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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Ecuador

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Remedies and Commitments in Abuse Cases

- Contribution from Ecuador –

1. Introduction¹

1. The Ecuadorian regime of Competition Law is relatively young, the Organic Law of Regulation and Control of Market Power (LORCPM, hereinafter) is only 11 years old and the Superintendence of Market Power Control (SCPM, hereinafter) just turned 10 years old last October. Nevertheless, taking into consideration the complexity of abuse of dominance, the experience of the SCPM with such cases is meaningful. Thus, there is important experience to be shared regarding commitments and remedies.

2. This paper will be divided in the following sections: first, it will explore commitments, where we will describe its rules, main particularities, and the criteria used by the SCPM in order to assess and accept them; the frequency of commitments in abuse of dominance cases; their guidelines; and, its compliance. Second, we will explore remedies their difference with commitments; the criteria for their application; its rules; their frequency; and their compliance, in order to conclude with the most important aspects of both.

2. Commitments

3. The commitments in abuse of dominance in Ecuador are quite particular, they are prescribed in articles 89 and 90 of the LORCPM and article 114 onwards of its Regulation. Their particularity lies in the fact that the undertaking asking for a commitment must accept all or part of the allegedly abuses that are being investigated, this acceptance must be plausible in the light of the evidence that is already in the file. In addition, the undertakings must offer remedies which guarantee that the alleged abuses are over and they will not be recidivist. Also, if there are any, they must pay for the incurred or potential damages. In the same line, if the commitment is not accepted, the same officials who knew about it will be the ones who carry out the investigation, and this is not a cause for their recusal. Finally, it must be noted, that the undertakings can ask for a modification of the commitment that was already accepted.

4. Commitments are executed in a confidential an additional file, the main file being the abuse of dominance investigation. Since the same officials are the ones investigating the main and commitment file, the SCPM has the authority to suspend the terms or periods fixed in the LORCPM up to twenty days in order to execute investigations, so just both files are not carried out simultaneously.

5. Commitments could be accepted, modified or denied. If accepted, the main file is over; if the SCPM asks for a modification, the applying undertaking is informed of the modification proposal and granted a fix period, so it can present a new commitment taking into account the SCPM'S proposal. If a new proposal is not presented within the granted

¹ This contribution was prepared by Carlos Trujillo Viteri. The opinions contained in the present article are of exclusive responsibility of the author and do not represent the vision or a statement of the Superintendence of Market Power Control.

period the commitment is considered to be desisted, and the main file continues its course of action. Finally, if the commitment is denied the main file carries on.

6. In the effort to provide legal certainty, the SCPM in 2022 published the Resolution No. SCPM-DS-2022-18, in which it established the new *Instructive for the management and execution of the termination commitments in the Superintendence of Market Power Control*.² In this document, the process regarding to commitments established in the Regulation and the LORCPM is clarified, being the most important, the prohibition of the usage of the information given in the commitment in any other investigation, it determines the formulas to be carried out in calculating the amount of payments for the damages, and indicates the process to be followed if an undertaking wants to modify their commitment.

7. Now, with regard of abuse of dominance, article 9 of the LORCPM establishes a non-exhaustive list of 23 examples of different kind of abuses³, even though the SCPM have meaningful experience with abuse of dominance, most of the examples set in the LORCPM, so far, in the 10 year of existence of the SCPM have not been analysed. This is one of the key criteria in order to accept or not a commitment. As Wathelet states:

*Perhaps the strongest criticism [...] of adopting commitment decisions is that they fail to sufficiently elucidate the law in novel and complex competition cases. This is due to the lack of a formal finding of infringement in commitment decisions coupled with the fact that they provide limited opportunity for the solution adopted to be challenged before the General Court and the Court of Justice. While a commitment decision may offer 'legal comfort' to its addressee and rapidly restore competition in a given instance, it may provide less clarity and thus legal certainty for other actors than infringement decisions, which provide a more effective legal road map.*⁴

8. Something similar is perceived by Wagner-von Papp, who states: “The resulting decrease in the number of infringement decisions breeds further legal uncertainty about what the law demands. This results in an even greater demand for commitment decisions and accordingly fewer infringement decisions.”⁵

9. Therefore, following this line of thinking, the SCPM considers more important to elucidate the law, if it is the case, impose a sanction and go to Court, in order to give legal certainty to the undertakings rather than accept commitments, even if this represents the investment of the agency’s resources.

10. As same as important, another criteria to take into consideration in the assessment of a commitment are the facts of the case being investigated. For instance, just like the CMA, if the allegedly abuse is serious⁶ the commitment is not likely to be accepted. The seriousness of abuse is primarily based in factors like the market power of the undertaking and the abuse allegedly committed. Is not the same if a monopoly establishes resale price

² Vid. https://www.scpm.gob.ec/sitio/wp-content/uploads/2022/03/RESOLUCION-SCPM-DS-2022-018_signed.pdf

³ Some of the examples overlap with one another, therefore certain abuses according to article 9 could be various infringements at the same time.

⁴ Melchior Wathelet. “Commitment Decisions and the Paucity of Precedents”. pg. 553-554.

⁵ Florian Wagner-Von Papp. “Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the ‘Struggle for Competition Law’”. pp. 931.

⁶ Competition and Markets Authority. “Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8”, pg. 31.

maintenances clauses,⁷ than a price discrimination incurred by an undertaking with a 50% market share, the former is clearly more serious and therefore must be investigated.

11. In the same line, if the undertaking is a recidivist the commitment is not likely to be accepted. As we mentioned, one of the requirements for the acceptance of this figure according to the LORCPM is that the undertaking guarantees that it will not be a recidivist, if an undertaking is being investigated, again, for an abuse of dominance, it is much harder to take into account a supposedly real guarantee that it will not incur in abuses, this concern is accentuated if the recidivist offered a commitment which was accepted in the past.

12. Regarding to abuse of dominance, so far, there have been four requests for commitments⁸⁹ three of them were rejected. The accepted was the SCPM-CRPI-2016-010, being one of the biggest criticisms to the last administration of the SCPM, for its extensive usage. As it was stated by the OCED in the Peer Reviews of Competition Law and Policy of Ecuador. The main criticism was that the case was solved in such a way that the SCPM missed a “[g]ood opportunity to set a precedent and increase legal certainty in the future”.¹⁰ As we mentioned, currently one of the criteria to accept a commitment is to give legal certainty, thus, it is unlikely that a commitment will be accepted if the allegedly abused is novel and not investigate hitherto.

13. In regard with the compliance of commitments, the SCPM must monitor if the undertaking is fulfilling the compromises that were offered and if the damages were paid, if it was the case. Since hitherto there has been only one accepted commitment in abuse of dominance, no problems with its compliance were detected.

14. So far we have explored the main issues about commitments, now we will review remedies.

3. Remedies

15. Abuse of dominance according to articles 78 and 79 of the LORCPM is considered a serious or a very serious infringement¹¹, and is punished with 10 or 12 percent of the total turnover of the previous year of the imposition of the fine. In all cases, a fine must be established. However, in addition to the fine, the SCPM can impose a remedy to the perpetrator.

16. The objectives of these remedies, in Ecuador, are crystal clear: restore the competitive process, to prevent, impede, suspend, correct or reverse a conduct that is against the LORCPM –abuse in our case- and prevent that the abuse occurs again. The SCPM could impose basically any remedy that it considers will fulfil the above-mentioned objectives.

⁷ The LORCPM establishes that unjustified RPM could be an abuse of dominance and a restrictive agreement.

⁸ 0014-SCPM-CRPI-2013; SCPM-CRPI-2015-027; SCPM-CRPI-2016-010.

⁹ The fourth commitment so far has not been published in the website of the SCPM.

¹⁰ Vid: <https://www.oecd.org/daf/competition/ecuador-oecd-idb-peer-reviews-of-competition-law-and-policy-2021.pdf>.

¹¹ For an abuse of dominance to be considered a very serious infringement, it must be produce highly harmful effects in the market or the consumer; the abuse must be carry out by an undertaking with a market share near to the monopoly; or which enjoys exclusivity rights –legal monopolies-. Otherwise the abuse will be considered serious.

17. As we can see, both commitments and remedies are tools that the SCPM has in order to protect competition, economic efficiency and consumer welfare.¹² However, both functions in a different way and cannot be interchanged. In the case of remedies they are the culmination of an investigation and are imposed with a fine.

18. For the establishment of a remedy an Inform must be made, usually this Inform is the same one where the filing of charges is recommended. When the remedies are established the undertakings have a fix period of 72 hours to present any objection that they may have or accept the remedies.

19. After a remedy is imposed, just like with commitments, they must be monitored constantly. They usually could take up to a year to be carried out. If a remedy is not fulfilled the officials in charge of the monitoring must make an Inform, and another file investigating this non-fulfilment will start. However, if the non-full remedy was regarding an abuse of dominance, it is considered to be a very serious infringement of the LORCPM with a fine of up to 12 percent of the total turnover of the undertaking, these kinds of infringements, in contrast with normal investigations, have an expedite process to be followed that spurs the investigation and cuts its times in more than 50 percent.¹³

20. In contrast with commitments, remedies are as frequent as abuses of dominance sanctioned files, and the kind of remedy imposed will depend on the facts of the investigation. In the 10 years of existence of the SCPM there have been more than 100 investigations of allegedly abuse of dominance,¹⁴ but only two sanctions¹⁵ were established, one of them in this year. In both sanctions remedies were imposed. Now, regarding their compliance, the remedy imposed in the case SCPM-CRPI-001-2022 must be carried out up to this November,¹⁶ thus, we cannot assess properly if there has been proper compliance with them because the remedy is supposedly being carried out as we write this contribution.

4. Conclusions

21. Commitments in the Ecuadorian legislation are quite particular, the requesting undertaking must accept all or part of the allegedly abuses investigated, this acceptance must be plausible, and they must pay for the incurred or potential damages. Legal certainty and the facts of the case being investigated are key criteria in order to assess the acceptance or the refusal of the commitment. The SCPM will prefer legal certainty rather than the end of an investigation and if the allegedly abuse is serious, the commitment might not be accepted.

¹² Article 7 of the LORCPM establishes that the competition, economic efficiency, consumer welfare or consumer rights are protected against the abuse of dominance.

¹³ *Vid:* https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/01/RESOLUCION_SCPM_DS_2021_01-signed.pdf, article 58.

¹⁴ *Vid:* <https://www.oecd.org/daf/competition/ecuador-oecd-idb-peer-reviews-of-competition-law-and-policy-2021.pdf>.

¹⁵ SCPM-CRPI-2013-009; SCPM-CRPI-001-2022.

¹⁶ *Vid:* <https://www.scpm.gob.ec/sitio/wp-content/uploads/2022/08/Resolucion-11-05-2022-EXP-SCPM-CRPI-001-2022-version-no-confidencial-y-publica.pdf>.

22. The objective of remedies are quite clear, the SCPM has a vast discretionally in the imposition of the remedies it considers appropriate in order to fulfil the LORCPM objectives. Even though, commitments and remedies must be monitored, they are different and cannot be interchangeable. There is an expedited procedure in order to investigate non-fulfilled remedies and this breach is considered a very serious infringement. The imposed remedy will depend on the type of abuse being investigated. So far only two abuses of dominance sanctions have been imposed with their respective remedy, one of them in 2022, so, in order to assess its compliance, we must wait until November.