

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

Published in association with:

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

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SRS Advogados

Van Bael & Bellis



Competition Enforcement Agencies Handbook 2019

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Competition Enforcement Agencies Handbook 2019

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Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

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Questions and answers

How long is the head of agency's term of office?

The superintendent is appointed by the National Assembly for a term of five years.

When is he or she due for reappointment?

According to the Regulation and Market Power Control Organic Law's article 43 (LORCPM), the superintendent is chosen by the Citizen Participation and Social Control Council (CPCCS) from a troika sent by the Ecuadorian President. The current superintendent was appointed on 6 November 2018.

Which posts within the organisation are political appointments?

None of the posts at the Superintendency for Market Power Control (SCPM) are political appointments. The superintendent appointment process is established by law in article 43 LORCPM. The rest of the posts, executive and technical are determined by the criterion and the technical knowledge required in order to be part of the workforce of the SCPM.

What is the agency's annual budget?

The budget assigned in 2019 is US\$6.6 million.

How many staff are employed by the agency?

At a national level, the SCPM has a total of 186 officials in charge of investigative and administrative activities.

To whom does the head of the agency report?

The SCPM belongs to the Transparency and Social Control Function (FTCS), which is the fifth branch of the state and the entity in charge of control and public management at all levels: transparency, efficiency, equity and the fight against corruption.

The SCPM must give periodical reports to the FTCS, to the people by an annual accountability and also has to address yearly to the National Assembly.

There is also the Regulation and Market Power Control Organic Law's Regulation Board (JRLORCPM) that has a regulatory role. The JRLORCPM and the SCPM work together to expand the economic operator and other government entity's mandatory compliance normative. The SCPM must inform the JRLORCPM about the execution and application of the general nature norms issued by the regulation board in a semi-annual way or whenever the JRLORCPM requires.

Do any industry-specific regulators have competition powers?

Despite the existence of industry-specific regulators, the SCPM has the power to investigate and act in all markets.

If so, how do these relate to your agency's role?

The attributions of the JRLORCPM include:

- to exercise the rectory in the formulation of public policies and their planning in the scope of the law, in accordance with the duties, powers and attributions established for the executive function in the Constitution of the Republic;
- to issue regulatory acts for the application of the law regarding the control of market power abuse, restrictive agreements and practices, unfair competition and economic concentration, without such legislative acts may alter or innovate the legal provisions;
- to provide methods of determining relevant markets and other criteria for the evaluation of the practices typified in the law, which will be binding for the superintendency for market power control;
- to issue criteria for the evaluation of the practices typified in the law;
- to authorise, by a reasoned resolution, the establishment of restrictions to competition;
- to determine the criteria for the application of the minimis rule in respect of restrictive agreements and practices;
- to set the amount of the total turnover in Ecuador of all the participants in an operation of economic concentration;
- to set the minimum amount of state aid;
- to promote, coordinate and encourage the signing of international cooperation instruments in matters regulated by the law;
- to issue recommendations for the establishment of price policies needed for the benefit of the popular consumption, as well as for the protection of the national production and sustainability;
- to determine cooperation and understanding agreements with the regulatory and control agencies or pertinent public authorities to issue sectoral regulations in accordance with the law, in order to establish the relationship between them in relation to issues requiring joint action;
- to establish the methodology for the calculation of the amount of fines and the implementation of cease commitments; and
- to know and resolve the challenges that arise from the acts of the board itself, in accordance with the

Statute of the Legal and Administrative Regime of the Executive Function.

May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example.

The SCPM has independence and autonomy within the powers of the state. The acts of the SCPM are executed in accordance with the LORCPM and its regulation of application. The issuance of resolutions is the responsibility of the First Instance Resolution Commission (CRPI) of the SCPM, whose decisions are not subject to external authorities or economic operator's discretion. However, the decisions of the CRPI embodied in the resolutions can be appealed within two instances: the superintendent (second instance decision) and the Contentious Administrative Court of the Judiciary Branch of the State.

Does the law allow non-competition aims to be considered when your agency takes decisions?

Article 226 of the Ecuadorian Constitution allows state institutions and their dependencies to exercise only the powers and faculties that are attributed to them in the Constitution and the law. Therefore, the SCPM, in its exercise, cannot refer to other areas that are not of its competence.

Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?

The process is the following.

Actions to fines imposed by the SCPM through the First Instance Resolution Commission

Once the investigation results in a fine that is imposed by the CRPI, the economic operator, in a period of no more than 20 days, may bring before the CRPI the following actions (if there are not posed actions, the case processes directly through the Contentious Administrative Court).

- Administrative action. It will be resolved before the same authority that issued the decision and will have a maximum time of 60 days to process, dictate and notify the resolution (article 66 LORCPM).
- Clarification action. In accordance with what is stated in the First General Provision (LORCPM) and the Organic Code of Processes, this action can take place in case of an unclear sentence. The decision regarding this action must be issued within 15 days.

- **Ampliation action.** This proceeds when one point in dispute has not been solved or has been omitted. The decision regarding this action must be issued within 15 days. These resources, if accepted, lead to a reinstatement, extension or clarification of the administrative act that can be challenged. If the appeal is processed with a favourable decision, it does not change the investigation, since they are not invasive.

If the action is not accepted or processed, the economic operator using its rights may submit an appeal or extraordinary revision actions, which have the following procedure.

- **Appeal action.** The economic operator has 20 days to submit this action, counted from the day after the notification of an administrative act. It has a 60-day period to be solved. This action is presented before the superintendent.
- **Extraordinary revision action.** This action can be posed by the superintendent, economic operators or agents that have interest in the case, for the superintendent to review de facto or de jure errors existing in administrative acts. This action can be posed in a maximum period of three years after the final decision or resolution.

In both cases of actions, there is a devolution effect as mentioned above. For this reason, if an action is accepted, processed and has a favourable decision for the economic operator, the case must be returned to the instance where the procedural fault has been evidenced.

If all of the aforementioned actions are denied by the SCPM (administrative instance), the economic operator may appeal to the contentious action (Contentious Administrative Court), to pose a complaint. It is necessary to defend the sentence as long as the contested administrative act is not executed, the term the economic operator has to pose this action is of 90 days counted from the notification of the appealed act.

In order to initiate a contentious trial, the economic operator must pay 50 per cent of the fine. The fine has suspensive and devolutive effect.

Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.

Yes, the Intendancy of Merger Investigation and Control in charge of analysing and authorising merger operations, after the respective legal and technical analysis, has denied two cases, one related to medicinal oxygen and the other to cement.

Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.

The Intendancy of Merger Investigation and Control has authorised eight merger operations subject to conditions in the telecommunications, oil services, alcoholic, financial, food and beverages sectors.

Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.

In Ecuador, unlike other jurisdictions, the analysis of concentration operations is not carried out in phases depending on the complexity of the same. According to the procedure established by the Organic Law of Regulation and Control of Market Power – particularly in its articles 16, 21 and 22, in accordance with the provisions of articles 20 and 21 of its regulations of application – all concentration economic operations processes involves the same procedure divided into two stages, namely:

- the stage of investigation substantiated by the National Intendancy of Research and Control of Economic Concentrations, who issues a legal-economic report based on the information provided by the notifying economic operators and collected by said investigation body; and
- the resolution stage substantiated by the First Instance Resolution Commission that, based on the report of the National Intendancy of Research and Control of Economic Concentrations, or based on criteria of this Commission, resolves authorise, condition or deny the concentration operation submitted to the mandatory procedure of prior authorisation.

Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.
No.

Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?

The SCPM issued resolution SCPM-DS-027-2016, highlighting these main points:

- the application of a system to grant the benefits of exemption or reduction of the amount of the fine operate with a request made freely and voluntarily only by the interested party;

- such request for exemption must be submitted to the general secretariat of the SCPM by any natural or legal person, public or private;
- The request must include:
 - their express will to benefit from the system of exemption or reduction of the amount of the fine;
 - a specification of the industry or market, and good or service, being part of the request; and
 - their commitment to assume every expense caused in the process to determine evidence;
- deadlines to recognise signatures and the time to submit evidence;
- reserve and confidentiality of the processing of information received by the SCPM; and
- points to be included in the evidence, exemption or reduction of the amount of the fine and resolution reports, and the file of the record.

Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

The SCPM does not act in criminal matters. The relevant investigative body is the Attorney General's Office.

Are there any plans to reform the competition law?

Since its creation in 2012, the SCPM, as the Ecuadorian Antitrust Agency, has considered it necessary to make several amendments to the LORCPM. The SCPM has drafted these changes and waits for them to be discussed at the National Assembly.

When did the last review of the law occur?

Since 2011, when the LORCPM was issued, there have not been any law reviews.

Do you have a separate economics team? If so, please give details.

Each thematic intence at the SCPM has a team of lawyers and economists in charge of performing both the econometric and legal analysis during an investigation.

Has the authority conducted a dawn raid?
No.

Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.

No.

What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?

In accordance with article 16 LORCPM, a merger must be notified if it complies with one of the following conditions.

- The total amount of sales in Ecuador between the participants exceeds, in the previous accounting year of the merger, the amount of minimum wages established by the regulation board. These amounts are:

Merger Sector	Amount of minimum wages
Mergers that involve institutions of the local financial system and the stock market	3,200,000
Mergers involving insurance and reinsurance entities	214,000
Mergers involving institutions not mentioned in the two previous points	200,000

- In the case of a merger involving institutions engaged in the same economic activity, when it reaches a quota equal or greater than 30 per cent of the relevant market of the product or service in a national or defined geographic market.

Are there any restrictions on investments that involve less than a majority stake in the business?
No.

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