

# **Guideline** for ***Compliance in Competition***

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**National Direction of Competition Promotion  
National Intendence of Competition Advocacy**

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**SCPM**

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## **Superintendency For Market Power Control**

**National Intendency of Competition Advocacy**

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### **Guideline of Compliance in Competition Version 1.0.**

**Guideline SCPM – INAC –DNPC – 002.  
Quito, august 2021.**



The current world demands enterprises to adopt all good practices applicable to their operation: there are social, environmental, standards, among others. Within this tendency, Compliance (also called normative compliance), is presented as a discipline that looks to grant of mechanisms to the organizations for them to comply with any type of norms, regarding legal order as for the ones voluntarily assumed, as for example, quality standards.

In exercise of the attributions that this Superintendency for Market Power Control (SCPM) has, we put at the disposition of economic operators, the Guideline for Compliance in Competition, that has been built with the valuable help of Fundación Ciudadanía y Desarrollo (FCD) and the Pan American Development Foundation (PADF). We also thank everyone that in a qualified and generous manner, have taken part in the construction of this document, in benefit of the collectivity

Our guide in compliance in competition looks to become into a contribution to all economic operators, their directive officers, representatives, advisors, and, in general, for all of their members, as it shall provide recommendations to serve as guide for each organization, doing a self-evaluation of its risks, design its compliance program in matter of compliance in competition. With that said, the guide pretends to be a tool for the effective enforcement of competition law, on the part of economic operators. The success of these, is not based only in the way in which they serve their clients, but also in the way they manage their business in front of the parameters that the law and good corporative practices impose.

We trust that economic operators may encounter the benefits of implementing a compliance program, among which is important to mention the generation of a more solid corporative culture and a commitment of employees with business integrity. Finally, I must mention that the guide is a solid evidence of what can be achieved when there is mutual support between public and private sectors. For that, we are sure that the product of this close collaboration will be of great benefit in the relation of economic operators with the regime of competition and authorities in charge of its vigilance.

***Danilo Sylva Pazmiño***

**Superintendent For Market Power Control**

## Guideline of Compliance in Competition

This Guide will address the figure of a Compliance Program in Ecuadorian competition law, with the aim of becoming an effective tool to prevent the commission of anti-competitive practices, which are established in the Organic Law of Regulation and Control of Market Power (LORCPM), and which are explained and regulated in complementary regulations to the LORCPM<sup>1</sup>. In this manner, we intend to contribute with a model of Competition Compliance adapted to the reality of Ecuador, with a preventive approach on all the regulations that must be fulfilled by all the actors of the society that can be considered as economic operators, according to article 2 of the LORCPM<sup>2</sup>.

This Guide seeks to orient economic operators in the adoption and implementation of a Compliance program, informing them of the benefits of having such a program as part of their business strategy, establishing general recommendations on the essential requirements and elements that such programs should include. In turn, a Compliance program serves as a tool to identify the risks related to the possible committing of infractions to Ecuadorian competition law, in order to prevent and, if necessary, mitigate such risks.

In the construction of this guideline we highlight the following activities:

Virtual Discussion "Let's talk about Compliance in Competition" - June 3, 2021

Interviews with experts - June 10, 2021

Roundtables - June 24 and July 5, 2021

Co-creation meeting - July 15, 2021

Thanks to the contributions received in these activities, we can affirm that the construction of this guide has been a fully participative process.

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<sup>1</sup> The complementary regulations include the regulations to the LORCPM, regulations and instructions issued by the SCPM, which allow the application of the legal provisions.

<sup>2</sup> Art. 2 of the LORCPM:

Scope: All economic operators are subject to the provisions of this Law, whether natural or legal persons, public or private, national or foreign, for profit or non-profit, which currently or potentially carry out economic activities in all or part of the national territory, as well as the guilds that group them together, and those that carry out economic activities outside the country, to the extent that their acts, activities or agreements produce or may produce harmful effects on the national market.



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## 1. INTRODUCTION

### 1.1. What is competition and what advantages does it bring?

Competition can be defined as the rivalry that economic operators have with each other to trade their products or services and gain a greater share in different markets. Competition takes into account all the characteristics that are present in a market (type of products, levels of investment, production costs, geographical area and others) as they determine the competitive environment within that market, and therefore, the degree of rivalry that economic operators participating in it can or should have<sup>3</sup>.

Among the greatest advantages of competition is that resources are distributed and used efficiently in the markets, as well as, that consumers can have a greater variety of goods and services, with better quality and lower prices, allowing, therefore, that there is a higher level of economic welfare in society<sup>4</sup>.

### 1.2. Benefits of having an adequate competition regime

The competition regime can be understood as the whole set of policies and legal norms that promote and protect competition in society, involving the competition agencies or authorities (in the Ecuadorian case, the Superintendence for Market Power Control - SCPM), the public regulatory entities of the productive sectors, the economic operators participating in the markets and the consumers of goods and services.

The proper application of competition law (i.e., laws and regulations related to the competition regime) can bring multiple benefits such as, among others, preventing and combating anti-competitive practices, controlling mergers or economic concentrations that may detrimentally increase market power, examining restrictions to the efficient functioning of markets, and promoting measures to eliminate unjustified barriers to competition.

Likewise, competition advocacy seeks to promote the creation of an environment conducive to competition, which can be done, for example, by issuing competition guides for the use of economic operators, conducting training to increase knowledge of competition in society, or conducting market studies to learn how different sectors or markets are functioning.

### 1.3. Competition Policy

Competition policy is the actions and strategies that are carried out to promote and protect competition, that seeks to ensure the competitive functioning of markets, as

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<sup>3</sup> Dennis W. Carlton and Jeffrey Perloff, *Modern Industrial Organization* (Edinburgh Gate: Pearson Education Limited, 2015), 80-110.

<sup>4</sup> In economics, competition is a force that has the main merit of allocating efforts and resources where it is most important and necessary for them to be allocated". Jorge Tarzizán and Ricardo Paredes, *Organización industrial para la Estrategia Empresarial* (Santiago de Chile: Pearson Educación de Chile Ltda, 2012), 6-8.

well as to protect both consumers and economic operators from anti-competitive behavior<sup>5</sup>.

A proper competition policy incorporates government policies that can be applied to enhance competition in national and local markets (international trade liberalization, foreign investment and economic deregulation) and, on the other hand, a competition law that foresees anti-competitive practices by firms and the necessary government intervention in the market.<sup>6</sup>

In general terms, competition policy has as important objectives:

- 1) Allow greater market access for new competitors;
- 2) To protect competition by sanctioning anti-competitive conduct and to be a deterrent to future anti-competitive practices;
- 3) Promote business efficiency and welfare for consumers and suppliers<sup>7</sup>;
- 4) Establish conditions of equity in the markets; and
- 5) Promote market integration by encouraging the elimination of regulatory barriers that impede the free transit and circulation of products and services within and between countries<sup>8</sup>.

#### **1.4. Relevant questions regarding Compliance programs in Competition**

##### **1.4.1. ¿What is a Compliance program in competition?**

A compliance program can be defined as the set of internal measures (policies, procedures, among others) that an economic operator adopts to diagnose, prevent, avoid and minimize the risk of incurring in both, legal and corporate principles, as result of its activities, those of its partners and collaborators<sup>9</sup>.

Thus, a competition compliance program is a program implemented by economic operators to properly comply with applicable competition law (whether at the national or international level) and to promote a culture of competition under good practices by these organizations.

As such, a better understanding of competition rules and, in particular, an effective compliance program that focuses on creating an ethical culture in this area enables:

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<sup>5</sup> Martín Urbano, Pablo, and Sánchez Gutiérrez, Juan Ignacio, and "The politics of competition, growth and globalization." *Accounting and Business* 9, no. 17 (2014):84. Redalyc, <https://www.redalyc.org/articulo.oa?id=281632446007>

<sup>6</sup> Claudia Curiel, *Diseño de un Modelo de Abogacía de la Competencia en el Contexto de la Implantación de las Políticas de Competencia en América Latina* (New York: Conferencia de las Naciones Unidas sobre Comercio y Desarrollo, 2000), 6-7, [https://unctad.org/es/Docs/itcdclpmisc12\\_sp.pdf](https://unctad.org/es/Docs/itcdclpmisc12_sp.pdf)

<sup>7</sup> Ana Julia Jatar and Luis Tinero, *Competition Policy in the Andean countries: a policy in search of its place* (Washington DC: Organization of American States, 1997), 1.

<sup>8</sup> Federal Economic Competition Commission (COFECE), "Competition Policy in Mexico," COFECE, March 26, 2020, [htStpCsP:/M/www.cofece.mx/wp-content/uploads/2018/07/GuiaExpositor\\_Politica\\_de\\_Competencia.pdf](https://www.cofece.mx/wp-content/uploads/2018/07/GuiaExpositor_Politica_de_Competencia.pdf).

<sup>9</sup> Indecopi, *Guía de programas de cumplimiento de las normas de libre competencia* (Lima: Indecopi, 2019), 9.



- a) Prevent and avoid infringements of the LORCPM;
- b) Reduce risks and contingencies;
- c) Mitigate materialized risks;
- d) To safeguard the job stability of employees and managers;
- e) Generate business security and certainty;
- f) Protect commercial interests and corporate reputation.

#### **1.4.2. Is the adoption of a compliance program in competition mandatory?**

The creation, implementation, control and enforcement of a Competition Compliance program is not mandatory, however, it is highly recommended for the benefits that it can mean to the economic operator that implements it and, consequently, to the market; it is the sole responsibility of each economic operator that decides to implement it, therefore, it is important to clarify that the SCPM does not oblige economic operators to implement or compliance with a Compliance program. This leaves open the possibility that the competition control and resolution authorities in Ecuador<sup>10</sup>, in a particular case, may order or recommend the adoption of a compliance program.

#### **1.4.3. What are the benefits of a competitive compliance program?**

Among the main benefits of having a Competition Compliance program, we can highlight<sup>11</sup>:

- Avoid economic fines and sanctions by the authority;
- It avoids internal non-compliance. This is because staff and managers will have appropriate knowledge about the actions they must take to properly comply with the competition law;
- The timely detection of possible contraventions of the competition law, as well as the due action or correction of such infringements;
- The improvement of the economic operator's reputation in terms of its compliance with the law, which gives it a better image of seriousness and responsibility of its actions in the market;
- In some countries, having compliance programs in place, could be an advantage for the economic operator participating in a public procurement process.
- The SCPM could consider as mitigating factors the implementation, application, control and compliance with compliance programs in economic operators under investigation.

Specifically, the benefits of compliance programs in the area of Competition translate into the establishment of an orderly system for the economic operator, through concrete policies and manuals or methodologies, which support the delimitation of responsibilities, and the prevention and elimination of bad corporate practices. It is important to have a robust program that also has a monitoring and continuous improvement phase.

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<sup>10</sup> The SCPM, the First Instance Resolution Committee and/or the investigative bodies of the SCPM.

<sup>11</sup> Indecopi, Guía de programas de cumplimiento de las normas de libre competencia (Lima: Indecopi, 2019), 12-13.



#### **1.4.4. Will the SCPM certify Compliance programs?**

The SCPM will not certify Compliance programs, so the content will be the sole responsibility of the economic operator that implements it, voluntarily, or because it has been ordered or recommended by any of the competition authorities.

#### **1.4.5. What kind of benefits does this SCPM Compliance Guide provide?**

The main benefit of this guide is that it helps economic operators to build their own competition compliance program, which helps to prevent anti-competitive conduct and other actions that may also be subject to sanctions (for example, failure to provide the information requested by the SCPM); in other words, it serves as an ex-ante control of possible harm to economic operators.

As part of the promotion of the use of compliance programs, the SCPM could consider as mitigating factors the implementation, application, control and compliance of the programs in the economic operators; in the same way, and inversely, the inadequate design or implementation of a compliance program could be taken as an aggravating factor in an investigation by the authority<sup>12</sup>.

Based on the presented above, it is possible to point out that the purpose of this Guide is to provide basic recommendations for those economic operators that are working on the implementation of a competition compliance program.

## **2. ASPECTS OF THE ORGANIC LAW ON REGULATION AND CONTROL OF MARKET POWER (LORCPM)**

### **2.1. General information about the LORCPM**

In summary, and in a general way, the purpose of the Law is to prevent and take controlling actions and sanctions on any conducts that are considered anticompetitive, such as the abuse of market power, collusive agreements and unfair practices, in order to achieve more efficient markets and the welfare of consumers<sup>13</sup>.

In general, persons, organizations or enterprises engaged in any type of economic activity are subject to the provisions of the Law; they may be natural or legal persons, public or private, national or foreign, seeking profit or non-profit, whether they participate in all or as part of the national territory, or are part of a trade association<sup>14</sup>.

*It is very important to emphasize that the custom (commercial or not) of an economic operator may not be invoked for the exoneration or exemption of conducts contrary to the Law<sup>15</sup>.*

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<sup>12</sup> The assessment of the *Compliance* program will depend on the stage of the investigation procedure, provided that the assessment of the facts investigated and all the elements in the file allow such analysis, in accordance with the regulations in force.

<sup>13</sup> Ley Orgánica de Regulación y Control del Poder de Mercado, Registro Oficial 555, Suplemento, October 13, 2011, art. 1.

<sup>14</sup> Ibid., art. 2.

<sup>15</sup> Ibid., art. 3.



## **2.2. Importance of complying with competition law and other applicable standards**

It should be clear to economic operators that a culture of respect for economic competition regulations fundamentally prevents the commission of possible anti-competitive practices. Compliance with competition law must be inherent in the market activities carried out by economic operators. Therefore, their prestige and success will depend not only on the quality of the goods and services they offer to their customers but also on full compliance with the law.

Likewise, economic operators must take into account that the globalization of the market imposes stricter rules of the game on companies, so a culture of compliance will prevent companies from incurring in infractions that entail onerous penalties that put their capital and permanence in the market at risk.

Compliance with the regulations of market activities is everyone's responsibility in the company, especially its managers. Therefore, managers and employees must be aware that infringing such regulations may generate serious consequences for the company and for them, such as financial fines, loss of jobs, and even, if the assumptions set forth in the criminal law are configured, penalties in this matter.

In this sense, it can be very counterproductive or damaging for economic operators to put at risk all the effort made in their businesses, simply because they do not comply with economic competition laws.

Although competition regulations are to some extent difficult to understand, it should be noted that there are basic rules that economic operators must know and respect. It is essential to always seek legal advice from a professional in the field.

It is also important to point out that the LORCPM establishes suitable mechanisms for companies to denounce possible anti-competitive practices that affect healthy competition and the general welfare of consumers.

## **2.3. Practices prohibited by the LORCPM in competition matters**

In general, the practices prohibited by the LORCPM in competition matters are the following:

**Market Power Abuse:** Abuse of market power is defined as when one or more economic operators, on the basis of their market power, adversely affect economic

efficiency or general welfare. Market power is understood as the ability (individually or collectively) of economic operators to significantly influence the market<sup>161718</sup>.

**Market Power Abuse in a situation of economic dependence:** This refers to any exploitative treatment by one or more economic operators towards their customers or suppliers who are in a situation of economic dependence with respect to those operators.<sup>19</sup>

**Prohibited agreements and practices:** Those collective agreements or practices by two or more economic operators, which may be detrimental to competition, and adversely affect economic efficiency or general welfare<sup>20</sup>.

**Unfair practices:** It is considered unfair any practice contrary to honest, uses or customs, in the development of economic activities, which may be detrimental to competition, and adversely affect economic efficiency or the general welfare<sup>2122</sup>.

**Economic concentration operations:** Economic concentration is understood as the change or taking of control of one or several companies or economic operators, through acts such as mergers, transfer of effects, acquisitions, common management links, or other similar acts<sup>23</sup>; the reason for controlling economic concentrations is to analyze and prevent operations of this type that may create, modify, or reinforce market power. Although an economic concentration is not per se an anticompetitive conduct, compulsory concentration operations that have not been notified to the SCPM may be sanctioned and intervened.

In the following, several considerations of each of the anticompetitive practices mentioned above are discussed in more detail.

### **2.3.1. Considerations regarding agreements and restrictive practices**

According to the Law, restrictive agreements and practices may include, but are not limited to, the following:

- To agree on prices, interest rates, fees, discounts, and the like;

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<sup>16</sup> Ibid., art. 9.

<sup>17</sup> It should be mentioned that obtaining or reinforcing market power is not per se a matter harmful to competition, unless it threatens economic efficiency, general welfare, or the rights of consumers or users, which will constitute a conduct subject to control and, if applicable, to the application of sanctions established in the LORCPM.

<sup>18 18</sup> For more references on abuse of market power you can review the guide that the SCPM has issued at <https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/08/Gu%C3%ADa-para-la-investigaci%C3%B3n-de-conductas-de-abuso-de-abuso-del-poder-de-mercado.pdf>.

<sup>19</sup> Ibid., art. 10.

<sup>20</sup> Ibid., art. 11.

<sup>21</sup> Ibid., art. 25.

<sup>22</sup> For more information, it is recommended to review the guide that the SCPM has issued for the application of unfair conduct <https://www.scpm.gob.ec/sitio/wp-content/uploads/2020/05/Gui%C3%A1a-de-pra%C3%81ticas-desleales-20.5.2020.pdf>

<sup>23</sup> Ibid., art. 14.

- To allocate, restrict, limit, or concertedly control the production or commercialization of goods or services, customers, geographic areas, or sources of supply;
- Agreements between suppliers and purchasers in public procurement, with the aim of unjustifiably favouring one or several economic operators<sup>24</sup>

It is worth mentioning that, restrictive practices **by object** may be<sup>25</sup>, those conducts between economic operators of the same level of the productive or commercialization chain, that directly or indirectly, may be considered as restrictive agreements and practices by their objective:

- a) Fix prices;
- b) Limit production, distribution and/or marketing; or,
- c) Share markets, being them geographic, product and/or consumer markets;
- d) Collusive conduct in procurement processes or public auctions, may also be considered.<sup>26</sup>

However, restrictive agreements and practices are exempted from sanction if they fully comply with the following conditions:

1. The practice allows consumers or users to share equally in its benefits;
2. Practice does not impose restrictions that are not indispensable; and,
3. The practice does not give economic operators the possibility of eliminating competition regarding a substantial part of the products or services concerned<sup>27</sup>

### **2.3.2. Considerations regarding the abuse of market power**

Abuses of market power are those anticompetitive conducts carried out by one or several economic operators with market power, with the purpose of:

- Arbitrarily removing an economic operator from the market, or preventing his access to it;
- Set prices that are either exploitative (i.e. that can be considered excessively high) or predatory (i.e. that are below their costs);
- Unjustifiably establishing exclusive advantages in favor of one or more economic operators;
- Impose obligations or conditions that are not congruent with the sale of a product or service;

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<sup>24</sup> Ley Orgánica de Regulación y Control del Poder de Mercado, Registro Oficial 555, Suplemento, October 13, 2011, art. 11.

<sup>25</sup> By object" means that it is not necessary to demonstrate its effects on the market, but rather it is sufficient to demonstrate that there was an anticompetitive agreement to be considered a punishable act

<sup>26</sup> Reglamento de la Ley Orgánica de Regulación y Control del Poder de Mercado, Registro Oficial 697, Suplemento, 07 de mayo de 2012, art. 8.

<sup>27</sup> Ley Orgánica de Regulación y Control del Poder de Mercado, Registro Oficial 555, Suplemento, October 13, 2011, art. 12.

- Unjustifiably denying access to networks or infrastructures considered as essential facilities<sup>28</sup> to other economic operators
- Unjustifiably setting resale prices;
- Abuse of an intellectual property right.

Thus, there are in general two types of conduct of abuse of market power:

- **Exclusionary practices** are those that seek to hinder or restrict the entry or permanence of other competitors in the market.
- **Exploitative practices:** that cause serious harm to customers (e.g., by charging very high prices).

### 2.3.3. Unfair Practice Considerations

It is considered unfair any fact, act or practice that is contrary to honest uses, in the exercise of any economic activity; this concept includes commercial, professional, service and other activities.

According to the LORCPM, the following are considered unfair practices:

- a) Acts of confusion
- b) Acts of deception
- c) Imitation acts
- d) Acts of vilification
- e) Acts of comparison
- f) Exploitation of the reputation of others
- g) Infringement of trade secrets
- h) Inducement of breach of contract
- i) Violation of rules
- j) Aggressive bullying practices<sup>29</sup>

In those cases related to intellectual property, the SCPM will have competence when there is an affectation to the general interest, otherwise, this competence belongs to the national intellectual property authority.

### 2.3.4. Considerations with respect to economic concentration transactions

According to the Law, in case an economic concentration operation creates, modifies or strengthens market power, the SCPM may deny the concentration operation or determine measures or conditions for the operation to be carried out.

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<sup>28</sup> An essential facility is an asset or infrastructure that is indispensable for trading a product or service in the market.

<sup>29</sup> Ley Orgánica de Regulación y Control del Poder de Mercado, Registro Oficial 555, Suplemento, October 13, 2011, art. 27.



If the concentration operation was carried out without prior notification or while the corresponding authorization has not been issued, the SCPM may order de-concentration measures, or corrective measures, or the cessation of control by one economic operator over another or others, when the case so warrants, this in addition to the corresponding economic sanction.

Likewise, economic operators are obliged to notify a concentration (horizontal or vertical), always that one of the following conditions is met:

- a. The total turnover in Ecuador of all of the venturers together exceeds (in the accounting period prior to the transaction) the amount of prevailing Unified Base Remuneration (UBR) shown below<sup>3031</sup>

Type of economic concentration	UBR	Millions of USD by 2021
Institutions of the national financial system and the securities market	3'200.000	1.280,0
Insurance and reinsurance companies	214.000	85,6
Other economic operators	200.000	80,0

- b. In the case of concentrations involving economic operators engaged in the same economic activity, and that as a consequence of the concentration a share equal to or greater than 30 percent of the relevant market for the product or service is acquired or increased at the national level or in a defined geographic market within the same<sup>32</sup>.

In cases on which the concentration transactions do not meet any of the above conditions, authorization by the SCPM shall not be required. However, the SCPM may request ex officio or at the request of a party, that the economic operators involved in a concentration transaction notify it, under the terms provided by the Law.

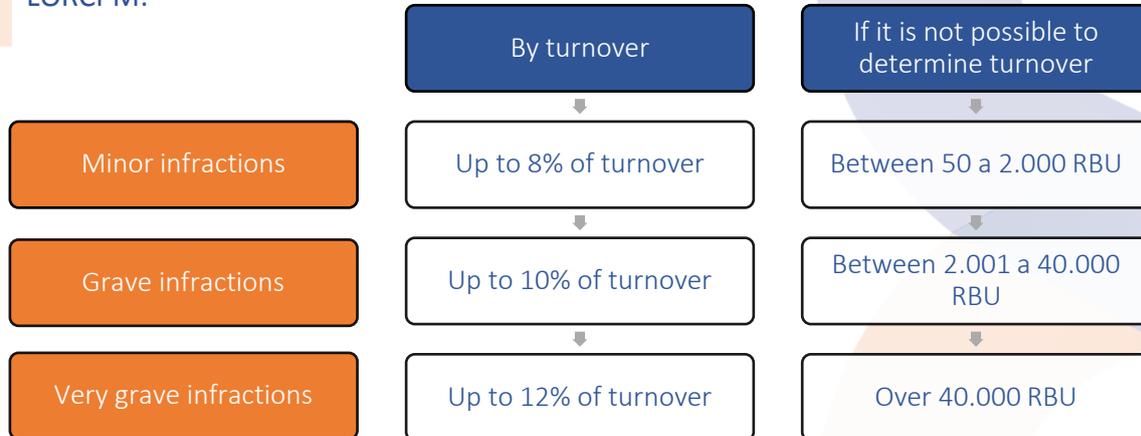
30 Regulatory Board of the LORCPM, Resolution 009 - Fixing the thresholds of the amount of the total turnover in Ecuador of all the participants in an operation of economic concentration on which the prior notification procedure must be complied with, <https://www.planificacion.gob.ec/wp-content/uploads/downloads/2017/12/Resoluci%C3%B3n-No.-009-Umbrales-de-Concentraci%C3%B3n.pdf>.

31 For the purposes of the above resolution, the Unified Base Salary should be understood as the Unified Basic Salary.

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#### 2.4. Penalties and measures applicable under the Act

The SCPM will impose the following sanctions on economic operators who infringe the LORCPM:



Source: Ley Orgánica de Regulación y Control del Poder de mercado, art. 79

Elaboration: Superintendencia de Control del Poder de Mercado, 2021

In addition to the sanctions above exposed, where the offender is a legal person and has committed very serious infringements, **a fine of up to 500 RBU may be imposed on each of its legal representatives or on the persons who are members of the executive bodies** involved in the anti-competitive practice.

The SCPM may impose successive and unlimited fines in case of recidivism of anticompetitive practices, so that in these cases the **thresholds of 8%, 10% and 12% of the total turnover of the infringer will not be applicable**.

In addition, if the SCPM determines that the benefits obtained as a result of a conduct are higher than the above-mentioned thresholds, the offenders **will be sanctioned with an amount identical to the amount of such benefits**.

Finally, whoever fails to provide the SCPM with the information it has requested, or if incomplete or incorrect information has been provided, the penalty shall be **up to 500 RBU**.

For more information on the criteria used by the SCPM to determine the amount of the fine for infringements to the LORCPM, access the following link: <https://www.scpm.gob.ec/sitio/no-%20007-vigente-nueva-metodologia-para-%20calculate-fines-for-infringements-to-the-lorcpm>

The following aggravating and mitigating circumstances, among others, shall be taken into account when setting the amount of the penalties:



#### Aggravating factors

- The repeated commit of infractions typified in the LORCPM.
- The position of the person responsible for or instigator of the offence.
- The adoption of measures to enforce or secure compliance with unlawful conduct.
- Failure to cooperate with or obstruct the SCPM's inspection work

#### Extenuating circumstances

- The performance of actions that put an end to the infringement.
- Failure to effectively enforce the prohibited conduct
- The performance of actions aimed at repairing the damage caused.
- Active and effective collaboration with the SCPM

Source: Ley Orgánica de Regulación y Control del Poder de mercado, arts. 81, 82.  
Elaboration: Superintendencia de Control del Poder de Mercado, 2021

In addition to the sanctions that the SCPM may impose for violating the Law, the SCPM may issue corrective measures aimed at restoring the competitive process, preventing, impeding, suspending, correcting or reversing anti-competitive conduct, and preventing such practice from occurring again.

#### **Criminal sanctions related to conducts covered by the LORCPM**

Anti-competitive conducts may be related to crimes to be investigated and sanctioned in the criminal field. There are penalties with custodial sentences for the acts involved:

- Circulation of restricted information
- Scam
- Deception of the consumer in the quality of products or services sold
- Economic panic
- Agiotaje (Speculation of basic need goods)

The aforementioned types are only some of the cases that, after the respective substantiation by the criminal justice system, could be considered to have been committed by individuals in the course of a competition investigation. Under article 72 of the LORCPM, the SCPM is required to forward a copy of a case file to the Office of the Attorney-General when it considers that there are indications of criminal liability.

In this area it is very important to note that through the Organic Law Reforming the Comprehensive Organic Criminal Code (COIP) in anti-corruption matters, important reforms to the criminal liability of legal persons have been introduced in the COIP; among them, the consideration that the spontaneous confession of crimes, collaboration in investigation, reparation of damages and the implementation of

Compliance programs are considered as actions that mitigate the criminal responsibility of the legal person in crimes related to corruption, bribery, corruption between private parties, etc.

Therefore, a compliance program can be a useful tool to prevent economic operators from committing acts that could be considered crimes.

### **Civil sanctions (payment of damages to affected parties)**

People who have suffered damage or injury as a result of an anti-competitive practice may bring legal action for compensation. The actions will be processed before civil judges, in a summary trial<sup>33</sup>.

### **2.5. Measures that may be taken by the SCPM**

The SCPM may also order the application of corrective or preventive measures it deems appropriate in any of the cases related to violations of the LORCPM.

#### **Corrective measures**

In addition to the sanction imposed, the SCPM may issue corrective measures aimed at restoring the competitive process, preventing, impeding, suspending, correcting or reversing conduct contrary to the LORCPM.

Corrective actions may include, but are not limited to:

- a) The cessation of the anticompetitive practice, including under certain conditions or time limits;
- b) Carrying out activities or entering into contracts aimed at re-establishing the competitive process, including under certain conditions or deadlines; or,
- c) The unenforceability of anti-competitive clauses or provisions in legal acts<sup>34</sup>.

#### **Preventive measures**

Preventive measures shall be applied before or at any stage of the investigation procedure, and their purpose is to preserve the affected conditions of competition and avoid the damage that could be caused by the conducts to which the procedure refers, or to ensure the effectiveness of the SCPM's final resolution.

The LORCPM provides that the SCPM may apply preventive measures, in order to preserve the conditions of competition and avoid possible damages. Among these we have the following. (a) cease and desist order of the conduct; (b) imposition of conditions; (c) suspension of the effects of legal acts related to the prohibited conduct; (d) adoption of positive behaviors; and (e) any other measures deemed relevant.

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<sup>33</sup> Ibid., Art. 71

<sup>34</sup> Ibid., art. 73.

Preventive measures must be adopted with criteria of intensity, proportionality and necessity, taking into account the harm they seek to avoid<sup>35</sup>.

## **2.6. Resources offered by LORCPM**

The LORCPM grants the SCPM the tools to reduce or interrupt the possible harm of anticompetitive conducts, among which are: the commitments to cease, the benefits of exemption or reduction of the amount of the fines, as well as, the filing of complaints before the SCPM or consultations on the application of the LORCPM..

### **2.6.1. Cease agreements**

Cease commitments allow the investigated, related or denounced economic operators to submit a commitment proposal whereby they undertake to cease the conduct under investigation and to remedy; if it is the case, the damages, harm or effects that their anticompetitive practices have produced, are producing or may produce in the relevant market and on consumers <sup>36</sup>.

The economic operators that wish to make use of a termination commitment must follow the guidelines of the "Instructions for the Management and Execution of Cessation Commitments in the Superintendency for the Control of Market Power" and submit its content in accordance with article 8 of such Instructions.

More information on the process of cease-and-desist commitments can be found at the following link: <https://www.gob.ec/scpm/tramites/solicitud-compromiso-cesecometimiento-presuntas-practicas-anticompetitivas>.

### **2.6.2. Procedure for exemption and reduction of fines (Leniency Program)**

The LORCPM contemplates a program of benefits of exemption or reduction of the amount of fines for those economic operators or individuals who admit to the SCPM that they have incurred in anticompetitive practices and, in addition, collaborate with the authority to detect and sanction these practices.

The purpose of this program is to facilitate the detection of anti-competitive practices, as well as to provide an alternative to companies that have chosen to comply with competition regulations, in order to prevent and avoid serious sanctions that could jeopardize the permanence of economic operators in the market.

In this regard, the program of exemption and/or reduction of the amount of the fine allows a reduction of between 20% and 100% of the fines, depending, among other factors, on the order of arrival<sup>37</sup>.

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<sup>35</sup> Ibid., arts. 83, 84

<sup>36</sup> Ibid., arts. 89, 93

<sup>37</sup> Ibid., arts. 83, 84

The fine may be waived for a natural or legal person who meets either of the following two conditions:

- Be the first to provide evidence that, in the opinion of the SCPM, would allow it to order an inspection in relation to a infringement of Article 11 (Restrictive Agreements and Practices), provided at the time there is not sufficient evidence to order such an inspection;
- Be the first to provide evidence which, in the opinion of the SCPM, would enable it to establish an infringement of Article 11, provided at the time, the SCPM does not have sufficient evidence to establish the existence of the infringement.

All other operators wishing to cooperate will only be eligible for a reduction of the fine of up to 50%, depending on the case.

Those seeking an exemption or reduction of the fine must meet the following requirements:

1. Cooperate in full, continuously and diligently with the SCPM, under the terms established by regulation, throughout the administrative investigation procedure.
2. Terminate its participation in the alleged infringement as soon as it provides the evidence, except in cases in which the SCPM deems it necessary for such participation to continue in order to preserve the effectiveness of an inspection
3. Have not destroyed any evidence relating to the request for exemption, nor have you disclosed, directly or indirectly, to any third party other than SCPM, your intention to submit this request or its contents
4. Not to have taken any measures to coerce other undertakings or economic operators to participate in the infringement.

Once the application for exemption or reduction of the fine has been submitted by an economic operator, the following procedure must be followed:

1. Assessment of the application for exemption or reduction of the amount of the fine;
2. Meetings with the applicant to agree on the terms of cooperation;
3. Signing of the collaboration agreement;
4. Issuance of the benefit report;
5. Decision to grant exemption from or reduction of the amount of the fine<sup>38</sup>.

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<sup>38</sup> Superintendencia de Control del Poder de Mercado, Instructivo para el Otorgamiento de Beneficios de Exención o Reducción del Importe de la Multa de la SCPM, Registro Oficial 52 of 02 October of 2019, art. 5.



Interested parties may submit their application by sending an e-mail to [programadelacion@scpm.gob.ec](mailto:programadelacion@scpm.gob.ec); in this application, they must expressly state their desire to join the program and provide their contact details in accordance with Article 6 of the above-mentioned instructions.

For further reference, please refer to the following link:  
<https://www.scpm.gob.ec/sitio/programa-de-delacion/>

### 2.6.3. Allegations of anti-competitive practices

Any person having a legitimate interest may report anti-competitive practices to the SCPM. To do so, a written complaint must be filed at the SCPM's General Secretariat or at its offices at the national level. It must be addressed to the Superintendent of Market Power Control and describe the following:

Content of the complaint	
a)	The name and address of the complainant;
b)	Identification of the alleged perpetrators;
c)	A detailed description of the conduct complained of, indicating the approximate period of its duration or imminence;
d)	The relationship of those involved to the conduct complained of;
e)	The identification data of those involved known by the complainant, including, among others, their addresses, telephone numbers and e-mail addresses; if any, and, if applicable, the identification data of their legal representatives; the lack of one or more of the requirements of this paragraph does not invalidate the complaint;
f)	The characteristics of the goods or services that are the object of the conduct denounced, as well as the goods or services affected; and,
g)	Evidence reasonably available to the complainant.

Source: Ley Orgánica de Regulación y Control del Poder de Mercado, art. 54.

Elaboration: Superintendencia de Control del Poder de Mercado, 2021

The corresponding Intendancy will verify that the complaint meets the requirements established in article 54 of the LORCPM; if the complaint does not meet the established requirements, the complainant will be granted a term of three (3) days to clarify or complete it, while if it does not comply with the requirements, within the term indicated, it will be ordered to be filed. For more information, you can review the following link: <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/10/denuncias.pdf>

### 2.6.4. Acceptance of queries

Any economic operator may request in writing to the SCPM an acquittal of the consultation in matters of economic competition in relation to the application of the LORCPM<sup>39</sup>. The formal opinion is issued by the SCPM and has a binding effect on the consultant.

<sup>39</sup> Ibid. art. 38 núm. 20

### 3. RECOMMENDATIONS AND GUIDELINES FOR THE ELABORATION AND IMPLEMENTATION OF A COMPETITION COMPLIANCE PROGRAM

#### 3.1. Generación de una cultura para cumplir con la LORCPM

Any compliance program should aim to prevent, identify and eradicate any anti-competitive conduct affecting consumers and competitors. For this purpose, a corporate culture and policy should be formed to prevent and mitigate risks and possible sanctions, as well as to improve the knowledge of the company's processes<sup>40</sup>. In this sense, in order to create a true compliance culture it is advisable to incorporate policies and guidelines that cover all types of matters such as corruption, human rights, communication, data protection, etc. This ensures that the economic operator acts ethically in all areas and situations in which it finds itself, including those related to competition law.

This culture of compliance is the basis of any compliance program. In this sense, the Competition compliance program is a tool that allows improving the competitive practices of economic operators, considering elements of good corporate practice, ethical principles and values. Therefore, it is advisable to make efforts so that this program becomes part of the corporate culture, apart from the value it has to avoid sanctions. The current global trend dictates that economic operators develop their operations in an environment guided by corporate values and under the internal commitment to comply with the law, for the benefit of the company, its consumers or users, and society.

In the creation of a culture of compliance, the management and administrative bodies of the economic operators play a key role, as they are the ones who will promote the company's ethical values and provide the necessary impetus for the other members of the organization to join this initiative. In order to generate and sustain a corporate culture of compliance, it is necessary that the actions of the managerial bodies, as well as those of the employees, reflect the company's ethical commitments.

Based on the above, the SCPM recommends considering the following aspects to generate a culture of compliance.

##### 3.1.1. Commitment

In order to fully implement and comply with a compliance program, it is essential that the economic operator is committed to creating a culture of compliance within the company. This culture must be fostered essentially in a vertical sense, i.e. the first to

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<sup>40</sup> From this better knowledge and development of the company's processes, the consequence is that in the face of possible errors, omissions or irregularities, it is possible to have better internal and external damage control. See: Superintendencia de Industria y Comercio Colombia, Guía para facilitar al sector empresarial el Cumplimiento legal de sus obligaciones y derechos en Materia del marco jurídico de protección al Consumidor y competencia económica (Colombia: Superintendencia de Industria y Comercio Colombia, 2018), 48.



demonstrate the importance of a program of this nature should be the company's managers. This conduct on the part of company managers will send a strong message to your employees regarding the importance to the company of implementing and practicing a regulatory compliance program.

### **3.1.2. Responsibility to comply with LORCPM**

Compliance with the LORCPM by economic operators lies mainly in recognizing the importance of establishing a culture of respect for the law among its members. This will be achieved through ongoing programs to raise awareness among company managers and employees of the benefits of adopting a culture of compliance. Economic operators should be aware that respecting and complying with competition regulations will prevent them from being immersed in legal conflicts that put the company's assets and good name at risk.

### **3.1.3. Generation of a code of conduct**

Many economic operators have codes of conduct, which are manifestations of voluntary compliance that allow them to improve their good market practices. Competition rules and principles need to be incorporated into the economic operator's code of conduct and other internal rules.

In this way, the code of conduct is the cornerstone of the compliance program, since it embodies the values or guiding principles of the economic operator. These principles must be internalized by the company's managers and collaborators. It is important that the Code of Conduct is accepted by all current and future employees of the organization. In addition, tools and training must be implemented to verify that all members of the organization understand the purpose and benefits of the Code of Conduct. In this way, compliance is not only implemented in theory but also in practice.

### **3.1.4. Generate integration with other compliance programs**

Some economic operators have regulatory compliance programs in different areas, such as criminal, environmental, occupational health and safety, among others; in order to optimize resources, these operators could integrate compliance with the competition regime into their existing regulatory compliance programs.

It is important to mention that, although it is not necessary to have different specific compliance programs for each topic, in the interest of continuous improvement, new topics can be incorporated into existing programs.

This will not only avoid regulatory dispersion, but will also contribute to comprehensive compliance programs and a greater positive impact on the company.

## **3.2. Responsible for compliance and allocation of resources for this purpose**

The effectiveness of a compliance program will depend to a large extent on the responsible person or persons who are assigned to oversee compliance, in the form of,

for example, a compliance officer or a compliance committee. They should have sufficient expertise, independence and authority to oversee and monitor the compliance program. The compliance officer should be seen as a strategic ally who, in addition to overseeing compliance, can answer questions from employees.

The appointment of the person or persons responsible for the compliance program must necessarily take into account the size and scope of the company. It is not the same to implement a compliance program in a corporation with several subsidiaries as in a small company. In this regard, economic operators should designate the persons in charge, depending on the case, observing a principle of proportionality and optimization of resources<sup>41</sup>.

The functions of the compliance officer are best performed by a specialised department. However, in the case of smaller economic operators, the legal department - if it exists - may develop and supervise the compliance program<sup>42</sup>. It is also possible that, by affinity with the objectives of the program, other departments of the organization, such as risk control or audit, may perform the functions in an appropriate manner.

Additionally, it must be ensured that the person(s) responsible for the compliance program is (are) free of conflicts of interest, as determined by the company. This aspect is also countered by a compliance program, through policies and forms regarding conflicts of interest. What is essential in this area is that the person or persons responsible for the compliance program have the backing of the company's senior management and governing bodies, with whom they should maintain direct communication.

### **3.2.1. Functions of the person responsible for compliance of the program**

It is essential that the compliance officer is a person with sufficient independence to investigate, sanction and take action within the compliance program. The compliance officer shall have, among others, the following functions:

1. Oversee the design and implementation of the compliance program;
2. Ensure that the compliance program is in accordance with the organization's objectives and policy;
3. Provide advice to the organization's staff on competency issues;
4. Identify the risks of the economic operator;
5. Report on program performance to the governing body and senior management;

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<sup>41</sup> The principle of proportionality aims to adapt the preparation of a Compliance Program for companies, in accordance with their size, structure and specific needs, so that they do not have to use the same requirements and conditions as those designed for large corporations. See: Iberley, *The Principle of Proportionality en Compliance*, 2018.

[https://www.iberley.es/temas/principio-proporcionalidad-compliance-62769?\\_\\_cf\\_chl\\_captcha\\_tk\\_\\_=%20pmd\\_58d4e9ba82ff38aa8fb65a78460ed01d4e33d68f-1627322710-0-gqNtZGzNAyKjcnBszQh6](https://www.iberley.es/temas/principio-proporcionalidad-compliance-62769?__cf_chl_captcha_tk__=%20pmd_58d4e9ba82ff38aa8fb65a78460ed01d4e33d68f-1627322710-0-gqNtZGzNAyKjcnBszQh6)

<sup>42</sup> In the case of SMEs, they may not have the resources to have a separate legal area responsible for the program. However, they are likely to have a finance or administration officer who could take responsibility for the compliance program. See: International Chamber of Commerce Competition Commission, *ICC Antitrust Compliance Toolkit* (Paris: ICC, 2015), 17

6. Receive complaints and initiate investigation processes, as it is most appropriate to the case;
7. Evaluate and monitor the performance of the compliance program..

### 3.2.2. Resources

The program must have adequate financial, human and technological resources, proportional to the size and operational risk of the company, in order to ensure its design, implementation and maintenance. An effective compliance program is a profitable investment, since it not only reduces risks, preventing the economic operator from having to face investigative processes before the SCPM, as well as fines or sanctions, but also enhances its reputation.

### 3.3. Risk approach

4. As explained above, infringing the LORCPM generates risks of various kinds. In this sense, it is necessary to identify and prevent the risks to which the economic operator is exposed. For this purpose, it is necessary to take into account the following aspects:

Table of risks of violating the LORCPM		
Minor infractions	Fine of up to 8% of turnover	<ol style="list-style-type: none"> <li>a. Submitting the notification of the economic concentration to the SCPM outside the time limits provided for in Article 16.</li> <li>b. Failure to notify a concentration required ex officio by the SCPM, as provided for in Article 16.</li> <li>c. Failure to comply with the corrective measures provided for under sections 73 et seq. of this Act.</li> <li>d. Failure to comply with or contravene the provisions of a resolution of the SCPM.</li> <li>e. The administrative authorities or any other official who has admitted or granted administrative appeals, which are formulated with the intention of or have the result of preventing, restricting, distorting or distorting competition, or delaying or preventing the application of the rules provided for in this Law, shall be guilty of a minor infringement.</li> <li>f. Failure to submit to an inspection ordered in accordance with the provisions of this law.</li> <li>g. Any person who files a false report, using false data or documents, with the purpose of causing damage to competition, without prejudice to the other civil and criminal actions that may correspond, shall be guilty of a minor infringement.</li> <li>h. Obstruction by any means of the SCPM's inspection work..</li> </ol>



<b>Serious Violations</b>	<b>Fine of up to 10% of turnover</b>	<p>a. The development of collusive conducts under the terms set in Article 11 of this Law, when they consist of cartels or other collective agreements, decisions or recommendations, concerted or consciously parallel practices between companies or economic operators which are not actual or potential competitors.</p> <p>b. Abuse of market power as defined in Article 9 that is not considered as a very serious infringement.</p> <p>c. Distortion of the competition regime by means of unfair practices or acts under the terms established in Article 27 of this Law.</p> <p>d. The execution of a concentration operation subject to control, before it has been notified to the SCPM; or before it has been authorized in accordance with the provisions of this Law.</p> <p>e. The unfounded, deliberate and repeated use of legal or judicial incidents or administrative remedies that prevent, restrict, falsify or distort competition, or delay or impede the application of the rules provided for in this Law.</p> <p>f. Failure to comply with the corrective measures provided for under this Law, in the case of abuse of market power or restrictive agreements and practices.</p> <p>g. Failure to comply with the commitments acquired in accordance with this Law.</p> <p>h. Providing SCPM with misleading or false information.</p>
<b>Very serious infringements</b>	<b>Fine of up to 12% of turnover</b>	<p>a. The development of collusive conducts typified in Article 11 of this Law, consisting of cartels or other collective agreements, decisions or recommendations, concerted or consciously parallel practices between competing companies or economic operators, actual or potential.</p> <p>b. The abuse of market power as defined in Article 9 of this Law when it is committed by one or more companies or economic operators that produce highly harmful effects for the market and consumers or that have a market share close to a monopoly or enjoy special or exclusive rights.</p> <p>c. The execution of acts or contracts carried out by the economic operator resulting from a concentration operation subject to control, before it has been notified to the SCPM; or before it has been authorized in accordance with the provisions of this Law.</p> <p>d. Failure to comply with, or contravene the provisions, of a resolution of the SCPM, both in terms of abuse of market power, anti-competitive conduct and of control of concentrations..</p>
<p>When the offender is a legal person and has incurred in very serious infringements, a fine of up to 500 RBU may be imposed on each of its representatives or on the persons who are members of the management bodies that have intervened in the agreement or decision, depending on the degree of intervention or participation of such representatives or managers.</p> <p>* Those persons who, forming part of the collegiate administrative bodies, had not attended the meetings or had voted against or saved their vote, are excluded from the sanction.</p>		

Source: Ley Orgánica de Regulación y Control del Poder de Mercado, arts. 78 y 79  
Elaboration Superintendencia de Control del Poder de Mercado, 2021

### 3.3.1 Define the organizational structure

The first step for risk identification is to define the internal procedures, as well as to determine the people in charge of each of the processes, the attributions and responsibilities of each member of the organization.

### 3.3.2 Elaboration of risk matrix

The elaboration of a risk matrix allows to identify in an adequate and timely manner the main risks that the company runs of committing an anticompetitive practice or other non-compliances that may also be punishable, for example, failure to cooperate with the SCPM in providing requested information, or improper conduct of the organization's



staff if they are subject to inspection or raid by the authority. Based on this matrix, actions can be designed and managed by the company to reduce the occurrence or impacts of risks, and in turn, plan and implement activities, both prevention and remediation, if one or more of the risks materialize in practice.

It is very important to carry out an appropriate categorization of risks in order to prioritize the actions that merit greater observation and care for the timely anticipation of practices or omissions that may be punishable by the authority; it is very common to adopt a qualitative risk assessment system that classifies them as "high", "medium" or "low"<sup>43</sup>, although the company may also consider other methodologies that take into account quantitative parameters.

Risks may depend on several considerations, such as the size of the company, whether it belongs to a union/guild or some type of broader association, the influence that the organization may have in the market, the company's own characteristics, the market in which it participates, the type of conduct or non-compliance that may be punishable, the manager or personnel in charge of a certain activity, and other factors that must be identified by the company itself for its particular case<sup>44 45</sup>.

It is also worth mentioning that the risk matrix deserves a periodic and continuous revision on the part of the organization so that it is always adapted to the current conditions, both of the regulations in force and of the company's own position in the market; seen in another way, the matrix must have sufficient flexibility so that it can be adapted to any change in the legal aspects, as well as to the inherent evolution of the sector in which the company participates<sup>46</sup>.

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43 World Compliance Association, Compliance Implementation Guide for SMEs: A Practical Implementation Manual, 2019, 65.

44 Federal Economic Competition Commission, Recomendaciones para el cumplimiento de la Ley Federal de Competencia Económica dirigidas al sector privado (Mexico: COFECE, 2015), 26.

45 Indecopi, Guía de programas de cumplimiento de las normas de libre competencia (Lima: Indecopi, 2019), 16.

46 Comisión Nacional de los Mercados y la Competencia, Guía de Programas de Cumplimiento en relación con la defensa de la competencia (Spain: CNMC, 2020), 26.

### Ejemplo de matriz de riesgos

Risk Type	Description of the Inherent Risk (risk existing prior to any action)	Probability of occurrence (1=unlikely ;...; 5=highly likely)	Impact (1=very low impact ;...; 5=very high impact)	Risk Rating (Formula: Probability x Impact)	Risk Rating (greater than 9=High; between 4 and 9=Medium; up to 3=Low)	Control and/or Prevention Actions	Responsible de las Acciones	Identification of Residual Risks (risks that persist or occur despite actions taken).	Review and/or Remedial Actions
Acuerdos y prácticas restrictivas	Fix product prices together with other companies in my same sector or market	2	5	10	High	Training for managers on the risks of agreeing prices with other companies	General Manager	A meeting is scheduled with the producers' union, where the agenda includes a review of production levels and prices for the next two (2) years.	Refrain from participating in the meeting, or propose to the union the exclusion from the agenda of any discussion and agreement on quantities and / or prices between companies
Abuso de Poder de Mercado	Refusing to supply inputs to certain companies in an unjustified manner	3	3	9	Medium	Refrain in general from denying the sale of inputs (with possible exceptions that may be justified), in the light of the LORCPM)	Sales Manager	The company has increased its market share from 20% to 35% in the last five (5) years, so it could be considered as having increased its market power as well	In previous years the company may not have been considered to have market power because of its small size, so given its current participation it should prepare trainings regarding the abuse of market power and its consequences.
Infracciones que no constituyen una práctica anticompetitiva	Failure to comply with the delivery of information requested by the SCPM.	1	3	3	Low	Continuous review of applications carried out by SCPM	Legal Director	You have a request for information that has expired its delivery deadline	Immediately attend to the delivery of information

Elaboration: Superintendencia de Control del Poder de Mercado, 2021

Other risks concerning the economic operator can also identify by asking simple questions, such as:

Organizational Context	(check if applicable)
Are employees aware of the competition regime and the behaviours it regulates?	
Does the organization participate in meetings with unions?	
Do members of the organization participate in industry events (trade fairs, exhibitions, seminars, etc.)?	
Is it common in the organization for employees to move from one company to another?	
Does the organization have the same suppliers as its competitors?	
Does the organization usually enter into "partnership agreements" or similar, with its competitors?	
Does the organization participate in public procurement?	
Does the organization follow the pricing behavior of its competitors in any way?	
Does the organization maintain distribution systems with any type of exclusivity?	
Do you recommend prices to your business partners?	
Does the organization exert strong pressure on its sales force and/or business partners to win customers at any cost?	
Do you maintain different terms of business for clients without written policies and procedures in place and approved prior to the application of such terms?	
Do you distribute products or provide services exclusively?	
Does the organization usually lower its prices, even below cost?	
Do you increase your prices particularly high, under the certainty that sales volumes will remain at similar levels?	
Do you advertise your products aggressively, often without substantiation for your advertising claims?	
Does the organization have a member on its board of directors/board of directors who is part of another economic operator that is a competitor in the same market?	

Elaboration: Superintendencia de Control del Poder de Mercado, 2021

The number of affirmative answers to these questions, and others that the organization or its compliance advisors determine, could be an indicator of how robust the Competition Compliance program needs to be.

### 3.3.3 Identification of persons at risk

Although it is expected that all employees of an economic operator are aware of, and participate in compliance programs, it is necessary to identify those persons who, because of the functions they perform, are in situations that represent a significant risk of infringing competition law. For these purposes, the risk matrix and questionnaire included, as a suggestion, in the previous section, are useful, as they allow to identify the nature of the different anticompetitive practices foreseen in the LORCPM and to locate the collaborators who are related to competitors, clients and suppliers, such as sales or marketing personnel, as well as those involved in partnerships, among other situations.

### 3.3.4 Validity and updating of programs

Compliance programs should be reviewed periodically, in order to consider regulatory changes or any other aspect of the market context that may have an impact on the risk



matrix initially drawn up. These aspects may include changes in the market share held by the economic operator, personnel movements (especially if personnel who worked with competitors have been hired), changes in the line of business, among others. It is therefore recommended that a periodic evaluation is carried out to account for possible changes<sup>47</sup>.

### **3.4 Development of guides, manuals and policies**

The compliance program needs clear institutional policies to guide the development of the program. Likewise, the program should be supported by internal regulations such as guides or manuals that develop specific aspects of the economic operator's compliance culture. It is also possible to create manuals that deepen competition issues that have been addressed in the training.

These manuals should have a practical inspiration and be written in simple language that is understandable to all members of the economic operator. These manuals are a tool that allows workers to identify possible risks, internal procedures, and possible sanctions in the event of non-compliance with competition regulations, and it is therefore advisable that employees be trained on their provisions and take concrete responsibility for their compliance. On this issue, the SCPM recommends considering the following:

#### **3.4.1 Internal rules and controls for each risk**

Economic operators must establish procedures, rules of action and internal controls for each risk, using the risk matrix as a reference. This action will allow the company to intervene immediately when there are alerts of possible non-compliance with competition regulations. For example, the economic operator that has a single license for the supply of a good, and refuses to supply its product to a client, must establish in which cases it can justifiably refuse to sell; if the economic operator participates in any guild, an action procedure must be defined for participating in forums, since the exchange of information that takes place in them may be conducive to collusive conduct.

#### **3.4.2 Staff training**

Continuous and permanent training on the operation of the Compliance program, corporate values, organizational culture, good competitive practices, competition regulations, among others, are essential for the sustainability of the program. In this way, training for all employees, administrators and management bodies, allow all members of the economic operator to know and participate in the different phases of the compliance program, and to form an active part of the organization's compliance culture.

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<sup>47</sup> Periodic and permanent diagnosis is key for the good performance of the compliance program. Although the periodicity should be adjusted to the needs of the economic operator, it is recommended that it be on an annual basis in order to update internal controls and promote continuous improvement of the program.

All workers, especially those who work in higher risk areas or who interact with competing economic operators, should be periodically trained on issues related to the implementation and monitoring of the compliance program. These trainings should be evaluated in order to measure the performance of the workers and their degree of knowledge regarding the program<sup>48</sup>.

The following is an indicative list of possible training contents for different audiences:

Employee type	Training
New workers	Ethical principles of the business operator Business culture of the economic operator Main documents: Code of Conduct, Compliance Program, Company Policies.
Employees on staff	Organizational structure Risk prevention Operation of the complaints channel Disciplinary and sanctioning regime Good competitive practice Competition law or issues
Executives and middle management	The behaviors exposed to potential risks, according to the area and functions of each member of the company.
Compliance Officer	Working methods for developing and monitoring procedures and guidelines of different programs developed

Source: World Compliance Association, 2019

Elaborated by: Superintendencia de Control del Poder de Mercado, 2021

As part of the duty of ongoing training, all economic operators must be aware of their rights and obligations, as in the case of an inspection or search by the SCPM, in order to avoid the penalties that apply to those who oppose or obstruct such proceedings. For example, the economic operator must ensure that the information contained in the document providing for the diligence is correct; and in the case of a search, he must ensure that the order for such diligence has been issued by the competent authority (judge). In addition, it is essential that the economic operator cooperates fully during the execution of the inspection or dawn raid.

### 3.5 Monitoring, auditing and internal hearings

In order for the Compliance program to be effective, its implementation and compliance must be subject to continuous surveillance; it will then be key to success to have a permanent monitoring program, along with an adequate audit and appropriate channels for internal complaints. It is recommended that a program is audited and/or updated periodically, to evaluate its effectiveness or validity according to the changes that may occur to the regulations.

#### 3.5.1 Monitoring

Monitoring consists of continuously supervising the implementation, management and results of the compliance program, in order to control the correct development of the

<sup>48</sup> Indecopi, Guía de programas de cumplimiento de las normas de libre competencia (Lima: Indecopi, 2019), 31.



program. Similarly, monitoring seeks to ensure that the objectives of the program are met and that the actions of employees, managers and the managerial body are in line with the compliance program and are consistent with the ethical principles and organizational values.

For continuous monitoring, the use of indicators such as KRIs (Key Risk Indicators)<sup>49</sup> and KPIs (Key Performance Indicators)<sup>50</sup> is recommended to assess the effectiveness and efficiency of the compliance program that has been implemented by the economic operator.

### **3.5.2 Audits**

Regulatory compliance programs should have periodic audits, so that the economic operator can detect in a timely manner whether the program is being fully complied with or, in fact, is suffering any deviation. This will allow the company to immediately correct what is not being complied with. Audits are particularly important for economic operators with high levels of risk. Similarly, it is important to note that audits not only allow the detection of non-compliance in the compliance program, but also help to generate alerts of possible anti-competitive behavior.

Therefore, audits play an important role in regulatory compliance programs, as they allow to prevent and correct in time any non-compliance of the economic operator.

If, as a result of an audit, a possible anti-competitive conduct is detected, the person responsible for the audit must immediately inform the company's directors, so that they in turn proceed in the manner established by law.

For a compliance program audit to achieve the expected results, it is essential that the person assigned to perform the audit has complete autonomy to ensure the transparency of his or her work and the effectiveness of the audit. Therefore, it is advisable to use external auditors on the regular basis<sup>51</sup>.

### **3.5.3 Internal complaints**

Compliance programs require a whistle-blowing channel that allows employees, managers and the management body, as well as interested third parties acting on the basis of a reasonable belief, to inform the person in charge of the program of alleged breaches of the organization's policies and guidelines, or to make enquiries about future

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<sup>49</sup> KRI is a measure to indicate the potential presence, level or trend of a risk, providing an early and timely signal of a growing risk exposure in various areas of the business. See: PwC, Key Risk Indicators (KRI).

<https://www.pwc.com/ve/es/publicaciones/assets/PublicacionesNew/Boletines/Indicadores%20claves%20de%20riesgoot2020.pdf>

<sup>50</sup> These are indicators that are defined based on the historical performance of the organization, its units and key operations. They allow monitoring the performance of the organization and its main operations. See: PwC, Key Risk Indicators (KRI).

<https://www.pwc.com/ve/es/publicaciones/assets/PublicacionesNew/Boletines/Indicadores%20claves%20de%20>

<sup>51</sup> It's common practice for companies to conduct such audits at least once a year.

actions. Whistleblowing channels must guarantee confidentiality, and it is highly recommended that they allow whistleblowers to remain anonymous.

It is recommended that the complaints channel be adapted to the needs and resources of the economic operator. For example, in an economic operator with few resources, the complaints channel could be implemented through an e-mail administered by the person responsible for the program, while those economic operators with greater financial resources could use web pages, telephone lines, specialized software, etc.

Regardless of the mechanism used, it is essential that the complaints channel be handled with due confidentiality, in order to avoid reprisals, or hindering the work of investigating and sanctioning those possibly responsible for non-compliance. The number of complaints filed can be an indicator of the effectiveness of the program, since it shows that workers know what practices put the economic operator at risk; on the other hand, it shows the commitment of the governing body not to take reprisals in the face of possible complaints.

### **3.6 Internal disciplinary actions**

Compliance programs should establish, as far as possible, disciplinary actions for those who by action or omission fail to comply with the Compliance policies assumed responsibly by the company. For this purpose, the economic operator must appoint a person in charge with the necessary authority to apply the corresponding sanctions. In these cases, it is advisable that these tasks are applied by the human resources area. This procedure serves as a deterrent to behaviour that is detrimental to the development of the program, as well as a visible sign of the organization's genuine commitment.

It is also recommended that organizations categorise disciplinary measures with criteria of proportionality and progressiveness in their application, so that employees are clearly aware of the sanctions to which they could be subjected in the event of non-compliance with the Compliance program, and that they serve as a deterrent to future non-compliance.

Disciplinary sanctions should be applied to any member of the economic operator, without distinction of any kind with regard to their position or function within the organization.

It is recommended that incentives are established to strengthen the culture of competence; thus, compliance and active participation in the program can be considered as a factor that has a positive impact on employee evaluations.

### **3.7 Evaluation of the Compliance Program**

Periodic evaluation makes it possible to determine to what extent the compliance program has contributed to improving the competitive practices of the economic

operator, to establish the degree of compliance with the policies implemented, and to identify aspects of the program that need to be strengthened or improved.

In this way, indicators can be established to help measure the effectiveness and efficiency of the compliance program, such as: i) number of complaints filed, ii) number of employee training sessions, iii) compliance with program objectives, iv) sanctions imposed, v) level of satisfaction of the members of the organization with the compliance program, among others.

The evaluation of the compliance program can be developed by means of two types of evaluations, an ordinary or periodic evaluation, which is one that is carried out from time to time (monthly, quarterly, annually); and an extraordinary evaluation, carried out when internal or external circumstances occur that affect the level of risk of the economic operator. In this way, the results of the evaluation constitute a new starting point for the redesign of the program, since it allows strengthening certain aspects of it.

### 3.8 Summary of a Competitive Compliance Program

In order to facilitate the review of the most important aspects to be taken into account in the preparation of a Competition Compliance program, the elements that comprise it are detailed below, with an indication of the most important points:

Elements	Outstanding points
Generate a culture of compliance with the Law	<ul style="list-style-type: none"> <li>•The economic operator is committed to creating a culture of compliance in the company's environment.</li> <li>•Be aware that respecting and complying with competition regulations will prevent them from being immersed in legal conflicts.</li> <li>•The code of conduct is the cornerstone of the compliance program.</li> <li>•Generate integration with other compliance programs.</li> </ul>
Responsible for compliance and allocation of resources for this purpose	<p>The appointment of the person(s) responsible for the compliance program should necessarily take into account the size and scope of the company.</p> <ul style="list-style-type: none"> <li>•It is essential that the compliance officer be a person with sufficient independence to investigate, sanction and take action within the program.</li> <li>•The program must have adequate financial, human and technological resources, proportional to the size and operational risk of the company.</li> </ul>
Risk approach	<ul style="list-style-type: none"> <li>•Identify the various risks of violating the LORCPM.</li> <li>•Develop a risk matrix.</li> <li>•Identify the risks of the economic operator by asking simple questions.</li> <li>•Identify persons who, due to the functions they perform, are in situations that represent a significant risk of infringing competition regulations.</li> <li>•Compliance programs should be reviewed periodically to take into account regulatory changes or any aspect of the market context.</li> </ul>



<b>Development of guides, manuals and policies</b>	<p>The program should be supported by internal regulations, such as guidelines or manuals that develop specific aspects of the compliance culture.</p> <ul style="list-style-type: none"><li>• Establish procedures, rules of action and internal controls for each risk.</li><li>• All workers, and especially those working in higher risk areas or dealing with competing economic operators, should be trained periodically.</li></ul>
<b>Monitoring, auditing and internal reporting</b>	<p>Monitoring seeks to ensure that the objectives of the program are met and that the actions of workers, managers and the governing body are in line with the program.</p> <ul style="list-style-type: none"><li>• Audits play an important role in regulatory compliance programs, as they make it possible to prevent and correct in time any non-compliance by the economic operator.</li><li>• It is recommended that the complaints channel be adapted to the needs and resources of the economic operator, regardless of the mechanism, the principle of proportionality must be observed</li></ul>
<b>Internal disciplinary actions</b>	<p>The economic operator must appoint a person in charge who has the necessary authority to apply the corresponding sanctions. In these cases, it is recommended that these tasks be carried out by the human resources area.</p> <ul style="list-style-type: none"><li>• Disciplinary sanctions should be applied to any member of the economic operator, without distinction of any kind with regard to their position or function within the organization.</li></ul>
<b>Evaluation</b>	<p>It allows to determine to what extent the compliance program has contributed to improve the competitive practices of the economic operator, to establish the degree of compliance with the implemented policies, as well as to identify the aspects of the program that should be strengthened or improved.</p>

Source: Federal Economic Competition Commission, 2015

Preparation: Superintendence of Market Power Control, 2021

## 4. USEFUL REFERENCES FOR THE DESIGN OF A PROGRAM OF COMPLIANCE

This section contains various documents that might be useful for the elaboration of a Compliance program:

### 4.1 Related to LORCPM

#### 4.1.1 Legal instruments

This section contains a list of the main instruments that make up the legal framework on competition in Ecuador:

- Constitution of the Republic of Ecuador
- Organic Law on Regulation and Control of Market Power
- Regulation to the Organic Law on Regulation and Control of Market Power
- Market Power Regulation Board Resolutions

- Resolutions of the Superintendence for the Control of Market Power.

#### **4.2 SCPM Resolutions**

Citizens can learn about the SCPM's reasoning and arguments in the cases it resolves. The resolutions are available in a search engine of the official institutional portal: <https://www.scpm.gob.ec/sitio/resoluciones-scpm/>

The SCPM also issues other types of instruments that are useful for the compliance of economic operators with the regulatory framework:

- Recommendations
- Exhortations
- SCPM Guidelines

##### **4.2.1 Public disclosure documents**

The SCPM publishes documents aimed at different audiences that provide information on how competition policy operates:

- Market research
- Special Reports
- Information campaigns

##### **4.2.2 Guidelines issued by peer competition agencies**

This section presents a list of documents generated by competition authorities of other jurisdictions and international organizations. These may serve as additional support for implementing competition compliance programs.

In this regard, it is important to note that they are included only as a reference, given that they are adapted to the realities of each country. The recommendations contained in these documents are the sole responsibility of the issuer and reflect the characteristics of specific regulatory systems.

Competition Guide - Fiscalía Nacional Económica de Chile (National Economic Prosecutor's Office of Chile).

- Guide to Competition Law Compliance Programs - Instituto Nacional de Defensa de la Competencia y de la Protección de Propiedad Intelectual of Perú (National Institute for the Defense of Competition and Intellectual Property Protection of Peru).
- Guide to facilitate the business sector's legal compliance with its obligations and rights in terms of the legal framework for consumer protection and economic competition - Superintendencia de Industria y Comercio de Colombia (Superintendence of Industry and Commerce of Colombia).



- Recommendations for compliance with the Federal Economic Competition Law addressed to the private sector - Comisión Federal de Competencia Económica of México.
- Guide to Antitrust Compliance Programs - Comisión Nacional de los Mercados y la Competencia de España (Spanish National Markets and Competition Commission)

## CONTACT WITH SCPM

For questions about the scope of this Competition Compliance Guide, as well as the powers exercised by the SCPM, we make available the following channels of communication:

-  [scpm.gob.ec](http://scpm.gob.ec)
-  [secretaria.general@scpm.gob.ec](mailto:secretaria.general@scpm.gob.ec)
-  (593 2) 395 6010
-  Av. de los Shyris N44-93 y Río Coca, Edificio Ocaña, Quito-Ecuador

## We invite you to follow SCPM on their social networks

-  **SCPM**
-  **@SCPM\_Ec**
-  **Competencia Ecuador SCPM**

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