Highlights from the OECD-IDB Peer Review on Competition Law and Policy in Ecuador

Ecuador adopted its law on competition – Organic Law of Regulation and Control of Market Power (LORCPM) – in 2011. Its authority, the Superintendencia de Control del Poder de Mercado (SCPM) has been active since 2012 and been the driving force behind many of Ecuador’s efforts to meet international good practices over the past two years. 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, and the quality and focus of market studies has improved. All of this accomplished in the face of severe budget limitations.

Institutional Design and Resources

SCPM faces several human resource challenges. Less than half employees are assigned to the agency’s core competition activities; the remainder work on administrative tasks. 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. SCPM’s employee turnover is high which can result in a loss of corporate knowledge. Remuneration for senior positions should be re-considered to improve SCPM’s attractiveness as an employer, and SCPM should introduce credible career plans.

SCPM’s budget is low by international standards and it has been decreasing since 2014. Lack of resources reduces investigations and advocacy activities that an agency can carry out, and affects its performance. 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.

Figure 1. Evolution of SCPM employees and budget

<table>
<thead>
<tr>
<th>Year</th>
<th>Budgetary expenses</th>
<th>Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>$10 000 000</td>
<td>230</td>
</tr>
<tr>
<td>2015</td>
<td>$9 000 000</td>
<td>220</td>
</tr>
<tr>
<td>2016</td>
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<td>210</td>
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<td>2017</td>
<td>$7 000 000</td>
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<td>2018</td>
<td>$6 000 000</td>
<td>190</td>
</tr>
<tr>
<td>2019</td>
<td>$5 000 000</td>
<td>180</td>
</tr>
</tbody>
</table>
Types of anti-competitive conduct

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.

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. SCPM should focus on investigating horizontal hard-core restrictions, such as price fixing or market sharing. 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. In addition, the provision in the LORCPM prohibiting restrictive agreements should be clarified and simplified and the prohibition of tacit collusion should be deleted, as this conduct normally falls outside the remit of competition law.

The provision in the LORCPM concerning abuse of market power lays down a long non-exhaustive list of specific conducts, containing duplications and redundancies. This list should be simplified. The provision governing abuses of economic dependence does not attach sanctions to it and should be deleted.

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, if the perpetrator has market power. The resources dedicated to the enforcement of unfair competition rules are significantly more than those devoted to investigating anti-competitive practice and mergers. Resources should be shifted to the investigation of antitrust cases. Alternatively, Ecuador could consider whether to remove unfair competition from the LORCPM.

Remedies and Sanctions

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. Although SCPM’s fining powers are substantial, the penalties imposed seem not to have had sufficient deterrent power. SCPM should ensure that fines have sufficient deterrent effects and, if necessary, impose higher fines.

Leniency Programme and Commitments

The amended leniency programme, introduced in 2019 establishes a clear process, which improves the comprehension of and the access to the programme. 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, this change was recognition of the errors made in the Kimberly-Clark case, in which confidential information coming from a leniency application was declassified. While to date, only two leniency applications have been presented, it seems that Ecuador’s new leniency programme goes in the right direction.

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. The Ecuadorian legislation does not 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 decisions, and impedes or delays the development of legal precedents, which are crucial in a country with a relatively short history in competition law enforcement. SCPM should use commitments carefully, for instance, reserving them for infringements with lower impact on competition.

Judicial appeal

SCPM decisions can be challenged before the regional Administrative and Contentious District Courts (TDCA). TDCA’ 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.
The legislation establishes that the judicial process before the administrative courts should be resolved within a maximum of 100 days. 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.

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.

**Merger control**

SCP'M’s experience is growing through a steady flow of merger notifications. 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). If the turnover of only one participant is sufficient to trigger merger notification, a 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 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. 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 with their lack of certainty.

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.

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. In addition, it would be advisable that Ecuador complements the procedure with the adoption of a two-phase system. 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.

**Advocacy and Market Studies**

SCP'M has multiple tools to promote competition, including market studies. Recent market studies show a marked improvement in quality. SCPM is encouraged to continue in this direction and to determine criteria to guide the selection of markets.

SCP'M should continue to use its power to 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. Up until April 2020, SCPM has issued one opinion and six petitions.

Until 2018, SCPM held a great number events, on a case-by-case basis. In 2019, the new SCPM’s president decided to discontinue most of the outreach 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.

**International co-operation**

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.
Key Recommendations

1. Increase the budget of SCPM.

2. Review the structure of human resources by prioritising cartel prosecution and merger control, appointing a chief economist, and hiring more economists. Adopt measures aimed at ensuring that employees, especially more senior staff, remain at the agency longer.

3. Simplify and ensure the consistency of conducts listed in Article 9 of LORCP, on abuse of market power, and Article 11 of LORCPM, on restrictive agreements. Delete Article 10, on abuse of economic dependence.

4. Better prioritise enforcement and advocacy activities of SCPM. SCPM should assign certain priority to investigating conducts that are clearly harmful, such as cartels.

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

6. Courts should build competition expertise.

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

8. Extend the deadline for merger notification to provide merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger.

9. Develop a strategy for SCPM’s promotional activities and continue to improve the quality of market studies.

10. Improve the co-operation with the Andean Community of Nations’ Secretariat. A co-operation agreement would be useful to limit overlapping competition investigations.

Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.


Access all OECD country reviews on competition law and policy at www.oecd.org/competition/countryreviews