appeal is to review errors of fact or law, errors in procedure or submit new evidence. The extraordinary appeal must be lodged within three years of the final administrative act.

2.5.3. Judicial appeals

SCPM decisions can be challenged before regional Administrative and Contentious District Courts (TDCA). Challenges before TDCAs may be subjective (claiming breach of rights) or objective (claiming abuse of power). The General Organic Code of Processes (COGEP) establishes that the judicial process before the administrative courts should be resolved within a maximum of 100 days.⁷⁷ Still, this is seldom the case due to a backlog of cases and their complexity. Several suspensions of preliminary hearings and trials have been noted, lengthening decisions.

TDCAs' decisions may be challenged before the National Court of Justice, the highest court in Ecuador. The National Court of Justice is made up of six courtrooms, one of them specialised in the contentious administrative issues. It hears two types of appeal: extraordinary appeals, which aim to ensure the correct, true and uniform application of the law and legal doctrine; and appeals on the facts, which claim that the TDCA decision was erroneous. According to COGEP, decisions by the National Court of Justice should be issued within approximately 80 days.⁷⁸ Currently, they take over a year to conclude (when the court looks at merits) and over six months (when the court rejects them at the admissibility stage). During the period 2014 to 2019, 44 appeals were lodged before the National Court of Justice, of which 15 were resolved with 7 decisions favourable to SCPM, and 8 unfavourable.

Courts seem to face two main challenges. First, as indicated above, delays. This results in legal uncertainty, given that for a relatively long time alleged infringers do not know whether a conduct does constitute an infringement or not, in the court's view. Delays may also hinder the effectiveness of competition law enforcement if companies have access to means to suspend the application of the fines and remedies imposed by SCPM.

⁷⁷ Starting from the claim or order qualification, considering the time for the subpoena.

⁷⁸ This calculation that does not include the procedure from the recourse to the body that issued the contested decision.

The second challenge is judges' lack of competition expertise. For example, Ecuador's National Court of Justice in the Recapt case ruled that the standard applicable to cartels was the rule of reason and that a cartel's harmful effects should be proven (see Box 6). The court erred in two ways. First, it used the per se/rule of reason dichotomy, while LORCPM uses a by object/by effect distinction. Secondly, LORCPM clearly stipulates that cartels are a by object offence, without need to prove harm. The judgment was based on an erroneous use of a criminal law standard (requiring proof of harm) in a competition law case imposing a fine, which is an administrative, non-criminal, sanction.

Capacity building of judges in competition law is crucial for Ecuador, where competition and its enforcement are recent, and the competent courts are courts of general jurisdiction.⁷⁹ Judges may not have specialised knowledge of competition law nor had an opportunity to gain this knowledge through studies or case experience in their career.

Ecuador could consider creating, in regional Administrative and Contentious District Courts (TDCA), chambers specialised in limited administrative and competition law issues. The creation of specialised chambers would allow judges to gain competition law experience, potentially leading to greater efficiency, enhanced uniformity of decisions, and better quality decisions. Ecuador should also consider the potential risks of specialised chambers, including judges focusing on a specific area of the law, decision biases, and detachment from the rest of the judiciary system.⁸⁰

⁷⁹ See the executive summary of the Roundtable on the Standard of Review by Courts in Competition Cases (2019). [https://one.oecd.org/document/DAF/COMP/WP3/M\(2019\)1/AN/N2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2019)1/AN/N2/FINAL/en/pdf).

⁸⁰ See the OECD Secretariat background note of the Roundtable on the Standard of Review by Courts in Competition Cases (2019): “*Experience across OECD Members shows that competition law can be enforced effectively by either generalist or specialist judges (OECD, 1996). The specialisation of courts may lead to greater efficiency, enhanced uniformity and better quality decisions. Greater efficiency is due to the repetition and standardisation of tasks, and the judges’ larger experience in hearing and understanding economic evidence and arguments that underpin competition cases. Uniformity of decisions is increased through the concentration of all competition cases in a single court. The improvement in decision quality results from the greater expertise and experience in competition law and practice. Still, specialised courts can be affected by risks that the concentration of cases in one single body can bring about, such as the less broad experience due to the judges’ focus on a specific legal area, and the detachment from the overall judicial system. Courts of general jurisdiction may also build a deep knowledge of substantive competition questions, as well as skills and experience in competition matters, while benefitting from their greater experience in applying*

2.5.4. Constitutional recourses

The Constitutional Court is the highest public entity for the control and interpretation of constitutional matters. It is made up of nine judges and is regulated in Article 429 to 440 of the 2018 constitution. The Constitutional Court reviews binding acts and decisions for compliance with the constitution. It hears actions on alleged due process violations or other constitutional rights.

During the period between 2014 and 2019, 18 constitutional appeals related to the competition law were lodged before the court. Of these, 16 have been resolved; 14 finished in decisions favourable to SCPM, and 2 in unfavourable decisions.

Table 9 summarises the number of appeals submitted before the National Court of Justice and the Constitutional Court, as well as their outcome.

Table 9. Judicial appeals, 2014-2019

| Court | Total submitted | Total resolved | Total resolved favouring SCPM | Total resolved not favouring SCPM |
|---------------------------|-----------------|----------------|-------------------------------|-----------------------------------|
| National Court of Justice | 44 | 15 | 7 | 8 |
| Constitutional Court | 18 | 16 | 14 | 2 |
| Total | 62 | 31 | 21 | 10 |

Source: OECD, using SCPM's Legal Directorate data

2.6. Damages actions

Natural or legal persons who have suffered damages due to infringements of competition law may lodge a case for compensation for damages under general civil law. SCPM does not intervene in the follow-on actions for damages. Decisions by the agency are not a requisite for lodging a damages action. This in line with OECD Council's Recommendation concerning Effective Action against Hard Core Cartel, which advises that private enforcement actions that do not follow on infringement decisions be allowed.

The OECD received no information on any private damages actions. Ecuador should consider encouraging private enforcement to allow for the compensation of victims and boost the deterrent effect of competition law by increasing the potential cost of infringing competition law.

legal principles across areas of law.”

[https://one.oecd.org/document/DAF/COMP/WP3\(2019\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2019)1/en/pdf).

Several measures can be adopted to encourage damages actions. First, final infringement decisions by SCPM should have adequate probative value, which they currently do not have, to facilitate follow-on actions. Second, information in SCPM's files seems difficult to access, as confidentiality appears to be construed too broadly. Private parties need information to be able to bring actions, however. SCPM should still protect confidential information and, in particular, leniency statements, in order not to disincentive leniency applications. SCPM could however allow access to non-confidential information that substantiated its infringement decision.⁸¹

3. Enforcement of competition law

This section presents the most important cases the SCPM has investigated and shows that, in general, CRPI has adopted only a small number of final decisions. In total, the CRPI took 49 final decisions between 2014 and 2019, in cartels, abuse of power and unfair competition.

A few private sector lawyers have gained experience in competition law enforcement, following SCPM's activity. Most of these lawyers, however, are not only specialised in competition; they work in other fields of law as well. There are fewer private sector specialised economists. During fact-finding, stakeholders reported to the OECD that it is difficult to find economic expertise in the country.

⁸¹ All this is in accordance with the OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels on private enforcement (recommendation II.6):

“a. Establish rules that enable parties to access the evidence necessary to bring a claim for compensation;

b. Protect leniency statements, as well as settlement submissions, from disclosure to ensure the right balance between public enforcement by competition authorities and private enforcement by victims of cartels;

c. Allow private enforcement actions that do not follow on infringement decisions by competition authorities, so as to allow enforcement in cases where there is no prior decision;

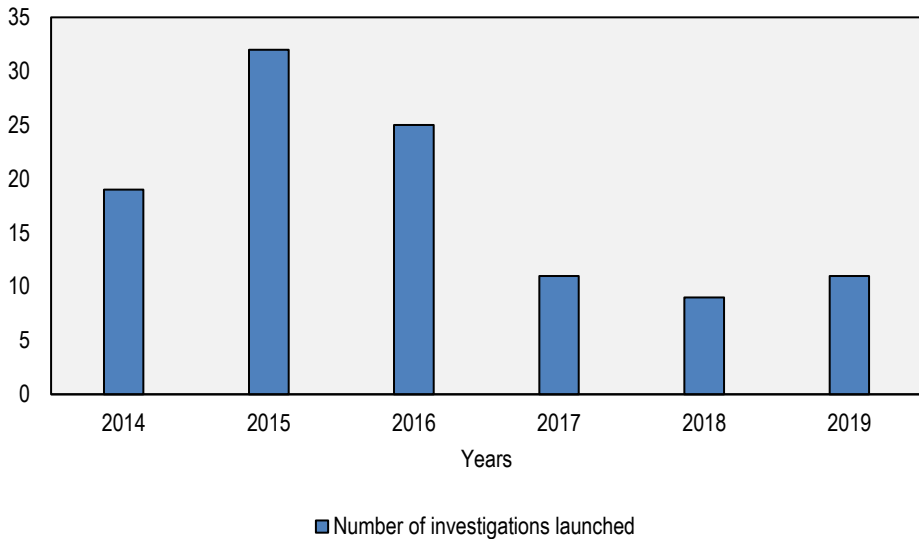
d. Introduce collective redress mechanisms, which allow groups of similarly situated claimants to request compensation collectively;

e. Grant adequate probative value to final infringement decisions by competition authorities, in private enforcement actions concerning the same hard core cartel”.

3.1. Abuse of market power

During the period 2014 to 2019, SCPM initiated 107 investigations, significantly more than for restrictive agreements. As shown in Figure 10, a peak was reached in 2015 with 32 new investigations. Since 2017, this number has decreased compared to the previous three years.

Figure 10. SCPM investigations launched into abuse of market power



Source: OECD, using INICAPMAPR data.

Despite the large number of initiated investigations, the CRPI has so far only issued three decisions regarding cases on abuse of market power (Article 9 LORCPM) and abuse of economic dependence (Article 10 LORCPM). Another five cases are currently open.

According to the INICAPMAPR, the closure of a large number of ex officio investigations because of lack of merit explains the difference between the number of initiated investigations and that of open cases and final decisions.

The first final decision (Conecel, see Box 1) concerned an exclusionary conduct (Article 9 LORCPM) – the decision was later annulled by the Contentious and Administrative District Tribunal (TDCA). Another case investigated the discriminatory treatment (Article 9 LORCPM) given to some distributors (Cervecería Nacional, see Box 2) and was solved by the adoption of commitments and a payment of USD 236

094. The third case dealt with the abuse of economic dependence (Article 10 LORCPM) of four supermarket chains towards their suppliers (Supermarkets, Box 3)

All the abuse of market power cases resolved by CRPI have been considered as seriously flawed by stakeholders. Courts have also annulled decisions by SCPM. For example, in the Conecel case (see Box 1), which concerned the installation of mobile-phone masts, CRPI's decision wrongly defined the relevant market, an error that led to its annulment of the decision by the TDCA. In the Cervecería Nacional case (see Box 2), some stakeholders complained about the fact that the CRPI decided to accept commitments instead of continuing the investigation. In their view, the case was a good opportunity to set a precedent and increase legal certainty in the future. In the supermarkets case (see Box 3), SCPM chose to apply Article 10 of LORCPM (abuse of market dependence), the infringement of which carries no sanctions, instead of Article 9, and made procedural errors that led to the annulment of one of the four decisions issued by CRPI.

Cases on abuse of dominance are typically much more complex than cartel cases and are more challenging for young agencies. Precisely because they are not as clear-cut, the substantive assessment of decisions may be more vulnerable at court. Particularly for a young agency like SCPM, it would be more effective to use its resources on enforcement against cartels, and only initiate abuse of dominance cases where the damage is particularly significant and/or when the case is relatively straightforward.

Box 1. Conecel case: incorrect determination of the relevant market and unjustified fines

In October 2012, state-owned National Telecommunications Corporation (CNT) filed a complaint before SCPM arguing that due to the exclusivity clauses imposed by Conecel to property owners in its lease agreements, it could not access certain properties necessary to deploy its network and antennas. Conecel argued that CNT was not affected by the exclusivity clauses, since it did not prevent CNT from entering into lease agreements with other owners and accessing other real estate to deploy its antennas. Conecel argued that it had neither a dominant position in the real-estate market nor in properties where antennas could be installed.

CRPI issued three main decisions regarding the case. First, in April 2013, it imposed interim measures on Conecel, ordering the suspension of exclusivity clauses in the lease agreements. Second, in February 2014, CRPI found Conecel guilty of violating Article 9 of LORCPM and imposed a fine of USD 138 495 965 (Decision N° SCPM-CRPI-2013-0009). Third, in April 2016 and after declaring non-compliance with the interim measures ordered in 2013, CRPI fined Conecel another USD 82 773 059 (Decision N° SCPM-CRPI-2016-035).

To calculate both fines, SCPM defined the relevant market as the telecommunications market, despite Conecel's arguments. Neither of the two decisions made transparent the economic methods used by CRPI to determine this relevant market.

In the investigation stage, SCPM determined that Conecel had a 60% market share upstream (installation of antennae and masts) and a 69% market share downstream (provision of mobile voice service), in the years 2010, 2011 and 2012, making Conecel a dominant operator in both markets. The CRPI decision stated that the company, by having deployed its network infrastructure first, had the *“ability to create strategic and contractual entry barriers intentionally to prevent the expansion of other economic operators within this relevant market.”*

Conecel challenged the three SCPM before the TDCA, which annulled them in September 2017 and October 2018. SCPM challenged the TDCA's decisions before the National Court of Justice and the Constitutional Court, but failed, and therefore TDCA's judgements have become final.

Multiple stakeholders have criticised two aspects of the case. First, its lack of sound definition of the relevant market. Second, the lack of reasoning for the

determination of both fines. Other observers have expressed concerns regarding the possible pressure exercised by Conecel's competitor, a state-owned company, on SCPM.

Source: Judgement N° 09802-2016-00738, Judgement N° 09801-2014-0125, File N° SCPM-CRPI-2013-002, File N° SCPM-CRPI-2013-009, and File N° SCPM-CRPI-2016-035.

Box 2. Cervecería Nacional case: extensive use of commitments

In September 2016, the CRPI decided to accept commitments presented by Cervecería Nacional, who had accepted a violation to Article 9(6) of LORCPM (unjustified price discrimination), and Article 9(7) of LORCPM (application of unequal conditions for equivalent benefits in commercial relations). Both violations took place during a 2015 “Black Friday” promotion during which Cervecería Nacional decided to make significant discounts to its products, but only for two large commercial chains: Corporación Favorita and Corporación El Rosado. Over 2,600 distributors and retailers did not benefit from the promotion.

CRPI set the reparatory payment of the commitment at USD 236 094, alongside a series of remedies, including a discount scheme for the distributors excluded from the original promotion, and complementary measures, such as competition training programmes and competition-promotion activities.

Source: File N° SCPM-CRPI-2016-010.

Box 3. Supermarkets case: procedural challenges

In 2013, SCPM initiated an investigation to four supermarket chains – Tiendas Industriales Asociadas (TIA), Corporación El Rosado, Corporación Favorita, and Mega Santa María – for alleged violations of Article 10 of LORCPM in their commercial relations with suppliers.

The investigation focused on the 1) imposition of commercial conditions that were not previously agreed such as price, free delivery of merchandise for opening new premises, discounts paid for by suppliers in promotions carried out by supermarkets; 2) unjustified merchandise returns; 3) refusal to purchase or conditioned purchases; 4) termination of business relationships. The situation and possible infringements varied according to each supermarket chain.

CRPI issued four different decisions between February and March 2017, one for each economic operator. In each of these decisions, the CRPI recognised a situation of economic dependency and an infringement of Article 10(4) of LORCPM (imposition, directly or indirectly, of prices or other discriminatory commercial conditions or services).

CRPI ordered the four supermarket chains to comply with corrective measures including: 1) changes to provisions of contracts, rules on prices and means of payment, payment terms, receipt of products, validity of the contracts and return of products; 2) a prohibition on the termination of commercial relations; and 3) other measures including an annual competition-law training for suppliers, the publication of the standard provisions of contracts on the supermarket's corporate website.

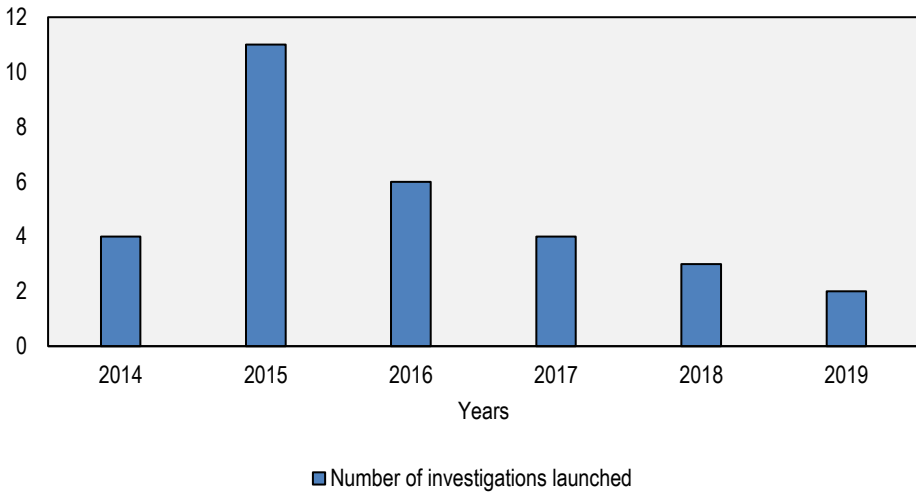
In January 2017, Corporación El Rosado won an appeal against SCPM's decision before the TDCA, which annulled the decision against the company. The other SCPM decisions still stand. Following unsuccessful appeals by SCPM before the National Court of Justice and the Constitutional Court, TDCA's decision concerning El Rosado has become final.

Source: Judgement N° 17230-2016-17484, Judgement N° 09802-2017-00803, Judgement N° 09802-2016-00681, Constitutional Court Case N° 1172-17-EP, File N° SCPM-CRPI-2016-061, File N° SCPM-CRPI-2016-062, File N° SCPM-CRPI-2016-063, and File N° SCPM-CRPI-2016-064.

3.2. Restrictive agreements

During the six-year period between 2014 and 2019, SCPM initiated 30 ex officio investigations. This is one third of the number of investigations on abuse of market power during the same period. As seen in Figure 11, ex officio investigations peaked in 2015 with 11 initiated investigations, a number that has since decreased.

Figure 11. Ex officio investigations launched into anticompetitive practices and agreements



Source: OECD, using INICAPMAPR data.

As shown in Table 10, in the 6-year period from 2014 to 2019, a total of 12 final restrictive-agreement and practice decisions were adopted by the CRPI. Eleven of these decisions concerned bid rigging. SCPM has accepted commitments in 8 of the 12 cases, 7 of which were bid rigging cases.

Table 10. Anticompetitive agreements and practices final decisions taken by SCPM

| Year | Total final decisions taken by SCPM | Total decisions in which commitments were used | Total fines amount (USD) | Total amount from commitments (USD) |
|--------------|-------------------------------------|--|--------------------------|-------------------------------------|
| 2019 | 1 | 0 | 286 912* | 0 |
| 2018 | 6 | 4 | 52 584 | 10 335** |
| 2017 | 2 | 2 | 0 | 20 894 |
| 2016 | 1 | 1 | 0 | 123 466 |
| 2015 | 2 | 1 | 308 529 | 36 003 |
| 2014 | 0 | 0 | 0 | 0 |
| Total | 12 | 8 | 648 025 | 190 697 |

Notes: *Due to long-running appeals, the fines against Recapt and Solnet, which were first levied in 2015, are counted in 2019's total.

**The decision of commitments corresponding to Decision N° SCPM-CRPI-042-2018 was not made public by the CRPI and so is not counted in this table.

The detail of all the cases in this table can be found in Table 26, Appendix 1. Detail of the total final decisions taken by SCPM.

Source: OECD, using INICAPMAPR data.

In the future, SCPM should prioritise cartel enforcement to build expertise and acquire public recognition. Cartels are the most damaging type of competition infringement and enforcement against them is particularly beneficial for citizens. Cartels are also the most clear-cut infringement from a substantive perspective – provided that the facts are proven, there is no need for a sophisticated analysis.

SCPM faces a number of challenges. First, its resources are limited and only five people are allocated to cartel enforcement, including the director, one economic analyst and three legal analysts. Therefore, companies know that the agency does not have enough resources to detect cartels or investigate them if it receives a complaint or a leniency application.

Second, commitments seem to undercut the effectivity of the cartel leniency programme. As explained in Section 2.3.4, companies prefer to wait the opening of investigations and proposing commitments after, rather than applying for leniency, especially after the SCPM's disclosure of confidential leniency information to SGCAN in the Kimberly Clark case. Higher commitments payments may help maintain the attractiveness of the leniency programme.

As explained in Section 2.2.3, the OECD Council's Recommendation concerning Effective Action against Hard Core Cartels advises that hard core cartels be considered illegal "regardless of the existence of proof of actual adverse effects on markets." This Recommendation is particularly relevant, as in the Recapt case Ecuador's National Court of Justice seemed to suggest that the standard applicable to

cartels was the rule of reason and that the cartel's harmful effects should be proven (see Box 6). International good practices, on which the OECD Recommendation is based, recommend that this type of infringements should be punishable without need to prove harm.

The boxes below describe some of the most relevant anticompetitive agreement cases.

Box 4. Frankimport case: a successful case, with a low fine

The case was initiated by the Undersecretariat for Competition, the former competition agency, and concerned a procurement procedure for work boots run by the state-owned company Petroecuador EP. In the electronic reverse auction process, 10 economic operators submitted offers, two of which qualified for final consideration: Frankimport and Jorge Franklin Hinojosa. The contract was finally awarded to Frankimport for a value worth 2.5% less than the reference price.

The Undersecretariat's investigation revealed the existence of legal and financial links between the two final suppliers. Jorge Franklin Hinojosa, who was participating as a natural person, was also president and 50% owner of Frankimport. Evidence also showed that both parties had the same IP address and were communicating; this proved that the offers were not made independently and that co-operation had occurred, distorting competition.

In May 2015, CRPI imposed a fine on Frankimport and Jorge Franklin Hinojosa of USD 308 529.

Source: File N° SCPM-CRPI-2014-019.

Box 5. Martec case: a hesitant start to the leniency programme

The Martec and Cyberbox case is the only case where SCPM successfully applied the leniency programme. The case involved the two companies arranging bids in four electronic reverse-auction procedures for printer toner. The investigation uncovered financial and family ties between companies. For instance, the companies were billing each other for services such as maintenance.

In April 2016, as SCPM was carrying out the preliminary investigation, Martec presented a commitment proposal and a request for exemption or reduction of fines under the leniency programme. Cyberbox also presented a commitment proposal, which was rejected by CRPI in November 2016. In May 2018, the CRPI decided both companies had engaged in big rigging, and imposed a fine of USD 3 835 for Martec and USD 3 068 for Cyberbox (Decision N° SCPM-CRPI-021-2016).

In August 2018, CRPI decided to reduce Martec's fine by 50% for having co-operated with SCPM and provided evidence, in accordance with rules regulating the leniency programme. Consequently, the final fine imposed on Martec was just USD 1 918.

Source: File N° SCPM-CRPI-2016-21.

Box 6. Recapt and Solnet case: procedural challenges for incorrect calculation of the amount of the sanction

In 2013, SCPM received a complaint against two companies, Recapt and Solnet, for rigging bids in an electronic reverse-auction process for a call centre for the Ecuadorian Institute of Social Security (IESS).

There was clear evidence of collaboration between employees of the companies, including the use of the same external consultants for the tender and the presentation of strikingly similar documents during the procurement process.

In September 2015, CRPI determined that Recapt and Solnet had engaged in bid rigging and that IESS had directed the process to unreasonably favour one or more economic operators. It also established aggravating circumstances for Recapt as it instigated and adopted measures to impose or guarantee the anticompetitive conduct. CRPI imposed a fine of just over USD 2.3 million to Recapt and USD 9

875 to Solnet (Decision N° SCPM-CRPI-2015-019). Recapt had an appeal against CRPI's decision rejected in January 2016.

Later, Recapt appealed to the TDCA on the grounds that the fine applied by SCPM was not properly calculated. CRPI determined the amount of the fine by calculating 12% of the total contract amount that was awarded to Recapt through the public procurement process. Recapt argued that the fine should have been calculated based on its total turnover the fiscal year immediately prior to the imposition of the fine, as stated in Article 79 of LORCPM. As the amount of the awarded public procurement was USD 19,450,795.59 and its validity was two years, while the turnover according to the corresponding tax declaration was USD 10,106,627.76, using the turnover as a basis for calculation benefited Recapt. The TDCA accepted that the fine applied by SCPM was improperly calculated, but confirmed that Recapt had committed a very severe infringement of LORCPM. In response, both SCPM and Recapt appealed TDCA's decision before the National Court of Justice.

In October 2017, the National Court of Justice annulled SCPM's decision for lack of evidence and required that the investigation be re-initiated. In its ruling, the court also stated that the standard applicable to anti-competitive conduct was the "*rule of reason*" and, hence, that the conduct could not constitute an infringement "*by object*". This was due to the Court's interpreting competition law using erroneously a criminal law standard.

Several stakeholders expressed concerns about this judgement as it revealed that the highest judicial authority in the country was not familiar with the legal test applicable to cartels.

In October 2019, CRPI imposed a fine on Recapt of up to USD 277 037 and ordered Recapt and Solnet to apologise publicly as an additional corrective remedy.

Source: Judgement N° 17811-2016-01271 and File N° SCPM-CRPI-2015-019.

Box 7. Kimberly-Clark case: legitimate doubts about the correct application of the leniency programme

In June 2014, during the investigation phase, Kimberly-Clark Ecuador (KCE) submitted a leniency application to SCPM providing self-incriminating information and documentation. Two dawn raids were carried out at the company's offices in Ecuador in July 2014 and in March 2016.

In October 2016, SCPM issued a decision declassifying the self-incriminating documents submitted by KCE in 2014 to support for the leniency application. Later that month, INICAPMAPR filed a complaint before the General Secretariat of the Andean Community of Nations (SGCAN) against Kimberly-Clark in Ecuador, Colombia and Peru. In addition, INICAPMAPR accompanied the complaint with KCE's disclosed confidential documents.

In response, KCE brought three legal actions. First, KCE appealed before SCPM the agency's decision to send a complaint to the SGCAN. SCPM did not reply within the legal time frame, so KCE appealed further before the TDCA. TDCA dismissed KCE's appeal in May 2019, declaring that procedural actions carried out within the framework of Decision 608 of the SGCAN were admissible. KCE filed an extraordinary appeal before the National Court of Justice against that ruling and lost. In May 2020, KCE brought another appeal before the National Court of Justice, which is still pending.

Second, KCE brought before the TDCA an appeal against SCPM's declassification decision of October 2016 and in September 2018, TDCA declared the declassification decision null and void. SCPM challenged the TDCA's decision before the National Court of Justice and the Constitutional Court, but lost, and therefore TDCA's judgements have become final. No further appeal or action is possible.

Third, KCE brought an action against SCPM's actions before SGCAN, requesting that TDCA declare illegal the declassification of the leniency-related information. This judicial process is currently pending.

In May 2018, SGCAN adopted a decision fining KCE USD 18.35 million and Productos Familia USD 16.86 million. In August 2018, SGCAN suspended the effects of its decision, until all court cases in Ecuador are resolved.

The Kimberly-Clark case has generated an international discussion about the necessary foundations for an effective and legitimate leniency programme (namely, the confidentiality of leniency-related documents and information).

Various regional authorities, such as INDECOPI in Peru and the SIC in Colombia, have spoken out against SCPM's actions and the risk that the disclosure of leniency-related information poses to leniency programmes in Latin America.

Source: Decision N° SCPM-IG-DES-001-2016, SCPM's Complaint to the CAN (N° 2709), Decision N° 1883 of the SGCAN, Application N° SCPM-IDIAPMAPR-2013-277, File N° SCPM-IIAPMAPR-EXP-2016-004, Judgement N° 09802-2017-00197, Judgement N° 09802-2017-00767, Judgement N° 09802-2017-00196, and Constitutional Court Case N° 2007-19-EP.

3.3. Mergers

The Directorate for Economic Concentrations (ICC) has been gaining experience through the review of a steady flow of merger notifications. The outcomes of merger review seem to be broadly aligned with best international practices, if slightly stricter, in terms of the percentage of mergers authorised subject to conditions and prohibited transactions.

Table 11 shows that for the six-year period 2014-2019, ICC received a total of 108 mandatory notifications, on average 18 a year. From that total, SCPM has analysed and adopted decisions on 91 transactions up to April 2020; 11 are still pending and six where withdrawn. Only 11 transactions (12% of all decisions) were subject to conditions, and two (2% of all) were prohibited (Holcim Ecuador/Lafarge Cementos and Indura Ecuador/Swissgas del Ecuador). The rest, 86% were cleared without conditions. According to OECD's CompStats, in the 46 jurisdictions that provided data for the period 2014 to 2018, approximately 2% of mergers were cleared with remedies, 0.2% of mergers were prohibited, and the rest, approximately 98%, were cleared.

Table 11. Merger review statistics for mandatory notifications

| Year | Total mandatory notifications | Total clearances | Total clearances with conditions | Total prohibitions | Total withdrawn notifications* | Total pending cases |
|--------------|-------------------------------|------------------|----------------------------------|--------------------|--------------------------------|---------------------|
| 2019 | 23 | 11 | 1 | 0 | 1 | 11 |
| 2018 | 16 | 13 | 0 | 0 | 2 | 0 |
| 2017 | 22 | 17 | 3 | 0 | 2 | 0 |
| 2016 | 16 | 12 | 3 | 0 | 1 | 0 |
| 2015 | 16 | 13 | 3 | 0 | 0 | 0 |
| 2014 | 15 | 12 | 1 | 2 | 0 | 0 |
| Total | 108 | 78 | 11 | 2 | 6 | 11 |

Note: *In six other cases, the merger parties withdrew the notification during the investigation phase
Source: ICC

As explained in Section 2.2.4, SCPM can also review voluntary notifications, for information purposes, and accepts pre-notification consultations. In addition to the 108 mandatory notifications, SCPM received 44 voluntary notifications, 9 requests for pre-notification consultations and also reviewed 6 non-notified mergers (See Table 12).

Table 12. Number of mergers reviewed by type procedure between 2014 and 2019

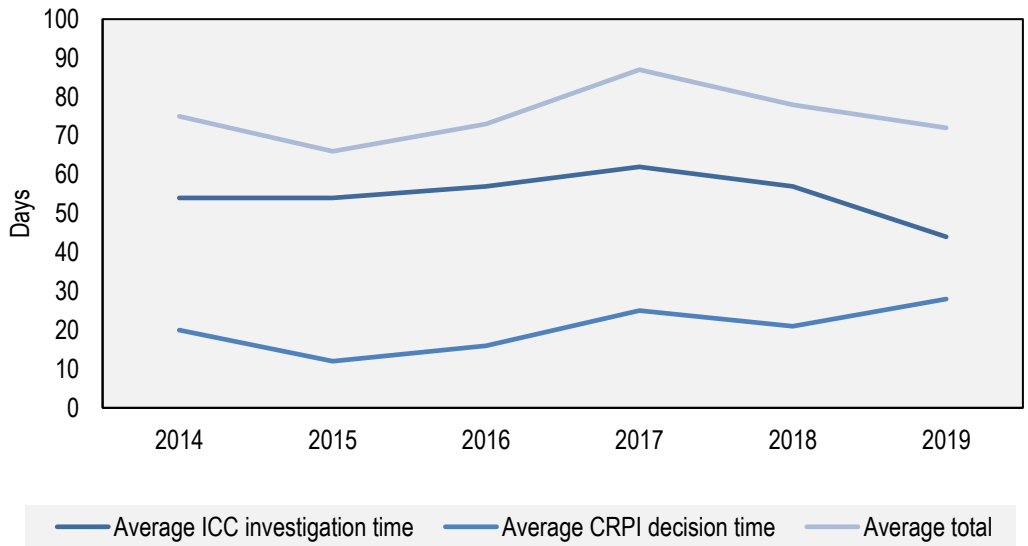
| Type of procedure | Number of cases | Percentage of total cases |
|--|-----------------|---------------------------|
| Mandatory notifications | 97* | 62% |
| Notifications for informative purposes | 44 | 28% |
| Consultations prior to notification | 9 | 6% |
| Investigation procedures for unreported concentrations | 6 | 4% |
| Total | 156 | 100% |

Note: *Does not include 11 notifications on which SCPM has not yet adopted a decision.
Source: ICC

The ICC reported that one of its main challenges is meeting deadlines. Until recently, Ecuador did not have a simplified merger review allowing the quick clearance of mergers that do not threaten competition; the country introduced the simplified merger review in April 2020. Having a simplified procedure will help free up resources that could be used in problematic mergers. Still, as explained in Section 2.2.4, Ecuador should consider adopting a two-phase system in line with international good practices, in addition to its fast-track procedure.

From 2014 to 2019, the average duration of merger clearance in cases started by mandatory merger notification was 65 days; where conditions were imposed, the average duration of the review was 128 days; and 83 days for prohibited mergers.

As shown in Figure 12, during the last years the ICC has reduced the number of review days, while the duration of the review at CRPI level has increased. Overall, the time it takes to SCPM to issue a merger decision has decreased since 2017.

Figure 12. Average case resolution times, 2014-2019

Source: OECD, using ICC data.

Box 8. Indura Ecuador/Swissgas del Ecuador: first prohibited transaction

In 2014, Indura Ecuador notified a takeover of Swissgas del Ecuador. The ICC analysed the four relevant markets affected by the transaction: bulk industrial oxygen, bottled industrial oxygen, bulk industrial nitrogen, and bottled industrial nitrogen.

At the time of the analysis, five companies were operating in the gas market in Ecuador: Enox, Swissgas, Oxyguayas, Indura and Linde. Applying the HHI index, a significant variation in the concentration of the commercialisation and production market for bottled nitrogen, bulk nitrogen and bulk oxygen was found. SCPM estimated that under a post-merger scenario, the time for a new competitor to enter the market would be higher than the international standard, and that infrastructure costs, sunk costs, investments in installed capacity, contracts, and discounts would discourage any possible entry to this market.

ICC concluded that the transaction did not raise concerns about possible unilateral price increases, but did increase the risk of co-ordinated effects given the high market concentration, the products and costs homogeneity between companies, and the fact that most of the products were offered in public tenders.

Finally, CRPI prohibited the merger in August 2014 and the decision was not appealed.

Source: File N° SCPM-CRPI-2014-032.

Box 9. Holcim/Lafarge: second prohibited transaction

In July 2014, Holcim and Lafarge and their subsidiaries Holcim Ecuador and Lafarge Cementos notified an international merger between these two companies.

At that time, the market was made up of three main competitors – Holcim, Lafarge, and Unión Cementera Nacional (UCEM). SCPM, in its analysis, determined that the proposed merger would have concentrated around 80-90% of the relevant market and generated a variation of 3 000 to 4 000 HHI points.

Moreover, market entry would have been made more difficult due to barriers such as investments in infrastructure, capital requirements, provision of clinker deposits, and the building of distribution channels. SCPM determined that even if the operators would be able to enter the market in the future, they would not have had the competitive strength to create pressure on the combined entity.

ICC also quantified that the merged company would have been strong enough to increase prices by 65% and found that the bargaining power of customers was weak.

In October 2014, CRPI decided to prohibit the merger between the two companies, which both appealed and again lost in February 2015.

Source: File N° SCPM-CRPI-2014-044.

Box 10. AB InBev/SAB Miller: complexity of merger remedies

In November 2015, the worldwide acquisition of SAB Miller by AB InBev was notified in Ecuador. Both companies were engaged in the commercialisation and production of beer and malt-based beverages internationally. In Ecuador, the purchase had effects on SAB Miller's subsidiaries, Cervecería Nacional (CN), Dinadec, and Cernyt, and AB InBev's subsidiary Compañía Cervecería Ambev Ecuador (Ambev).

After determining that other alcoholic beverages were not substitutes for beer, SCPM distinguished three segments for the beer market: inexpensive beer, regular beer, and imported beer. The malt-drinks market was defined as a different market.

In 2015, Ambev and CN offered inexpensive beers and regular beer in the Ecuadorian market and SCPM determined that the merger would leave the resulting entity with 100% of both relevant markets. The transaction would also have concentrated 100% of the malt-drink market.

Capital investments and costs associated with factory assembly, brand positioning, advertising, distribution network, and excess capacity were evaluated as major impediments to the entry of new competitors. Using the upward pricing pressure (UPP) method, SCPM quantified that the combined entity could increase prices up to 10% in the malt market, up to 39% in the inexpensive beer market, and up to 23% in the regular beer market. Finally, ICC determined that customers had no bargaining power.

Based on the assessment, in May 2016, CRPI decided to condition the authorisation of the merger to the following remedies: 1) divestment of Ambev's beer-production plant and distribution channel; 2) the sale of beer and malt beverage brands, Zenda, Dorada, Biela, and Maltín; 3) licensing of use and exploitation of the Brahma brand for a 10-year period; 4) use of the marketing network of Dinadec, SAB Miller's distribution company in Ecuador; 5) limiting advertising in the Pilsener, Club, Budweiser, Bud66, and Pony Malta brands; 6) creation of an e-commerce platform for the sale of craft beer; 7) increased worker participation in the capital stock of the resulting economic operator, and job stability; 8) access to the bottling process, bottle design, distribution system, training and promotion for craft-beer producers; and 9) prohibition of exclusive contracts.

CRPI approved the remedies and authorised the transaction in July 2016. The following month, four breweries not involved in the merger appealed the

decision. SCPM denied the appeal, arguing that the economic operators were not, from the procedural point of view, part of the procedure. However, in November 2016, SCPM's president added, ex officio, a new condition to the merger: the divestment of the Club brand, owned by SAB Miller, which had 10% national market share. This was appealed by AB InBev. The appeal was accepted and the divestment of the Club brand annulled. SCPM appealed and lost before the Constitutional Court in April 2018.

Source: Decision N° SCPM-CRPI-2016-017, Constitutional Court Case N° 0008-17-EP, and Judgement N° 009332-2016-10714.

Box 11. Icebell/Recapitomsa: incorrect turnover calculation and low fine

In June 2014, Icebell acquired the assets and liabilities of Recapitomsa, owner of the Dolce Incontro restaurant chain. Icebell was 60% controlled by Deli Internacional, which was 97% owned by Neckic, a company that also had a 64% in the coffee-shop chain Shemlon.

The transaction was not notified because according to Icebell's calculations, the combined turnover did not exceed the notification threshold. Icebell argued that only Deli Internacional, Icebell, and Recapitomsa should be considered for calculating turnover, which totalled USD 50 million. However, SCPM in its calculation also incorporated Shemlon, adding USD 29 million to the total. This new total, USD 79 million, met the merger's threshold and meant that the merger was subject to mandatory notification.

In light of this, in March 2018, CRPI decided that the merger between Icebell and Recapitomsa should have been notified on a mandatory basis, and that, in failing to do so, Icebell had committed a minor infringement. After determining that the transaction did not produce any adverse economic effects, Icebell was fined USD 24 609.

Source: File N° SCPM-CRPI-2018-009.

Box 12. Unión Cementera Nacional/Equinohormigonera: the possibility to offer commitments for gun-jumping

In March 2016, Unión Cementera Nacional (UCEM) paid USD 1.6 million to acquire 99.99% of concrete supplier Equinohormigonera's shares. As UCEM was a cement producer, the raw material for making concrete, and Equinohormigonera supplied concrete, it was a vertical acquisition. For 2015, the total turnover of the two companies involved in the merger amounted to USD 272 million,^{*} far above the notification threshold.^{**}

In March 2018, UCEM offered a commitment with SCPM, for not notifying the transaction. In December of the same year, CRPI rejected the commitment on the grounds that the only admissible commitment would have been to unwind the transaction.

SCPM continued the investigation and, in March 2019, CRPI imposed a fine of USD 123 494 on UCEM for a very serious infringement.

Notes: ^{*} Determined by the ICC in its report, No.SCPM-IGT-INICCE-006-2019-I, of February 2019

^{**} In 2015, the RBU was equivalent to USD 354, making RBU 200 000 worth USD 70.8 million

Source: File N° SCPM-CRPI-2019-007.

4. Related competition regimes

4.1. Unfair competition

In Ecuador, unfair competition is investigated and sanctioned by SCPM.

Article 25 of LORCPM defines unfair competition as any practice contrary to honest uses or customs in economic activities. According to the law, unfair competition can be sanctioned even if the act is not deliberate and the harm to competition is only potential and not actual.

LORCPM prohibits acts of unfair competition that impede, restrict, or distort competition, threaten economic efficiency, or the general welfare or the rights of consumers or users. SCPM only deals with unfair competition cases if the violator has market power. Unfair acts that affect only individual interests are heard by the civil courts, in accordance with Article 26 of LORCPM.

Article 27 of LORCPM establishes the detailed list of possible acts of unfair competition.

Table 13. Infringements of unfair competition in Article 27

| Nature of the conduct | Main specific conducts |
|---|--|
| 1) Confusion | Use or imitation of distinctive signs of third parties Use of labels, packaging, means of identification associated with third parties |
| 2) Deception | Acts that mislead the public about the advantages or attributes or conditions of the products or services or the economic operator Untruthful or inexact advertising |
| 3) Imitation | Imitation in violation of an intellectual property right Imitation of benefits that create confusion or take advantage of the reputation of a third party Imitation to prevent or hinder the presence of a third party in the market |
| 4) Denigration | Making or spreading incorrect or false assertions to undermine a third party Making or disseminating assertions that refer to the nationality, beliefs or private life or any other personal circumstance of the affected Making or spreading assertions with a tone of contempt or ridicule |
| 5) Comparison | Comparison that is not analogous, relevant or verifiable |
| 6) Exploitation of the reputation of others | Improper use for own benefit of third party's reputation |
| 7) Violation of business secrets | Disclosure of business secrets with commercial value Disclosure of secrets for breach of contract Acquisition of confidential information for espionage, breach of contract, breach of trust |
| 8) Inducement to breach of contract | Interference by a third party in the contractual relationship that a competitor maintains with its workers, suppliers and customers |
| 9) Rule violation | Abuse of judicial and administrative processes to stay in the market Breach of legal regulations to stay on the market |
| 10) Harassment, coercion or undue influence against consumers | Taking advantage of weaknesses or consumer ignorance Harassment to debilitate the consumer Complicating the termination of contracts Threat of unfounded legal action Contracts that harm consumers' rights |

Source: OECD, based upon Article 27 of LORCPM.

According to information provided by the Directorate for Unfair Practices (INPD) during the fact-finding process, there is no legislative proposal to separate competition law from unfair practices.

SCPM's has a relatively large unit –the Directorate for Unfair Practices (INPD), which has 9 staff– and a considerable track record in unfair competition cases: an average of 32 investigations a year, with a peak in 2016 of 54. The INPD is SCPM's division that receives the largest number of complaints and investigates the largest number of cases.

In practice, most of these cases are solved by commitments (17 out of 25 in the period 2014-2019). 60% of all commitments accepted by CRPI correspond to unfair practices.

Table 14. SCPM unfair practice final decisions, 2014-2019

| Year | Total final decisions | Total decisions with commitments | Total fines (USD) | Total correction amount from commitments (USD) |
|--------------|-----------------------|----------------------------------|-------------------|--|
| 2019 | 3 | 2 | 2 019 | 217 403 |
| 2018 | 3 | 1 | 156 621* | 15 010 |
| 2017 | 7 | 4 | 177 194 | 1 019 727** |
| 2016 | 6 | 5 | 708 354 | 1 666 171 |
| 2015 | 5 | 4 | 79 484 | 315 647 |
| 2014 | 1 | 1 | 0 | 0 |
| Total | 25 | 17 | 1 123 671 | 3 233 958 |

Notes: *Does not include a fine imposed on the company F&E Ecuatoriana. The decision was appealed before the TDCA and the fine was suspended; no final decision has been reached.

**One fine from 2016 is counted in 2017, as it concerns a case for which a decision was adopted in 2017.

The detail of all the cases in this table can be found in Appendix 1:

Source: OECD, using INPD data.

The resources dedicated to the enforcement of unfair competition rules are significantly more than the resources devoted to investigating anti-competitive practise and mergers. This share should be rebalanced, with more resources allocated to the investigation of antitrust cases, and fewer to unfair competition.

Alternatively, Ecuador should consider whether it is practical to entrust the review of unfair competition cases, whether or not the perpetrator has market power, to a separate agency. In that case, Ecuador should consider whether to remove unfair competition from the LORCPM. These changes would allow SCPM to focus on its core role, competition enforcement and advocacy, and avoid potential misunderstandings concerning the different objectives pursued by competition law, on the one hand, and unfair competition law, on the other.

Three relevant unfair competition cases are detailed below.

Box 13. Juice-powder case

In 2013, Mondelez Ecuador denounced Quala Ecuador for allegedly carrying out unfair practices in the juice-powder market. The infringement consisted in misleading advertising about the vitamin content of two brands of juice powder (JugosYá and JugosYá Fruit) of Quala Ecuador.

Quala Ecuador proposed a commitment that was accepted by the CRPI in February 2015 and a fine of USD 248 282 was imposed.

Source: File N° SCPM-CRPI-2014-052.

Box 14. “Light” oil case: the need to define the relevant market for calculating the fine and the correction amounts on the unfair competition cases

In 2013, SCPM launched an investigation into six supermarket chains – El Rosado, La Fabril, La Favorita, Industrial Ales, Industrial Danec, and Pronaca – for alleged misleading advertising for “light” oils.

In April 2016, CRPI fined El Rosado USD 3.1 million for a serious infringement of Article 78 of LORCPM for marketing oil with a “light” label without authorisation from the National Agency for Health Regulation and Surveillance (ARCSA).

The remaining five supermarkets presented commitments, which were accepted by SCPM. The following correction amounts were determined: La Favorita (USD 9 188); La Fabril (USD 194 563); Pronaca (USD 53 394); Industrial Ales (USD 1.12 million); and Industrial Danec (USD 4.22 million).

Industrial Ales appealed the decision twice, both times unsuccessfully. Industrial Danec submitted an appeal before CRPI arguing, among other things, an erroneous calculation of the relevant market, and therefore of the reparatory amount. This argument was admitted by CRPI, which, in September 2016, partially accepted the appeal and determined a new amount of USD 1.5 million. Danec subsequently appealed the decision on two instances and lost. In April 2017, it decided to withdraw its commitment. In July 2017, CRPI declared that Danec had not complied with the commitment and ordered the investigation procedure to continue.

El Rosado, the only operator fined, challenged CRPI's decision before the TDCA, which in 2017 accepted the complaint and annulled the decision, arguing that the absence of an explanation on how the relevant market was defined and the market turnover calculated affected the reasoning of this decision. SCPM filed two appeals, which were dismissed.

Source: File N° SCPM-IIPD-2013-015, File N° SCPM-CRPI-2015-076, Judgement N° 09802-2016-00608, and Constitutional Court Case N° 0796-17-EP.

Box 15. Household appliances case: incomplete information to consumers

SCPM began an investigation into Comandato and Concredito Concreta for providing incomplete information about household-appliance sale conditions, misleading the consumer about forms of payment, interest rates when generating direct credit, and the value of the periodic payments by consumers. In response, both economic operators offered commitments, which were accepted by CRPI in July 2016 and August 2017. The correction fines were USD 447 480 for Comandato and USD 499 500 for Concredito Concreta.

Source: File N° SCPM-CRPI-2016-020.

4.2. Consumer protection

The Ombudsman's Office (DPE) is in charge of protecting consumer rights. Similarly, SCPM is charged with investigating behaviour that may affect consumers or the general interest. The exact scope of their jurisdiction is not always clear and may sometimes overlap. Both agencies are independent and there are no rules or practices to avoid inconsistent decisions or to decide how to proceed if they are adopted. SCPM and Ombudsman's Office should establish a framework clarifying when each agency is expected to act and when not, as well as what happens if both act (e.g. one of them may be required to stop proceedings).

4.3. Intellectual property

SENADI oversees the protection of intellectual rights. In addition, pursuant to LORCPM, SCPM can investigate competition issues with an intellectual property

component if they affect the general interest or consumer welfare; if appropriate, SCPM can impose sanctions.⁸²

Articles 30 and 31 of the RLORCPM regulate the procedures that both SCPM and SENADI must follow when they receive intellectual property complaints. However, the law is not clear about the distinction between SCPM and SENADI's jurisdictional powers. The authorities informally organise their remits on the basis of the following principle: when a case involves an impact on the market, SCPM investigates it and, where appropriate, sanctions; when there is no market impact, SENADI is the competent agency. Nevertheless, cases have been investigated by both SENADI and SCPM. Both agencies claim that, so far, they have adopted no conflicting decisions. Still, they should establish a framework clarifying when is each institution expected to act, when not, as well as what happens if both act (e.g. one of them may be required to stop proceedings)

4.4. Telecommunications sector

In Ecuador, the 2015 Organic Telecommunications Law (LOT) regulates the telecommunications sector.⁸³ The law, which contains provisions that specifically refer to competition issues, created the Telecommunications Regulation and Control Agency (ARCOTEL), which is in charge of the administration, regulation, and control of telecommunications. It is attached to the Ministry of Telecommunications and the Society of Information but has administrative, technical, economic and financial autonomy.⁸⁴

ARCOTEL can regulate rates or prices and adopt measures to avoid market distortions and the strengthening of market power, and to guarantee user access to public services.⁸⁵

Every two years, ARCOTEL defines the telecommunications relevant markets and analyses the competition conditions within those markets. Where, following this analyses, markets are found not to be competitive, ARCOTEL may impose specific

⁸² Article 26 of LORCPM.

⁸³ See, www.telecomunicaciones.gob.ec/wp-content/uploads/downloads/2016/05/Ley-Organica-3-A-Inica-de-Telecomunicaciones.pdf.

⁸⁴ Article 142 of LOT.

⁸⁵ See Article 28 of the LOT.

obligations (as detailed in Article 32 of the LOT) on economic agents with market power.⁸⁶

According to Article 33 of the LOT, a telecommunication provider will be considered as holding market power if it has the capacity to significantly influence the market. This market power definition is aligned with the definition provided by Article 7 of LORCPM.

The LOT establishes that, in order to avoid distortions in the market, companies with a market share greater than 30% in the telecommunication sector must make a quarterly payment to the State. State-owned telecommunication companies are exempted from this obligation. Some observers have pointed out that this provision discourages investment and growth, is discriminatory and goes against the competitive neutrality principle, which establishes that firms should compete on the merits and should not benefit from undue advantages due to their ownership or nationality. The OECD understands that the ARCOTEL is studying the need to maintain this payment, which collected approximately USD 14 million last year.

ARCOTEL also holds competition enforcement powers regarding the telecommunications sector. It can investigate and impose sanctions on economic operators for abuse of market power or anticompetitive practices, infringement that can also be sanctioned under LORCPM by SCPM. To avoid a double sanction for the same conduct, the penalty is imposed by whichever agency that first notifies the

⁸⁶ Article 32 of LOT addresses the imposition of obligations, which include: “1) *Provide information related to accounting, technical specifications, characteristics of the networks, conditions of supply and use, including, where appropriate, conditions that could limit access or use of services or applications, as well as prices.* 2) *Provide the information required by ARCOTEL in a timely and complete manner, in accordance with the formats and periodicity determined for this purpose.* 3) *Carry cost or regulatory accounting, in the event that it provides various services, in the format and with the methodology that, where appropriate, is determined by ARCOTEL.* 4) *Set prices and tariffs that allow promoting effective competition and benefits for users in terms of prices and quality of services, as well as favouring investment by the service provider, especially in networks of new generation. The rate mechanism is included for services within the same network or outside the network (on-net or off-net).* 5) *Set interconnection charges that promote the eradication of anti-competitive practices.* 6) *Limit commercialisation of services and use of terminal equipment.* 7) *Prohibition on signing leases for infrastructure installation.* 8) *Setting symmetrical interconnection charges.* 9) *Setting of asymmetric interconnection charges.* 10) *Symmetric rate regulation.* 11) *Asymmetric rate regulation.* 12) *Infrastructure-sharing obligations.* 13) *Regulation on the use of trademarks or trade names.”*

economic operator of the start of the investigation procedure. So far, ARCOTEL has initiated no investigation for competition law violations.

In the case of mergers, ARCOTEL has no competition powers. For companies that have merged, it is necessary in order to obtain a license to operate in the telecommunications sector that they provide ARCOTEL with the authorisation from SCPM. Between 2016 and February 2020 SCPM has provided its opinion on ten cases concerning the markets regulated by ARCOTEL: five pre-notification consultations, three voluntary notifications, and two mandatory notifications.

SCPM may also issue non-binding recommendations to ARCOTEL regarding competition matters. Since 2015, SCPM has issued two. One, about the distribution and adjudication of sound radio frequencies, in 2017 (see Section 5.1).⁸⁷ The second was issued in 2018, and recommended that ARCOTEL, CORDICOM, and the Comptroller General review the decisions adopted about applicants who requested two matrix frequencies for the same service.⁸⁸

5. Advocacy and promotion of a competition culture

SCPM has multiple tools to promote competition. It can undertake market studies, issue non-binding opinions and recommendations, prepare guidelines, and carry out training and outreach activities.⁸⁹

The Directorate for Competition Advocacy (INAC), SCPM's advocacy unit, comprises the Direction of Studies, which carries out market studies, and prepares recommendations, and manuals; and the Direction of Promotion, which organises national and international events, training, guidelines, citizen and academic observatories, and other campaigns. SCPM's advocacy material (opinions, guidelines, guides, market studies, etc.) must be published on its website on condition to protect and not disclose reserved or confidential information.⁹⁰

⁸⁷ See, www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/Estudio_SCPM-IAC-0008-2017_RS.pdf.

⁸⁸ See, www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/SCPM-DS-005-2018_v2.pdf.

⁸⁹ Article 38 of LORCPM.

⁹⁰ Article 2 of General Provisions of the Regulation of LORCPM. In addition, the Vice Minister of the Co-ordinating Ministry of Production, Employment and Competitiveness, may promote and co-ordinate the conduct of market and economic studies for the drafting of regulations by the Regulatory Board, in accordance with Article 47 of the Regulations.

INAC has 15 employees. As noted in Section 2.1.5, this is more than the Directorate for Investigation (IIAPMAPR), which oversees both abuse of market power and restrictive agreements. This is because, at least in the past, SCPM prioritised competition advocacy activities.

INAC carried out many activities and studies to promote the agency and competition, and to advocate for a model of social economy based upon solidarity. Several of the advocacy activities carried out under previous SCPM's presidents were recently found by SCPM's current management to fall outside SCPM's legal scope. In light of this, and of the budget cuts that have affected SCPM, the new agency's president has stopped the majority of these activities, choosing instead to concentrate on issuing specific market studies and opinions.

LORCPM establishes that one of SCPM's powers is to promote the removal of entry barriers.⁹¹ However, the agency neither has a clear methodology for analysing entry barriers, nor is the legal basis of its powers clear. SCPM is developing a guide on the evaluation of barriers to entry, which could be a valuable tool. The guide should not only set out the method of identifying barriers but also clarify what actions SCPM may take once it has identified a barrier. SCPM could use as reference the Recommendation of the OECD Council on Competition Assessment and the methodology followed by the OECD Secretariat in in-country assessments of regulatory barriers.⁹²

5.1. Market studies, special reports and recommendations

INAC's Direction of Studies oversees the development of market studies and special reports to identify possible market distortions. SCPM's internal regulations do not establish any difference between market studies and special reports, but in practice, market studies appear to have more content and complexity than special reports. The distinction between market studies and special reports is arguably redundant and the two tools could be merged into one.

Market studies are prepared over a period of 180 days, which can be extended 180 additional days by decision of INAC's Director. Special reports are expected to take 90 days to prepare, which can be extended for an additional 90 days by INAC's Director. SCPM's General Director (IGT) can authorise additional extensions both for market studies and special reports, it appears, with no limit. Each extension must

⁹¹ Clauses 21 and 24 of Article 38,

⁹² See www.oecd.org/daf/competition/oecdrecommendationoncompetitionassessment.htm.

be for a defined period.⁹³ In any event, failure to comply with these deadlines does not have a negative impact upon the validity of studies or reports. Market studies and special reports can include non-binding recommendations, which are expected to inform and influence other public institutions and the general public.

Until 2017, SCPM could also publish recommendations independent of any particular study. Each recommendation contained actions to be considered or applied by involved actors. Recommendations were non-binding and addressees of recommendations were not required to justify their failure to follow a recommendation.

The Direction of Studies has recently been granted the power to issue periodic reports concerning past recommendations.⁹⁴ These reports detail whether recommendations have been applied and whether addressees of recommendations have taken action, but they contain no specific evaluation of the effects of SCPM's recommendations in different markets.

During the early years of SCPM, a large number of market studies and special reports were launched in a wide variety of economic sectors and topics. Stakeholders told the OECD that most such studies or reports were not focused and their quality and depth were poor, while a few were nothing more than transcripts of existing regulations. This lack of focus can be seen in the fact that only 26% of the market studies and 35% of the special reports included recommendations. This is striking given the resources and time devoted to their production.

From 2013 to December 2018, SCPM issued a total of 68 recommendations, including those in market studies and special reports, as well as the standalone ones. These recommendations included 285 actions of which 113 (39.65%) were fully implemented, 29 (10.17%) were refused, and 75 (26.31%) were not answered. The monitoring of the remaining 68 actions (23.85%) has been interrupted due to the long time period that has elapsed since the recommendations were originally made.⁹⁵

⁹³ Article 42 of the “SCPM Administrative Procedural Management Instructions”, available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2017/SCPM-DS-012-2017.pdf>. The Instructions were amended in May 2020, but not Article 42. Amendments available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2020/04/RESOLUCION-SCPM-DS-2020-18.pdf>.

⁹⁴ *SCPM Organic Statute of Organizational Management by Processes*, published in August 2018.

⁹⁵ This information corresponds to the last report issued in December 2019 regarding follow-up on recommendations.

Since 2019, SCPM has stopped publishing independent recommendations; recommendations are now issued only in the context of market studies and special reports.

Table 15. Market studies, special reports, and recommendations statistics

| Year | Total market studies | Total market studies with recommendations | Total special reports | Total special reports with recommendations |
|--------------|----------------------|---|-----------------------|--|
| 2019 | 1 | 1 | 1 | 1 |
| 2018 | 0 | 0 | 8 | 2 |
| 2017 | 8 | 3 | 17 | 8 |
| 2016 | 15 | 2 | 8 | 0 |
| 2015 | 15 | 3 | 3 | 2 |
| 2014 | 17 | 5 | 9 | 3 |
| Total | 56 | 14 | 46 | 16 |

Source: INAC

As seen in Table 16, the majority of SCPM studies have focused on: trade; agriculture, livestock, hunting and forestry activities; public administration; and financial services.

Currently, SCPM does not have criteria to guide the selection of markets. It should decide and publish such market study selection criteria, aiming at identifying markets whose characteristics may suggest competition problems or regulatory inefficiencies, or that have a greater importance for the economy.⁹⁶ Effective selection of the markets to study allows competition authorities to focus on the sectors that most require their attention. Further, the publication of the criteria would increase SCPM's transparency and predictability. SCPM should still be allowed to investigate markets that do not meet the criteria, provided that it justifies its decision.

⁹⁶ See the materials of the Roundtable on Market Study Methodologies for Competition Authorities (2017) (<https://www.oecd.org/competition/market-study-methodologies-for-competition-authorities.htm>) and the OECD report on Competition and market studies in Latin America 2015: The case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru (2015) (<https://www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america-2015.htm>).

Table 16. Market studies and special reports by industry

| Industry | Number of market studies | Number of special reports |
|--|--------------------------|---------------------------|
| Financial services | 5 | 7 |
| Public administration | 2 | 14 |
| Agriculture, livestock, hunting and forestry | 12 | 4 |
| Tourism | 1 | 0 |
| Trade | 10 | 8 |
| Construction | 4 | 1 |
| Mail and communications | 3 | 2 |
| Social, health and education services | 3 | 1 |
| Manufacturing | 6 | 4 |
| Other services | 1 | 1 |
| Fishing | 2 | 0 |
| Transport | 7 | 1 |
| Total | 56 | 45 |

Source: OECD, using INAC data

Perhaps because of their large number, a majority of SCPM's earlier studies and reports do not engage in substantive economic or legal sectoral analysis, as seen in the following examples.

Box 16. SCPM's earlier studies and reports

Market study: food sector and product labelling (2013)

In October 2013, SCPM published a nine-page market study on the food sector – of which only six pages are content – divided into five sections: background, introduction, objectives, legal framework (including quotations from the Constitution, Organic Consumer Law, and LORCPM), and a half-page list of the main industry operators. Despite the report's fourth objective being to identify possible anti-competitive practices that could cause distortions in the food market and product labelling in Ecuador, the study does not refer to the relevant market, possible barriers to entry, sectoral concentration levels, or market shares of the main operators. This study does not have a conclusion and contains no recommendations.

Market study: supermarkets (2014)

This 14-page SCPM market study of supermarkets has six sections: background, introduction, general description of supermarkets, main operators, geographical distribution of the main supermarket chains, and finally, sales level. However, it contains no economic analysis, nor does it refer to the relevant market, possible barriers to entry, sectoral concentration levels, or main operators' market shares. This study does not establish its objectives and does not present a description of the sector's legal framework. It contains neither conclusions nor recommendations.

Market study: sales of products in gas stations (2016)

This SCPM's 20-page market study has four sections: background, introduction, general sectoral description, and a 14-page regulatory framework, which quotes liberally from the relevant legislation. The study has no analytical or economics component, and makes no reference to the relevant market, possible barriers to entry, level of sectoral concentration, or the main economic operators' market shares. Furthermore, the study contains no precise objectives. It does establish that it was triggered by a concern with "*the possible existence of tied or conditioned sales by wholesale fuel sellers to the retail market, requiring the sale of a certain type of oil or specific lubricant and so reducing competition in the sector*". However, this intention is unrelated to the study's content. Finally, the market study contains no conclusions or recommendations.

Sources: The report for the market study concerning the food sector and product labelling (2013) is available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/02/ETIQUETADO-DE-ALIMENTOS.pdf>. The report for the market study on supermarkets (2014), is available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/02/Supermercados-Versin-Pblica.pdf>. The report for the market study on sales of products in gas stations (2016) is available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/02/Informe-de-venta-de-productos-relacionados-a-las-gasolineras.pdf>.

More recent market studies identify their objectives, contain regulatory and economic analysis, present useful conclusions and provide recommendations. There is a clear contrast with the initial market studies referred above, and there is a trend to improve such instruments and make them more sophisticated. Still, as can be seen in Box 17, SCPM has made some recommendations that seem counter-productive or, at least, odd from a competition perspective. SCPM is encouraged to continue to improve its market studies.

Box 17. Recent Market Studies

Market study: Radiofrequency bands (2018)

In October 2018, SCPM published a market study on the allocation of radiofrequency bands, which aimed to analyse the structure of the sound radiofrequency sector, identify possible abuses of market power in the communications sector, and classify radio stations, their operation and services generated by the sector.

The study requested that ARCOTEL and CORDICOM review the current distribution and allocation of radiofrequencies for radio stations nationwide, and correctly apply existing regulations.*

Special report: Uber, Cabify and Easy Taxi (2018)

Published by SCPM in August 2018, this report investigated the presence of commercial ride-hailing platforms in Quito and analysed the sector's regulatory framework, the impact of new technologies, market players, ride-hailing service structure, and possible barriers to entry.

The main findings were that certain regulations could constitute a barrier to entry for new economic operators with disruptive technology whose presence generates alternatives for users. SCPM made a number of recommendations.⁹⁷

⁹⁷ Recommendation N° SCPM-DS-007-2018, dated on July 20, 2018. Available at https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/SCPM-DS-007-2018_v2.pdf

These included having the National Transit Agency (ANT) and the Quito Municipality order Uber, Cabify and Easy Taxi to immediately have their services legally approved nationally and in Quito; and ensure that mobile ride-hailing applications are national and only acquired, installed, managed, and used by transport operators legally established in Ecuador. It is unclear how these recommendations serve to remove regulatory barriers to entry or promote economic efficiency.

Market study: Port services (2019)

SCPM's most recent market study was published in April 2019. An investigation of port services, it undertakes a legal-economic analysis of the Ecuadorian port sector and its economic operators for the period between 2011 and 2017. The study revealed the existence of two instances of vertical integration of shipping companies and logistics operators in the port-services sector, and one instance of horizontal integration between shipping companies.

INAC issued preliminary recommendations, among which a request that the Ministry of Transport and Public Works initiate a reform of port-sector regulations, and of rules on inspections of merchandise exported and imported through authorised port terminals. In addition, INAC preliminarily recommended the preparation of a standardised port-tariff regime for all the services and sub-services provided by economic operators involved in the sector. The latter recommendation seems odd from a competition perspective. INAC also preliminarily recommended that ICC initiate an investigation regarding the need for mandatory notification for mergers between economic operators in the port sector.

At the moment of drafting this report, the market study was being updated, in view of information provided by the Ministry of Transport and Public Works. SCPM has not yet issued formal recommendations.

Notes:

* Article 106 of the LOC stipulates that the frequencies of the radioelectric spectrum destined to the operation of open signal radio and television stations will be distributed equally in three parts, reserving 33% of these frequencies for the public media operation, 33% for the private media, and 34% for the community media.

Sources: The report of the market study on radiofrequency bands (2018) is available at https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/Estudio_SCPM-IAC-0008-2017_RS.pdf and the recommendation at www.scpm.gob.ec/sitio/wp-content/uploads/2019/04/Recomendacin-SCPM-DS-05-2017.pdf. The report of the special report concerning Uber, Cabify and Easy Taxi (2018) is available at https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/INFORME-DNITEE-015-2017-TAXIS_VP3.pdf and the recommendation at https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/SCPM-DS-007-2018_v2.pdf. The report of the market study on port services is currently not publicly available.

5.2. Opinions and petitions to public authorities

SCPM can issue non-binding opinions on laws, regulations, circulars and administrative acts, based on competition considerations. The aim is to promote competition in legislation. This objective is in line with the OECD Council's Recommendation on Competition Assessment,⁹⁸ which encourages countries to introduce appropriate processes to identify existing or proposed public policies that unduly restrict competition. The Recommendations advises developing specific and transparent criteria for performing competition assessments. Up until April 2020, SCPM had only issued one opinion, in February 2019; it dealt with oil derivatives and biofuels.⁹⁹

SCPM can also issue petitions to public authorities to implement actions that ensure that the provisions in LORCPM are effective. These are general observations through which SCPM tries to ensure that public authorities do not hinder competition. Contrary to opinions, petitions are not necessarily about a specific regulation.¹⁰⁰

Up until April 2020, SCPM has issued six petitions - four in 2019, and two more in 2020 related to the Covid-19 pandemic. The first petition in 2019 was related to the hydrocarbon market;¹⁰¹ the second dealt with passenger ground transport operators;¹⁰² the third was a general reminder about competition issues for public institutions and economic operators;¹⁰³ and the fourth dealt with ground transport and was aimed at

⁹⁸ Adopted in 2009 and available at <http://www.oecd.org/daf/competition/OECD-Recommendation-Competition-Assessment.pdf>.

⁹⁹ **File** N° SCPM-IGT-INAC-2019-0106-0F, dated on February 2019. This opinion is not available on SCPM's website.

¹⁰⁰ Clauses 11 and 13, Article 38 of LORCPM

¹⁰¹ This document is undated. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/02/Exhorto-Derivados-de-Hidrocarburos-14-01-2019.pdf>

¹⁰² This document is undated. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/02/Exhorto-a-los-Oeradores-de-Transporte-Terrestre-de-Pasajeros-del-Ecuador.pdf>

¹⁰³ Dated on May 9, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/05/Exhorto-3-A-las-Instituciones-de-la-Administraci%C3%B3n-P%C3%BAblica-y-Operadores-Econ%C3%B3micos.pdf>

operators and public entities.¹⁰⁴ SCPM's two recommendations in 2020, for manufacturers, suppliers, and marketers of respirators and antiseptics, public-control institutions, and the general population. They reminded the illegality of price-fixing, anti-competitive agreements, and price gouging, as well as stressed that public bodies needed to carry out competitive and transparent emergency procurement processes.

5.3. Guidelines

Both SCPM and the Regulation Board have the power to issue rules and instructions. The main documents adopted to date are presented in Table 17.¹⁰⁵

Table 17. Guidelines currently in place

| Subject | Name | SCPM | Regulation Board |
|------------------------|--|--|--|
| Administrative | Regulation for the issuance of rules by SCPM | | Adopted in 2014; ¹ amended in 2015 ² |
| Administrative | Regulation concerning the functioning of the Regulation Board | | Adopted in 2017 ³ |
| Administrative | CRPI internal regulations | Adopted in 2013; ⁴ amended in 2019 ⁵ | |
| Administrative | SCPM's organisation structure | Adopted in 2018; ⁶ amended in 2019 ⁷ | |
| Administrative | Instruction for SCPM's inter-institutional agreements | Adopted in 2019; ⁸ amended in 2019 ⁹ | |
| Restrictive agreements | Criteria for the application of de minimis rule to restrictive agreements | | Adopted in 2014; ¹⁰ amended in 2015 ¹¹ |
| Commitments | Instruction for the handling and execution of commitments | Adopted in 2015; ¹² amended in 2016 ¹³ | |
| Mergers | Fee for the analysis of mergers subject to mandatory notification | Adopted in 2013 ¹⁴ | |
| Mergers | Notification form for obligatory and informative mergers to be presented to SCPM | Adopted in 2013 ¹⁵ | |
| Mergers | Instruction on the preliminary contacts concerning the notification of an economic transaction | Adopted in 2014 ¹⁶ | |

¹⁰⁴ Dated on July 19, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/07/EXHORTO-A-los-Organismos-y-Entidades-del-Sector-Pu%CC%81blico-Opera.pdf>

¹⁰⁵ Guidelines that are not issued through SCPM's head resolutions are not considered internal regulations, guidelines, or soft law; they are simply supporting documents.

| Subject | Name | SCPM | Regulation Board |
|-----------------|---|-------------------------------|---|
| Mergers | Thresholds for the compulsory notification of mergers | | Adopted in 2015 ¹⁷ |
| Mergers | Instruction concerning the payment of the fee for the analysis mergers | Adopted in 2016 ¹⁸ | |
| Mergers | Instruction on the simplified procedure for the analysis of mergers | Adopted in 2020 ¹⁹ | |
| General public | Manual to promote and incentivise citizen surveillance | Adopted in 2014 ²⁰ | |
| Investigation | Methods for the definition of relevant markets | | Adopted in 2016; ²¹ amended in 2017 ²² |
| Investigation | Methodology for determining the fine for violations of LORCPM | | Adopted in 2016 ²³ |
| Investigation | Instruction regulating SCPM's inspections and dawn raids and the keeping of evidence | Adopted in 2016 ²⁴ | |
| Investigation | Instruction for the classification of information within the investigation and sanction files of SCPM | Adopted in 2017 ²⁵ | |
| Investigation | Guidelines on SCPM's decisions containing obligations for companies to make something public | Adopted in 2017 ²⁶ | |
| Leniency | Instruction on the exemption and the reduction of fine amounts imposed by SCPM | Adopted in 2019 ²⁷ | |
| Specific market | Regulatory standards for supermarket chains and their suppliers | | Adopted in 2017; ²⁸ amended in 2017 ²⁹ and 2018 ³⁰ |
| Specific market | Regulatory standards for specialised establishments for the sale of household appliances, electrical appliances, and other products | | Adopted in 2017 ³¹ |

Notes:

¹ Resolution N°004, dated on December 24, 2014. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-004-Regulacion-para-Expedicion-de-Normas-por-Parte-de-la-Superintendencia-de-Control-del-Poder-de-Mercado.pdf>.

² Resolution N°005, dated on February 5, 2015. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resolucion-005-Reforma-a-la-Resoluci%C3%B3n-004.pdf>.

³ Resolution N°JR-001-2017, dated on December 27, 2017. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2018/10/Resolucion-No.-JR-001-2017.pdf>.

⁴ Resolution N° SCPM-DS-2013-027, dated on April 30, 2013. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2013/RESOLUCION-SCPM-DS-027-2013.pdf>.

⁵ Resolution N° SCPM-DS-2019-07, date on February 11, 2019. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2019/RESOLUCION-SCPM-DS-2019-07.PDF>. Resolution N° SCPM-DS-2019-36, dated on July 23, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/07/SCPM-DS-2019-036.pdf>.

⁶ Resolution N° SCPM-DS-22-2018, dated on August 30, 2018. Not available.

⁷ Resolution N° SCPM-DS-2019-62, dated on November 25, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/11/SCPM-DS-2019-62.pdf>.

- ⁸ Resolution N° SCPM-DS-2019-34, dated on July 16, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/07/RESOLUCION-SCPM-DS-2019-34-1.pdf>.
- ⁹ Resolution N° SCPM-DS-2019-66, dated on December 24, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/12/RESOLUCION-SCPM-DS-2019-66.pdf>.
- ¹⁰ Resolution N°003, dated on January 14, 2014. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resolucion-003-Criterios-para-la-aplicacion-Regla-de-Minimis-de-Acuerdos-y-Practicas-Restrictivas.pdf>.
- ¹¹ Resolution N°010, dated on September 25, 2015. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-No.-010-Regla-de-Minimis.pdf>.
- ¹² Resolution N° SCPM-DS-078-2015, dated on November 19, 2015. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2015/RESOLUCION-SCPM-DS-078-2015.pdf>.
- ¹³ Resolution N° SCPM-DS-041-2016, dated on July 13, 2016. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2016/SCPM-DS-041-2016.pdf>.
- ¹⁴ Resolution N° SCPM-DS-2013-002, dated on January 4, 2013. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2013/RESOLUCION-SCPM-DS-002-2013.pdf>.
- ¹⁵ Resolution N° SCPM-DS-2013-0022, dated on April 4, 2013. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2013/RESOLUCION-SCPM-DS-022-2013.pdf>.
- ¹⁶ Resolution N° SCPM-DS-035-2014, dated on May 5, 2014. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2014/RESOLUCION-SCPM-DS-035-2014.pdf>.
- ¹⁷ Resolution N°009, dated on September 25, 2015. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-No.-009-Umbrales-de-Concentracion.pdf>.
- ¹⁸ Resolution N° SCPM-DS-059-2016, dated on November 7, 2016. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2016/SCPM-DS-059-2016.pdf>.
- ¹⁹ Resolution N° SCPM-DS-017-2020, dated on April 17, 2020. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2020/04/RESOLUCION-SCPM-DS-2020-17.pdf.pdf>.
- ²⁰ Resolution N° SCPM-DS-078-2014, December 10, 2014. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2014/RESOLUCION-SCPM-DS-078-2014-Manual-promover-vigilancia-ciudadana.pdf>.
- ²¹ Resolution N°011, dated on September 23, 2016. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-011-Expedicion-de-Metodos-de-determinacion-de-Mercados-Relevantes.pdf>.
- ²² Resolution N°013, dated on January 4, 2017. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resolucio%CC%81n-No.-013-Reforma-de-los-articulos-20-y-25-de-la-Resolucion-N%C2%BA-011.pdf>.
- ²³ Resolution N°012, dated on September 23, 2016. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-012-Determinacion-de-importe-de-multas.pdf>.
- ²⁴ Resolution N° SCPM-DS-043-2016, date don July 26, 2016. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2016/SCPM-DS-043-2016.pdf>.
- ²⁵ Resolution N° SCPM-DS-037-2017, dated on July 21, 2017. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2017/SCPM-DS-037-2017.pdf>.
- ²⁶ Resolution N° SCPM-DS-021-2017, dated on April 27, 2017. Available at <https://www.scpm.gob.ec/images/resoluciones-despacho/2017/SCPM-DS-021-2017.pdf>.

²⁷ Resolution N° SCPM-DS-2019-38, dated on August 8, 2019. Available at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/08/Resoluci%C3%B3n-No-SCPM-DS-2019-38.pdf>.

²⁸ Resolution N°014, dated on January 4, 2017. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resolucion-No.-014-expedicion-de-nuevas-Normas-Regulatorias-para-las-Cadenas-de-Supermercados-y-sus-Proveedores.pdf>.

²⁹ Resolution N°JR-002-2017, dated on December 27, 2017. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2018/10/Resolucion-No.-JR-002-2017.pdf>.

³⁰ Resolution N°JR-002-2018, dated on May 9, 2018. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2018/10/Resolucion-JR-002-2018.pdf>.

³¹ Resolution N°015, dated on May 11, 2017. Available at <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2018/02/Resolucion-No.-015-Normas-Regulatorias-para-los-establecimientos-especializados-de-venta-de-electrodomesticos-aparatos-electricos-y-otros-productos.pdf>.

In addition to the guidelines listed above, SCPM has published more than 40 administrative instructions on internal procedures. SCPM updated its administrative procedural management instructions on 4 May 2020.

Also, in 2015, SCPM published in collaboration with SERCOP the Manual of Good Practices in Government Procurement for the Development of Ecuador. Finally, between 2015 and 2017, SCPM drafted 30 Manuals for Good Commercial Practices (MBPC) for different markets, including supermarket suppliers, which were sent to the Regulation Board for approval; the board has so far given no opinion. The Regulatory Board did, however, issue two ‘Regulatory Standards’ in relation to supermarket chains and their suppliers, and specialised establishments for the sale of household appliances, electrical appliances, and other products (see Table 17).

Guidelines contribute to legal certainty, as companies and citizens can be aware of the approach of SCPM and the Regulation Board to rules and practice. The publication of the documents can also contribute to increase quality, as it grants the public the opportunity to scrutinise the documents.

However, the duplication of functions across SCPM and the Regulatory Board can cause issues. According to some stakeholders, in the past, there have been cases in which SCPM and the Regulatory Board did not act in a co-ordinated manner, notably in the case of the MBPCs mentioned above. As indicated in Section 2.1.7, to avoid conflicts and improve effectiveness, it seems reasonable to either leave SCPM as the sole issuer of guidelines, leaving the Regulation Board as the body for complaints about those documents, or simply remove the Regulatory Board’s ability to set rules.

5.4. Training and outreach activities

5.4.1. 2014-2018

Until 2018, SCPM had no annual organised plan of competition-promotion activities. The agency developed events on a case-by-case basis with no apparent strategy behind. The events organised during this period include: business meetings for small- and medium-sized producers to interact directly with supermarkets and exhibit their produce; events where small- and medium-sized producers in a particular area interact directly with regulatory bodies in charge of granting permits for the distribution of their goods and services; academic and citizen observatories; a TV series (*Ciudad Quinde*),¹⁰⁶ and campaigns. These activities are listed in Table 18.

Table 18. Promotion activities that SCPM no longer develops since 2019

| Activity | Number carried out between 2014 and 2018 |
|-------------------------|--|
| User committees | 14,433* |
| Academic observatories | 172 |
| Productive assemblies** | 574 |
| Awareness campaigns | 130 |
| Citizen fairs | 232 |
| Promotional events | 160 |
| Business rounds | 69 |

Note: * This number, according to SCPM, results from the events on competition organised, among others, by the six regional offices SCPM had during that period and the civil society.

** Productive assemblies were events to which small and medium producers from a specific region and economic sector were invited so they could meet with the public bodies regulating the sector. These events also counted with the participation of public bodies providing financing.

Source: SCPM Direction of Promotion

According to certain stakeholders, these activities caused a certain degree of confusion about SCPM's powers and dealt with topics more typical of a consumer-rights organisation. For example, as part of the campaigns, SCPM met consumers in different commercial establishments – such as pharmaceutical distributors – to check if retail prices and expiration dates complied with regulations. Inspections were also

¹⁰⁶ Web series *Ciudad Quinde* was developed as a digital-communications strategy by SCPM in 2014 to promote competition in the country. It presented everyday events such as the purchase of medicines or basic necessities and how they could be affected by a monopoly or a company abusing its market power, as a way to make LORCPM more understandable. It sought to reach all levels of society nationally, promote participation, dialogue, and a discussion of issues related to competition and LORCPM. *Ciudad Quinde* ran for 14 chapters between 2014 and 2018 on a variety of media outlets including online and on television.

carried out at supermarkets to investigate misleading advertising, product labelling and food expiration dates.

5.4.2. *Since 2019*

In 2019, the new SCPM's president decided to discontinue most of the promotion activities. The discontinuation of the activities made sense, as there were too many, uncoordinated and, some of them at least, only tangentially related to competition law enforcement.¹⁰⁷ Fewer promotional activities also makes sense from a budget perspective. Currently, the Department for Promotion holds few events, campaigns and training and they appear much more targeted. It is important that SCPM develops a strategy for its promotion activities and continues to carefully consider which activities bring real added value.

The main promotion activities carried out since 2019 are detailed below:

¹⁰⁷ The Legal Directorate, through Legal Report SCPM-DS-INJ-2019-026 of July 25, 2019, concluded that: *"In accordance with the powers assigned to SCPM in article 38 of LORCPM, there is no evidence that the development of activities such as business rounds are part of the actions of the Institution, just as such activities do not appear within the powers and responsibilities concerning the management of the Intendancy of Competition Advocacy."* Through Legal Report SCPM-DS-INJ-2019-029 of August 08, 2019, it concluded that: *"In accordance with the powers assigned to SCPM in article 38 of LORCPM, there is no record that the development of activities such as the organisation of citizen fairs are part of the actions of the Institution, nor are they framed within the mission and objectives pursued by SCPM and its applicable regulations; further considering that citizen fairs have not been an effective means of promoting competition nor have they contributed to the transparency of the markets."* Through Legal Report SCPM-DS-INJ-2019-027 of July 26, 2019, it concluded that: *"In accordance with the powers assigned to SCPM in article 38 of LORCPM, there is no record that the development of activities such as the productive assemblies are part of the actions of the Institution, just as said activities are not established within the powers and responsibilities concerning the management of the Intendancy of Competition Advocacy; In this sense, as it does not fall within the mission and objectives of SCPM and its applicable regulations, SCPM must dispense with its implementation."* Through Legal Report SCPM-DS-INJ-2019-019 of 17 May 2019, it concluded that: *"In the powers and powers of SCPM contemplated in articles 37 and 38 of LORCPM, it does not refer to SCPM having to conform citizen observatories."* Through Legal Report SCPM-DS-INJ-2019-028 of August 02, 2019, it concluded that: *"In accordance with the powers assigned to SCPM in article 38 of LORCPM does not state that the development of activities such as the establishment of User Committees are part of the actions of the Institution, nor are they framed within the mission and objectives of SCPM and its regulations. applicable; further considering that the CUMs have not been a means of promoting competition nor have they contributed to the transparency of the markets."*

- Events. National and international events include congresses, seminars, workshops, and forums, in which national and international experts discuss competition and its impact on economic development and other matters, followed by roundtable discussions. Two such events were held in 2019.
- Campaigns. SCPM continues to carry out campaigns to promote competition, such as the 2020 *Let's Talk About Competition*, which included the development of digital content, distribution of concepts and activities on social networks, and a series of workshops and seminars. Its objective was to publicise basic competition concepts, their importance and benefits, LORCPM, and SCPM's powers. SCPM is also promoted through a number of channels, such as its website or through material uploaded onto LinkedIn, YouTube, Twitter, and Facebook.
- Training activities. In 2019, the Direction of Promotion developed an Annual Plan for Training and Formation. This plan contained training sessions on competition, prevention and sanction of anticompetitive acts in public-procurement processes. During 2019, SCPM carried out 16 training sessions attended by 332 people. Twelve were with external audiences, such as public-administration bodies and the general public, and four were internal to SCPM. Topics addressed included the public procurement process, the exemption and fine-reduction programme, investigation techniques, and the competition-law and policy compliance programme.

SCPM could consider partnering with procurement agencies to set up training for procurement officials and produce printed or electronic materials on bid rigging, in line with OECD Council's Recommendation on Fighting Bid Rigging in Public Procurement.¹⁰⁸

5.5. Ex-ante and ex-post impact assessments

SCPM does not self-evaluate its actions. It has conducted no case evaluations in any of the enforcement areas covered by SCPM – cartels, abuses, mergers or unfair competition.

¹⁰⁸ Adopted in 2012 and available at <http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>.

SCPM manages its key performance indicators through Kallari, an internal computer module that records and ranks information, such as strategic, tactical and operational objectives, and generates reports. The information regarding the indicators – such as the percentage of implemented SCPM recommendations for each period – are publicly accessible in the Transparency section of SCPM’s website. This is to be commended as it increases the opportunities for a certain scrutiny of SCPM’s activities.

SCPM also carries out monthly monitoring of its Annual Operational Plan (POA), in which it evaluates budget execution according to the established goals and indicators, and pursues a semi-annual technical and financial evaluation of its institutional planning execution across all areas or units. The degree of compliance with management indicators and institutional goals is also evaluated, which is useful for SCPM’s president decision-making. Once approved, this report is sent to the Ministry of Economy and Finance and the Technical Secretariat.

SCPM has generally had high compliance rates with its self-set goals. Based on its December 2019 evaluations, SCPM reached 96.25% of “goals achieved”. In terms of budget, the agency reached 97.48% of budget execution, or “high compliance”. These good results may be partly due to the objectives being set at a low threshold. The results are not reflective of the general opinion of SCPM held by the Ecuadorian competition community or, it appears, the specific effects that SCPM’s actions have achieved.

6. Co-operation agreements

6.1. Domestic co-operation

One of SCPM’s roles is to enter into co-operation agreements with both public and private entities to promote free participation of economic operators in different markets.¹⁰⁹ Co-operation with other public entities, such as public procurement bodies, public prosecutors and anti-corruption agencies, including by facilitating the exchange of information and evidence, is a good practice, as recognised in OECD Council’s Recommendations concerning Effective Action against Hard Core Cartels and on Fighting Bid Rigging in Public Procurement.

In this capacity, SCPM has entered into agreements with: public bodies, such as the Judicial Council, the Constitutional Court, the State Attorney, the Central Bank, the Financial Super-Intendancy and regional governmental authorities; academic institutions; including a number of universities around the country; and business bodies, such as chambers of commerce and even individual businesses.

¹⁰⁹ Article 38 of LORCPM, literal 29.

SCPM issued Guidelines for Inter-Institutional Agreements in 2019, setting out the process for entering into arrangements with other institutions.

6.2. International co-operation

SCPM's role includes co-ordinating with other competition authorities. To date, SCPM has signed international agreements with 12 competition agencies.

The adoption of international agreements is regulated by SCPM's Instruction for Inter-Institutional Agreements, issued in 2019. According to this instruction, the adoption of an agreement requires that its viability be duly justified and that it be authorised by SCPM's president.¹¹⁰ Stakeholders have noted that, in the past, SCPM's reasons for signing certain inter-institutional agreements have been unclear. Therefore, guidelines on the adoption of inter-institutional agreements would be useful.

Table 19. SCPM co-operation agreements in force with international competition agencies

| Competition agency | Country | Date signed |
|--|--------------------|------------------|
| Federal Commission on Economic Competition (COFECE) | Mexico | 1 October 2012 |
| National Commission for the Competition Defence (CNDC) | Argentina | 2 October 2012 |
| National Economic Prosecutor's Office (FNE) | Chile | 15 November 2012 |
| Free Competition Defence Court (TDLC) | Chile | 16 November 2012 |
| National Commission of Markets and Competition (CNMC) | Spain | 2 April 2013 |
| Ministry of Commerce | Tunisia | 5 April 2013 |
| Hellenic Competition Commission (HCC) | Greece | 6 July 2013 |
| Commission for Promotion and Defence of Competition | Uruguay | 11 August 2013 |
| Competition Superintendence | El Salvador | 7 February 2014 |
| Federal Antimonopoly Service (FAS) | Russia | 23 April 2014 |
| Federal Competition Authority | Austria | 24 April 2014 |
| National Commission for the Defence of Competition | Dominican Republic | 11 June 2014 |
| Institute for the Protection of Competition and Intellectual Property (INDECOPI) | Peru | 28 February 2019 |

Source: SCPM

The co-operation activities set out in these agreements include the exchange of information. For information transfers, the agency asks the National Direction of International Relations (DNRI) to contact international competition authorities or other related entities to initiate bilateral co-operation. The information exchanged is

¹¹⁰ See Article 11 and 12 of SCPM's Instructive for Inter-institutional Agreements.

publicly available in most cases. In all cases but one no confidential information has been exchanged. In the one case where SCPM requested confidential information, an agreement was signed to ensure the confidentiality of the information.

Depending on case complexity, information may be exchanged more than once to obtain clarifications or further information. This co-operation seems in line with international good practices. OECD Council's Recommendation concerning International Co-operation on Competition Investigations and Proceedings,¹¹¹ encourages countries "to exchange information that is not subject to legal restrictions under international or domestic law, including the exchange of information in the public domain and other non-confidential information." According to the Recommendation, agencies may also consider the exchange of information that is not routinely disclosed, even if subject to conditions, and even confidential information, if necessary.

Agreements also allow for technical assistance exchanges. When deciding whether to co-ordinate enforcement with an international competition agency, SCPM takes into account the agency's experience in similar cases to assess whether it can contribute to Ecuadorian practice and SCPM's research methodologies. SCPM has prioritised co-operation with regional competition authorities since these countries may have market conditions similar to Ecuador. It seems likely that this is related to the fact that anticompetitive practices in Ecuador are more likely to also take place in the region than further afield.

SCPM has also requested and engaged in informal co-operation activities without a signed agreement between both parties. For example, SCPM has co-operated with the US Federal Trade Commission (FTC), without a signed agreement.

The agreements also provide for capacity-building activities. Thanks to these agreements, SCPM staff have participated in diverse exchange programmes, trainings, study visits, and internships in countries including Spain, Mexico and Peru. In 2015 and 2019, SCPM officials participated in internship programmes offered by Switzerland and the United States, despite Ecuador not having signed agreement with either country.

¹¹¹ Adopted in 2014 and available at <http://www.oecd.org/daf/competition/2014-rec-international-coop-competition.pdf>.

6.2.1. Free Trade Agreements

Certain trade agreements signed by Ecuador include chapters on competition, including Chapter 7 of the Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador,¹¹² signed in June 2018; Title VIII of the Trade Agreement between Peru, Colombia, and the EU,¹¹³ which Ecuador joined in January 2017;¹¹⁴ and Title VI of the Economic Complementation Agreement signed between MERCOSUR countries (Argentina, Brazil, Paraguay, Uruguay) and the member states of the Andean Community of Nations (Bolivia, Colombia, Ecuador, Peru, Venezuela) in October 2004.¹¹⁵

6.2.2. The Andean Community of Nations

Ecuador is a member of the Andean Community of Nations (CAN), alongside Bolivia, Colombia and Peru.¹¹⁶ The CAN's competition rules apply in Ecuador. CAN's General Secretariat (SGCAN) may initiate investigations ex officio or following a complaint when there are indications of abuse of a dominant position or restrictive agreements in the CAN market.¹¹⁷ When investigating, SGCAN can carry out unannounced inspections (i.e. dawn raids), require natural and legal persons to provide information and evidence and question them.¹¹⁸

SGCAN has the power to reach decisions and sanction companies for anticompetitive practices. SGCAN's sanctioning powers include fines up to a maximum of 10 percent of the total gross income of the offender, and ordering

¹¹² See <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/ecuador/EFTA-Ecuador-Main-Agreement.PDF>

¹¹³ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:354:FULL&from=EN>

¹¹⁴ See <https://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/>

¹¹⁵ See http://www.sice.oas.org/Trade/mrcsrac/ecal_s.asp

¹¹⁶ Venezuela was also a member from 1973 until 2006 when it joined MERCOSUR.

¹¹⁷ According to Article 5, are subject of Decision 608 those behaviours practiced in: “a) *The territory of one or more Member Countries and whose real effects occur in one or more Member Countries, except when the origin and effect occur in a single country; and, b) The territory of a country that is not a member of the Andean Community and whose real effects occur in two or more Member Countries.*”

¹¹⁸ Article 16 of the CAN Decision 608.

corrective measures including stopping the practice, or other conditions or obligations.¹¹⁹

In practice, the relationship between Ecuador and CAN has been confusing and problematic as regards competition law. The CAN has no clear rules defining the SGCAN's and national competition authorities remit to avoid overlapping investigations. SCPM has not signed a co-operation agreement with SGCAN. As a result, there is confusion as to which agency is responsible for which case.¹²⁰ Some of the risks stemming from this situation are clearly illustrated by the Kimberly Clark case (see Box 7, in Section 3.2). A co-operation agreement would be useful to limit overlapping investigations.

SGCAN has rarely pursued competition investigations. With only a few cases having been pursued by CAN in the past, the regime is unclear and often ignored in practice.

7. Recent challenges for competition

7.1. Covid-19

The Covid-19 pandemic has raised fresh challenges for competition authorities across the world.

The health crisis requires, first of all, that merger review is quicker. Even before the pandemic, the Directorate for Economic Concentrations had already identified compliance with deadlines as its greatest challenge. SCPM has implemented two measures to overcome this challenge. First, SCPM introduced a simplified (fast track) merger review procedure for concentrations that do not seem to harm competition and thus do not merit in-depth analysis and for concentrations involving operators that are at risk of bankruptcy (failing firm).¹²¹ Second, SCPM committed to continue with its merger control activities, even during the health emergency period (merger review had been suspended by a previous decision).

¹¹⁹ Article 34 of the CAN Decision 608.

¹²⁰ However, there is a collaboration agreement with the Andean Court of Justice for the exchange of information, academic knowledge, and the development of joint investigations.

¹²¹ Resolution N°SCPM-DS-2020-18, 20 April 2020, www.scpm.gob.ec/sitio/wp-content/uploads/2020/04/RESOLUCION-SCPM-DS-2020-18.pdf, www.concurrences.com/en/bulletin/news-issues/april-2020/the-ecuadorian-competition-authority-publishes-new-merger-review-procedure-due

Review is limited to mergers for which SCPM has sufficient information or which seem to qualify for a simplified review.¹²²

Challenges remain, such as mechanisms to render the implementation of merger remedies more flexible or increasing its co-operation with sectoral regulators and other public bodies, such as ARCOTEL.

SCPM should also take into account that political pressure upon competition authorities is likely to increase in times of crisis, such as the one caused by the pandemic. To minimise the impact of this pressure, SCPM should make sure that the public understands the risks of approving anticompetitive operations and the consequences of concentrated markets.

As regards anticompetitive practices, SCPM has issued two recommendations warning manufacturers, suppliers, and marketers not to “take advantage of the emergency to increase their profit margins by unjustified extraction of consumer surplus or damage to state resources”¹²³ and a reminder that changes in prices should follow the market and the “individual and independent decisions of the economic agents” rather than “anti-competitive agreements or union recommendations.”

Further, SCPM has issued a statement with SERCOP, the institution in charge of public purchases, that the current crisis does not constitute a reason to ignore competition or public-procurement regulations.¹²⁴

Finally, the crisis caused by the pandemic might incentivise public authorities to grant aid where it is not required or to do so in a disproportionate manner. SCPM can review state aid according to LORCPM and should make sure that State aid, which is sometimes necessary, is not unduly granted.

7.2. Digital economy

Digital markets present competition law with a new set of challenges. Some agencies, such as the UK’s Competition and Markets Authority (CMA), have

¹²² Resolution N°SCPM-DS-2020-19, 20 April 2020, www.scpm.gob.ec/sitio/wp-content/uploads/2020/04/RESOLUCI%C3%93N-SCPM-DS-2020-19.pdf.

¹²³ See, www.scpm.gob.ec/sitio/wp-content/uploads/2020/03/EXHORTO-A-los-fabricantes-proveedores-y-comercializadores-a-las-instituciones-p%C3%BAblicas-organismos-de-control-y-a-2.pdf.

¹²⁴ “Comunicado: A las Entidades Contratantes y Proveedores en Situación de Emergencia”, 13 April 2020, www.scpm.gob.ec/sitio/wp-content/uploads/2020/04/Comunicado-SCPM-SERCOP-13-04-20.pdf.

increased the importance of competitive variables other than price in merger analysis, since services are often offered – at least initially – free of charge to the final consumer. Among these new competitive variables are innovation and consumer experience. Additionally, the CMA has improved the stringency of counterfactual scenarios to make them more appropriate to this rapidly changing industry¹²⁵.

SCPM is currently developing a study that addresses the market for digital platforms and mergers, as it has faced cases where it has not been able to impose remedies on international businesses that work only digitally in Ecuador.

SCPM's Uber, Cabify, and Easy Taxi special report,¹²⁶ discussed in Section 5.1, was a step towards developing new competition strategies for digital markets. Market studies and special reports including recommendations are tools that could contribute to regulating the digital economy,¹²⁷ even if, as in Ecuador, they are non-binding.

8. Conclusions and recommendations

8.1. Institutional setting

Recommendations on budget and human resources

Increase the Ecuadorian Competition Authority's (*Superintendencia de Control del Poder de Mercado* or SCPM) budget.

SCPM's budget is relatively low by international standards. Since 2014, the budget has been decreasing, mainly due to the government's austerity policy. Further, the budget is also decreased in the course of the fiscal year almost every year since SCPM's creation, as part of horizontal cuts requested from public sector entities by Ecuador's government.

¹²⁵ Fung, S.S., Haydock, J., Moore, A. et al (2019), "Recent Developments at the CMA: 2018-2019", *Review of Industrial Organization*, 55, pp. 579-605, www.dx.doi.org/10.1007/s11151-019-09730-5.

¹²⁶ SCPM (2017), "INFORME ESPECIAL N°SCPM-IAC-DNEM-015-2017 Análisis de la normativa legal relacionada con el servicio de transporte comercial terrestre de personas a través de plataformas tecnológicas en el Distrito Metropolitano de Quito (DMQ)", www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/INFORME-DNITEE-015-2017-TAXIS_VP3.pdf.

¹²⁷ See, for example, European Commission (2020), "Antitrust: Commission consults stakeholders on a possible new competition tool", https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

Lack of resources reduces the investigations and advocacy activities that the agency can carry out, and ultimately affects its performance. Ecuador should increase SCPM's budget to align it to international standards. In addition, Ecuador should ensure that mid-year budget reductions are only done when strictly necessary, and that they are proportionate and non-discriminatory.

Prioritise and assign more human resources to cartel prosecution and merger control.

The allocation of SCMP's employees appears suboptimal. 93, i.e. less than half employees are assigned to the agency's core competition activities; the remainder work on administrative tasks. Out of the employees working on competition, only 11 work on the investigation of anti-competitive conducts (five on restrictive agreements and six on abuse of dominance) and nine on merger control, whereas 18 work on advocacy. The staff allocation should be re-balanced, with more people assigned to enforcement and, in particular, cartel investigations.

Increase the number of economists and appoint a chief economist.

Economists are under-represented at SCPM, accounting for only 23% of core-business positions. There is no chief economist to provide economic insights and coordinate the economic approach of SCPM. This creates a risk that economic analysis is not sufficiently considered in SCPM's enforcement and advocacy, and that, even when it is, the approach across the agency is inconsistent. SCPM's economists should be increased and a chief economist appointed.

Adopt measures aimed at ensuring that employees, especially more senior staff, remain at the agency longer.

SCPM's employee turnover is high. This may prevent it from building knowledge and expertise, and improving its performance. High turnover seems to be due to two reasons. First, SCPM's president (Superintendente) may remove his subordinates on his own volition, without submitting to any termination procedures or policies. This has happened frequently in the past. The second reason is linked to salaries. Entry-level wages are competitive; however, the pay gap with the private sector increases as employees progress. For senior positions, salaries are not competitive. Remuneration for senior positions should be re-considered to improve SCPM's attractiveness as an employer, and the SCPM should introduce credible career plans.

Recommendations on the independence of SCPM from the executive and between SCPM and CRPI

Ensure that SCPM's president may not be dismissed on political grounds.

Political considerations can be used to dismiss SCPM's president through an impeachment procedure that is set out in the Ecuadorian constitution. The agreement of a small number of parliamentarians is sufficient to start an impeachment process, without the involvement of either a technical or non-political body, such as a court. Ecuador should be vigilant that there is no impeachment process against the SCPM's president on political grounds.

Ensure that the CRPI (SCPM's decision-making body) is empowered and independent from SCPM's president and the other officials within the agency.

The CRPI does not have the time, personnel or resources to study cases in depth to ensure that its decisions are fully informed. It therefore requires more resources and time to enable it to fulfil its mandate.

Furthermore, stakeholders have expressed concerns about the CRPI's independence from SCPM's president, which manages SCPM's investigation units. The president elects the members of CRPI and can remove them on his/her own volition. Regulation should be enacted to protect the CRPI's independence, ensuring that members of the CRPI can only be removed on justified and reasonable grounds.

Recommendations on the co-ordination between SCPM with other public bodies

Clarify roles in relation to the Regulation Board.

The Regulation Board was set up to separate the regulation powers (vested in the Regulation Board) from the competition law enforcement powers (vested in SCPM). Its relationship with SCPM has been almost inexistent due to the Regulation Board's extremely wide mandate (which goes well beyond competition), lack of time, resources, technical expertise and support. Specifically, the Board lacks competition specialists; its members participate in approximately 80 other collegiate bodies and are, therefore, overwhelmed. Moreover, Ecuador's competition law (Ley Orgánica de Regulación y Control del Poder de Mercado or LORCPM) duplicates some functions regarding the issuance of competition-related regulations across SCPM and the Regulatory Board.

Ecuador should either designate SCPM as the sole issuer of new regulations related to competition, leaving the Regulation Board as the body for complaints about norms dictated by SCPM, or, if a more comprehensive measure is chosen, simply remove the Regulatory Board's ability to set rules.

Clarify roles in relation to the Ombudsman's Office.

The Ombudsman (DPE) is in charge of protecting consumer rights. Similarly, SCPM is tasked with investigating behaviour that may affect consumers or the general interest. The scopes of their respective mandates are not always clear and may sometimes overlap. Both agencies are independent. There are no rules or practices to avoid inconsistent decisions or decide how to proceed if contradictory decisions are adopted. SCPM and Ombudsman's Office should establish a framework clarifying when each agency is expected to act and when not, as well as what happens if both act (e.g. one of them may be required to stop proceedings).

Clarify roles in relation to SENADI (National Service of Intellectual Rights).

The law is not clear about the distinction between SCPM and SENADI's competences on cases involving intellectual property. The authorities organise informally their remits based on the following principle. If a case has an impact on the market, SCPM investigates and, if appropriate, imposes sanctions. If there is no market impact, the SENADI is the competent agency. Nevertheless, the SENADI and SCPM have both investigated some cases. Both agencies claim that, so far, they have not adopted any conflicting decisions. Still, they should establish a framework clarifying when is each institution expected to act, when not, as well as what happens if both act (e.g. one of them may be required to stop proceedings).

Clarify SCPM's case discretion in co-operation with the General Comptroller.

Ecuador's General Comptroller (Contraloría) may require SCPM to provide reasons for choosing not to appeal against unfavourable (for SCPM) court decisions, like first-instance judgments setting aside SCPM's decisions. Therefore, to avoid being criticised for failing to take action to defend the public interest, SCPM tends to lodge all appeals, even if these have little chance of success, for example in cases when the first-instance court found procedural defects in investigations, which no SCPM argument on appeal can convincingly explain or remedy.

SCPM and the General Comptroller should clarify that SCPM should make the ultimate judgement of whether an appeal is appropriate and whether lodging it is a good use of its resources.

Improve co-ordination with SERCOP.

SCPM launches only few investigations on bidding cartels based on leads received by the National Public Procurement Service (SERCOP). There is scope for more co-operation between the SERCOP and SCPM, particular so that SCPM receives data from the SERCOP on procurement on a regular and frequent basis, and SCPM

trains SERCOP's officials on competition law, in accordance with the OECD Recommendation on Fighting Bid Rigging in Public Procurement. SCPM could rely on recommendations on competition and procurement authority co-operation made by the OECD Secretariat in in-country competition reviews of procurement rules and practices.

8.2. Legal framework

Recommendations on abuse of market power

Simplify and ensure the consistency of conducts listed in Article 9 of LORCP, on abuse of market power.

Article 9 of LORCPM on abuse of market power establishes a non-exhaustive list of specific conducts, which is long and contains duplications and redundancies. The conditions attached to the listed conducts seem inconsistent. For some conducts, LORCPM requires that they be “unjustified” (e.g. increasing margins) but not for others (e.g. exploitive prices). The reasons for these differences are unclear. The list should be clarified, simplified and harmonised across the various examples of illegal conduct.

Delete Article 10 on abuse of economic dependence.

Article 10 of LORCPM establishes abuse of economic dependence as an infringement but does not attach sanctions to it. In addition, it is unclear whether the conduct, to be unlawful, must dominate the market or only the victim. It would be best to delete this provision and only investigate relevant cases under Article 9 on abuse of market power.

Recommendations on restrictive agreements

Simplify and ensure the consistency of restrictive agreements listed in Article 11 of LORCPM.

Article 11 of LORCPM on restrictive agreements includes a long non-exhaustive list of specific behaviours using inconsistent language. The list should be clarified, simplified and harmonised across the examples of illegal conduct. The part of the Article that prohibits consciously parallel practices should be deleted, as tacit collusion normally falls outside the remit of competition law.

Recommendations on merger control

Consider the suitability of market share thresholds.

Ecuador uses both turnover and market share thresholds to determine the obligation to notify transactions.

The OECD Recommendation on Merger Review advises countries to use clear and objective criteria to determine whether and when a merger must be notified, and there are doubts as to whether market share thresholds are clear or sufficiently objective. Ecuador should balance the advantages of this type of thresholds (notably, the ability to trigger the notification of potentially problematic mergers concerning companies with low turnovers), with their lack of certainty (given that they require a complex and non-objective analysis, i.e. market definition and the calculation of shares, to determine whether a transaction must be notified).

Require that at least two participants in the transaction and/or the target exceed a certain turnover, to trigger merger notification.

LORCPM requires that a merger be notified if the turnover of the group of participants exceeds a certain turnover. Thus, a transaction needs to be notified even if there is only one participant with significant turnover in Ecuador (e.g. a large company acquiring a small business).

According to international good practices, an obligation to notify must only exist if the transaction has a sufficiently material impact in the reviewing jurisdiction. If the local turnover of only one participating undertaking is sufficient to trigger merger notification, then a very significant number of merger transactions which have no or very little impact on competition in the country would have to be notified. For this reason, a threshold must require that at least two participants in the transaction (in the case of acquisition of joint control, it could be the acquirers) and/or the acquired business meet the required local turnover threshold. International good practices do not address how high the threshold should be, but Ecuador could consider the thresholds set by countries with a similar economy.

Extend the deadline for merger notification.

The deadline is currently only eight calendar days from the date of the merger agreement. The deadline should be longer to provide merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger, as per the OECD Recommendation on Merger Review, on condition that the merger is not implemented prior to notification and clearance, as, in that case, Ecuador's gun jumping rules would apply.

Adopt a two-phase system for the analysis of mergers.

In April 2020, SCPM introduced a fast-track procedure allowing for an abbreviated and simplified review of mergers that do not seem to have the potential to harm competition.

The introduction of the fast-track procedure goes in the right direction and is in line with the OECD Recommendation of Merger Review to provide procedures

that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance. In addition, it would be advisable that Ecuador complements the fast-track procedure with the adoption of a two-phase system, which competition authorities across the world typically use. Under this system, a first phase (or phase I) is used to consider whether a merger raises competition concerns. Non-problematic mergers can be authorised under phase I (conditionally or unconditionally). If a merger is considered potentially problematic, an in-depth review is carried out in a second phase (or phase II). After phase II, mergers may be authorised (with conditions or unconditionally) or prohibited.

Consider changing the dominance test for a substantial lessening of competition test.

Ecuador assesses mergers under the dominance test. The vast majority of competition authorities across the world use the substantial lessening of competition (SLC) test. The SLC test focuses on the effects of the merger on the market (whether prices are likely to rise post-merger) and on the loss of competition among firms, rather than on structural issues such as market shares, which is the focus of the dominance test.

A move towards SLC would allow the Ecuador merger control system to look at anti-competitive effects of mergers below the threshold of dominance, and address coordinated effects. Namely, SLC could allow looking at coordinated effects and cover conglomerate mergers, while a dominance test would usually cover a merger's unilateral effects, i.e. the strengthening of the merged entity's market position.

Recommendations on unfair competition

Consider rebalancing staff or removing unfair competition rules from LORCPM and from SCPM's remit.

LORCPM prohibits acts of unfair competition (i.e. acts contrary to honest uses or customs in economic activities) that impede, restrict, or distort competition, threaten economic efficiency, or the general welfare or the rights of consumers or users, if the perpetrator has market power.

SCPM's has a relatively large unit –the Directorate for Unfair Practices (INPD), which has 9 staff– and a considerable track record in unfair competition cases: an average of 32 investigations a year, with a peak in 2016 of 54. The INPD is SCPM's division that receives the largest number of complaints and investigates the largest number of cases.

The resources dedicated to the enforcement of unfair competition rules are significantly more than the resources devoted to investigating anti-competitive

practise and mergers. This share should be rebalanced, with more resources allocated to the investigation of antitrust cases, and fewer to unfair competition.

Alternatively, Ecuador should consider whether it is practical to entrust the review of unfair competition cases, whether or not the perpetrator has market power, to a separate agency. In that case, Ecuador should consider whether to remove unfair competition from the LORCPM. These changes would allow SCPM to focus on its core role, competition enforcement and advocacy, and avoid potential misunderstandings concerning the different objectives pursued by competition law, on the one hand, and unfair competition law, on the other.

Other recommendations

Clarify SCPM's power to order divestments.

SCPM can order the divestment, break-up or spinning-off of companies in the cases in which it determines that that is the only way to re-establish competition in antitrust cases (Article 79 of LORCPM). There is no clarification regarding this power in LORCPM, and it has never been used (although divestments have been sought in merger cases, under the merger review rules). SCPM should define when, and in which type of cases, this power might be used.

Enable anonymous complaints.

LORCPM does not allow for complaints by anonymous sources. Excluding anonymous complainants limits unnecessarily the pool of potential whistle-blowers, as some people may not be willing to make a complaint if they need to provide their name. The OECD Recommendation concerning Effective Action against Hard Core Cartels encourages Members to implement an effective cartel detection system by facilitating the reporting of information on cartels by whistle-blowers who are not leniency applicants, providing appropriate safeguards protecting the anonymity of the informants.

8.3. Enforcement

Better prioritise enforcement and advocacy activities of SCPM.

SCPM should determine which enforcement and advocacy actions are a priority for it. SCPM should assign certain priority to investigating conducts that are clearly harmful; take into account the market position of the companies involved, and whether the affected products and services are important to consumers; consider the number of consumers affected by the practice; and focus on sectors that are critical for Ecuador's economy or where there are clear market developments (e.g. digital platforms and e-commerce, use of personal data).

SCPM should consider publishing its priorities annually for the following year. Clear and transparent objectives and priorities are important for the accountability of SCPM's actions and for the generation of public trust in the agency.

Prioritise investigations with more chances of success and focus on conducts causing greater consumer harm.

Between 2014 and 2019, SCPM initiated a great number of investigations, but only issued a small number of decisions. There were 107 investigations concerning abuse of market power, with only three decisions, and 30 investigations on restrictive agreements, with 12 decisions. A large number of investigations, in particular on abuse of market power, were closed due to lack of merit.

First, SCPM should avoid starting investigations that, at initial review, seem without merit and should close early those that seem unlikely to succeed. In addition, SCPM should focus on investigating hard-core restrictions, especially horizontal agreements, such as price fixing or market sharing. These not only cause great consumer harm, but are also clear infringements where, if the facts are proven, there is no need for sophisticated economic analysis. Given that there are three times as many investigations on abuse of market power than investigations on restrictive agreements, the ratio could be reversed.

Ensure that fines have sufficient deterrent effects and, if necessary, impose higher fines.

According to SCPM, fines imposed to date have not had sufficient deterrent power. It is the case that, if fines are not high enough, resources to investigate infringements are limited and, in addition, there are only few successful investigations, companies have no incentives to avoid or stop anti-competitive conducts. The OECD Recommendation concerning Effective Action against Hard Core Cartels encourages Members to provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels and incentivise cartel members to defect from the cartel and co-operate with the competition agency. The Recommendation encourages using a combination of sanctions (civil, administrative and/or criminal, monetary and non-monetary) for an adequate deterrent effect.

SCPM should seek to impose sanctions that are sufficiently serious to act as a deterrent.

Publish all decisions establishing an infringement.

SCPM's website has only a small number of the agency's decisions, despite a legal obligation to publish them. Even when a decision is published, it does not

always provide the specific information that supports the findings, or only refers to undisclosed internal documents.

SCPM is currently digitalising its decisions, which is a positive development. SCPM should publish all information that supports its findings, with the exception of reserved and confidential information. All decisions, once digitalised, should be published on the authority's website.

Use commitments carefully.

The use of commitments by SCPM seems to lower incentives to comply with the law or, in cartel cases, the use of leniency. Namely, companies prefer to wait for the opening of investigations and propose commitments, rather than apply for leniency before they know of any investigation against them. This is due to SCPM's low enforcement rate (which lowers the likelihood that an illegal conduct will be caught and sanctioned) combined with low commitment payments in exchange for SCPM's stopping an investigation (making the race to apply for leniency unattractive).

Better enforcement, in general, and higher commitments payments, in particular, would help with law compliance and maintain the attractiveness of the leniency programme.

The use of commitments also means fewer opportunities for courts to review competition cases, and impedes –or delays– the development of legal precedents, which are crucial in a country with a relatively short history in competition law enforcement.

Still, when dealing with infringements with lower impact on competition, SCPM could continue to use commitments, so as to free resources to deal with higher priority cases.

Consider encouraging private enforcement.

The OECD received no information on any private damages action. Ecuador should consider encouraging private enforcement to allow for the compensation of victims and boost the deterrent effect of competition law by increasing the potential cost of infringing competition law.

Several measures can be adopted to encourage damages actions. First, final infringement decisions by SCPM should have adequate probative value, which they currently do not have, to facilitate follow-on actions. Second, information in SCPM's files seems difficult to access, as confidentiality appears to be construed too broadly. Private parties need information to be able to bring actions, however. SCPM should still protect confidential information and, in particular, leniency statements, in order

not to disincentive leniency applications. SCPM could however allow access to non-confidential information that substantiated its infringement decision.

Prior to encouraging private enforcement, courts should build competition expertise (see Section 8.4). This is to ensure that the right standards are applied and that private and public competition enforcement are consistent.

8.4. Judicial review

Courts should build competition expertise.

In Ecuador, judges lack substantial competition expertise. For example, Ecuador's National Court of Justice in the Recapt case ruled that the standard applicable to cartels was the rule of reason and that a cartel's harmful effects should be proven. The court erred in two ways. First, it used the per se/rule of reason dichotomy, while LORCPM uses a by object/by effect distinction. Secondly, LORCPM clearly stipulates that cartels are a by object offence, without need to prove harm. The judgment was based on an erroneous use of a criminal law standard (requiring proof of harm) in a competition law case imposing a fine, which is an administrative, non-criminal, sanction.

Capacity building of judges in competition law is crucial for Ecuador, where competition and its enforcement are recent, and the competent courts are courts of general jurisdiction. Judges may not have specialised knowledge of competition law nor had an opportunity to gain this knowledge through studies or case experience in their career.

Ecuador could consider creating, in regional Administrative and Contentious District Courts (TDCA), chambers specialised in limited administrative and competition law issues. The creation of specialised chambers would allow judges to gain competition law experience, potentially leading to greater efficiency, enhanced uniformity of decisions, and better quality decisions. Ecuador should also consider the potential risks of specialised chambers, including judges focusing on a specific area of the law, decision biases, and detachment from the rest of the judiciary system.

8.5. Advocacy

Eliminate the distinction between market studies and special reports.

SCPM's internal regulations do not establish any difference between market studies and special reports. In practice, market studies appear to have more content and complexity than special reports. The distinction between market studies and special reports is arguably redundant and can be abolished.

Establish and publish the criteria used to select the markets subject to studies.

Effective selection of the markets to study allows competition authorities to focus on the sectors that most require their attention. Currently, SCPM does not have criteria to guide the selection of markets. It should decide and publish such market study selection criteria, aiming at identifying markets whose characteristics may suggest competition problems or regulatory inefficiencies, or that have a greater importance for the economy. The publication of the criteria would increase SCPM's transparency and predictability. SCPM should still be allowed to investigate markets that do not meet the criteria, provided that it justifies its decision.

Continue improving the quality of market studies.

Most of SCPM's earlier studies and reports did not engage in substantive economic or legal sectoral analysis. More recent market studies are better and more sophisticated: they identify their objectives, contain regulatory and economic analysis, reach useful conclusions and provide recommendations. Still, SCPM has made some recommendations that seem odd from a competition perspective, and is encouraged to continue to improve its market studies.

SCPM should develop a strategy for its promotional activities.

In 2019, SCPM discontinued most of its past promotional activities, considering that they are not part of SCPM's mandate, as defined in LORCPM. The discontinuation of the activities made sense, as there were too many, uncoordinated and, some of them at least, only tangentially related to competition law enforcement. Fewer promotional activities also makes sense from a budget perspective. Currently, the Department for Promotion holds few events, campaigns and training and they appear much more targeted, which is a positive development.

It is important that SCPM develops a strategy for its promotional activities and carefully considers which activities bring real benefit.

Establish a clear methodology for analysing entry barriers.

LORCPM establishes that one of SCPM's powers is to promote the removal of entry barriers. However, the agency neither has a clear methodology for analysing entry barriers, nor is the legal basis of its powers clear. SCPM is developing a guide on the evaluation of barriers to entry, which could be a valuable tool. The guide should not only set out the method of identifying barriers but also clarify what actions SCPM may take once it has identified a barrier. SCPM could use as reference the Recommendation of the OECD Council on Competition Assessment and the methodology followed by the OECD Secretariat in in-country assessments of regulatory barriers.

8.6. Co-operation

Establish guidelines on the adoption of inter-institutional agreements.

The adoption of an inter-institutional agreement requires that its viability be duly justified and that it be authorised by SCPM's president. Stakeholders have noted that, in the past, SCPM's reasons for signing certain inter-institutional agreements have been unclear. Therefore, guidelines on the adoption of inter-institutional agreements would be useful.

Improve co-operation with CAN's General Secretariat.

The relationship between Ecuador and CAN has been confusing regarding competition law enforcement. The CAN has no clear rules defining the SGCAN's and national competition authorities remit. SCPM has not signed a co-operation agreement with the SGCAN. As a result, there is confusion over which agency is responsible for which case. A co-operation agreement would be useful to limit overlapping investigations.

Appendix 1: Detail of the total final decisions taken by SCPM

Table 20. Total final decisions in abuse of market power

| Year | Parties | Commitment | Fine | Reparatory payment (USD) | Infringement |
|--------------|---|------------|----------|--------------------------|---------------------------|
| 2017 | Tiendas Industriales Asociadas (TIA), Corporación El Rosado, Corporación Favorita, and Mega Santa María | No | 0 | 0 | Clause 4, Article 10 |
| 2016 | Cervecería Nacional | Yes | 0 | 236 094 | Clause 6 and 7, Article 9 |
| Total | 2 | 1 | 0 | 236 094 | |

Source: OECD, using INICAPMAPR data

Table 21. Total final decisions in anticompetitive practices and agreements

| Year | Parties | Commitment | Fine (USD) | Reparatory payment (USD) | Infringement |
|--------------|---|------------|----------------------|--------------------------|--------------------------------|
| 2019 | Recapt and Solnet | No | 286 912 ¹ | 0 | Clause 6, Article 11 |
| 2018 | Muzalpharma and Ecubioesteril | Yes | 0 | 2 580 | Clause 6, Article 11 |
| 2018 | Danilo José Chamico | Yes | 0 | 323 | Clause 6, Article 11 |
| 2018 | Mario Fernando Lema | Yes | 0 | 193 | Clause 6, Article 11 |
| 2018 | Oxialfarm | No | 47 598 | 0 | Clause 6, Article 11 |
| 2018 | National Tire Experts and Ecuaccessorios | Yes | 0 | 7 239 ² | Clause 6, Article 11 |
| 2018 | Martec and Cyberbox | No | 4 986 | 0 | Clause 6, Article 11 |
| 2017 | Viaproyectos, Drivecorp, and Corporación Plazacropolis | Yes | 0 | 12 994 | Clause 6, Article 11 |
| 2017 | Margot Soraya Palomino, Rosa Narcisa Ichina, Juan Carlos Rocha Lahuasi and María del Carmen Lahuasi | Yes | 0 | 7 900 | Clause 6, Article 11 |
| 2016 | Adolcit and Plasticos Rival | Yes | 0 | 123 466 | Clause 6, Article 11 |
| 2015 | Frankimport | No | 308 529 | 0 | Clause 6, Article 11 |
| 2015 | Sintofil | Yes | 0 | 36 003 | Clause 1, 2 and 13, Article 11 |
| Total | 12 | 8 | 648 025 | 190 702 | |

Notes:

¹ CRPI took the initial decision in 2015 and fined both Recapt and Solnet. The final decision regarding Recapt was only confirmed in 2019 after a rejected appeal. To avoid double counting, both Recapt and Solnet's fine are only counted in 2019.

² The decision of commitments corresponding to the economic operator Ecuaccessorios, processed in Decision N° SCPM-CRPI-042-2018, has not been digitalised by CRPI, preventing access. The amount of Ecuaccessorios's fine is not included in this table as its value is unknown.

Source: OECD, using INICAPMAPR data.

Table 22. Total final decisions in unfair practices

| Year | Parties | Commitment | Fine (USD) | Reparatory payment (USD) | Infringement |
|--------------|--|------------|----------------------|--------------------------|----------------------------------|
| 2019 | Marketing Worldwide Ecuador | Yes | 0 | 65 675 | Clause 2, Article 27 |
| 2019 | OTV Multicable | No | 2 019 | 0 | Clause 9, Article 27 |
| 2019 | Banco del Pacifico | Yes | 0 | 151 729 | Clause 2, Article 27* |
| 2018 | Comercializadora Inralbe | No | 1 631 | 0 | Unknown* |
| 2018 | Comercializadora Hal Rob | Yes | 0 | 15 010 | Numeral 2, 9 and 10, Article 27 |
| 2018 | F&E Ecuatoriana | No | 154 990 ¹ | 0 | Clause 2, Article 27* |
| 2017 | Marketing Worldwide Ecuador | Yes | 0 | 777 | Unknown* |
| 2017 | Reckitt Benckiser Ecuador | No | 4 727 | 0 | Unknown* |
| 2017 | Compañía Azucarera Valdez | No | 14 659 | 0 | Unknown* |
| 2017 | Quala Ecuador | Yes | 0 | 67 318 | Clause 5, Article 27* |
| 2017 | Productos Cris Cia | Yes | 0 | 4 650 | Clause 9, Article 27* |
| 2017 | Nestlé | No | 157 807 | 0 | Clause 2, Article 27* |
| 2017 | Comandato and Concredito Concreca | Yes | | 946 981 ² | Clause 2, Article 27 |
| 2016 | Lácteos Ecuallac | Yes | 0 | 50 345 | Clause 2 and 7, Article 27 |
| 2016 | Linde Ecuador | Yes | 0 | 51 961 | Clause 9, Article 27 |
| 2016 | Unión Constructora Uniconstruct | No | 708 354 | 0 | Clause 2, Article 27* |
| 2016 | Genommalab Ecuador | Yes | 0 | 82 968 | Clause 2, 9 and 10, Article 27 |
| 2016 | Pinturas y Químicos del Ecuador PyQ | Yes | 0 | 26 638 | Clause 9, Article 27 |
| 2016 | La Favorita, La Fabril, Pronaca, and Industrias Ales | Yes | 0 | 1 454 259 | Clause 2, Article 27 |
| 2015 | Quala Ecuador | Yes | 0 | 248 283 | Clause 2, 9 and 10, Article 27 |
| 2015 | Reckit Benckiser Ecuador | No | 79 484 | 0 | Clause 1, 2, 4 and 5, Article 27 |
| 2015 | Marketing Worldwide Ecuador | Yes | 0 | 32 966 | Clause 2 and 9, Article 27 |
| 2015 | Mondelez Ecuador | Yes | 0 | 30 121 | Clause 2 and 10, Article 27 |
| 2015 | Toyocosta | Yes | 0 | 4277 | Numeral 2, 4 and 5 of Article 27 |
| 2014 | Confiteca | Yes | 0 | 0 | Numeral 2 of Article 27 |
| Total | | 25 | 17 | 1 123 671 | 3 233 958 |

Notes: ¹ F&E appealed to the TDCA and the fine was suspended; TDCA has yet to make a ruling. ² CRPI took the Comandato decision in 2016 and the Concredito Concreca decision in 2017. To avoid double counting, both are only counted in 2017.

*Decision not available on SCPM website. Source: OECD, using INICAPMAPR data.

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