

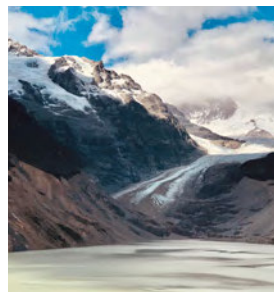
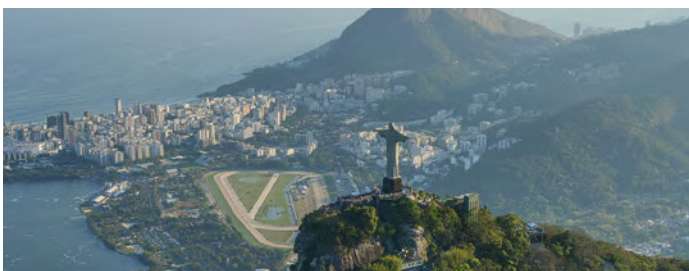


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# PRICE CONTROLS AND COMPETITION LAW

DURING COVID-19 IN LATIN AMERICA

2020





## INTRODUCTION

In light of the Covid-19 pandemic, goods such as hand sanitizers, face masks and other personal protective equipment have become first and basic necessities deemed essential to combat the health emergency. Many Latin American governments have stepped up to take measures to guarantee their stock, including price caps. In some cases, governments have extended -or already had measures in place to that effect- price and supply obligations to other type of goods. The response of competition agencies to the crisis and certain practices raising antitrust concerns has varied among jurisdictions, from no change from the pre-pandemic situation to allowing some flexibility to otherwise more rigid rules.

This report is the result of a collaborative work of renowned competition law experts from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, Uruguay, and Venezuela, consolidating their answers to a common set of questions covering price controls and competition law developments during Covid-19. The information is updated as of July 2020.



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## PRICE CONTROLS

### 1. Are there any laws setting maximum prices, or regulating supply?

Historically, politicians of all tendencies in Ecuador have had an interventionist bent. There are several price controls measures in place ranging across industries, from agricultural produce to medicine. As expected, these fixed prices almost always result in higher prices that get passed-on to consumers through intermediaries such as distributors, or in processed goods.

Price controls in Ecuador are especially ubiquitous in agriculture, as is common in developing, export-led economies. There are two systems in place, the first one a national program and a second one part of the Andean Community of Nations. The national program depends on the Ministry of Agriculture who sets price bands for wheat, barley, milk, rice, soy, bananas, and corn<sup>1</sup>. Generally, producers vocally support these price bands -that in practice are price floors- and protest deviations from them. Deviating from these price bands is criminally prosecuted according to the recently enacted Criminal Code<sup>2</sup>:

*'§308.2 - Whoever does not pay the official minimum price established by the State for bananas, corn, rice or any other agricultural product, for the purpose of commercialization in the national or foreign market, shall be imprisoned from one to three years.'*

The government does not collect figures on prison sentences being served for non-compliance, but the fact that the criminal system can intervene to force the payment of specific prices demonstrates how culturally entrenched these agricultural price floors are.

The Andean System, enacted through Decision No. 371, seeks to stabilize the importation prices of several volatile and sensitive agricultural products. Stabilization is achieved by increasing the ad-valorem tariff when the international price is below the floor level, and lowering said tariff to zero when said price is above the ceiling<sup>3</sup>. These tariffs are set within the margins allowed by the World Trade Organization.

<sup>1</sup> Press release by the Ministry of Agriculture, Livestock, Aquaculture and Fishing, 'Ministry of Agriculture and Livestock defines support prices for rice, corn and bananas with new technical mechanism', available at <https://www.agricultura.gob.ec/mag-define-precios-de-sustentacion-de-arroz-maiz-y-platano-con-nuevo-mecanismo-tecnico/> [Last visited on June 11th, 2020].

<sup>2</sup> Ecuadorian Criminal Code. Official Record No. 180. February 10, 2014. Section §308, 2.

<sup>3</sup> Andean Community of Nations. Decision No. 371 (November 26, 1994).

Similarly, prices for electricity are not liberalized in Ecuador. The government sets fixed prices depending on patterns of consumption, aiming to subsidize small consumers in rural areas.

Ecuadorian authorities also control prices of medicines, pharmaceutical products, and related industries. Depending on the availability of substitutes, the medical condition, the product treats, and international trends, the National Council for Setting and Reviewing Prices for Medicines for Human Use and Consumption distinguish between goods that have price bands, those that have fixed prices and those whose price is freely set by market forces<sup>4</sup>.

As part of the national emergency declared by the Executive due to the SARS-CoV-2 pandemic, the government took several measures related to prices. For example, through resolution MSP-2020-057 price ceilings were set for different types of Covid-19 test kits, differentiating those ceilings between public (USD 80) and private health providers (USD 120). During the peak of cases in Guayaquil -the hardest- hit city in the country- the government even set price ceilings for coffins and funeral services. For example, the ceiling was set in no more than USD 150 for a coffin able to carry a person of up to 100 kilograms, and no more than USD 675 for cremation services.

The effectiveness of these measures has not been quantified, but it is highly unlikely that these prices were observed by private companies that do not have direct oversight of the government, such as providers of test kits that sell them directly to public hospitals.

## INFORMATION REGIMES

### **2. Are companies obliged to report prices, production plans or other aspects of its operation to the authorities?**

The Ecuadorian government has not enacted new laws during the pandemic requiring companies to report prices, production plans or other aspects of its operation to the authorities.

<sup>4</sup> See the website of the National Council for Setting and Reviewing Prices for Medicines for Human Use and Consumption, available at: <https://www.salud.gob.ec/consejo-nacional-de-fijacion-y-revision-de-precios-de-medicamentos/> [Last visited on June 10th, 2020].

## COMPETITION ENFORCEMENT

### 3. Have authorities enforced competition laws against conducts that might be related to or have originated in the Covid-19 pandemic? If so, please provide details.

During the pandemic, the Superintendencia de Control del Poder de Mercado (the Ecuadorian competition agency) has worked on two fronts. First, after a series of scandals relating to bid-rigging and high prices of personal protective equipment and other supplies needed to fight the pandemic<sup>5</sup>, the agency publicly exhorted private companies to observe and respect norms relating to competition. The first exhort was directed specifically to manufacturers, suppliers and distributors of respiratory protection devices and cleaning products, reminding them that excessive or unjust prices can be investigated and fined as abuses of dominance under Ecuadorian law. The second call to attention was aimed to manufacturers, suppliers and distributors that participate in public tenders, underlining that cartels are a very serious offense that can be investigated and tried as anticompetitive by its object.

No specific cases have been made public (the entire investigation is confidential under the Ecuadorian regime, and the agency tends to publish only decisions where an infringement is found and a fine imposed) but it is reasonable to presume the agency is pursuing both excessive price cases and bid-rigging investigations related to the pandemic.

The second front relates to merger control. After initially suspending all new, pending and under-review merger filings,<sup>6</sup> the SCPM reversed its course. Several undertakings complained and argued they were finalizing negotiations of transactions that had to be notified and that the suspension forced them to wait until the emergency was lifted just to begin the five to six-month review period. It is reasonable to assume that some of them decided to close transactions without notifying and assumed the risk of a possible gun-jumping investigation.

Consequently, the agency adopted a sensible solution. It reinstated merger procedures with some caveats and exceptions. First, the clock will start again for transactions that have been under review and where the agency has enough information to produce its report. Second, the eight-day rule is again in force. This rule requires all transactions to be notified within eight calendar days of 'conclusion'.<sup>7</sup> In recent years, the agency has uniformly interpreted 'conclusion' to mean the execution of the document from which the concentration arises, although there is some leeway to use a binding version of some preliminary document -such as a Letter of Intent or a Memorandum of Understanding - if the parties wish to begin the procedure earlier.

<sup>5</sup> See for example the following media reports: Portal Diverso, 'Ecuadorian Comptroller's Office finds overpricing in supplies for Covid-19' April 8, 2020, available at <https://portaldiverso.com/contraloria-de-ecuador-constata-sobrepuestos-en-compra-de-insumos-para-covid-19/>, La Hora, 'Overpricing of PCR tests research in Quito', May 28, 2020, available at <https://lahora.com.ec/cotopaxi/noticia/1102319347/investigacion-sobrepuestos-en-pruebas-pcr-compradas-por-quito>, and Primicias, 'New reports of overpricing in public purchases during the emergency' May 4, 2020, available at <https://www.primicias.ec/noticias/politica/denuncias-sobrepuestos-compras-emergencia/>. [Last visited on 17 June 2020]

<sup>6</sup> Superintendency of Market Power Control, Resolution No. SCPM-DS-2020-14, (March 16, 2020).

<sup>7</sup> Filings must be made through the following email: [recepcion.documentos@scpm.gob.ec](mailto:recepcion.documentos@scpm.gob.ec).

Once notified, and until the health emergency is formally lifted by the Executive,<sup>8</sup> the agency can take three courses of action:

- First, begin its regular review only when the agency has up-to-date information (corresponding to at least 2018 and 2019) allowing it to properly define the relevant market and the main competitive constraints without having to request information from any third party. This will most likely occur if the agency has recently reviewed other transactions in the same relevant market.
- Second, begin its review if the transaction falls under any of a number of categories allowing it to benefit from the fast-track procedure. Those categories are the following:

- 1 First landing.** If the firm acquiring control does not directly or indirectly conduct business in Ecuador. 'Indirect' activity is defined as any sale or service rendered through any subsidiary of the economic group. Consequently, the sale of products through an independent distributor does not constitute indirect activity and thus may benefit from expedited review.
- 2 Market share.** The parties' joint share in each of the relevant markets, both in horizontal and vertical mergers, must be less than 30 percent. This exception was created for economic groups with large sales that trigger the turnover threshold, but which have marginal activity in the affected relevant markets.
- 3 Market concentration I.** Horizontal mergers where the affected relevant markets have a pre-merger HHI of 2000 points or less and the post-merger delta is less than 250 points.
- 4 Market concentration II.** For vertical mergers where the affected relevant markets have a pre-merger HHI of 2000 points or less.
- 5 Failing firms.** The agency incorporated a three-limbed test inspired by the EU Guidelines, with some variations that may have substantial consequences. The test comprises the following elements: (i) that undertakings are unable to meet their financial obligations in the near future; (ii) lack of existence of potentially less restrictive alternatives. This limb imposes a high evidentiary threshold, namely, proof that all efforts have been made to find the least restrictive alternative; and (iii) that absent the merger, the target company would exit the market.

If the merger does not allow the agency to adopt any of the foregoing two courses of action, the notifying party must still submit all documents within eight days of the conclusion of the agreement, but the review period will only begin once the emergency ends.

Finally, even though all transactions that fall within the above exceptions will move forward, the agency has announced that it will prioritize all cases related to the food industry and associated markets, pharma and medical supplies, cleaning and disinfectant products, and tourism and associated industries.

<sup>8</sup> Executive order No. 1017, (March 16, 2020).



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## COMPETITION ENFORCEMENT

### **4. Have any guidelines or comments being issued as regards the application of competition laws in the context of the pandemic?**

No guidelines have been issued as regards the application of competition laws in the context of the pandemic.

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## ONLINE PLATFORMS

### **5. Have the authorities enforced competition or price control laws in the context of digital platforms during the Covid-19 pandemic? If so, have online marketplaces taken measures against sellers using their online platforms?**

The Ecuadorian agency has not enforced competition or price control laws in the context of digital platforms during the Covid-19 pandemic.

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## LOOKING FORWARD

### **6. Do you expect the enforcement of the measures described above to continue after the Covid-19 pandemic?**

We do expect the enforcement of the price gouging and cartel investigations to continue after Covid-19, including the enforcement of regulations relating to price controls enacted during the pandemic.

## **PÉREZ BUSTAMANTE & PONCE (PBP)**

Pérez Bustamante & Ponce (PBP) is the largest full-service law firm in Ecuador, consistently considered a leader in the legal market and a trusted advisor for national and international clients. It has offices in Quito and Guayaquil and outreach throughout Ecuador.

PBP endeavors to understand clients' challenges and needs. Its multi-practice teams -integrating expertise in 13 practice areas and 9 industries- have an in-depth understanding of the specific challenges of each sector.

The firm has been awarded as Ecuadorian Law Firm of the Year by Chambers Latin America in the last 7 years and has been the most recognized firm by Who's Who Legal in the last decade. Also, in 2019 was recognized by International Tax Review (ITR) as Ecuador Tax Firm of the Year.

PBP believes that pro bono work is inseparable from the practice of law. In 1987, it founded Fundación Fabián Ponce Ordóñez to coordinate and optimise the firm's pro bono resources and maximise its scope.



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