

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

### [Superintendencia de Control del Poder de Mercado, Ecuador]

The following template is submitted by Superintendencia de Control del Poder de Mercado de Ecuador, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

The Superintendency for Market Power Control (hereinafter SCPM) is the main competition authority of Ecuador and it enforces the Organic Law of Regulation and Market Power Control (hereinafter LORCPM)<sup>1</sup>, whose purpose is to avoid, prevent, correct, eliminate and sanction the abuse of economic operators with market power; the prevention, prohibition and sanction of collusive agreements and other restrictive practices; the control and regulation of economic concentration operations; and the prevention, prohibition and punishment of unfair practices, seeking efficiency in markets, fair trade and general well-being of consumers and users, for the establishment of a social, solidarity-based and sustainable economic system.

##### MISIÓN

To control and monitor the correct functioning of the markets by preventing, correcting, eliminating and / or sanctioning the abuse of economic operators with market power; the prevention, prohibition and sanction of collusive agreements, restrictive practices and unfair practices; the control and regulation of economic concentration operations; promoting competition, efficiency and transparency of the market and fair trade with the active participation of citizens.

##### VISIÓN

By 2021 we will be a national leading institution in defending competition that benefits consumers, users and economic operators within the framework of fair trade and a transparent, efficient and equitable market that operates without distortions, to contribute to the establishment of a social, solidarity-based and sustainable economic system.

<https://www.scpm.gob.ec/sitio/>

#### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

##### b) No Discriminación

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

Beyond the international instruments which Ecuador is a part, the guarantee of non-discrimination is contained, within the internal legal order, in the Constitution of Ecuador. This norm establishes that all

<sup>1</sup> View Annex 2.

people are equal and will enjoy the same rights, duties and opportunities. It also recognizes and promotes real equality in favor of rights holders without discrimination of sex, cultural identity, place of birth, disability, immigration status or any other.

In addition, there is an express provision in the Constitution that recognizes the same rights as Ecuadorians to foreign persons who are in the country:

*"Art. 9.- Foreign persons who are in Ecuadorian territory will have the same rights and duties as Ecuadorians, in accordance with the Constitution "*

Other articles of the Constitution that are relevant to the subject are transcribed below:

*"Art. 11.- The exercise of people's rights will be governed by the following principles:*

*(...) 2. All people are equal and will enjoy the same rights, duties and opportunities.*

*No one may be discriminated against on the basis of ethnicity, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, judicial past, socio-economic status, immigration status, sexual orientation, health status, carrying HIV, disability, physical difference; nor for any other distinction, personal or collective, temporary or permanent, that has the purpose or result to impair or nullify the recognition, enjoyment or exercise of rights. The law shall punish all forms of discrimination.*

*The State will adopt affirmative action measures that promote real equality in favor of rights holders who are in a situation of inequality. "*

*"Art. 66.- People are recognized and guaranteed:*

*(...) 4. Right to formal equality, material equality and non-discrimination. "*

*"Art. 230.- In the exercise of public service it is prohibited, in addition to what the law determines:*

*(...) 3. Discrimination actions of any kind. "*

*"Art. 341.- The State will generate the conditions for the integral protection of its inhabitants throughout their lives, which ensure the rights and principles recognized in the Constitution, in particular equality in diversity and non-discrimination, and will prioritize their action towards those groups that require special consideration for the persistence of inequalities, exclusion, discrimination or violence, or by virtue of their age, health or disability condition."*

In the specific case of the LORCPM, its application must at all times observe the constitutional guarantees. It should also be noted that the LORCPM has jurisdiction over foreigners and has the possibility of being applied extraterritorially. The relevant articles in respect of these arguments are presented below.

*"Art. 2.- Scope.- Are subject to the provisions of this Law all economic operators, whether natural or legal, public or private, national and foreign, with or without profit, who currently or potentially carry out economic activities in all or a part of the national territory, as well as the organizations that group them, and those that carry out economic activities outside the country, insofar as their acts, activities or agreements produce or may produce detrimental effects on the national market."*

*"Art. 4.- Guidelines for regulation and principles for application. - In accordance with the Constitution of the Republic and the current legal order, the following guidelines will be applied for the regulation and formulation of public policy in the matter of this Law:*

*1. The recognition of the human being as subject and purpose of the economic system.*

*2. The defense of the general interest of society, which prevails over the private interest. [...]*

*For the application of this Law, the principles of non-discrimination, transparency, proportionality and due process will be observed."*

### **c Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

In Ecuador, the laws come into effect as they are published in the Official Gazette, a type of State Journal. The regulations issued through Presidential Decrees, as is the case with the LORCPM Regulations<sup>2</sup>, are also published through this way. Therefore, it is understood that they are public. Regarding the rest of the regulations, things are not so absolute, however, in general, it is not difficult to access them through the internet. There are also specialized payed search engines (LEXIS, FIEL) that contain almost all of the regulations and are often used by law firms, public institutions and University libraries.

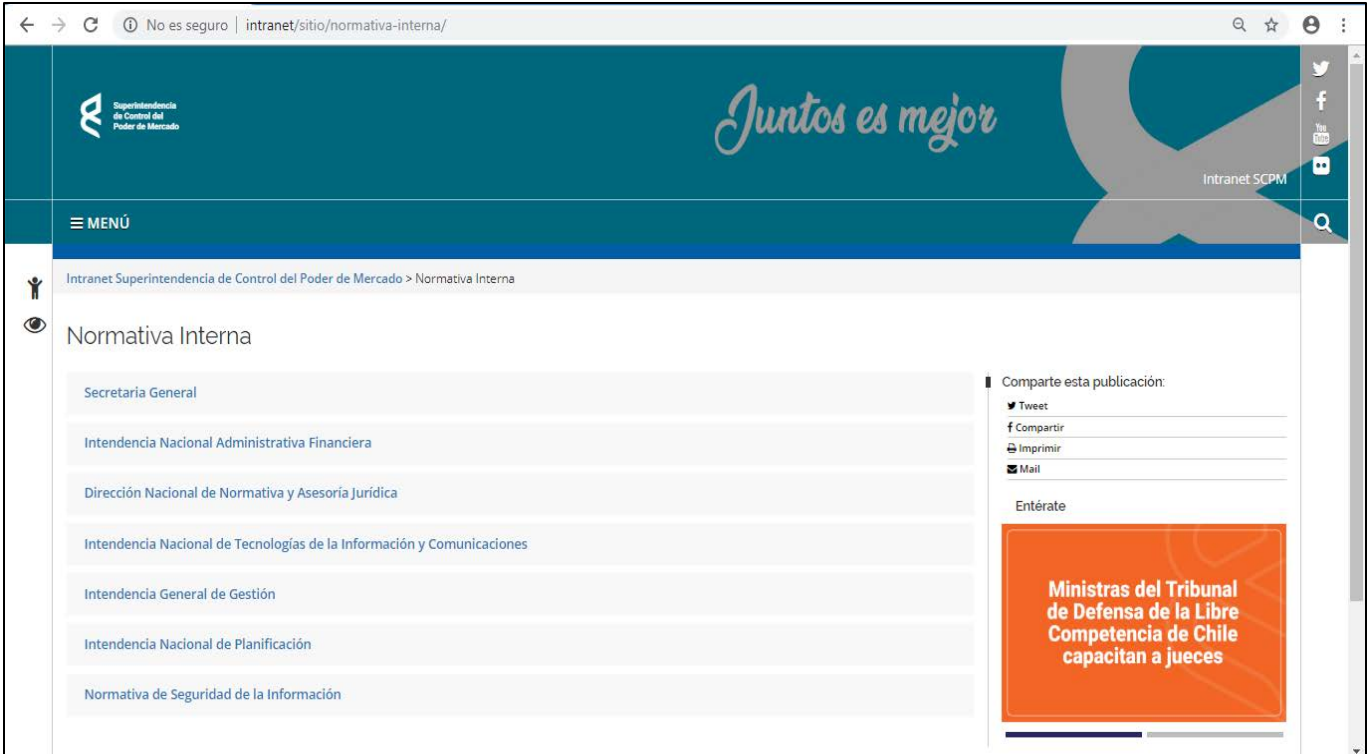
Moreover, in compliance with the principles of transparency that govern the Ecuadorian Public Administration and based on the provisions of the Organic Law of Transparency and Access to Public Information, public institutions must make available to citizens, on its website, the regulations that govern them.

In sum, both the LORCPM and its Regulations are understood to be public as they have been issued through the Official Gazette. Some other internal regulations of the SCPM have also been published in the Gazette, but,

---

<sup>2</sup> View annex 3.

regardless of this detail, all the relevant regulations for the SCPM are published on the Institution's website. Screenshots are attached for the record.



The SCPM, under a new administration, is in the process of updating and / or building its methodological guides. A Technical Guide for Market Studies, a Technical Guide for Analysis of Concentration Control, and a Technical Guide for the Evaluation of Public Aids are planned for prompt publication.

Some provisions that are relevant to the subject are cited.

### CONSTITUCIÓN OF ECUADOR

*"Art. 82.- The right to legal certainty is based on the respect of the Constitution and on the existence of previous, clear, public legal norms applied by the competent authorities."*

*"Art. 227.- Public administration constitutes a service to the community that is governed by the principles of effectiveness, efficiency, quality, hierarchy, deconcentration, decentralization, coordination, participation, planning, transparency and evaluation."*

*"Art. 336.- The State will promote and ensure fair trade as a mean of access to quality goods and services, which minimizes the distortions of intermediation and promotes sustainability. The State will ensure transparency and efficiency in the markets and will promote competition on equal terms and opportunities, which will be defined by law. "*

### LORCPM

*"Art. 4.- Guidelines for regulation and principles for application. - In accordance with the Constitution of the Republic and the current legal order, the following guidelines will be applied for the regulation and formulation of public policy in the matter of this Law:*

- 1. The recognition of the human being as subject and purpose of the economic system.*
- 2. The defense of the general interest of society, which prevails over the private interest.*
- 3. The recognition of the structural heterogeneity of the Ecuadorian economy and of the different forms of economic organization, including popular and solidarity organizations.*
- 4. The promotion of economic deconcentration, in order to avoid private monopolistic and oligopolistic practices contrary to the general interest, seeking efficiency in the markets.*
- 5. The right to develop economic activities and the free participation of economic operators in the market.*
- 6. The establishment of a regulatory framework that allows the exercise of the right to develop economic activities, in a system of free competition.*
- 7. The promotion and strengthening of fair trade to reduce distortions in intermediation.*
- 8. The development of mechanisms that guarantee that people, peoples and nationalities achieve self-sufficiency in healthy food through the redistribution of resources such as land and water.*
- 9. The equitable distribution of development benefits, incentivize production, productivity, competitiveness, develop scientific and technological knowledge; and,*
- 10. The need for transparent and efficient markets.*

*For the application of this Law, the principles of non-discrimination, transparency, proportionality and due process will be observed."*

On July 7, 2017, the Organic Administrative Code<sup>3</sup>, a regulatory body that governs the management of the Ecuadorian Public Administration, came into force in Ecuador. This code establishes the principles that should govern the administrative work of public administrations and determines general guidelines for administrative procedures. In the face of doubts arising from the possible existence of antinomies between this new legal body and the LORCPM, the pronouncement of the Office of the Attorney General of the State of Ecuador was requested, as an entity that has the legal powers to resolve doubts about the proper application of the laws and whose pronouncements are mandatory. This entity, on November 11, 2019, issued its pronouncement stating that the administrative procedure of the LORCPM and everything related to administrative appeals of said rule remain in force. However, there is no doubt that, at least in the dogmatic and conceptual elements, this legal body is applicable to the management of the SCPM and may, in addition, have a supplementary character.

### ORGANIC ADMINISTRATIVE CODE

*"Art. 12.- Principle of Transparency. - People will access public information and of general interest, administrative records, files and archives, in the manner provided for in this Code and the law."*

*"Art. 14.- Legal principle. Administrative action is subject to the Constitution, international instruments, law, principles, applicable jurisprudence and this Code."*

<sup>3</sup> View annex 5.

*The discretionary power will be used according to Law."*

*"Art. 17.- Principle of good faith. Public servants and individuals are presumed to maintain legal and appropriate behavior in the exercise of their powers, rights and duties."*

*"Art. 21.- Principle of ethics and probity.- Public servants, as well as people who are related to public administrations, will act with rectitude, loyalty and honesty. In public administrations, the mission of service, probity, honesty, integrity, impartiality, good faith, mutual trust, solidarity, transparency, dedication to work will be promoted, within the framework of the highest professional standards; respect for people, diligence and the primacy of the general interest, over the individual. "*

*"Art. 22.- Principles of legal certainty and legitimate expectations. Public administrations will act under the criteria of certainty and predictability.*

*The administrative action will be respectful of the expectations that the public administration itself has reasonably generated in the past. The application of the principle of legitimate expectations does not prevent administrations from changing, in a motivated way, the policy or criteria that they will use in the future.*

*The rights of the people will not be affected by errors or omissions of public servants in administrative procedures, unless the error or omission has been induced by serious fault or fraud of the person concerned. "*

#### **d) ) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

As was mentioned above, the SCPM acts, at all times, in application of the guarantees provided in the Constitution. This norm establishes, as one of the fundamental guarantees of due process, the guarantees of people to be heard within a process and having adequate time and means to prepare your defense.

#### **CONSTITUCIÓN DE ECUADOR**

*"Art. 76.- In any process in which rights and obligations of any order are determined, the right to due process will be ensured, which will include the following basic guarantees:*

*1. It corresponds to all administrative or judicial authority to guarantee compliance with the rules and the rights of the parties.*

*(...) 7. The right of individuals to defense shall include the following guarantees:*

*(...) b) Have the time and the appropriate means to prepare their defense.*

*c) Be heard at the right time and on equal terms.*

*d) The procedures will be public except for the exceptions provided by law. The parties may access all the documents and proceedings proceedings.*

*(...) l) The resolutions of the public powers must be motivated. There will be no motivation if the resolution does not state the legal norms or principles on which it is based and does not explain the relevance of its application to the factual background. Administrative acts, resolutions or rulings that are not duly motivated will be considered null. The responsible servers will be sanctioned.*

m) Appeal the ruling or resolution in all procedures in which a person's rights are decided. (...)"

The LORCPM, its Regulations and the Administrative Procedural Management Rulings<sup>4</sup> provide in all processes, the opportune moments and means for people to prepare their defense. All this without prejudice to the SCPM authorities being able to take action to guarantee adequate defense conditions for those administered. The following relevant articles are cited:

### LORCPM

#### "Section 2

##### *Of the Investigation and Sanction Procedures*

(...) Art. 58.- *Term of exceptions. - After the investigation, if there is merit to continue the procedure, the substantiation body will order the defendant to be notified with the complaint and the filing of charges, so that he can answer it and deduct exceptions within fifteen days. If the accused does not reply to the complaint within the term provided in this article, the procedure will continue in absentia. During the procedure, the accused will have the right to access and request copies of all the proceedings in the file.*

Art. 59.- *Probative term. - The substantiation body will order the opening of the probative term of sixty (60) days, extendable for up to a term of thirty (30) additional days, at the discretion of the authority. Once the term of evidence has concluded, the parties may present arguments within ten (10) days. "*

#### "Section 1

##### *Corrective measures*

(...) Art. 75.- *Procedure. - The Superintendency of Market Power Control will notify the economic operators that have incurred, or may incur, in conduct contrary to this Law, and will indicate what such conduct is and will impose the corrective measures that it deems appropriate.*

*The economic operator(s) will have a term of seventy-two (72) hours to present the disclaimer they believe assists them, or accept the corrective measures. If the discharge is unfounded or insufficient, the SCPM will order the application of corrective measures, without prejudice to the continuation of the procedures determined by this Law."*

### LORCPM REGULATIONS

"Art. 26.- *Procedure of investigation of not notified concentrations. - (...) If, from the previous actions carried out, the Superintendency for Market Power Control concludes that the concentration operation should have been notified and authorized, it will inform the economic operator(s) that it should have notified so that within thirty (30) days they justify the lack of notification. Once the term for presenting explanations has expired, if the Superintendency for Market Power Control considers that they are not satisfactory and if there is merit for the continuation of the investigation, it will initiate the investigation procedure that may not exceed the term of sixty (60) days, extendable for an additional sixty (60) days at one time."*

#### "Section 2 Of the Investigation and Sanction Procedure

(...) Art. 68.- *Term of exceptions. - The investigative body will notify the complainant and the alleged person or persons responsible the report of the results of the investigation. The investigatory body will notify with a copy of the complaint and the formulation of charges in order to answer it and deduct exceptions within fifteen (15) days. If the accused does not reply to the complaint within the term provided for in this article, the procedure will continue in absentia.*

"Art. 69.- *Probative term. - Upon expiration of the term indicated in the previous article, the investigatory body shall order the opening of the probative term of sixty (60) days, which may be extended up to a term of thirty (30) additional days, at the discretion of the authority. During the probative term, the parties may deduce the allegations and present or request the investigation body to carry out the tests that they consider relevant for the defense of their interests."*

### ADMINISTRATIVE PROCEDURAL MANAGEMENT RULINGS OF THE SCPM

"Art. 12.- *NOTIFICATION OF THE RESULTS REPORT. - The investigation phase will conclude with the preparation of a results report issued by the corresponding Director within fifteen (15) days, which will elapse within the aforementioned period of one hundred eighty (180) days, which must be delivered to the Intendent, beginning phase four (4) called substantiation. In this phase of substantiation, the complainant and denounced will be notified with the results report so that the latter answers and deducts exceptions within fifteen (15) days in accordance with Arts. 58 to 61 of the LORCPM and 62 to 72 of the RLOCPM.*

Art. 13.- *PROBATION TERM WITHIN THE SUBSTANTIATION PHASE.- With the exceptions or in default, within three (3) days of the fifteen (15) days term established in Art. 68 RLOCPM for the presentation of the exceptions, the Intendent by order will order the opening of the probative term for sixty (60) days, extendable up to thirty (30) days more, at its discretion, in accordance with article 69 of the RLOCPM; that will be notified to all the procedural parties and to the State Attorney General when*

<sup>4</sup> Procedural internal norm of the SCPM, issued through Resolution of the Superintendent. It is included in annex 4.

appropriate. During this evidentiary season, the procedural parties may request the practice and reproduction of those evidences that during the process they have added. In view of the fact that the burden of proof is, in principle, on the SCPM, the Intendancy must request the practice of evidence that it considers pertinent, in accordance with article 48 of the LORCPM. Any evidence practiced outside the evidentiary term or in violation of the principles of due process will be void in accordance with article 76 number 4) of the Constitution of the Republic.

Documentary information will not be accepted in single copies.”

## ORGANIC ADMINISTRATIVE CODE

*“Art. 14.- Legality principle. Administrative action is subject to the Constitution, international instruments, law, principles, applicable jurisprudence and this Code.*

*The discretionary power will be used according to law.*

*Art. 33.- Due administrative procedure. People have the right to an administrative procedure adjusted to the provisions of the legal system.*

*Art. 101.- Effectiveness of the administrative act. The administrative act will be effective once notified to the administered. The execution of the administrative act without complying with the notification will constitute, for the purposes of the responsibility of public servants, a flawed administrative act.*

*Art. 187.- Complaint. The complaint is the act by which any person informs an administrative body of the existence of a fact that may constitute a basis for the actions of public administrations.*

*The complaint for administrative offenses will express the identity of the person who presents it, the account of the events that may constitute an offense and the date of its commission and, when possible, the identification of the alleged perpetrators.*

*Art. 177.- Competition. Only the competent bodies may order the investigation, investigation, audit or inspection in the matter. The previous actions can be executed by direct or delegated management, in accordance with the law.*

*Art. 248.- Guarantees of the procedure. The exercise of the sanctioning power requires a legally established procedure and it will be observed:*

- 1. In sanctioning procedures, due separation shall be provided between the investigating and sanctioning functions, which shall correspond to different public servants.*
- 2. In no case will a sanction be imposed without the necessary procedure having been processed.*
- 3. The alleged responsible for being notified of the facts imputed to him, of the infractions that such facts may constitute and of the sanctions that may be imposed on him, as well as of the identity of the instructor, of the authority competent to impose the sanction and the norm that attributes such competence.*
- 4. Every person maintains his legal status of innocence and must be treated as such, as long as there is no firm administrative act that resolves otherwise.*

*Art. 164.- Notification. It is the act by which the content of an administrative act is communicated to the interested person or to an undetermined group of people so that the interested persons are able to exercise their rights.*

*The notification of the first action of public administrations will be made personally, by ballot or through the media, ordered by them.*

*The notification of the actions of the public administrations is practiced by any means, physical or digital, that allows to record the transmission and reception of its content.*

*Art. 165.- Personal notification. The content of the administrative act will be delivered to the interested person or their legal representative, anywhere, in any day and time.*

*The constancy of this notification will express:*

- 1. The reception of the administrative act that the interested person grants through any physical or digital means.*
- 2. The refusal of the interested person to receive the physical notification, through the intervention of a witness and the notifier. Notification through electronic means is valid and produces effects, provided that there is evidence in the procedure, by any means, of the transmission and reception of the notification, of its date and time, of the entire content of the communication and that it is reliably identified to sender and recipient.*

*Art. 166.- Notification by ballots. If the interested person is not personally found, they will be notified with the content of the administrative act by means of two ballots that will be delivered on different days at their home or residence to any person in the family. If no person is found to hand them over to, they will be posted at the door of the place of residence. Notification by ballots to the legal representative of a legal person will be made at their main domicile, within the working day, delivering them to one of their dependents or employees, upon confirmation that they are active. The notification of subsequent actions will be made by means of a single ballot, in the event that the interested person has established his domicile in accordance with this Code.*

*Art. 167.- Notification through one of the communication media. The administrative act will be notified through a means of communication in the following cases:*



1. When interested persons are unknown.
2. When the act is addressed to an undetermined plurality of people.
3. When public administrations consider that the notification made to a single interested party is insufficient to guarantee notification to all, being, in the latter case, additional to the notification made.
4. When it comes to acts that are part of a public tender procedure.
5. When the place of the notification is ignored in the procedures initiated ex officio.
6. When expressly authorized by law. Notification through one of the means of communication is void when the public administration has or may have, by any legal mechanism, access to the identification of the domicile of the person concerned or it is possible to practice notification by the means provided.

Art. 168.- Way of executing the notification through one of the communication media. The notification provided in the preceding article will be made by:

1. Publications to be made on two different dates, in a newspaper with wide circulation in the area. If there is not, they will be made in a newspaper of the provincial capital, also widely circulated. If there is not there either, in one of wide national circulation. The publications will contain the text of the administrative act and will be added to the file.
2. Messages that will be transmitted on two different dates, at least three times a day, in a local radio station, between six and twenty-two hours and that will contain the text of the administrative act. The owner or the legal representative of the radio station will issue the certificate attesting to the dates and times when the message transmissions were made and a copy of the audio. Radio notification will be made when, in the opinion of the public administration, this is the main mean of communication in the area.

It can also be published through the institutional media. This will not replace the notification that must be made through one of the abovementioned media.

Publications containing an extract from the administrative act will be void. The administrative act is considered notified, ten days after its publication.

Art. 169.- Notification abroad. In the event that the interested person is abroad, the notification will be made by posters posted at the consulate in which the person is registered.

A record of the certification of the Ministry of Foreign Affairs indicating whether the person left the country or is recorded in the consular registry will be recorded.

Art. 170.- Notification to a plurality of interested parties. In procedures that are initiated ex officio, all interested persons will be notified individually at the beginning of the procedure. For subsequent acts, a common representative will be appointed, unless the interested person decides to participate individually in the procedure.

In the case of indigenous, Afro-Ecuadorian, Montubian and peasant communities not organized as a legal entity, the administrative act will notify three members of the community who are recognized as their leaders and by posters that will be posted in the most frequented places. In addition to the copies in the Spanish language, copies will be delivered in the language of the community in which the procedure is carried out.

In procedures that are initiated at the request of interested persons, notifications will be made to the person designated in their request or, in the absence thereof, to whoever appears first.

Art. 171.- Responsibility. The notification, by direct or delegated management, will be made under the personal responsibility of the public servant determined in the internal organization instruments of the public administrations, who will record in the file the place, day, time and form of notification. "

As can be seen in the previously cited standard, the act of notification of administrative acts and processes is extensively detailed in the current regulations.

With respect to requests for information, the LORCPM grants the SCPM broad powers to request information in its investigations and establishes the legal obligation of the administrators to collaborate at all times with the SCPM. The secondary regulations establish the reasonable terms in which the information must be delivered. The relevant provisions are cited below:

## LORCPM

### "Section 1 Research Faculties

Art. 48.- General rules. - The Superintendency for Market Power Control, before starting the procedure or at any time during it, may require any economic operator or institution or body from the public or private sector, the reports, information or documents that it deems necessary for carrying out their investigations, as well as summon to declare those who are related to the cases in question.

For these purposes, the Superintendency may examine, retrieve, search, use and verify such documents and information, obtain copies or make extracts from them. Those reports or documents must be provided within the term that the Superintendency determines.

*The Superintendency for Market Power Control will not be obliged to abide, against its conviction, to the content of those reports or information. No administrative procedure may be suspended for lack of them.*

*No prior notice is required to the accused or the person to request the information or documentation, prior to the opening of the file.*

*The burden of proof will correspond to the Superintendency for Market Power Control, without prejudice to the evidence provided by the complainant and the accused. However, in the case of agreements and practices prohibited pursuant to Article 11 of this Law, if an economic operator or person denies, hinders or prevents access to information; damages, hides or omits information or delivers false, fraudulent, misleading, deceitful, false, artificial, unreal or malicious information required or related to the economic operator or person in an investigation by the SCPM, the burden of proof will be reverted to said economic operator or person, without prejudice to the other sanctions established in the law.*

*The SCPM has the power to access, review, archive, process and use any data, which exclusively corresponds to the information and documents relevant to the administrative process, respecting the constitutional right to the protection of this information, for investigations, cases or resolutions within its competence, in accordance with the Constitution and the law.*

*The form of the legal acts used by the contracting parties does not weaken the analysis that the authority carries out on the true purposes of the conduct that underlie the legal act that expresses it.*

*Art. 50.- Obligation to collaborate with the organs of the SCPM.- Any natural or legal person, public or private, as well as the authorities, officials and agents of the Public Administration are obliged, without the need for any judicial requirement, to supply the data, documentation, true, truthful and timely information, and all its collaboration, as required by the SCPM and its public servants, if this does not violate citizens' rights.*

*The authorities and public servants referred to in the preceding paragraph are obliged to lend their collaboration and help, under penalty of the sanctions provided in the law that regulates the public service for the breach of its essential duties and this Law. Individuals who do not supply the required information will be sanctioned with the fines and penalties provided in this Law.*

*The Superintendency of Market Power Control has the power to request and practice ex officio all the tests and administrative procedures necessary to clarify the acts, complaints and procedures that it knows and will investigate ”*

## **ADMINISTRATIVE PROCEDURAL MANAGEMENT RULINGS OF THE SCPM**

### **CHAPTER VIII PROCEDURAL MANAGEMENT IN PROCEDURES SPECIALS AND THEIR SANCTIONS**

*Art. 56.- PROCEDURE AND APPLICATION OF THE FINE FOR NOT DELIVERING INFORMATION. - When information is requested, within investigative processes or for market studies or research pursuant to article 38, number 1; 48 and 50 of the LORCPM, it will proceed as follows:*

*1.- In the case of Market Studies carried out by the Intendencies of Advocacy of Competition and of Control of Concentrations, the Intendent will request the respective economic operator to deliver the necessary information to carry out the market studies, for which it will grant a term of up to thirty (30) days for the fulfillment of the delivery of accessible information without a security key to be treated confidentially and reserved, as the case may be, in accordance with Article 3 of the RLORCPM, which may be extended, from ex officio or at the request of a party, and once only for a term of twenty (20) days, warning that in case of non-compliance, the sanction provided for in the penultimate subsection of Article 79 of the LORCPM will be imposed.*

*2.- In the case of request for delivery of information arranged by the SCPM, in investigation processes of alleged infractions to the LORCPM and in cases of examination of control of economic concentrations, the Intendent will arrange for the economic operator to deliver the required information granting a term of up to thirty (30) days, which may be extended, ex officio or at the request of a party, up to a term of twenty (20) days, preventing that in case of non-compliance, the sanction provided for in the penultimate subsection will be imposed of Article 79 of the LORCPM.*

*If the economic operator does not deliver the required information or the delivery outside the granted term or the information delivered is partial or defective or forwards it in technological instruments with securities that make it inaccessible, the following will be observed:*

- a) Within the term of five (5) days after the infraction, a reasoned report signed by the Intendent, Director and the analysts will be sent to the First Instance Resolution Commission (CRPI in Spanish), informing the Intendent General of this action;*
- b) The CRPI within three (3) days after receipt of the report, will take knowledge and open a file, and may within five (5) days end of taking knowledge by providence, request the issuer to clarify, modify or complete the information, if applicable, giving the requested the next five (5) days term to attend the provision;*
- c) The CRPI, with the report clarified, modified or completed, will provide a transfer to the economic operator by order, for a period of three (3) non-extendable days, so that it may pronounce;*
- d) With or without the answer, the term of proof will be opened ex officio for six (6) days in which evidence and documents may be presented in original or certified copies, simple copies will not be considered.*

e) To consider it relevant in accordance with the provisions of art. 38 number 4 of the LORCPM, within three (3) days of the conclusion of the probative period, the CRPI may set the day and time for the holding of a hearing; however, if this is at the request of a party, the diligence cannot be denied.

f) The Commission within a term of ten (10) days after the expiration of the probatory period or after the hearing has been held, shall issue the reasoned resolution by which, if applicable, will impose the fine for noncompliance, provided for in article 79, second to last paragraph of the LORCPM, or will request the archive of the file.

g) The Commission, in case of having imposed a fine, will order in its resolution that it be paid within the term of fifteen (15) days. For this, the Commission will order the Financial Direction of the SCPM to certify if the payment has been made; if it has not done so, it shall order said Direction to issue the title of credit and send it to the CGAJ so that it may collect the payment through a coercive method.

In the event that the imposition of a coercive fine is appropriate, the provisions of this instrument will be followed; and, in the Instructive of the matter.

## e) ) **Timing of Investigations and Enforcement Proceedings**

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

The times, for the investigations, are fatal, that is to say, the maximum time cannot be exceeded (extensions included) without affecting the validity of the process. The only exception is the case of market studies which, being an exercise in promoting competition, are subject to the times set in internal regulations with the possibility that the times be extended according to the authorities' criteria.

Of the most important processes we can point out that, in general, the procedural times are:

- Economic concentration authorization process: (Art. 21 LORCPM) sixty (60) business days, extendable for sixty (60) additional business days.
- Preparation of market studies: (Art. 41 letter f) Administrative Procedure Management Instructions) one hundred eighty (180) calendar days, extendable by one hundred eighty (180) additional calendar days and possibility of extra extensions by decision of the authorities.
- Administrative sanctioning procedures: (Arts. 53-71 Regulations to the LORCPM)
  - A preliminary investigation stage is established with a maximum duration of one hundred eighty (180) business days.
  - Fifteen (15) business days are granted to the respondent to present explanations.
  - If it is decided to open a formal investigation, a stage of one hundred eighty (180) calendar days, extendable for one hundred eighty (180) additional calendar days, is opened.
  - Fifteen (15) business days are granted to the respondent to present explanations.
  - A trial period is opened for sixty (60) business days, extendable for an additional thirty (30) business days.
  - A term of fifteen (15) business days is opened for the issuance of the final report.
  - A term of ten (10) additional business days is granted for allegations.
  - A stage of ninety (90) calendar days is opened within which the final resolution will be issued.

As mentioned, with the exception of market studies, non-compliance with the times has drastic consequences for the validity and efficiency of the processes, since administrative silence may occur in the case of concentration authorizations or the SCPM may lose competence. Therefore, any administrative act issued by it will be void.

In certain cases, the times established above can be suspended. The relevant regulations are cited below:

### **LORCPM**

*"Art. 21.- Authority Decision.- In all cases submitted to the prior notification procedure established in this chapter, except for those of an informative nature established in the second paragraph of article 16 of this Law, the Superintendency, by reasoned resolution, shall decide within the term of sixty (60) calendar days of submitting the application and respective documentation:*

- a) *Authorize the operation;*
- b) *Subordinate the act to the fulfillment of the conditions that the Superintendency itself establishes; or,*
- c) *Deny the authorization.*

*The term established in this article may be extended once, up to sixty (60) additional term days, if the circumstances of the examination require it."*

## LORCPM REGULATIONS

### "Section 2

#### *Investigation and sanction procedure*

*Art. 53.- File. - The Superintendent for Market Power Control will regulate the treatment of the files and their replacement in case of loss or destruction.*

*Art. 54.- Initiation of the procedure. - In accordance with the provisions of article 53 of the Law, the procedure will be initiated ex officio, at the request of another body of the Public Administration, or by complaint.*

*Art. 55.- Initiation of the ex officio procedure. - The procedure will be initiated ex officio by the SCPM after having had direct or indirect knowledge of the conduct that may constitute an infringement; or as a consequence of the results of economic studies or the permanent examination of the restrictions conferred under the Law.*

*The substantiation body will open a file and conduct a preliminary investigation, the report of this investigation may not be issued in more than one hundred eighty (180) days, after having resolved the initiation of the investigation.*

*Within the term of three (3) days of having concluded the report, the alleged or presumed responsible will be notified of the existence of presumptions of having incurred an infraction.*

*The alleged or presumed responsible may present explanations within fifteen (15) days of notification of the start of the preliminary investigation. Upon expiration of this term, the substantiation body will rule, within ten (10) days, on the initiation of the investigation in accordance with article 56 of the Law or will order the archive of the file. If the investigation begins, the procedure will continue and will be resolved in accordance with articles 58 to 61 of the Law and articles 62 to 72 of the LORCPM Regulations.*

*Art. 56.- Initiation of the procedure at the request of another body of the Public Administration. - Any body of the Public Administration that has direct or indirect knowledge of conducts that may constitute an infringement must request the SCPM to initiate a procedure against the alleged or alleged perpetrators. For this purpose, it will accompany all the information it deems relevant to justify the start of the procedure.*

*If the Superintendence finds that it is appropriate, through the substantiation body, it will open a file and conduct a preliminary investigation. The report of it may not be issued in more than one hundred eighty (180) days after having resolved the initiation of the investigation.*

*Within the term of three (3) days of having concluded the report, the alleged or presumed responsible will be notified of the existence of presumptions of having incurred an infraction.*

*The alleged or presumed responsible may present explanations within fifteen (15) days of notification of the start of the preliminary investigation. Upon expiration of this term, the substantiation body will rule, within ten (10) days, on the initiation of the investigation in accordance with article 56 of the Law or will order the file of the file. If the investigation begins, the procedure will continue and will be resolved in accordance with articles 58 to 61 of the Law and articles 62 to 72 of the Regulations.*

*Art. 57.- Commencement of the procedure by complaint. - The complaint may be made by the victim, or by any natural or legal person, public or private that demonstrates a legitimate interest.*

*Art. 58.- Substantiation. - In all cases, the investigation and sanction procedure will be substantiated by the investigative body until the final report is issued; and, by the substantiation and resolution body, from the moment it receives the final report and file sent by the investigative body until the resolution of the procedure. For the purposes of articles 55 to 63 of the Law, a substantiation body shall be understood as the one that conducts the procedure in each one of said stages in accordance with these Regulations.*

*Art. 59.- Content of the complaint. - The complaint must contain, as a minimum, the requirements established in article 54 of the Law. The withdrawal of the complainant will not prevent the SCPM from continuing with the investigation stage and from carrying out all the actions deemed necessary to determine if there are indications of an infraction of the norms established in the Law.*

*Art. 60.- Qualification of the complaint. - Once the complaint is received, the investigative body, within ten (10) days from the date of its receipt, will verify that it complies with the requirements indicated in these Regulations and the Law.*

*If the complaint does not meet the requirements established in the previous article, the complainant will be asked to clarify or complete it within three (3) days, as indicated in article 55 of the Law. If not completed in the indicated term, without further process, its file will be archived and the complaint will be considered abandoned.*

*If the complaint meets the requirements established in the Law, or if it is clarified or completed, the investigative body will open a file and will send a transfer to the alleged person or suspects with the complaint so that they can present their explanations within fifteen (15) days. .*

Art. 61.- *Previous investigation.* - Once the complaint is filed and prior to the resolution to initiate the procedure, the investigatory body may carry out previous actions in order to gather information or identify reasonable indications of the existence of infractions of the Law.

Art. 62.- *Resolution to initiate the investigation.* - Once the term has expired for the alleged or presumed responsible parties to present explanations, if the investigative body considers that there are presumptions of the existence of any of the infractions provided for in the Law, it shall issue, in the term of ten (10) days, a duly motivated resolution in which the investigation stage will begin and will establish its term of duration that may not exceed one hundred eighty (180) days, extendable up to one hundred eighty (180) days additional once.

The resolution to initiate the investigation stage must contain at least the following:

- a) Identification of the alleged perpetrators and the complainants, if any;
- b) The conduct under investigation, the characteristics of the goods or services that would be the subject of the conduct, the goods or similar services allegedly affected, the duration of the conduct, the identification of the parties, their existing economic relationship with the conduct, the relationship of the evidence presented;
- c) Facts that motivated the resolution of initiation;
- d) Identification of third parties who hold their status as interested parties, if any; and,
- e) Duration of the investigation stage.

Art. 63.- *Resolution of the complaint file.* - When, of the facts investigated, there is no merit for the continuation of the procedural instruction, or the explanations presented by the accused are satisfactory, the investigative body, by means of a reasoned resolution that will be notified to the complainant (s), will order the filing of the complaint.

Art. 64.- *Investigation stage.* - The investigative body may require any economic operator, institution or body of the public or private sector, the reports, information or documents that it deems necessary for the purposes of carrying out its investigations and will carry out any actions, procedures and analysis that are necessary for the clarification of the facts and the determination of responsibilities in accordance with the powers established in the Law.

The information requested must be provided within the term indicated in the information request and if this is not the case, the fines and penalties established by law will be applied.

Art. 65.- *Access to information in the file.* - During the processing of the procedure in the investigation stage, the parties may access the file and obtain individualized copies of all the documents that comprise it, except for the commercial secrets of other interested parties or third parties, as well as any other confidential information.

Art. 66.- *Accumulation of files.* - The investigatory body, ex officio or at the request of the interested parties, may order the accumulation of files when there is a direct connection between them.

The investigatory body, ex officio or at the request of the interested parties, may order the breakdown of the files when the nature of the facts denounced makes it necessary to process independent procedures.

Likewise, it may extend the Investigation Initiation Resolution when, in the course of the investigation, the participation of other alleged perpetrators, the alleged commission of other infractions, or new interested parties not included above appear.

If the Investigation Initiation Resolution is extended, said extension will be notified to the alleged perpetrators in order to answer and deduct exceptions within fifteen (15) days.

Art. 67.- *Report of the results of the investigation stage.* - At the end of the investigation period, the investigation body will issue a report on the results of the investigation carried out. In its report, it will propose, if applicable, the corrective measures and sanctions that in your opinion should be imposed.

Art. 68.- *Term of exceptions.* - The investigative body will notify the complainant and the alleged person or persons responsible the report of the results of the investigation. The investigatory body will notify with a copy of the complaint and the formulation of charges in order to answer it and deduct exceptions within fifteen (15) days.

If the accused does not reply to the complaint within the term provided in this article, the procedure will continue in absentia.

Art. 69.- *Test term.* - Upon expiration of the term indicated in the previous article, the investigatory body shall order the opening of the probative term of sixty (60) days, which may be extended up to a term of thirty (30) additional days, at the discretion of the authority.

During the probative term, the parties may deduce the allegations and present or request the investigation body to carry out the tests they consider relevant for the defense of their interests.

Art. 70.- *Final report.* - At the end of the probative period, the investigation body will issue a final report within fifteen (15) days. The final report will contain the enumeration and assessment of the evidence presented during the trial term; the proposed sanctions and corrective measures; and, where appropriate, the proposal for exemption or reduction of the amount of the fine in accordance with the provisions of the Law.

*The final report will be sent within the term indicated in the preceding paragraph to the substantiation and resolution body, together with the record of the procedure, for its knowledge and resolution.*

*Art. 71.- Resolution stage. - Once the final report has been received and within three (3) days, the substantiation and resolution body will send it to the parties, who may present arguments to said body within ten (10) days.*

*If the body of substantiation and resolution deems it appropriate, it will order that a public hearing be called, indicating the day and time of the hearing. The interested parties may plead and present the documents and justifications they deem pertinent.*

*Having transferred the parties the final report; or, once the public hearing has been held, the substantiation and resolution body will issue a duly motivated resolution within a maximum period of ninety (90) days.*

*The resolution must contain the background of the file, the allegations adduced by the interested parties, the evidence presented by them and their assessment, the factual and legal grounds for the resolution, the identification of the violated norms or principles and those responsible, the legal qualification of the facts, the declaration of infringement and, where appropriate, the effects produced in the market, the responsibility that corresponds to its authors, the concurrent aggravating and mitigating circumstances and the decision on the application, exemption or reduction of the amount of the fine.*

*If it is determined that an infringement of the Law occurred, the substantiation and resolution body through resolution, will impose the sanctions and corrective measures established by Law or, if applicable, the exemption or reduction of the fine when appropriate.*

*During this period, if the substantiation and resolution body considers it necessary, it may request that the investigative body carry out complementary actions that could serve as evidence. The investigative body will send the substantiation and resolution body a report on the results of the complementary actions it has carried out."*

## **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

Both the LORCPM and its Regulations impose the duty of secrecy and reserve on SCPM officials, for which there are administrative, civil and even criminal consequences in the event that said duty is not fulfilled. By virtue of the foregoing, the SCPM has established a protocol for the treatment of reserved and confidential information. Relevant standards are cited.

### **LORCPM**

*"Art.- 47 Duty of secrecy and reserve. - Those who take part in the conduct of investigations or in the processing of procedures or files provided for in this Law or who know such files by reason of their position, work or profession, are obliged to keep confidentiality, reservation and secrecy regarding the facts that they may have had knowledge through them, in application of the norms of this chapter.*

*The obligation of confidentiality and secrecy extends to all persons who, due to the exercise of their profession, specialty or occupation, even when they are not part of the Superintendency, come to know of information contained in the files, investigations and complaints based on the provisions of the present Law and in the laws and regulations of the matter.*

*Without prejudice to civil and criminal responsibilities, which may correspond to violators of the duty of secrecy, confidentiality or secret, the violation of this duty will be considered as grounds for dismissal. They will only be able to report on those facts or circumstances to the competent Judges, Courts and Bodies of the Judicial Function and only by express provision of the judge or of the judges who know a specific case, a Function that will maintain the confidentiality of the information."*

### **LORCPM REGULATIONS**

"Art. 3.- Confidentiality of the information. - The information and documents obtained by the SCPM in its investigations may be classified as reserved or confidential, ex officio or at the request of an interested party. The Superintendency will establish the instructions for its treatment within the framework of the Constitution and the law. "

#### **RESOLUTION No. SCPM-DS-037-2017**

#### **CLASSIFICATION OF INFORMATION IN THE INVESTIGATION AND SANCTION FILES OF THE SCPM**

"Article 1.- Scope. - All the personnel of the SCPM, within the scope of their administrative competences, in the digital records of studies, economic concentration, investigation, substantiation and resolution, must observe the classification of the information contained in the following articles. "

Article 4.- Confidential Information. The information classified as confidential is that information derived from the most personal and fundamental rights, the disclosure of which can cause serious damage to the holder of his personal data, commercial secrets, marketing strategies, and, in general, information that if it becomes known third parties may grant unwarranted advantages or benefits in the field of competition.

"For which this information will be declared confidential, ex officio or at the request of a party, in accordance with the provisions of the Constitution of the Republic of Ecuador; the LORCPM; its Regulations and other related regulations.

Article 5.- Reserved Information. - The information classified as reserved is that whose disclosure may jeopardize or compromise the existence of a legal asset of an economic, social, health, governance, security, or threaten prevention, investigation and sanction of the offenses established in the LORCPM, and its Regulations.

Therefore, only the parties directly involved in an administrative process of investigation and/or sanction, economic concentration or studies, which are processed in the SCPM, may access it, as long as the information has not been declared confidential in accordance with the provisions of the LORCPM,, its Implementing Regulations and other related regulations."

#### **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

In Ecuadorian legislation there are principles that generally cover the entire public sector and that attempt to resolve problems of conflicts of interest to prevent misuse of public resources, guarantee legal certainty, and protect citizens' rights. The SCPM is no stranger to this reality and there are express provisions of the LORCPM in this regard. The corresponding standards are cited below.

#### **CONSTITUTION OF ECUADOR**

"Art. 232.- Those who have interests in the areas to be controlled or regulated or represent third parties that have them may not be civil servants or officials or members of executive bodies of entities that exercise the state power of control and regulation.

Public servants will refrain from acting in cases in which their interests conflict with those of the body or entity in which they provide their services. "

#### **LORCPM**

"Art. 46.- Dedication and diligence. - The public servants and officials of the SCPM must dedicate themselves exclusively and full time to the tasks inherent to their function, except in cases of teaching in higher education entities. They will exercise their functions diligently and will be subject to professional responsibility. Tthe aforementioned personnel are prohibited from freely exercising their profession or technical specialty or other activity, with or without a dependency relationship, as well as occupying managerial, executive or administrative positions in entities or organizations with or without profit aims.

Servants or officials of the SCPM may not be appointed if they do not comply with the requirements established for the respective position, in accordance with the law that regulates the public service, or who have interests in the areas that will be controlled.

*The servers and officials of the SCPMI will be subject to periodic evaluations and will be permanently qualified. Those who have been servants or officials of the Superintendency may not exercise professional activities in areas related to the subject regulated under this law during the period of one year from the date on which said servers or officials have ceased their functions.*

*Administrative personnel who, due to the nature of their functions, have not had access to the information or files corresponding to the administrative processes submitted to the Superintendency, are excepted from this provision. "*

#### **ORGANIC ADMINISTRATIVE CODE**

*"Art. 19- Principle of impartiality and independence. Public servants will avoid resolving for affections or disaffections that involve a conflict of interest or generate actions incompatible with the general interest.*

*Art. 86.- Grounds. The following are grounds for excuse and challenge:*

- 1. Have a personal or professional interest in the matter.*
- 2. Maintain commercial, corporate or financial relationships, directly or indirectly, with taxpayers or contractors of any State institution, in cases where the public servant, due to his duties, must personally attend to such matters.*
- 3. Be a relative up to the fourth degree of consanguinity or second degree of affinity of any of the interested parties, their legal representative, agent or administrator.*
- 4. Have intimate friendship, manifest enmity, conflict of interest or pending controversy, with the interested person.*
- 5. Have intervened as a representative, expert or witness in the procedure in question.*
- 6. Have an employment relationship with the natural or legal person interested in the matter or have provided professional services of any kind and in any circumstance or place, in the immediately preceding year.*

*Art. 87.- Procedure in the excuse. The public servants in whom any of the circumstances of excuse concur must communicate this situation to their immediate superior so that they can resolve it.*

*The communication will be written and will express the cause or causes on which it is based. The excuse suspends the term for the resolution of the procedure and prevents the person who excuses himself from intervening in it, until the resolution is issued. The higher body must resolve the excuse within five days and, if it deems appropriate, designate the substitute in the same resolution.*

*The substitute will be of the same hierarchy as the inhibited public servant. If it is not possible, knowledge of the matter will correspond to the immediate superior.*

*If the superior does not admit the excuse, he must return the file so that the public servant can continue the procedure."*

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

*This topic was already described in section d) of this document, however it can be reiterated that the Constitution of Ecuador determines the basic procedural guarantees that are fully applicable in the management of the SCPM. The mention of the relevant standards is reiterated.*

#### **CONSTITUTION OF ECUADOR**



"Art. 75.- Everyone has the right to free access to justice and to effective, impartial and prompt protection of their rights and interests, subject to the principles of immediacy and speed; in no case will it be left defenseless. Failure to comply with court decisions will be sanctioned by law.

Art. 76.- In any process in which rights and obligations of any order are determined, the right to due process will be ensured, which will include the following basic guarantees:

7. The right of individuals to defense shall include the following guarantees:

a) No one may be deprived of the right to defense at any stage or degree of the procedure.

b) Have the time and the appropriate means to prepare their defense.

c) Be heard at the right time and on equal terms.

h) Present verbally or in writing the reasons or arguments for which it is believed to be assisted and replicate the arguments of the other parties; present evidence and contradict the ones presented against him. "

## ORGANIC ADMINISTRATIVE CODE

"Art. 32.- Right of petition. People have the right to make petitions, individually or collectively, before public administrations and to receive motivated responses, in a timely manner.

Art. 33.- Due administrative procedure. People have the right to an administrative procedure adjusted to the provisions of the legal system.

Art. 196.- Contradiction rule. The evidence provided by the public administration will only have value, if the interested person has had the opportunity to contradict it in the administrative procedure. For this purpose, the practice of the proceedings ordered by the public administration will be notified to the interested person in order to exercise their right of defense. "

### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.

As previously described within the SCPM management, constitutional guarantees of due process and the right to defense are fully applicable, which includes the right to legal representation.

## CONSTITUTION OF ECUADOR

Art. 76.- In any process in which rights and obligations of any order are determined, the right to due process will be ensured, which will include the following basic guarantees:

7. The right of individuals to defense shall include the following guarantees:

a) No one may be deprived of the right to defense at any stage or degree of the procedure.

g) In judicial proceedings, be assisted by a lawyer or attorney of his/her choice or by a public defender; access, free and private communication with their defender may not be restricted [...]"

The powers of investigation already mentioned in previous points allow the SCPM to request information directly from those administered, without prejudice to the fact that they can appoint a legal defender without the SCPM

being able to object. The only requirement of the SCPM will be that the legal defender accredit its quality in a documented way.

#### LORCPM

"Art. 49.- Faculty of investigation of the SCPM.- The SCPMr, through its internal organs, will have the following investigative powers, which will be exercised within the framework of the Constitution, the law and respect for the rights and guarantees of citizens:

1. Require that all securities, books, accounting vouchers, correspondence, magnetic or computer records, including their means of reading, and any other document related to the investigated conduct or the inspected activities be presented for examination, without reservation of any nature that can be adduced.
2. Notify, examine and receive a statement or testimony, through the officials designated for this purpose, to the persons subject to the investigation or to their representatives, employees, officials, advisers, dependents and third parties, using the technical means they deem necessary to generate a complete and reliable record of their statements, being able to use tape recordings, video recordings or other similar ones. For this, the statement will be made with the presence of a private attorney or a public defender provided by the State.
3. Carry out inspections, with or without prior notification, in the establishments, premises or buildings of natural or legal persons and examine books, records, and any other document related to the investigated conduct, commercial correspondence and property, being able to check the development of productive processes and will be able to receive the voluntary declarations of the people who are in them. "

#### j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.

Again, it is pertinent to resort to the general administrative procedural rules and constitutional guarantees that are applicable to the management of the SCPM. The Magna Carta requires that the acts of the public power be motivated, understanding that this motivation is the enunciation of the legal norms or principles on which the respective act is based and where the relevance of its application to the factual background is explained. Relevant standards are cited.

#### CONSTITUTION OF ECUADOR

"Art. 76.- In any process in which rights and obligations of any order are determined, the right to due process will be ensured, which will include the following basic guarantees:

7. The right of individuals to defense shall include the following guarantees:

l) The resolutions of the public powers must be motivated. There will be no motivation if the resolution does not state the legal norms or principles on which it is based and does not explain the relevance of its application to the factual background. Administrative acts, resolutions or rulings that are not duly motivated will be considered null. The responsible servants will be sanctioned."

#### ORGANIC ADMINISTRATIVE CODE

"Art. 99.- Validity requirements of the administrative act. The validity requirements are:

1. Competition
2. Purpose
3. Will
4. Procedure

#### 5. Motivation

Art. 100.- Motivation of the administrative act. In the motivation of the administrative act will be observed:

1. The indication of the legal norm or applicable legal principles and the determination of its scope.
2. The qualification of the facts relevant to the adoption of the decision, based on the evidence that appears in the administrative file.
3. The explanation of the relevance of the legal regime invoked in relation to the determined facts. Reference may be made to other documents, provided that the reference is incorporated into the text of the administrative act and is recorded in the file to which the person concerned has had access. If the decision contained in the administrative act does not derive from the procedure or does not follow logically from the stated grounds, it will be understood that it has not been motivated."

#### k) Independent Review

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

The LORCPM based on what is established in the Constitution, expressly contemplates the legal actions that can be attempted against its decisions. The judicial review is independent since it corresponds to another power of the State. There are also administrative remedies and it is even planned that it is not necessary to exhaust the administrative route to go to the judiciary. The relevant regulations are cited.

#### CONSTITUTION OF ECUADOR

"Art. 76.- In any process in which rights and obligations of any order are determined, the right to due process will be ensured, which will include the following basic guarantees:

(...) 7. The right of individuals to defense shall include the following guarantees:

(...) M) Appeal the ruling or resolution in all the procedures in which they decide on their rights. "

#### LORCPM

"Art. 69.- Contentious action.- In accordance with article 173 of the Constitution and with the challengeable nature of administrative acts, administrative acts of the SCPM are subject to challenge, provided they are not firm, by action or contentious appeal of full or subjective jurisdiction.

To deduce the contentious action it will not be necessary to exhaust the administrative route. The term to file this appeal before the Administrative Contentious Jurisdiction is ninety days from the notification of the appealed act. The contentious remedy of full jurisdiction will only have reimbursement effect.

This contentious remedy is not suspensive with respect to preventive measures and corrective measures in any case, except for the suspension of the economic fine, provided that the injured or sanctioned person pays bond for the fifty percent of value set by the competition authority, through a policy of insurance or bank guarantee issued in favor of the corresponding Court.

The contentious appeal for annulment or objective may be proposed within a period of three years from the effective date of the appealed act. This resource will only have a return and not a suspensive effect.

The protection action on the acts issued by the SCPM does not proceed in the cases established in article 42 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.

The claim or appeal presented does not suspend the investigation initiated by the SCPMr."

#### PARTICIPANTES DE ICN CAP<sup>5</sup>

(A partir de agosto de 2019)

1. Autoridad de competencia de Albania
2. Comisión de Competencia y Consumidores de Australia
3. Austria Bundeswettbewerbsbehörde

<sup>5</sup> <https://www.internationalcompetitionnetwork.org/>

4. Comisión de Competencia de Bangladesh
5. Comisión de Comercio Justo de Barbados
6. Bélgica Mededingingsautoriteit
7. Comisión de Protección de la Competencia de Bulgaria.
8. Brasil Conselho Administrativo de Defesa Econômica
9. Comisión de competencia de Caricom
10. Chile Fiscalía Nacional Económica
11. Superintendencia de Industria y Comercio de Colombia
12. Oficina de Competencia de Canadá
13. Costa Rica Comisión para Promover la Competencia
14. Autoridad de Comercio Justo de Curazao
15. Comisión de Chipre para la Protección de la Competencia
16. Oficina de Protección de la Competencia de la República Checa.
17. Dinamarca Konkurrenc-og Forbrugerstyrelsen
18. Ecuador Superintendencia de Control del Poder de Mercado
19. Comisión Europea Dirección General de Competencia
20. Autoridad Europea de Vigilancia de la Asociación de Libre Comercio
21. Finlandia Kilpailu- ja kuluttajaviraston
22. Francia Autorité de la concurrence
23. Autorité de la concurrence de la Polinesia Francesa
24. La Comisión de Competencia y Protección del Consumidor de Gambia
25. Bundeskartellamt alemán
26. Agencia de Competencia de Georgia
27. Autoridad Reguladora de la Competencia Guernsey (Islas del Canal)
28. Comisión Helénica de Competencia
29. Hungría Gazdasági Versenyhivatal
30. La autoridad islandesa de competencia
31. Comisión de Competencia de la India
32. Comisión de Indonesia para la supervisión de la competencia empresarial
33. Comisión de Competencia y Protección del Consumidor de Irlanda
34. Italia Autorità Garante della Concorrenza e del Mercato
35. Comisión de Comercio Justo de Jamaica
36. Comisión de Comercio Justo de Japón
37. Autoridad Reguladora de Competencia de Jersey (Islas del Canal)
38. Autoridad de competencia de Kenia
39. Comisión de Comercio Justo de Corea
40. Ministerio de Justicia de Corea
41. Consejo de Competencia de la República de Letonia
42. Consejo de competencia de Lituania
43. Conseil de la Concurrence Grand-Duche de Luxembourg
44. Comisión de Competencia y Comercio Justo de Malawi
45. Comisión de Competencia de Mauricio
46. México Comisión Federal de Competencia Económica
47. Consejo de Competencia de la República de Moldova
48. Países Bajos Autoriteit Consument & Markt
49. Autorité de la concurrence de la Nouvelle-Calédonie
50. Comisión de Comercio de Nueva Zelanda
51. Noruega Konkurranseloven Tilsynet
52. Comisión de Competencia de Pakistán
53. Autoridad de Protección al Consumidor y Defensa de la Competencia de Panamá
54. La Comisión Independiente de Consumo y Competencia de Papua Nueva Guinea
55. Perú Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual
56. Portugal Autoridade da Concorrência
57. Consejo de Competencia de Rumanía
58. Servicio Federal Antimonopolio de la Federación Rusa

59. Comisión de Protección de la Competencia para la República de Serbia
60. Comisión de Competencia y Consumidores de Singapur
61. Comisión de Competencia de Sudáfrica
62. Agencia Eslovena de Protección de la Competencia
63. España Comisión Nacional de los Mercados y la Competencia
64. Suecia Konkurrensverket
65. Suiza Wettbewerbskommission
66. Turquía Rekabet Kurumu
67. Comité antimonopolio de Ucrania
68. Autoridad de Competencia y Mercados del Reino Unido
69. Departamento de Justicia de los Estados Unidos, División Antimonopolio
70. Comisión Federal de Comercio de los Estados Unidos
71. Uruguay Comisión de Promoción y Defensa de la Competencia
72. Comisión de competencia y tarifas de Zimbabwe