New reforms to Ecuador's merger control regime and restrictions 'by object'

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Andrés Rubio Puente (Pérez Bustamante & Ponce)

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Last week (November 17, 2020), Ecuador's Executive Branch issued the second package of reforms to its competition regime this year (Executive Decree 1193). The two main changes have to do with merger control and with restrictions 'by object'.

Following last April's implementation of an expedited concentration procedure, the new reform now seeks to reduce the competition authority's decision times also within the regular track. This is expected to be achieved through the establishment of a two-phase investigation similar to that of the European Commission.

The new 'Phase I' will take place during the first 25 business days of the regular 60-day period. Transactions will be cleared at the end of this stage if the Superintendence concludes they do not present any anticompetitive risk. If further analysis is deemed to be necessary, the investigation will then continue to what can be called 'Phase II' for the remaining 35 days (or more, if the proceeding is extended, as allowed by law). This change will permit the competition agency to focus its efforts on the most complex deals while accelerating more straight-forward ones.

Additionally, the length of the period during which the proceedings can be suspended has also been reduced. The Superintendence has always had the faculty to stop the clock for up to 60 business days if the circumstances of the case so merit; now, such interruption cannot last longer than 45 business days.

Other modifications to the merger regime include smoother definitions of 'economic group' (single entity doctrine) as well as of what constitutes a 'conclusion of a concentration agreement' under different scenarios. Explicit recognition of the possibility to have less formal contacts with the authority before filing has also been included.

Regarding restrictions 'by object', the reform has clarified which practices shall specifically be considered so (price-fixing, market sharing, bid-rigging, other hardcore cartels) as well as the already existing legal rule according to which those behaviours cannot benefit from a *de minimis* justification, i.e. they are forbidden in all cases.

Although the Executive Decree has still left some room – arguably, more than before – for the Superintendence to include further conducts in this group besides hardcore cartels when the legal and/or economic context so merits (opening up the discussion, as in Europe, of which conducts are serious enough to constitute a restriction of this kind), in practical terms this list makes apparent the different regimes applicable to restrictions 'by object' and to restrictions 'by effect'. Both the Ecuadorian Competition Act and its Regulation have been referring to these situations rather indirectly, which has led to some confusions, on judicial forums especially.

Along the same line, it should be highlighted here the use of the expression 'agreements and practices restrictive by object' on the decree. A more technical interpretation of this figure could be expected as a result of this improved wording.

Another relevant development is the exclusion of the figure of 'abuse of market power in the context of economic dependence' from those conducts sanctioned with monetary fines. Although this was already done by the Competition Act, the Regulation ordered differently. The reform has then restored the original design on this matter, allowing only behavioural remedies to be ordered in that special – and less pernicious – case (which is a more reasonable position since this type of abuse, by its nature, can have private consequences only).

A reassignment of functions – from the Board of Regulation to the Superintendence – regarding the market definition and calculation of fines has also been included, whose effects are yet to be seen, but most surely will reinforce the powers of the Superintendence.

Both these and April's reforms are most welcomed improvements by the professional forum and, more importantly, by those businesses looking forward to land on Ecuador.