

>> **Ecuador: towards the regulation and control of market power**

Ecuador >> 10 >> 2013

In Ecuador, the Organic Law for the Regulation and Control of Market Power came into force in October 2011 in order to tackle the anti-competitive practices of the Ecuadorian business sector. The regulation for its implementation was issued six months later, in April 2012, and it was expected that it would ensure the full enforcement of the Law.

That was 16 months ago, and since then, the results obtained have been less impressive than expected, as the competent authority has focused mainly on dissuasion. According to the Superintendent of Control of Market Power, Pedro Paéz, the initial strategy was “ensuring that businessmen make things right thanks to cease agreements, which are aimed at making the companies say ‘I have made mistakes and I will follow the Law from now on.’ “

This legal regulation, which is considered a regulatory milestone of the Government of the President Rafael Correa, intends to create a scenario of rational and legitimate competition at a national level. This means that an economic operator would not be able to improve its economic situation by negatively affecting a third party, regardless of whether this third party is another economic operator, a supplier, a consumer client or a state entity.



Fander Falconi, the former National Secretary of Planning and Development, stated that the Law “is a big step forward in the creation of a democratic and sustainable State at a social and environmental level”. However, there is still room for improvement.

AN OVERLOOK OF THE LAW

Main objectives:

- To avoid, prevent, correct, eliminate and sanction the abuse of market power
- To prevent, prohibit and sanction the so called collusive arrangements —alliances made in order to sanction third parties— and restrictive practices.
- To control and regulate economic concentration transactions
- To prevent, prohibit and sanction unfair practices

WHAT IS COMPETITION?

Competition is a natural process of the market. It could be defined as the rivalry between companies to attract consumers or the pacific struggle to increase their market share. Paradoxically, the competition implies that the competition damage —which arises when several companies are in the same market and is produced by the efficiency levels— caused to a competitor is legitimate as long as it comes from the greatest, legitimate and fair effort of the businessman. Competition means entrepreneurial effort, initiative, innovation, customer service...

WHAT ARE THE INTERESTS THAT THIS LAW SEEKS TO PROTECT?

- Those of the economic system
- Those of the consumers
- Those of the businessmen

The competition law is the most important body of law in terms of economy, as it guarantees the permanence of markets and economic democracy, and it is transversely related to other economic issues.

BODIES AND COMPETENT AUTHORITIES

1 Superintendence of Control of Market Power: this body belongs to the Transparency and Social Control Function, which is in charge of ensuring the transparency and efficiency of markets by preventing, correcting or sanctioning the abuse of market power, the restrictive agreements and practices, and the unfair conducts. Moreover, this body grants authorizations for certain economic concentration transactions, such as mergers or acquisitions.

The Superintendent is the most important authority in terms of administration, resolution capacity and sanctions. It is appointed by the Council of Citizen Participation and Social Control through a list sent by the President of the Republic. The economist Pedro Paéz was appointed as Superintendent following this procedure.

2 The Regulation Board: its members are the different Ministers in charge of sectors such as Production, Economic Policy, Energy Sectors and Social Development. The Board regulates the competition and the control of market power. As a result, it can issue rules that usually have a statutory basis.

3 Executive Function: although the Superintendence forms part of the Council of Citizen Participation and Social Control, the Executive Function is the one who actually participates privatively in the regulation of competition, as it forms part of the Regulation Board and can define (exceptionally and through an Executive Decree) price policies to improve popular consumption and protect production and its sustainability.

THE MARKET POWER

The so called Competition Law defines market power as the economic operators' capacity to have a significant influence on the market. This capacity can be reached on an individual or collective basis. We can affirm that economic operators have market power when they are able to act independently with respect to their competitors, buyers, clients, suppliers, consumers, users, distributors or other parties that participate in the market.

It is important to stress out that the definition of market power stipulated in the Law is not bound to previously defined market share volumes, or to specific elements previously determined; it establishes some general guidelines that explain when a market power scenario is taking place.

As a consequence, for each particular case investigated by the authorities, it is necessary to conduct a study and thus determine if an operator has indeed market power. In addition to this, the Law establishes that the Superintendence is the one in charge of defining and determining the relevant markets, be they products, services or geographical circumscription markets.

SANCTIONS

According to the law, the sanctions to the company could reach 12 % of the gross income obtained by the firm in the previous fiscal year.

Sanctions are applied only after the cases under investigation follow this process: preliminary inquiry, legal investigation and resolution.

PROGRESSES MADE IN ITS ENFORCEMENT

The Superintendence of Control of Market Power was created five months after the Law's regulation creation (in September 2012) in order to control and guarantee the full enforcement of the said body of law. Since then —we are now in August 2013— some progresses have been made, but there is still much to be done.

Until February of this year and according to Pedro Paéz, the Superintendent of Control of Market Power, some progresses were made regarding the creation of bodies aimed at ensuring the enforcement of the Law, such as various entities related to market abuse, unfair competition, restrictive practices, concentration and centralisation, and competition advocacy.

35 CASES UNDER INVESTIGATION

Currently, the entity is investigating 35 cases for an alleged violation of the provisions of the Law since it came into force.

SECTORS UNDER INVESTIGATION

Industrial flour sector	Road transport	Financial
Public purchases	Tourism	Toilet articles
Airport sector	Fast food	Balanced
Telecommunications	Education	Sweet and salty snacks
Book selling	Automotive	Trust and funds management
Agroindustrial sector	Building	Public services
Pharmaceutical	Staple food	
Air transport	Medicines	

Source: Superintendence of Control of Market Power

MOTIVATION PROCESSES BY JULY 3013

REASON	Nº OF CASES
Claims	12
Submitted by the Ministry of Industry and Productivity	4
Ex officio initiation	6
Requested by the Public Administration	4
Notifications received	9
Total	35

Source: Superintendence of Control of Market Power

According to the data published on their website, three of them have been dismissed and the rest are under investigation. The majority of the processes are related to practices such as: confusion, deception, acts of denigration, rules violation, inducing to breach contractual obligations, exploitation of someone else's reputation, and imitation and violation of trade secrets. The companies investigated belong to 22 different sectors. The telecommunications sector concentrates the highest number of processes: five in total, followed by the financial sector with four.

However, these are not the only sectors that are under investigation. According to the public statements of the authorities and to the press releases, a total of 400 productive areas are being analysed, including the food supplements sector. Moreover, as part of this process and due to the publication of certain journalist reports, the Superintendence has requested information to several national media—Telemazonas and El Universo— in order to gather information that could help it during the preliminary inquiries of the investigation process.

As part of its offer and during the first months, the Superintendence has tried not to impose sanctions directly and reach good-faith agreements instead. For instance, in August 2013, the authorities informed that they were negotiating with seven companies of the food, communication and metal-mechanic industry in order to reach these agreements.

THE STATE OF COMPETITION IN ECUADOR

According to official data from the National Secretary for Planning and Development (SENPLADES), when the regulation of the Law was issued in April 2012, several sectors of the Ecuadorian economy showed high levels of concentration of sales in one or two companies (see table below).

For this reason, the Superintendence of Control of Market Power has mainly targeted these sectors. However, it has

"The companies should be careful. They should not wait until the trigger is pulled...we will not hesitate to punish the abuse of market power; we can fine these operators with up to 12% of their year's gross income"

also targeted other sectors that appear in the Preliminary Diagnostic of the state of competition in Ecuador, published in March 2013 by the entity. It is worth stressing out that this document is based on the information of the last Economic Census (2010), which shows the radiography of the business units existing in the country that are not under the regime of the Superintendence of Companies, or under the regime of the Superintendence of Banks and Insurance. This is reflected in the low sales amounts described below, as they do not comprise the economic movements of large companies.

On the basis of these data and according to the preliminary report, the following sectors are considered

the 10 most relevant ones in terms of total sales income registered in 2009:

- The supply of insurance services other than life insurances (79.1 millions)
- Life insurances and invalidity policies and double compensation insurances (78.6 millions)
- Retail sale of food products and other products (58.9 millions)
- Manufacture of processed food for farm animals (51.8 millions)
- Manufacture of cement (48.9 millions)
- Financial activities (46.2 millions)
- Activities for television channels (41.4 millions)
- Retail sale of pharmaceutical products (35.4 millions)
- Manufacture of medicinal substances for medicinal products (33.1 millions)
- Poultry holdings' exploitation (32.9 millions)

It is worth stressing out that the market shares' analysis of an economic operator is a common method to determine the existence of market power, although it is not the only method. Market power can exist even with low market shares, depending on the competitive environment of every market segment. In addition to this, market shares may vary substantially from one geographic jurisdiction to another (for instance, from Quito to Latacunga).

The dominant position or market power is exercised in a specific market, and as a result, its existence is determined through the analysis of a given reality. This implies conducting a detailed and thorough study of the structural features associated to the goods offer or to the rendering of a specific service. It also means studying the actions undertaken in a specific time period; not only the actions of companies that might have abused their dominant position, but also those of their competitors, suppliers and clients. Thanks to this, the existence of the dominant position would have as a factual basis a specific situational context in a specific market.

SECTOR	CONCENTRATION OF SALES
Production of milk products	61% in 5 companies 39% in 436 companies
Manufacture of textile products	61% in 9 companies 39% in 1.493 companies
Production of non alcoholic beverages	81% in 1 company 19% in 155 companies
Production of grain mill products	71% in 5 companies 29% in 335 companies
Manufacture of hygiene products	76% in 2 companies 24% in 88 companies
Production of pasta (noodles, macaroni...)	54% in 2 companies 46% in 26 companies
Production of plastic products	50% in 11 companies 50% in 373 companies
Production of oil	58% in 1 company 42% in 13 companies

As these rules are new in Ecuador and therefore there are no administrative or judicial resolutions for this matter, it would be wise to study the international case law and the international judicial interpretations in order to know how those bodies have solved their specific cases.

ACCORDING TO THE GOVERNMENT THE DELAYS LIMIT THE LAW ENFORCEMENT

The Law establishes that the companies under investigation will have a 60 to 90 days delay to present their exculpatory evidence. The competent authority believes that these delays

are too long, as they only include working days, meaning that the companies have up to five months to comply with the procedures required, and according to the Superintendent Pedro Paéz "that is a long time".

KEY CONCEPTS: ABUSE OF MARKET POWER

1 The abuse of market power occurs when one or several economic operators, on the basis of their market power and by any means, prevent, restrict falsify or distort competition, or adversely affect economic efficiency or welfare in general.

2 The following actions are considered abuse of market power:

- Taking actions that allow economic operators to increase their profit margin through the unjustified extraction of the consumer surplus.
- Imposing discriminatory conditions on equivalent services, allowing some competitors to have an unfair advantage over the others.
- Unjustified tied sales.
- The unjustified denial to satisfy purchase or acquisition demands
- The unjustified fixation, imposition, limitation or placing of conditions for the purchase of goods and services.
- Making the conclusion of contracts, acts or agreement subject to acceptance by the other parties of obligations (supplementary or conditioned) that due to their nature or according to commercial use are unrelated to the subject-matter of the said acts, agreement or contracts.
- Establishing, imposing, or suggesting unjustified, exclusive distribution or sale agreements, non-competition clauses, or similar agreements.

3 Regulation vs Business reputation. The reputation of a company is closely linked to its core activity: it is not a transactional object but rather the result of sustainable management of the financial, corporate, human talent and responsibility to the environment and society in which operates. To that extent, any attack on state regulations is detrimental to the business reputation. Even more when the Government has a strong communication strategy able to let know within minutes any failure or success of economic actors.

Given this possibility, companies are called upon to exercise a kind of armor which, first, allows showcase the commitments undertaken by the company in its different dimensions of sustainability and to their various stakeholders and, on the other hand, positions the attributes that it has chosen to be in the market in a loyal and respectful way with competitors. The important thing is that the stakeholders of the companies are aware of their qualities, something that may contribute to get some support in times of crisis.

How to do it? Companies have the need to map the risks that may affect the continuation of their reputation and, from this, identify the messages to be carried to its various stakeholders according to the level of criticality accounting for operations. The intention is to build a business relationship - Stakeholders relaying on dialogue and listening and understanding the needs and mutual interests. This way, reputation management is supported.



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