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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Compliance and antitrust programmes

- Contribution from Ecuador -

20–22 September 2021

The attached document from Ecuador is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming virtual meeting to be held on 20-22 September 2021 via Zoom.

Ms Lynn Robertson, Competition Expert - [Lynn.Robertson@oecd.org].

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Session 1: Compliance Programmes in Antitrust Enforcement

- Contribution of Ecuador -

1. Issues in Ecuadorian society that have been taken into account for this Guide

1. The process of creating the guide was carried out in a participatory process in which economic operators and experts in compliance shared their experiences of developing competition compliance programmes to ensure that the Superintendency for Market Power Control (SCPM) Guide reflects the real situation of Ecuadorian companies.
2. Certain recommendations were adapted in the Guide to make them accessible to small and medium-sized enterprises (SMEs) and other economic operators, taking into account the principle of proportionality. With respect to the resources that should be allocated to compliance programmes, in the case of SMEs, it is possible that they do not have the necessary resources to have a separate legal department in charge of the programme; however, they are likely to have a finance or administration officer who could take responsibility for the compliance programme. Similarly, regarding the complaints channel, it is recommended that economic operators adapt this channel to their available means, since it is possible to comply with this recommendation using a measure as simple as an e-mail inbox.
3. Working from this approach, the SCPM has tried to ensure that the compliance programme can be taken on by economic operators as a tool that can be implemented gradually, according to the availability of resources, under a criterion of “scalability” and starting from a risk approach. In this sense, the competition compliance programme implemented in each organisation should be considered a profitable investment in the long term rather than an expense for the economic operator.

2. Process of creating the SCPM Competition Compliance Guide

4. The Compliance Guide was constructed in a participatory manner with the valuable assistance of the civil society organisation *Fundación Ciudadanía y Desarrollo* [Citizenship and Development Foundation – CDF] and the Pan American Development Foundation (PADF), a non-profit organisation created by the Organization of American States. With the collaboration of these organisations, the SCPM organised several meetings, discussions and working groups with the participation of experts and academics from other countries and Ecuador to share their experience in the field of compliance, as well as to contribute to the drafting and modification of the text of the SCPM Compliance Guide.
5. The first discussion was held on 10 June 2021, with the participation of experts in competition and compliance matters by means of interviews. The discussion addressed topics such as the categories of companies that should be considered for the application of the guide, the mandatory or corrective nature of the compliance programme, the incentives and motivations that companies may have to develop a compliance programme and the evaluation or monitoring indicators to be included in a programme.

6. On 24 June 2021, a working meeting was held to gather the contributions of academics, specialised consultants, lawyers and companies. Topics discussed at the meeting included the benefits for companies of implementing a compliance programme, the resources that an economic operator must have to develop the programme, and the strategies that can be created to encourage the introduction of compliance programmes in SMEs.

7. Subsequently, on 5 July 2021, an interview was conducted with several professionals with experience in compliance issues to explore in depth the main motivations for companies to implement the programme, the benefits and difficulties that companies have encountered in the implementation of compliance programmes, the most important elements of the compliance programme, the role of the company's governing body in the compliance programme, and how to incorporate a compliance programme in SMEs.

8. With assistance from the CDF, the SCPM held a Meeting for the Co-creation of the Competition Compliance Guide on 15 July 2021, with the participation of experts from academia, compliance consultants, lawyers, professional associations and companies. The purpose of this event was the creation of task forces working on a range of topics to allow the experts to make contributions and specific comments to the SCPM Compliance Guide project. The SCPM sent a draft of the Guide to the participants to ensure that the meeting would yield changes to the text of the Guide proposed by the experts.

9. Once all the contributions from the different events held by the SCPM were systematised, the National Competition Advocacy Agency (INAC) worked on restructuring and modifying the draft Compliance Guide.

10. In the process of creating the Guide, the SCPM referred to compliance guides produced by other competition agencies. The contributions that emerged from the events and the co-creation meetings were subject to a process of discussion and drafting by the SCPM team, after which the final version of the Guide was issued.

3. Evaluation criteria in the Guide defining an “effective” programme

11. According to the SCPM Competition Compliance Guide, a programme must be subject to a comprehensive evaluation to determine whether it is effective. All aspects of the programme are important to its correct performance. However, it is possible to highlight some elements fundamental to any compliance programme, such as a commitment from the administrative body, the creation of a code of conduct, the allocation of human, technological and economic resources, use of the risk approach, regular and ongoing training, a complaints channel, and audits.

12. The essential elements of a compliance programme as set out in the SCPM Guide to Competition Compliance are summarised in the following table:

Elements	Most important points
Generate a culture of compliance with the Law	<ul style="list-style-type: none"> • The economic operator is committed to creating a culture of compliance in the company's environment • Be aware that respecting and complying with competition regulations will prevent them from being involved in legal conflicts • The code of conduct is the cornerstone of a compliance programme • Generate integration with other compliance programmes
There is a person in charge of compliance and resources are allocated to this end	<ul style="list-style-type: none"> • The appointment of the person(s) responsible for the compliance programme must necessarily take into account the size and scope of the company • It is essential that the compliance officer has sufficient independence to investigate, sanction and take action within the programme • The programme must have adequate financial, human and technological resources in line with the size and operational risk of the company
Risk approach	<ul style="list-style-type: none"> • Identify the various risks of breaching the Organic Law on the Regulation and Control of Market Power • Elaboration of risk matrix • The risks of the economic operator can be identified by asking simple questions • Identify people who, due to the functions they perform, are in situations that represent a significant risk of infringing competition regulations • <i>Compliance</i> programmes should be reviewed periodically to take into account regulatory changes or any other aspect of the market context
Development of guides, manuals and policies	<ul style="list-style-type: none"> • The programme should be supported by internal regulations, such as guidelines or manuals that address specific aspects of compliance culture • Establish procedures, rules of action and internal controls for each risk • All workers, especially those working in high-risk areas or dealing with competing economic operators, should receive regular training
Monitoring, auditing and internal reporting	<ul style="list-style-type: none"> • Monitoring seeks to ensure that the objectives of the programme are met and that the actions of workers, managers and the governing body are in line with the programme • Audits play an important role in regulatory compliance programmes as they make it possible to prevent and correct any non-compliance by the economic operator in a timely manner • It is recommended that the complaints channel be adapted to the needs and resources of the economic operator, regardless of the mechanism, and that the principle of proportionality must be observed
Internal disciplinary actions	<ul style="list-style-type: none"> • The economic operator shall appoint a person with the authority to apply the appropriate sanctions (in these cases, it is recommended that these tasks are performed by the human resources department) • Where necessary, disciplinary sanctions should be applied to any member of the economic operator, without distinction of any kind with regard to their position or function within the organisation
Evaluation	<ul style="list-style-type: none"> • The evaluation identifies the extent to which the compliance programme has contributed to improving the competitive practices of the economic operator, establishes the degree of compliance with the implemented policies, and identifies the aspects of the programme that should be strengthened or improved

Source: Federal Commission for Economic Competition, 2015.
Produced by: SCPM, 2021

4. SCPM position to support compliance programmes

13. In addition to any sanction imposed for infringement of the Organic Law on the Regulation and Control of Market Power, the SCPM may issue corrective measures aimed at restoring the competitive process, preventing, impeding, suspending, correcting or reversing anti-competitive conduct, and preventing such conduct from occurring again. In this regard, the SCPM has ordered economic operators to implement compliance programmes as a corrective measure, as established in Article 73 of the Organic Law on the Regulation and Control of Market Power. This was the practice of the SCPM prior to the publication of the Competition Compliance Guide.

14. Now, with the publication of the Guide, although it is not mandatory for economic operators to implement compliance programmes, the SCPM reserves the power to order the creation of a programme as part of sanctions imposed on economic operators that have violated the Organic Law on the Regulation and Control of Market Power.

15. In case no. SCPM-CRPI-010-2019, the SCPM resolved to accept the cessation request submitted by the economic operator Marketing Worldwide Ecuador S.A., on condition of compliance with all the corrective and complementary measures and the payment of the amount of the redress. In the resolution, as a complementary measure it ordered the economic operator to create a competition compliance programme to verify that the advertising of its products complies with the provisions of the Organic Law on the Regulation and Control of Market Power.¹

16. Likewise, in case no. SCPM-CRPI-001-2020, the SCPM resolved that the economic operators Comercializadora Katty Elizabeth Tubay, Carmen Inés Carvajal Cuppharma S.A. and Mercatti S.A. Mercattisa engaged in the conduct set out in Point 6 of Article 11 of the Organic Law on the Regulation and Control of Market Power, on collusion in public procurement. In this case, the Resolution Commission of the First Instance issued a Resolution on 4 August 2020 containing a corrective measure ordering the implementation of a competition compliance programme aimed at employees and managers of the company, focused on the various anti-competitive conducts established in the Organic Law on the Regulation and Control of Market Power.²

17. In case no. SCPM-CRPI-022-2020, the Resolution Committee of the First Instance decided to accept the proposal of conditions presented by IB Opco Holding, S.L. Among the remedies proposed for the concentration of IB Opco Holding, S.L. was the elaboration of a competition compliance programme.³

18. Following the issuance of the SCPM Competition Compliance Guide, the institution has established that the implementation of a compliance programme is not mandatory, although it is highly recommended due to the benefits it can bring to economic operators that implement it. However, this does not affect the possibility of competition control and resolution authorities in Ecuador ordering or recommending the adoption of a compliance programme in a specific case.⁴

¹ SCPM, *case no. SCPM-CRPI-010-2019*, 27 August 2019.

² SCPM, *case no. SCPM-CRPI-001-2020*, 4 August 2020.

³ SCPM, *case no. SCPM-CRPI-022-2020*, 25 November 2020.

⁴ The SCPM, the Resolution Committee of the First Instance and/or the investigative bodies of the SCPM.