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**INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS –
Contribution from Ecuador**

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Interactions between Competition Authorities and Sector Regulators

- Contribution from Ecuador *-

1. Introduction

1. The Superintendency for Market Power Control (SCPM) counts with a wide array of faculties within the scope of competition law, conferred by the corresponding set of norms, gathered specifically on the Organic Law for Market Power Regulation and Control (LORCPM) an its Regulation. Among the attributions with which the Institution counts, according to what is mentioned on Article 38 of the Law, the most relevant among them for this document are the ones that follow:

- Numeral 26, which mentions the attribution of: “support and advise the authorities of the public administration in all levels of government, for them, in compliance of their respective attributions, promote and defend competition of undertakings in different markets”.
- Numeral 9: “when it is considered pertinent, issue opinions in competition matters regarding laws, regulations communications and administrative acts, without such opinions having a binding effect.”
- Numeral 21 and 24, regarding the analysis of normative barriers, the norm determines respectively, to “promote control measures aimed to the elimination of barriers to free competition in markets, according to what is established in the law”, and to “propose the removal of normative or factual barriers, being them entry barriers or to markets, that exclude or limit the participation of undertakings.”
- For the effect of these attributions, the SCPM issued Resolution N°SCPM-DS-2021-03 of January 5, 2021, through which it published the Instructive for the identification and Review of Normative Barriers, that on its article 7 mentions that National Direction of Competition Promotion (DNPC) will evaluate the legality and proportionality of the normative barrier, accordingly to the parameters fixed on the Methodology for identification, review and elimination of normative barriers (“Methodology for Barriers”).
- Numeral 1: “carry out market studies and investigations that it considers pertinent. For which it can require to particulars and public authorities the documentation and collaboration that it considers necessary.”
- And numeral 11: “issue recommendations of general or sectorial character regarding modalities of competition in the markets”.

2. Furthermore, it is necessary to point out the Fourth General Disposition of the LORCPM, which determines that public entities in charge of issuing sectorial regulations, must observe and apply the precepts and principles established on the Law and must contribute to foster, promote and preserve the competition conditions in their sectorial markets.

3. Considering the normative dispositions mentioned beforehand, through this document we will analyze some of the most relevant cases where the SCPM has had interaction with the regulatory

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bodies of Ecuador, where opinion reports, normative barriers reports and also market studies¹ have been issued within the last two (2) years by the National Intendency for Competition Advocacy (INAC), unit that is composed by the DNPC and the National Direction of Market Studies. (DNEM).

4. On top of this, with the technical reports that will be detailed ahead we aim to identify opportunities for regulatory improvement, in order to, foster competition, transparency and efficiency on the markets, and therefore safeguard an equilibrium between protecting the general interest and the liberty of exercising economic activities by the undertakings of the different economic sectors, due to the existence of norms, public policies and institutional guidelines at a statewide level that would not always account for the competition law norms and consequently, might be generating distortions on such markets. This is why, it is essential for cooperating to exist among competition authorities and regulators. In this sense, a great effort has been applied for inter institutional relations to allow for collaboration within the scope of the competencies of the SCPM that influence the decisions that the regulatory bodies might issue on a normative level.

2. Cases

2.1. Gas stations: File N° SCPM-INAC-003-2021

5. The SCPM, after acknowledging the problems present in the sector of “commercialization of fuel”, carried out an analysis of normative barriers accordingly to what is stated on article 12, literal d) of the *Regulation for the Authorization of Activities of Commercialization of Derivatives from oil or derivatives from oil and biofuel, except Liquefied Oil Gas* (“Regulation for Gas Stations”).

6. In summary, the document states that all undertakings that wish to enter or continue to participate on the automotive sector of the commercialization of gasoline, diesel, biofuel and its different mixes, must count with at least ten (10) distribution centers or service stations, which could restrict the entrance and permanence of some undertakings of the sector that do not meet the minimums established (especially all those undertakings with lesser territorial scope) and on the other hand, because at the start, there was not enough clarity regarding the economic justification for such measure.

7. For the effects of this analysis, we applied the Methodology for Barriers, which proposes a test in two levels: legality analysis, that on itself checks two sublevels (if the authority that issued the norm has the competency to do so and if it does not contravene the current legal order), and, proportionality analysis, that determines the suitability, necessity and proportionality on a strict sense².

¹ It is worth mentioning that the SCOM has issued several market studies in order to verify the competition conditions in agricultural sectors, in the national public procurement system and on the telecommunications sector, but, due to the magnitude of each of them, these cases will not be described don this document. Such studies have also issued institutional recommendations to regulatory entities such as the Ministry of Agriculture and Livestock, the National Procurement Service and the Agency for Regulation and Control of Telecommunications.

² Here we detail a small explanation of the terms mentioned before:

- **Suitability** – the analysis of this sublevel includes the examination of the following elements: (i) that the public interest has been legitimately summoned, (ii) the identification of the problem or contingency for which the measure is being implemented, and (iii) the existence of a relationship between the identified objective and the proposed means.
- **Necessity** - in this sublevel we will verify if there is a normative mean that is less restrictive to achieve the same goals.
- **Strict Sense Proportionality** – In this last point we will evaluate if the normative measure generates more positive than negative effects.

8. In this sense, the SCPM contacted the entity of the public administration in charge of the application of the norm, which on that time was the Agency for the Regulation and Control of Hydrocarbons (ARCH), which came to be the current Agency for Regulation and Control of Energy and Natural and Non-Renewable Resources (ARC).

9. In first instance (meeting with the ARCH) we obtained a higher degree of predisposition and clarity when exposing the objective they had in mind when issuing the norm; nevertheless, in second instance (meetings with ARC), in the beginning they were unable to satisfactorily and specifically reply the queries that were sent (which they justified with the institutional changes), yet, later in the process they were able to present a better explanation of the objective of the norm. Out of the interaction held with the regulator, we were able to determine that the objective with which the norm was enforced was to guarantee the continuous, uninterrupted and quality provision, of the public service consisting of the commercialization of derivatives of oil and its mixes with biofuel.

10. It is important to point out that in regard to the technical information request that supports the issuance of the norm, we did not obtain documents from any of the institutions; nevertheless, with the information that could be gathered, the SCPM issued the Report N°SCPM-IGT-INAC-003-2021 of normative barriers analysis, which concluded that the requisite required by the Regulation for Gas Stations was indeed a normative barrier, because applying the analysis, though it successfully passed the legality check, it did not pass the proportionality check, therefore stalling on the first sublevel of suitability, as the ARC was not able to properly justify an appropriate relationship between the objectives of regulation, control and shortages with the requisite of counting with at least ten (10) distribution centers for an undertaking to be permitted to operate.

11. Based on the results of the report, the SCPM issued Recommendation N° SCPM-DS-2022-002, sent to the ARC as the correspondent sectorial regulator, which proposed a review and modification of the norm under analysis. It must be highlighted that in order to properly follow up regarding the implementation of the issued recommendations, the ARC requested a meeting to the SCPM where they could discuss and better understand the recommendations stated by the competition authority, with the aim of enforcing them and reform the corresponding norm. During this meeting the regulator showed their disposition to accept constructive criticism and to consider what was proposed on the report by the DNPC.

2.2. Hemp: File N° SCPM-INAC-004-2021

12. The analysis of barriers focused on the review of the *Regulation for Importing, Sowing, Growing, Harvesting, Post Harvesting, Storing, Transporting, Processing, Commercializing and Exporting Non-Psychoactive Cannabis or Hemp and Hemp for Industrial Use* (Regulation of Hemp) issued by the Ministry of Agriculture and Livestock (MAG), specifically on articles 5 and 9 of this document. Article 5 determines that only legal persons, cooperatives, associations, or communes, legally constituted can develop activities related to hemp. While article 9 establishes as a requisite a minimum of hectares for obtaining a license classified as follows: five (5) hectares for harvesting hemp for industrial use; and, in the case of non-psychoactive hemp: two hectares (2) on greenhouse and five (5) hectares out in the open.

13. During the analysis of such normative propositions, we requested information and held work meetings with the public entity that issued the norm as for economic operators of the sector.

14. In this case we also applied the Methodology for Barriers and out of this analysis the SCPM observed that both analyzed articles passed the legality check; nevertheless, regarding the analysis of proportionality, articles 5 and 9 did not meet the objectives for control and profitability for which they were created, and, on the contrary, would impede small producers and natural persons from taking part in the hemp market. In this sense, the report proposes alternatives that are detailed in

the following paragraph, to ensure, on one instance, a better control from the national agrarian authority, and on other instance, the entrance of new economic operators in the industry of hemp.

15. In this sense, and in line with the report, the SCPM issued recommendations to the MAG, with the aim of the entity making reforms on both articles and to establish a relation between the established objectives (control and profitability) and the implemented measures; as for the minimum of hectares required, no to account adjacent properties. Furthermore, it suggested the addition of alternative, less stringent, measures for competition, such as: the inclusion of a responsibility figure, intensifying random checks with inter institutional coordination, and to seek for certifications from international organizations. Once the report is issued it was sent to the MAG for the implementation of the recommendations. It has been known that, based on the recommendations issued by the SCPM, the MAG is preparing a reform for the Regulation regarding the topics discussed.

2.3. Tourism Case

16. At the start of the current year, it came to our knowledge that the Ministry of Tourism (MINTUR) was working on the *Project for the Regulation for Accommodations on Real State of Touristic Use of the Ministry of Tourism* (Project of Regulation). This norm looked to regulate activities of digital platforms that offer accommodation services (such as Airbnb), as it is considered that these, due to their operation model, were distorting the market by not complying with the requisites (industry standards and taxes) that other establishments such as hotels have to follow, deriving in problems in the sector.

17. The SCPM was invited by MINTUR to the presentation of the last version of the Project of Regulation, which would replace the current *Regulation for Accommodation on Real State for Touristic Use* (Current Regulation). In this meeting an agreement was reached with the SCPM for the respective observations to be made.

18. In this encounter, MINTUR also announced that the technical basis that were used to justify the Project of Regulation was a Study of Regulatory Impact named *Final Report about the Regulatory Impact Study: Informality on Services of Touristic Accommodation in Real State* issued by the Sub secretariat for Regulation and Control of MINTUR on year 2020, which was delivered to the SCPM in a formal manner after the mentioned meeting.

19. In this sense, the SCPM proceeded to carry out an analysis of the Project of Regulation based on the Methodology of Barriers, specially referencing the concept of regulatory improvement, which comprises an existent quality legal framework, which offers the necessary adequate incentives to strengthen economic activity. Simplify processes and reduce administrative burdens, this with the objective of facilitating participation of undertakings in the process of norm elaboration, and to assure the adaptation of rules and measures to the principles of regulation within the framework of an impact analysis.

20. Because of this, we can observe that the Study of Regulatory Impact carried out by MINTUR had low technical quality and did not adequately justify the need to count with a new norm, as the established situation and the context tackled, considering international experiences surrounding digital platforms for touristic accommodation, did not clearly expressed the reason for regulatory intervention in Ecuador. Moreover, it was identified that the study did not consider an impact analysis (cost-benefit) on the application of the Current Regulation, for which there was no data or results that allowed the verification of the impact the norm had on the market with the goal of supporting the need of a new norm.

21. In this way, the SCPM issued the *Technical Report on the Review to the Project of Regulation of Accommodation on Real State for touristic Use* of the Ministry of Tourism, which concludes that, among other statements, the Project of Regulation is a norm that must be thoroughly reviewed

by MINTUR with the goal of ensuring that it counts with the proper motivation and technical support for it to accomplish in an efficient manner, the stated objectives.

22. In this sense, it was concluded that, in its current state, the Project of Regulation, could potentially have effects over the efficiency of markets or economic competition, that would impose hurdles to innovation and to free participation of new competitors, which would be harmful for consumers interest and for the development of the national touristic potential, as the offer of accommodation services through digital platforms, such as Airbnb, would be subject to the compliance of requisites that are not necessarily accounting their functioning and structure. This could also derive in a lack of interest to offer these accommodation spaces or to do it without complying with the formalities of the sector. Consequently, we could face, on one side, a reduction on the supply of accommodation for consumers; and, on the other side, a discouragement of the accommodation sector from innovating, reducing prices, improving the quality of services, etc. aspects that rise predominantly from free competition between the different economic operators.

23. It must be pointed out that the interaction between institutions allowed the SCPM to expose to the tourism governing body that, in an environment of healthy competition, the intervention of public administration must be justified by the pursuit of specific objectives and to correct market failures. Parting from this intervention, among other considerations, MINTUR decided to delay the issuance of the Project of Regulation temporarily.

24. Despite this last decision, the SCPM continued with the issuance of the Report aforementioned, in which it gives a series of recommendations to MINTUR with the aim of avoiding acts that may distort or hinder the development of economic activities beyond what is strictly necessary in order to achieve its legitimate control objectives.

2.4. “Cannabis” Case

25. In face of several undertakings contacting the SCPM regarding possible entry restrictions to the hemp market as a result of the *Project of Technical Sanitary Norm to Substitute the Regulation and Control of Finished Products for Human Use and Consumption that Contain Non Psycho-active Cannabis or Hemp* (Here on, “Project of Norm”) made by the National Agency for Regulation, Control and Sanitary Surveillance (ARCSA); the SCPM, through the INAC, proceeded to review in a systematic manner such proposal through the use of the elements of the Methodology of Barriers, with the aim of evidencing possible barriers that could infringe the competition realm.

26. In this sense, INAC requested a meeting for ARCSA to present its Project of Norm; such meeting took place on June 29, 2022 and resulted in several agreements, among which it was to modify the document accounting a competition standpoint. For this, INAC, following its attributions, made a technical report to the Project of Norm with the aim of analyzing and recommending possible improvements from a competition standpoint.

27. The importance of carrying out this analysis lies in the potential that the production of hemp as an incipient industry in Ecuador, has. According to the information issued by sector experts³, it is expected that for each thousand 1000 hectares of hemp production, it is possible to generate an equivalent of one per cent increase on the Gross Domestic Product (GDP) and could generate up to sixteen (16) jobs per sowed hectare. Following the proposal of formalizing the production and commercialization of cannabis, foreign undertakings expressed their interest of entering the Ecuadorian market. Furthermore, according to the information sent by undertakings, by May 2022

³ «Ecuador puede llegar tarde a la industria de cannabis, Perú y Colombia ya lo producen», Primicias, September 26, 2019, <https://www.primicias.ec/noticias/economia/ecuador-cannabis-productos-legalizacion-redes/>

there were close to 100 license holders with an upward tendency⁴. From here on, in general terms, we can appreciate the importance of following through with the analysis in order to avoid any barrier that may restrict the access of new undertakings to this sector.

28. Once the technical report was developed, the INAC managed to identify important elements such as the lack of technical basis in the prohibition for the elaboration and commercialization of alcoholic beverages that contain THC, CBD and other cannabinoids. Equally so, the determination of a limit of milligrams of CBD, THC and their isomers per day in the statement on the label of foods and food supplements, among others. This would result in a high probability of restricting the possible entry of new competitors to these incipient market, and would result in negative affectations to determined investments of undertakings that are already in the market under the *rules of play* previously determined. For this reason, and with the aim that the norm stimulates competition and efficiency in markets, the SCPM recommended to the governing body to consider the Methodology of Barriers for the development of the proposal of norm.

29. As a reply to this and other actions carried out by different interested parties, the governing body delayed the Proposal of Norm regarding food and cosmetic products, with the purpose of obtaining technical basis for the comments made by the SCPM. It must be said that, the contribution of undertakings, as the predisposition of ARCSA was crucial in order to execute the necessary changes within the scope of competition, which would result in an improvement of economic welfare in the sector.

2.5. Opinion report in competition matters, “Flowers” Case: File N°SCPM-IGT-INAC-2-2022

30. In this case, an analysis was made over article 99 of the Organic Code of Social Economy of Knowledge, Creativity and Innovation (COESCI), which specifies that all transfer, authorization for use or licensing over any intellectual property right or request being treated must be inscribed with the national competent authority, meaning, the National Service of Intellectual Rights (SENADI). Such analysis was carried out due to the knowledge the SCPM had regarding the existence of irregularities within the flower sector, such as lack of compliance of labor norms, social security, among others.

31. The mentioned article was analyzed following what is established on article 493 of the legal body, which states that to agreements for plant breeder rights must be in written manner and, according to article 99, must be inscribed with the SENADI. Moreover, article 494 establishes that prior to such inscription, the authority for intellectual rights must verify that such agreements adjust to “*the dispositions of the Common Regime of Treatment of Foreign Capitals and Brands, Patents, Licenses and Royalties, or not to adjust to national or community dispositions about restrictive commercial practices of free competition or unfair competition*”.

32. In this sense, within the analysis it was evidenced that such dispositions were not being observed, which could result in hinders for the identification of possible anticompetitive scenarios by SENADI and therefore its respective regulation.

33. For this effect, meetings were held with SENADI in order to resolve doubts from the SCPM; nevertheless, the necessary clarity was not achieved to tackle all of them, and also some contradictions on the interpretation of the norm analysis came to light.

34. Furthermore, meetings with the National Revenue Service (SRI) were held in order to discuss topics related to tax deductions from royalties for intellectual property rights. This institution was

⁴ Trejo Abril, Santiago Xavier. «Carta Ciudadano Nro. CIUDADANO-CIU-2022-21559.» Reply to communication about norms that JEOPARDIZE the value chain of hemp. Communication ARCSA-ARCSA-2022-0295-0 and summoning of Decree 4 Art.3-n // Art. 23 del 24-may-2021, Quito, 2022.

not able to resolve the doubts presented done by the INAC, in an opportune and clear manner, showing that there is no tax law or related, regarding incentives for inscriptions regarding plant breeders' rights or over any other kind of rights regulated by SENADI.

35. After an exhaustive analysis of the information presented by the aforementioned institutions, as for the ones conferred by private entities, we could determine that contracts must be inscribed with the competent authority in order to, not only being able to regulate them, but also to identify alterations to the market beforehand. For this, the following recommendations were issued: to implement the necessary mechanisms for enforcing the binding status of inscriptions; carry out a training process to flower enterprises, that helps to distribute the knowledge of the law among the; generate related norms that allows for the application to tax deductions granted from the inscription; strengthening interinstitutional cooperation, with the aim of forcibly requesting a binding inscription, among others.

36. Once the report was issued it was possible to evidence that the analysis and its recommendations had an effect on the governing body, because, resulting from the report, and the actions done by undertakings of the sector, public institutions and social organizations, SENADI ISSUED Resolution N°01-2022-DG-NT-SENADI, which regulates the inscription of licensing contracts of plant breeders rights, with which it is possible to prevent the inclusion of anticompetitive clauses in agreements between parties, among other things.

37. It is necessary to mention that, even though the report issued by the SCPM was taken into account, and several recommendations have been tackled, there some others that have not been considered, for which it is understood that they could be implemented in the short, medium or long term.

38. Regarding the interaction with other institutions, it is possible to highlight the good predisposition to reply to information requests and participation on requested meetings, despite the obstacles mentioned.

3. Conclusions

39. On each different case, we have been able to identify that the reports and recommendations that were issued have had a positive impact over Ecuadorian regulatory agents, following what has been exposed, on the majority of cases there have been actions that respond to the issuance of such documents, ranging from modification of the analyzed normative or pausing the issuance of regulations until being able to thoroughly study the sector that would be regulated.

40. Additionally, it is worth mentioning that these reports have had a positive impact on the sectors involved, as they have been considered on academic spaces due to the importance of identifying normative or bureaucratic barriers in the scope of competition.

41. However, though it is possible to point out the interaction with state regulatory bodies has been favorable in the majority of cases, it is expected that this relationship grows stronger, with the aim of generating administrative improvements, reduce unreasonable paperwork and reach optimal results, benefitting the dynamic and efficiency of markets and the general citizenry. Moreover, it is important to mention that a fundamental tool for attracting the attention of regulatory entities has been the force that the press and media can have on a topic, which, in several cases, have pressured the decision making from involved institutions.