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resolution of cartel cases in Latin America and the Caribbean**

- Contribution from Ecuador -

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Session III: Early resolution of cartel cases in Latin America and the Caribbean

- Contribution from Ecuador –*

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1. Introduction

1. Commitments are an effective tool for dealing with anticompetitive conduct that is not highly harmful to the market, as well as for restoring competitive conditions. Conversely, they should not be applied to conduct such as cartels, for which the imposition of sanctions is imperative in light of the deterrent effect that every competition authority must ensure.
2. In Ecuador, this mechanism is not limited to any particular type of conduct for its application. In other words, it may be invoked in cases involving abuse of market power, unfair conduct, agreements, and restrictive practices. However, the competition authority retains discretion as to whether to accept the mechanism, taking into account the circumstances of the case, the nature and seriousness of the conduct, the acknowledgement of the facts committed, and the imposition of measures aimed at restoring competitive conditions.
3. The secondary legislation governing the commitment procedure has evolved throughout the existence of the competition authority with the aim of providing legal certainty to economic operators seeking to benefit from this mechanism. Among its main developments are the introduction of rules designed to ensure the confidentiality of information submitted during the procedure, prevent its use to the detriment of the economic operator in investigations concerning the same facts, and establish objective criteria for determining the remediation amounts associated with the commitment.
4. Finally, since 2018, the Ecuadorian competition authority has adopted the position of not accepting commitments in investigations concerning collusive agreements, on the grounds that cartels constitute one of the most harmful forms of conduct to competition. In this regard, the Authority has considered that the application of this mechanism could be incompatible with the objectives of effective detection and enforcement, in accordance with the highest standards of international doctrine and case law.

2. Introduction to commitments and their applicability to harmful conduct

5. Commitments constitute a mechanism for the early resolution of investigative proceedings conducted by a competition authority, whereby the undertaking under investigation voluntarily offers to cease the conduct, remedy the harm, damage or effects

* Contribution prepared by the Superintendency of Economic Competition (SCE) of Ecuador.

caused in the market, and implement corrective measures. Once accepted by the authority, such commitments become binding on the applicants¹.

6. Consistent with the foregoing, Article 9 of Council Regulation (EC) No. 1/2003² enshrines this framework for the application of commitment decisions, confirming that, once such commitments are accepted, there are no longer grounds for intervention by the European Commission.

7. It should, however, be recognised that commitments are not suitable for cases whose impact on the market is sufficiently serious that the undertaking should not benefit from such a mechanism. In particular, they are generally considered inapplicable to cartels, for which the imposition of fines constitutes a central element of competition law enforcement³.

8. In this regard, reference should be made to the Alrosa case. Although the case did not concern anticompetitive agreements or restrictive practices, but rather an abuse of dominant position, the Court of Justice of the European Union established several guiding principles that are important when assessing the application of commitments in cases involving harmful effects on competition.

9. The Court distinguished between infringement decisions and commitment decisions, noting that the latter are not intended to establish an infringement or impose a sanction, but rather to address the competition concerns identified by the authority. The Court also held that the Commission is not required to demonstrate that a commitment constitutes the least restrictive measure possible; it need only verify that the commitment is appropriate to eliminate those concerns⁴.

10. In this respect, the Alrosa case is significant because it defines the scope of the principle of proportionality applicable to the assessment of commitments. According to that judgment, the analysis undertaken by a competition authority does not consist of weighing the seriousness of the conduct under investigation against the commitments offered, but rather of determining whether those commitments are suitable, sufficient and effective to eliminate the competition concerns identified during the investigation.

3. Ecuadorian framework governing commitments

11. In Ecuador, commitments are provided for under the Organic Law for the Regulation and Control of Market Power⁵ (hereinafter, the LORCPM), the Organic Law on the Regulation of Unfair Competition, the Regulation for the Application of the Organic

¹ European Commission, Antitrust: Commitment Decisions – Frequently Asked Questions, 2013, p. 1.

² Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Document 32003R0001. Article 9.

³ Wouter P. J. Wils, “The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles”, *World Competition: Law and Economics Review*, Vol. 31, No. 3 (2008), p. 7.

⁴ Court of Justice of the European Union, Case C-441/07 P, ECLI:EU:C:2010:377, paras. 40 and 41, 29 June 2010.

⁵ Organic Law for the Regulation and Control of Market Power. Official Register No. 555 of 13 October 2011. Amended by the Seventh Supplement to Official Register No. 333 of 24 July 2026.

Law for the Regulation and Control of Market Power⁶, and the Guidelines for the Management and Implementation of Commitments⁷. These four legal instruments are consistent with one another and constitute the core framework governing the application of this legal mechanism under Ecuadorian competition law.

12. The acceptance of a commitment is a discretionary power of the competition authority, which must be exercised in a reasoned and reasonable manner. The authority is responsible for reviewing the application for a commitment and, through a duly reasoned decision, determining whether it should be accepted or rejected.

13. From a literal and systematic interpretation of the LORCPM, there is no provision, in cartel cases, that distinguishes or limits the application of commitments to investigations involving abuse of market power, agreements and restrictive practices, or even unfair competition practices. The law employs the broad term “anticompetitive practices” without distinction and, therefore, as a matter of law, the mechanism is applicable to all three categories of conduct.

3.1. Discretion in the approval of commitments

14. The regime governing commitments established under the LORCPM has a particular feature regarding their approval. Article 90 of the LORCPM expressly provides that, in assessing and deciding upon applications for commitments, the Superintendency of Economic Competition (hereinafter, the SCE) shall exercise its discretionary powers. Accordingly, the legislature itself recognises that the decision as to whether such an application should be granted does not constitute an exclusively regulated power; rather, it falls to the administrative authority to assess whether the proposal submitted by the economic operator is suitable for achieving the purposes set out in the law.

15. This legal provision constitutes a manifestation of the Administration's discretionary authority. In this regard, it is a case of legislative referral, whereby the law incorporates other provisions in order to complete the legal framework applicable to the exercise of the power and leaves the conditions governing its exercise to an administrative assessment. This assessment is not carried out through general regulatory rules, but rather analytically, on a case-by-case basis, through an evaluation of specific circumstances undertaken in advance of the application process⁸.

16. Within the framework of commitments, such discretion is reflected in the assessment that the SCE must undertake regarding the content of the proposal submitted by the economic operator. Although the law establishes the minimum requirements that an application for commitments must contain, as well as the objectives it must pursue, it does not exhaustively determine when a proposal should be regarded as suitable for achieving those objectives. Consequently, it falls to the administrative authority to assess the particular circumstances of each case in order to determine whether the commitments offered are sufficient to bring the investigated conduct to an end, prevent its effects from occurring, or remedy effects that have already arisen, as appropriate, and to decide whether

⁶ Regulation for the Application of the Organic Law for the Regulation and Control of Market Power. Official Register No. 697 of 7 May 2012, as amended by the Third Supplement to Official Register No. 171 of 19 October 2022. Article 8.

⁷ Guidelines for the Management and Implementation of Commitments, Resolution No. SCPM-DS-2022-18, Official Register No. 47 of 21 April 2022.

⁸ García de Enterría, E., and Fernández, T. R., *Curso de Derecho Administrativo* (16th ed., Vol. I), Thomson-Civitas, 2006, p. 492.

they should be approved. In this context, the authority's decision constitutes an exercise of discretionary power, since it must choose between various legally permissible alternatives, discretionary decisions being those taken between two or more solutions that are all equally valid in law.⁹

17. In this regard, legal doctrine distinguishes between regulated powers and discretionary powers of the Public Administration. The former are those in which the legal framework predetermines the content of the administrative action to be taken in a specific case¹⁰. By contrast, discretionary powers grant the authority a margin of appreciation to select, from among several legally permissible alternatives, the option that is most appropriate for serving the public interest and the objectives established by law¹¹.

18. The powers conferred by the LORCPM in relation to commitments combine both regulated and discretionary elements. The regulated aspects are established by the LORCPM itself, which specifies the stage at which an application may be submitted, its minimum content, the procedure for its assessment, and the consequences arising from its approval or non-compliance. The discretionary element, expressly granted by the law itself, lies in the assessment that the SCE must undertake regarding the suitability, sufficiency and effectiveness of the proposed commitments in achieving the objectives set out in the legislation. Accordingly, the discretion does not concern the authority's ability freely to approve commitments; rather, it concerns the technical and legal assessment of whether the proposal submitted satisfies the statutory conditions that justify its approval.

19. Nevertheless, the discretion conferred by the LORCPM does not constitute an absolute power. Under the Ecuadorian legal system, its exercise must be subject to the principle of legality¹², as well as to the principle prohibiting arbitrariness¹³, so that every decision adopted by the authority is grounded in the legal framework and serves the purposes for which that power was conferred.

20. This distinction has also been developed by the Constitutional Court of Ecuador. In Judgment No. 0458-14-EP, the highest constitutional review body clarified that "discretion is not arbitrariness", since the two concepts are antithetical. While arbitrariness stems solely from the will of the authority and arises where it acts through misuse or excess of power, discretion derives its basis, limits and justification from the legal system itself.¹⁴

21. Similarly, legal scholarship has noted that administrative discretion must contain certain elements in order to be valid, including the existence of the power conferred by law,

⁹ Tron Petit, J. C., "El control de la discrecionalidad administrativa en sede jurisdiccional. En Procedimiento y justicia administrativa en América Latina. Fundación Konrad Adenauer Stiftung e Instituto de Investigaciones Jurídicas, UNAM, 2009, p. 416.

¹⁰ Agustín Gordillo, *Tratado de Derecho Administrativo y obras selectas* (1st ed., Vol. I), Fundación de Derecho Administrativo, 2017, Chapter 10, Section 11.

¹¹ Ibid.

¹² Organic Administrative Code. Official Register No. 31 of 7 July 2017, as amended by the Constitutional Edition of Official Register No. 149 of 13 January 2026. Article 14.

¹³ Organic Administrative Code. Official Register No. 31 of 7 July 2017, as amended by the Constitutional Edition of Official Register No. 149 of 13 January 2026. Article 18.

¹⁴ Constitutional Court of Ecuador, Judgment No. 202-16-SEP-CC, Case No. 0458-14-EP. Reporting Judge: Alfredo Ruiz. 22 June 2016, p. 14.

its scope, the authority's competence to exercise it, and the purpose for which it was granted.¹⁵

22. Moreover, as already noted, such discretion is not absolute and therefore requires legal limits to prevent arbitrariness, since it can no longer be accepted that any part of administrative activity could exist outside or above the legal order.¹⁶ Among such limits are reasonableness, the public interest, good faith, and the principle of equality.¹⁷

23. These doctrinal elements are fully reflected in the commitments regime under Ecuadorian law, since it is the LORCPM itself that grants this discretionary power to the SCE to assess proposals and determine whether they are suitable for achieving the objectives established by the law, which, in this specific context, is the protection of the legally protected interest of economic competition.

24. Applied to the commitments regime, this means that the SCE cannot merely assert that a proposal submitted by an economic operator is sufficient or suitable to achieve the objectives set out in Articles 89 and 90 of the LORCPM without providing the proper reasoning to support such a conclusion.

25. In accordance with the duty to provide reasons established under Ecuadorian law, the authority must set out objectively the legal and factual grounds on which it considers that the commitments offered do or do not satisfy the statutory requirements for approval. This enables subsequent administrative and judicial review of its decision and ensures that the exercise of the discretionary power expressly provided for under the LORCPM remains within the limits imposed by the principle of legality.

26. Put differently, the discretion expressly recognised by the LORCPM does not relate to the freedom to approve commitments at will. Rather, it concerns the assessment of whether the proposal submitted by the economic operator is suitable for achieving the objectives established by the law itself. That assessment must be carried out within the limits imposed by the principle of legality and must be properly reasoned, so that it can be verified that the administrative decision reflects the legitimate exercise of discretionary power rather than an arbitrary act.

3.2. Requirements and procedure for commitments in Ecuador

3.2.1. The requirements

27. Unlike its application in other jurisdictions around the world, a commitment in Ecuador is subject to certain requirements that must be met in order for it to be accepted. These requirements are cumulative in nature, meaning that if any one of them is not satisfied, the competition authority will reject the application as part of its assessment¹⁸.

¹⁵ Eduardo García de Enterría, *La lucha contra las inmunidades del poder en el Derecho Administrativo (Poderes discrecionales, poderes de gobierno, poderes normativos)*. Revista de Administración Pública, 1962, p. 38.

¹⁶ Agustín Gordillo, *Tratado de Derecho Administrativo y obras selectas* (1st ed., Vol. I), Fundación de Derecho Administrativo, 2017, Chapter X, Section 15.

¹⁷ Roberto Dromi, *Tratado de Derecho Administrativo* (1998), cited in Moreta, A. (2019), *Procedimiento administrativo y sancionador en el COA*, Ediciones Continente, pp. 6–9.

¹⁸ Organic Law for the Regulation and Control of Market Power, Official Register No. 555 of 13 October 2011, as amended by the Seventh Supplement to Official Register No. 333 of 24 July 2026. Article 90(1).

28. The first requirement is that the economic operators under investigation acknowledge all or some of the facts forming the basis of the statement of objections against them. Such acknowledgement must be credible when compared against the evidence contained in the case file.

29. Under Ecuadorian law, the requirement to acknowledge the facts is consistent with international standards, including those of the European Union¹⁹, where a comparable mechanism exists in the form of settlement procedures in cartel cases.

30. The acknowledgement of facts required by the LORCPM introduces an element that may bear a functional resemblance to certain settlement procedures; however, a commitment should not be confused with a cartel settlement²⁰. In the latter, the early resolution of the case still involves a finding of infringement and the imposition of a fine, whereas a commitment decision is based on a different rationale for closing the case.

31. The settlement process safeguards the effective exercise of the parties' right to be heard regarding the accuracy and relevance of the facts and allegations asserted by the competition authority, as well as regarding the authenticity and interpretation of the evidence²¹.

32. The acknowledgement of facts is particularly significant given that there may be cartel cases in which not all the parties involved are willing to admit the conduct or submit to a commitment.

33. This requirement enables the authority, on the one hand, to assess whether the acknowledged facts are consistent with the evidence contained in the case file and, on the other, to conclude whether entering into a commitment is appropriate in order to bring the investigation to an end for the benefit of both parties²², namely the investigating authority and the investigated undertaking.

34. The second requirement²³ is that the economic operators submit corrective measures to the authority. These measures must, first, ensure the cessation of the conduct and, second, prevent its recurrence. In addition, supplementary measures may also be proposed where appropriate.

35. The corrective measures currently available under Ecuador's competition regime are set out in Article 73 of the LORCPM and may consist of: (i) cessation of the conduct;

¹⁹ European Union, Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No. 1/2003 in cartel cases (Text with EEA relevance), 2008/C 167/01, 2 July 2008.

²⁰ It is a form of consensual resolution of cartel infringement proceedings in the field of competition law, conceived as an alternative to the adversarial procedure that characterises ordinary enforcement proceedings. Under this procedure, the parties are offered the opportunity to acknowledge their participation in, and liability for, a cartel and, in return, benefit from a reduction in the fine imposed.

²¹ María Luisa Tierno, *El procedimiento de transacción comunitario para asuntos de cártel*. Revista de Derecho de la Competencia y la Distribución, No. 1, Iustel, 2009, p. 373.

²² Wouter P. J. Wils, "The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles", *World Competition: Law and Economics Review*, Vol. 31, No. 3 (2008), pp. 13–18.

²³ Organic Law for the Regulation and Control of Market Power, Official Register No. 555 of 13 October 2011, as amended by the Seventh Supplement to Official Register No. 333 of 24 July 2026. Article 90(2).

(ii) carrying out activities or entering into agreements to restore the competitive process; and (iii) the unenforceability of anticompetitive clauses²⁴.

36. The corrective measures provided for under Ecuadorian legislation are, in many cases, insufficient to bring the conduct to an end and/or to guarantee that offenders will not reoffend. As will be explained below, throughout the history of the Superintendency of Economic Competition, cartel investigations have largely focused on public procurement procedures.

37. It should be emphasised that, under Ecuadorian law, collusive agreements in public procurement processes are considered by-object infringements²⁵, and among the most harmful forms of conduct from the perspective of competition law²⁶. In this regard, particular attention should be paid to the fact that such practices in public procurement prevent resources from being released for other pressing needs and limit the achievement of greater value for public money spent²⁷.

38. Accordingly, in such cases, neither cessation of the conduct nor the unenforceability of anticompetitive clauses would generally be applicable, at least in relation to collusion in public procurement specifically. As a final measure, and with the objective of preventing recidivism, the corrective measure consisting of carrying out activities or entering into agreements²⁸ could be used, although not to restore the competitive process, but rather to prevent the conduct from occurring again.

39. As regards complementary measures, Ecuador's competition regime contains no provision defining or limiting their applicability. Their approval therefore falls within the discretion of the authority, based on the proposals submitted by economic operators in their applications for commitments.

40. In summary, these two requirements constitute the framework established by Ecuador's competition regime for any economic operator seeking to benefit from a commitment. In other words, they form the legal framework that enables the application of this mechanism.

²⁴ Organic Law for the Regulation and Control of Market Power, Official Register No. 555 of 13 October 2011, as amended by the Seventh Supplement to Official Register No. 333 of 24 July 2026. Article 73.

²⁵ Regulation for the Application of the Organic Law for the Regulation and Control of Market Power, Official Register No. 697 of 7 May 2012, as amended by the Third Supplement to Official Register No. 171 of 19 October 2022. Article 8.

²⁶ European Commission, Communications from the Institutions, Bodies, Offices and Agencies of the European Union, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements (2023/C 259/01), paras. 23, 24, 25 and 26.

²⁷ Superintendence of Industry and Commerce, Case No. 19-250007, Resolution No. 36450 of May 2026, p. 10.

²⁸ The practice of the Superintendency of Economic Competition in relation to commitments frequently involved the use of sworn statements aimed at ensuring that operators submitting to a commitment would not engage in collusive conduct again.

3.2.2. *The procedure*

41. The procedure for commitments allows for up to two preliminary informational meetings between the authority and the applicant economic operator prior to the formal submission of the commitment²⁹.

42. Economic operators may submit an application at any stage of the investigative proceedings up until the issuance of a decision by the decision-making body³⁰. Once the application has been submitted, the decision-making body opens a separate file, access to which is restricted to the applicant in order to preserve confidentiality³¹, and verifies compliance with the requirements analysed above in order to determine whether the relevant procedural steps should continue.

43. Where the application is complete, it is notified to the other investigated operators so that, in accordance with due process and the right of defence, they may submit any observations or arguments they deem appropriate.^{32, 33}

44. Once this procedural stage has been completed, the decision-making body forwards the application, together with the submissions made by the non-applicant parties, to the investigative body so that it may prepare a technical report and issue its opinion regarding whether the commitment should be accepted or rejected. It should be noted that this report, which contains the opinion of the investigative body, is not binding on the decision-making body when making its determination^{34, 35}.

45. Finally, where the decision-making body issues a favourable decision on the application, it may bring the investigation or complaint to an end, although such decision shall have effect only in respect of the facts or conduct accepted by the applicant operators³⁶. It shall also instruct the investigative unit to monitor effective compliance with the commitment and the corresponding measures.

²⁹ Guidelines for the Management and Implementation of Commitments, Resolution No. SCPM-DS-2022-18, Official Register No. 47 of 21 April 2022, Article 3.

³⁰ In Ecuador, the decision-making body is the First-Instance Decision-Making Commission, an ad hoc collegiate body composed of five commissioners, who deliberate and issue reasoned decisions.

³¹ Guidelines for the Management and Implementation of Commitments, Resolution No. SCPM-DS-2022-18, Official Register No. 47 of 21 April 2022, Articles 6 and 8.

³² Reglamento para la Aplicación de la Ley Orgánica de Regulación y Control del Poder de Mercado. Registro Oficial No. 697 de 07 de mayo de 2012, reformado en el tercer suplemento del Registro Oficial No. 171 del 19 de octubre de 2022. Artículo 115.

³³ Pursuant to Article 8 of the Guidelines for the Management and Implementation, this is the only notification that shall be made to any party other than the applicant.

³⁴ It is important to note that, at the discretion of the decision-making body, the calculation of procedural time limits and deadlines may be suspended for up to 120 working days.

³⁵ Judgment of the Court of Justice of the European Union of 29 June 2010, Case C-441/07 P, Alrosa v Commission, paragraph 95.

³⁶ Guidelines for the Management and Implementation of Commitments, Resolution No. SCPM-DS-2022-18, Official Register No. 47 of 21 April 2022, Article 8.

3.2.3. Remediation

46. Up to this point, the procedure covers the first aspect of commitments, namely bringing the conduct to an end and/or preventing its recurrence. Accordingly, the Guidelines also establish a specific chapter devoted to the remediation of the harm, damage or effects arising from anticompetitive practices, including a methodology for calculating the amount of remediation³⁷. Two calculation formulas are provided: one applicable where the respondent acknowledges the facts alleged in the complaint, and another where it acknowledges the charges brought as a result of the investigation.

47. The rationale for the existence of these two formulas is that investigative proceedings initiated following a complaint generally require less time than investigations commenced ex officio or at the request of another investigative body³⁸. The parameters used to calculate the remediation amount take into account three variables: (i) the time elapsed between the commencement of the investigation and the submission of the application; (ii) the turnover of the infringing undertaking in the market in which the conduct occurred; and (iii) the seriousness of the infringement, which may be classified as minor, serious or very serious, for the purpose of determining the remediation amount.

48. Accordingly, economic operators applying for the benefit of a commitment may be required to pay a remediation amount that may be substantially lower than the fine that could be imposed if the authority were to establish the existence of cartel conduct.

49. In conclusion, the Ecuadorian framework addresses both the cessation and/or non-recurrence of the conduct and the remediation of the harm caused by the anticompetitive practice. It should once again be noted that, as will be explained below, commitments are no longer applied in cartel cases, on the basis that operators involved in such conduct should not benefit from this mechanism when they engage in practices that are particularly harmful to competition. From this perspective, the unsuitability of commitments for cartel cases does not prevent the adoption of alternative mechanisms that acknowledge the infringement, maintain deterrent sanctions and preserve the incentives provided by leniency programmes.

50. In summary, Ecuadorian legislation does not provide for any mechanism through which an economic operator may benefit from a commitment without admitting either the charges or the conduct at issue and without accepting the corresponding conditions. Any such application would be rejected, since these are the two indispensable requirements for the mechanism to operate.

4. Evolution of the secondary legislation governing commitments

51. The evolution of the secondary legislation governing commitments in Ecuador may be divided into three stages: (i) Initial design; (ii) the introduction of discounts and incentives; and (iii) consolidation in 2022.

³⁷Guidelines for the Management and Implementation of Commitments. Resolution No. SCPM-DS-2022-18. Official Register No. 47 of 21 April 2022. Article 12.

³⁸ En Ecuador existen tres formas de inicio de una investigación. i) por denuncia: dura 180 días plazo prorrogables 180 días adicionales, ii) de oficio; y, iii) a solicitud de otro órgano de la investigación, tiene una fase previa de 180 días término, y luego la fase investigativa de 180 días plazo prorrogables 180 días adicionales.

4.1. Initial design

52. In Ecuador, the secondary legislation governing commitments has evolved continuously since 4 December 2013, when the “Manual of Procedures for the Application of Commitments”³⁹ was issued. This instrument established a relatively flexible procedure regarding the form in which an application should be submitted and the body within the Superintendency before which it should be filed, as well as a decision period of 45 days. However, it did not address important issues, such as the amount of remediation to be provided.

53. To address the regulatory gap referred to above, on 9 January 2014 the competition authority issued the “Guidelines for Calculating the Remediation Amount in Proposed Commitments”⁴⁰. These guidelines standardised three methodologies for calculating the remediation amount: (i) where no investigation had been notified; (ii) where the undertaking had been notified of the initiation of an investigation; and (iii) where no investigation had been notified, but parallel investigations were being conducted by another investigative body.

54. Scenarios (i) and (iii) were inconsistent with Article 89 of the LORCPM⁴¹ (as in force at the time) and Article 114 of the Regulation⁴² (as in force at the time), insofar as the higher-ranking legal provisions established, and continue to establish, that commitments may only be submitted by investigated parties, related parties, or respondents.

55. In that context, for an economic operator to be considered an investigated party or a respondent, there must at least be an ongoing investigative file and, at a minimum, either a request for explanations in response to a complaint or the formal opening of an investigation. By contrast, these two scenarios envisaged the unusual situation in which an operator could submit a commitment without being under investigation and undertake to cease conduct for which it was not even being investigated, contrary to the higher-ranking legal provisions.

56. These scenarios were so inconsistent with the regulatory framework that they even appeared to suggest that operators could, in some way, become aware of ongoing investigations against them and, on that basis, submit a commitment, thereby undermining the confidentiality and secrecy of investigations.

57. The commitment manual was subsequently amended⁴³. Ultimately, both the manual and the remediation calculation guidelines were consolidated into a single legal instrument, namely the first “Guidelines for the Management and Implementation of Commitments in the Superintendency for the Control of Market Power”⁴⁴. For the first time, this instrument protected the confidentiality of information, granted monitoring

³⁹ Superintendency of Economic Competition, Resolution SCPM-DS-067 of 4 December 2013.

⁴⁰ Superintendency of Economic Competition, Resolution SCPM-DS-003-2014 of 9 January 2014.

⁴¹ Organic Law for the Regulation and Control of Market Power. Official Register No. 555 of 13 October 2011, Article 89.

⁴² Reglamento para la aplicación de la Ley Orgánica de Regulación y Control del Poder de Mercado. Registro Oficial No. 697 de 02 de mayo de 2012.

⁴³ Regulation for the Application of the Organic Law for the Regulation and Control of Market Power, Official Register No. 697 of 2 May 2012.

⁴⁴ Superintendence of Market Power Control, Resolution SCPM-DS-062-2014 of 19 September 2014.

powers to the investigative units, and addressed the administrative discretion of the competition authority to accept or reject a commitment. However, it did not correct the flaws in scenarios (i) and (iii) relating to the calculation of remediation amounts that had been established in the 2014 guidelines.

58. Over time, a new regulatory instrument was issued⁴⁵. This instrument likewise failed to correct scenarios (i) and (iii) concerning remediation amounts and, moreover, expressly allowed the submission of commitments even where no investigation existed⁴⁶. It further empowered the investigative bodies to open a case file only at that stage and to assess, where appropriate, the suitability of the commitment within just 15 days. This approach continued to conflict with the law and the applicable regulation then in force.

59. It should be noted that this reform, at least implicitly, made the commitment procedure somewhat resemble a leniency or whistle-blower programme, which is the only mechanism under which an application may indeed be submitted without an investigation having already been opened, since that is the very purpose of such programmes. This is fundamentally different from the rationale underlying a commitment procedure.

4.2. Introduction of Discounts and Incentives

60. This regulatory instrument was subsequently amended⁴⁷, introducing as a new feature a schedule of reductions applicable to the financial remediation amount: 70% for the first operator to submit a commitment, 30% for the second, and 10% for the third, according to the order in which commitments were submitted during the preliminary investigation stage.

61. These reductions gave rise to two problems. The first was procedural in nature: during the preliminary investigation stage there are not yet any investigated parties, since the purpose of that stage is precisely to identify indications of conduct that may establish the existence of an anticompetitive practice and determine whether the formal opening of an investigation is warranted. In other words, it would be virtually impossible for an operator to submit a commitment at that stage. The second problem relates to the deterrent role that a competition authority must fulfil. In cartel cases, in particular, sanctions should be imperative; therefore, not only would cartel participants avoid being found liable for an infringement, but granting them additional reductions would effectively favour the infringer.

62. At the end of 2015, a new set of guidelines was issued⁴⁸. These retained the possibility of commitments being submitted in cases where no formal investigation had yet been opened, but corrected the error of allowing them during the preliminary investigation stage. The amendments also reduced the applicable discounts: 50% for the first operator to submit a commitment, 15% for the second, and 5% for the third.

63. These guidelines were subsequently amended again⁴⁹. The reform introduced specific remediation calculation scenarios for each category of infringement, namely minor, serious and very serious infringements, and also established different calculation

⁴⁵ Superintendence of Market Power Control, Resolution SCPM-DS-029-2015 of 16 April 2015.

⁴⁶ Ibid. Articles 7 & 8.

⁴⁷ Superintendency of Economic Competition, Resolution SCPM-DS-033-2015 of 20 May 2015.

⁴⁸ Superintendency of Economic Competition, Resolution SCPM-DS-078-2015 of 19 November 2015.

⁴⁹ Superintendence of Market Power Control, Resolution SCPM-DS-041-2016 of 13 July 2016.

scenarios depending on the stage at which the commitment was submitted, including screening, preliminary investigation, formal investigation and decision stages⁵⁰. In other words, this reform not only failed to resolve the problems associated with scenarios 1 and 3 created in 2014, but also introduced additional scenarios that generated even greater legal uncertainty.

4.3. Consolidation of the regulatory framework in 2022

64. Finally, in 2022, the guidelines that remain in force to this day were adopted⁵¹. These introduced the possibility of holding preliminary meetings between the authority and the applicant, safeguarded the confidentiality of information where necessary, and prohibited the use of information submitted as part of an application in the context of an investigative proceeding. At the same time, they corrected shortcomings concerning the stage at which a commitment may be submitted, aligning the procedure with both the law and its implementing regulation by standardising the rule that an application may only be filed once an investigation has been formally opened and before the issuance of the infringement decision.

65. The 2022 guidelines also removed the schedule of discounts based on the timing of the submission of an application for commitments, which, at least in cartel cases, was not consistent with the nature of the conduct or its harmful effects.

66. In summary, the secondary legislation governing commitments has evolved over time through both successes and shortcomings. Nevertheless, it has been progressively updated with the aim of providing greater legal certainty for economic operators and for the administration, which is responsible for applying the mechanism with the degree of reasoning and discretion that each individual case requires.

67. This does not, however, prevent the authority from reviewing the regulatory framework and, where appropriate, reforming it in light of current market conditions, with the objective of ensuring that commitments are capable of effectively restoring competitive conditions.

5. Application of commitments in cartel cases

68. In this regard, specialised doctrine and case law have clearly established that commitments should not be accepted in cases involving conduct that is particularly harmful to competition law.

69. This position has been reflected by the European Commission in its Notice on Best Practices, which states that where an infringement warrants the imposition of a fine, as is

⁵⁰ At the time of the reform, the Superintendency of Economic Competition structured its case files into five stages. The first was a 30-day screening phase (*barrido*), during which preliminary factual circumstances were analysed to determine whether a formal investigation should be opened; at this stage, there were no investigated parties. This was followed by a preliminary phase, during which indications or evidence were sought to determine whether the opening of a formal investigation was warranted.

⁵¹ Superintendency of Economic Competition, Resolution SCPM-DS-2022-18 of 29 March 2022.

the case with cartels, Article 7 of Regulation 1/2003 should invariably be applied instead of a commitment decision⁵².

70. Under the European framework, commitment decisions adopted pursuant to Article 9 are not appropriate where the Commission intends to impose a fine. In such cases, the finding and termination of the infringement are addressed through a decision adopted under Article 7 of Regulation 1/2003.

71. Legal scholarship has similarly concluded that it is detrimental to the objectives of antitrust law to use this type of commitment mechanism where an infringement as serious as a cartel has been identified⁵³.

72. Against this background, up to 2018, eleven applications for commitments were accepted in cases involving cartels in public procurement processes, a practice that diverged from international doctrine and case law.

73. The experience prior to 2018 provided an important institutional lesson: in cases involving collusion in public procurement, measures aimed solely at bringing the conduct to an end had limited practical value once the conduct had already produced its effects, while remediation amounts lower than the potential fine could weaken deterrence incentives. This experience contributed to a reassessment of the policy on accepting commitments.

74. The OECD's review of Ecuador likewise concluded that the use of commitments should be focused on conduct that is less harmful from a competition law perspective and should not be applied to cartels⁵⁴.

75. Consequently, from 2018 to the present, the competition authority has adopted a different interpretative approach regarding the application of commitments, seeking to prevent their use in cases involving this type of conduct.

76. As discussed above, the legal framework does not prohibit the use of this mechanism in cartel cases. However, through the exercise of its administrative discretion, the authority retains the power to determine, on a case-by-case basis, whether such applications should be accepted or rejected.

77. This shift in approach adopted by the competition authority is based on the objective of aligning its practice with international best practices, as well as prioritising the implementation of the leniency programme⁵⁵, which is considered an effective tool for addressing this type of conduct.

⁵² Fernando Cachafeiro García. Terminación Convencional de los expedientes sancionadores por la infracción del Derecho de la Competencia, in José María Beneyto Pérez (dir.), *Tratado de Derecho de la Competencia y de la Publicidad*, Tirant lo Blanch, Valencia, 2018, pág. 189.

⁵³ Eugenio Olmedo Peralta, Las decisiones de compromisos «commitment decisions» y la terminación convencional de los procedimientos en el derecho de la competencia europeo y español (Pamplona: Editorial Aranzadi, 2020), RB-2.19.

⁵⁴ Organisation for Economic Co-operation and Development (OECD), *Peer Reviews of Competition Law and Policy: Ecuador*, 2021, pp. 84 and 86.

⁵⁵ Superintendency of Economic Competition, *Guidelines for Granting Immunity from or Reductions in Fines*, Resolution SCE-DS-2019-38, Official Register No. 52 of 2 October 2019.

78. In this regard, it should be recognised that such conspiracies divert resources from purchasers and taxpayers, reduce public confidence in the competitive process, and undermine the benefits of a competitive market⁵⁶.

79. Agreements and restrictive practices are, by their very nature, among the most harmful forms of conduct, producing direct effects in the market, such as artificially increasing prices and reducing consumer choice⁵⁷. In this sense, the cartel is the anticompetitive agreement par excellence, from which, by definition, no competitive advantage to the market can arise. Consequently, there is a universally recognised principle that cartels should not go unsanctioned⁵⁸.

80. In summary, accepting a commitment in a cartel case and, consequently, refraining from imposing a fine for conduct that harms competition, negatively affects the deterrent effect of antitrust legislation. If companies come to believe that competition law proceedings generally conclude without sanctions, they are more likely to engage in anticompetitive behaviour than if they are convinced that competition law enforcement is ordinarily accompanied by significant penalties.

81. Based on this reasoning, and through the exercise of its administrative discretion, the Ecuadorian competition authority assesses each application for a commitment on a case-by-case basis, with a view to determining when the mechanism is appropriate within the market and when it should be rejected, taking into account the type of conduct, the characteristics of the market, and the impact on competition.

6. Conclusions

82. Ecuadorian legislation does not impose any restriction on the application of commitments in cartel cases. However, the forms of conduct that are most harmful to competition, namely agreements and concerted practices, cannot go unsanctioned, as this would diminish the deterrent effect of competition law.

83. Although the LORCPM does not contain an express exclusion for cartels, enforcement practice since 2018 has operated on the presumption that commitments are inappropriate in cases involving hard-core cartels, given the need to preserve the finding of infringement, the imposition of sanctions and the deterrent effect of enforcement. Any exception would require particularly robust reasoning and clearly identifiable extraordinary circumstances.

84. Since 2018, Ecuador's competition authority, acting in the exercise of its discretionary powers, has adopted a fundamentally different approach to the acceptance of commitments in cartel cases. No decisions granting such applications for this type of conduct have been issued since then, reflecting the application of international doctrine and case law, which hold that the most harmful forms of conduct should not benefit from this mechanism.

⁵⁶ Organisation for Economic Co-operation and Development (OECD), Guidelines for Fighting Bid Rigging in Public Procurement, 2009, p. 2.

⁵⁷ European Commission, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2006/C 298/11), paras. 1–4.

⁵⁸ Fernando Cachafeiro García, Terminación Convencional de los expedientes sancionadores por la infracción del Derecho de la Competencia, in José María Beneyto Pérez (dir.), Tratado de Derecho de la Competencia y de la Publicidad, Tirant lo Blanch, Valencia, 2018, p. 204.

85. The secondary legislation in Ecuador, namely the guidelines, has evolved over the years, culminating in the latest reform of 2022. The principal innovations include the possibility of up to two preliminary meetings between applicants and the authority, the protection of the applicant's confidential information, where requested, and, finally, safeguards preventing the authority from using information submitted in support of the application within the investigative proceedings.

86. The unsuitability of commitments for cartel cases does not imply abandoning all forms of early resolution. Ecuador may consider alternative mechanisms that, unlike commitments, preserve the acknowledgement of the infringement, ensure the imposition of sufficiently deterrent sanctions, and remain compatible with the incentives provided by the leniency programme.