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Advantages and Disadvantages of Competition Welfare Standards – Note by Ecuador

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This document reproduces a written contribution from Ecuador submitted for Item 6 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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1. Introduction¹

1. The Ecuadorian competition regime is a jambalaya of standards, the Organic Law of Regulation and Control of Market Power (LORCPM, hereinafter) in article 1 describes its objective, being: “[the] efficiency in the markets, fair trade and the general well-being of consumers and users, for the establishment of a social, supportive and sustainable economic system”.² Nevertheless, there are other objectives³ stated in articles 7, 9, 11, 25 and 26⁴ that are not prescribed in article 1, i.e., rights of consumers and users, competitive process (competition) and public economic order. In Ecuador there are at least eight standards that sometimes collapses which one another, challenging the assessment that the Agency should do.

2. Thus, we consider this round table to be key, being an opportunity to explain mainly: **i)** to what extend each standard is applied in our jurisdiction; **ii)** its description; **iii)** the alternative choices that exists; **iv)** the main attributions of the most applied standard; and, **v)** if there is an express weight to a particular attribute or standard that is being applied.

2. Welfare standards

3. In our peculiar jurisdiction, depending on the article, we can find the following standards:

Standard	Articles
Efficiency in the markets	1, 7, 9, 11, and 26
Fair trade	1
General well-being of consumers and users	1
Rights of consumers and users	7, 26
General well-being	7, 9, 11, and 26
Establishment of a social, supportive, and sustainable economic system	1
Competitive process	7, 9, 11, and 26
Consumers, public economic order	25

4. It’s no wonder that “efficiency in the markets” or “general well-being of consumers” can collide with “fair trade” or the “establishment of a social, supportive and sustainable system” which are clearly standards related to fairness rather than to an economic assessment.

5. Our jurisdiction does not gives an express weight to a particular standard or attributes, as we can see on the table there are multiple standards existing with each other.

¹ This contribution was prepared by the National Direction of Investigation and Control of Abuse of Dominance from the Superintendence of Market Power Control.

² Article 1 LORCPM.

³ Efficiency and general well-being are repeated standards in articles 1, 9, 11, 25 and 26.

⁴ Article 9 prescribes abuse of dominance; article 11 restrictive practices; and, articles 25 and 26 unfair practices.

6. The challenge in the preference of a standard over another, has been surpassed by applying the prescribed standard on the article corresponding to the conduct that is being investigated. Therefore, when the Agency investigates an abuse of dominance⁵ or restrictive agreements⁶⁷ the most applied standard is the competitive process. So far the Superintendence of Market Power Control (SCPM, hereinafter) has avoided the application of “fairness standards” such as the ones prescribed in article 1 of the LORCPM. In the same line, the “general well-being of consumers and users” which is considered to be the Ecuadorian “Consumer Welfare Standard”, has not been applied yet, however, there is an inner understanding of how this standard should be applied, which will be explained in this section of the article.

7. The prevailing welfare standard in Ecuador for abuse of dominance and restrictive practices is the competitive process which, hitherto, has been applied in all the sanctioned cases by the Agency. This standard takes into consideration the competitive process and if it could, potentially or actually, be affected by a conduct or an agreement carried out by an undertaking. With this standard, it is not compulsory to execute an assessment of how the consumers will be affected, with the proven effects of the affectation to the competitive process, the standard of proof will be fulfilled. This fulfilment will depend on the case, for instance proving a restriction by object has not an equivalent burden as a restriction by effect.

8. All the standards are established via legislation through their prescription in the LORCPM. Nevertheless, they can also be established by jurisprudence in one unique scenario. If there is a treble reiteration sentence from the National Court of Justice regarding to the application of certain standard, this sentence is considered to be law and the SCPM will be obliged to apply the jurisprudence. However, this scenario has not happened yet. Therefore, an important feature of the competitive process standard, is that it remains unchanged over the time.

9. In Ecuador, the discussion for changing the standard is the other way around, here undertakings and their lawyers argue that the Agency should solely apply the Consumer Welfare Standard, as it happens in the US, instead of the competitive process standard. However, since the LORCPM prescribes in article 9 and 11 the competitive process standard, not the Consumer Welfare Standard, the former will continued to be applied, at least, in the near future.

10. Nevertheless, the inner understanding of a possible approach in the application of the Consumer Welfare Standard is not considered as a “standard” rather as a broad guiding principle or concept which encompasses a series of elements such as: quality, choice, innovation among others, not only price. In the same line, our understanding is that “consumer” could also be an intermediate consumer, not only the final one. Therefore, an affectation to consumers could happen from producers to distributors –as intermediate consumers- or distributors to final consumers, not only to final consumers.

11. As it was presented, in the table above, in our jurisdiction there are multiple standards, hitherto the main one is the competitive process, its alternatives are the welfare standards, being the principal the Consumer Welfare. There are multiple differences between both standards, in our view the most important one is that the Consumer Welfare

⁵ *Vid:* Proceedings: SCPM-CRPI-001-2022; SCPM-INJ-22-2022.

⁶ *Vid:* Proceedings: SCPM-CRPI-012-2022; SCPM-CRPI-010-2022.

⁷ In this contribution we will not approach the standards used in unfair practices, just abuse of dominance and restrictive practices.

includes a compulsory obligation to assess an adverse effect not only to the competitive process but also to the consumers -intermediate or finals-. Applying the competitive process standard, so far, has helped the Agency in the saving of scarce resources, since the economic analysis and the standard of proof of the affectation is related only to the competitive process, there is no need to carry out more economic assessment, also proving how the consumers were affected.

12. Another clear alternative to the actual standard are the “*fairness standards*” established in article 1 of the LORCPM. However, these could bring more challenges than the welfare ones. For instance, the main questions in the assessment that may come into our minds are: What is fair? How do we assess fairness? A dominant undertaking should be sanctioned for excluding a competitor which is not as efficient? Which goals are we propping through fairness? just to mention some. Nevertheless, in our opinion the biggest problem is the lack of standard of proof for fairness, there is no an economic approach to assess *fairness*, these complications result in the lack of practical application of these standards.

13. Once that the main standards and its alternatives are presented, it is clear that the main difference between the competitive process standard over welfare and fairness standards, is predictability. The Agency hitherto has been applying the competitive process standard, undertakings and the “competition community” are used to it. If there were sudden changes of the applied standard, there will be uncertainty, at least, at the beginning; because there is no clear answer on how these standards should be approached. Therefore, in order to prevent this uncertainty, if the Agency at some point changes its view over the main standard to be applied, a Guide explaining this change and what our vision is regarding the new applied standard should be issued.

14. Now, we will continue explaining the expected attributes of the standards.

3. Attribute of welfare standards

15. If the Agency at some point applies the welfare standards, the main attribute that we wish they should have is predictability; that the standard will be feasible to apply and economically possible. In regard to predictability, as we are facing a global debate over the consumer welfare standard, in our view this attribute could be difficult to achieve. There is no a consensus on what the welfare standard is or what it should seek. In the Agency’s vision, if these standards are applied at some point, they would be a guiding principle rather than a “standard”.

16. With regard to the feasibility and economic possibility of the standard, this guiding principle should not be overly rigid or unduly burdensome, so Type 1 errors are avoided and anticompetitive conducts are sanctioned. We do not want a Consumer Welfare Standard to slow down the progress that the Agency has made in the last years applying the competitive process standard. Therefore, in our view the main attribute that it should have is feasibility.

17. As a regime with a strong appliance of different standards we can say that so far there was no need to apply the Consumer Welfare Standard and the competitive process has been good in the deterrence of anticompetitive practices. Nevertheless, if a certain case arises where this standard should be applied, we are ready for the challenge.

4. Conclusions

18. In the Ecuadorian competition regime there are multiple standards which encompasses competitive processes; fairness and consumer welfare. These standards can collide with one another. The challenge in order to prefer one standard over another was surpassed by applying the prescribed standard in the article of the conduct which was investigated. Hitherto the Agency in abuse of dominance and restrictive practices applies the competitive process standard. However, there are alternatives for this standard, being the Consumer Welfare the main one. The SCPM considers this standard as a broad guiding principle rather than a standard, in its application it expects feasibility and that Type 1 errors are avoided. If a there is a case where the Consumer Welfare Standard should be applied, we are ready for the challenge