

Regulatory Improvement in the Ecuadorian Legislation

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Introduction

The increasing intensity with which the impact of a regulation on markets and undertakings (and ultimately on the citizenship for the better functioning of the market) can be observed, and how much influence the legality and proportionality of its elaboration process has been noted. Therefore, codes, executive decrees, and institutional internal norms have sought to provide guidance and solutions on how to verify the effectiveness of regulations and ensure they serve their intended purpose. Specifically, they aim to prevent these regulations from adding to the multitude of other provisions that have been issued and lack meaning or applicability.

Development of the Topic

One of the institutions tasked with evaluating and monitoring laws within its powers is the Superintendence of Economic Competition (hereinafter 'SCE' acronym in Spanish), which, as part of the authorities granted under Article 38 of the Organic Law of Regulation and Control of Market Power (hereinafter 'LORCPM', acronym in Spanish), may:

[...]

16. Issue general resolutions, guidelines, and internal norms for its proper functioning.

[...]

21. Promote control measures aimed at eliminating barriers to free competition in the market, in accordance with the guidelines established by law.

[...]

24. Propose the removal of barriers, whether regulatory or factual, to market entry that exclude or limit the participation of undertakings.

[...]

In that regard, in October 2020, the SCE issued the Methodology for the identification, review, and elimination of regulatory barriers ((hereinafter 'Methodology'), which aims to be a tool for evaluating and monitoring regulations, aligning with the concept of *regulatory improvement* outlined in both Book VII of Good Regulatory Practices of the Organic Code of

Production, Trade, and Investment (2010) ('COPCI', acronym in Spanish) and various current executive decrees.

Article 237 of this regulatory framework states that its purpose is:

[...] Promote trade, investment, and economic development through good regulatory practices aimed at **reducing or eliminating unnecessary, burdensome, repetitive, or contradictory regulations**.

Every regulatory authority is obliged to apply good regulatory practices in the stages of planning, design, issuance, implementation, and evaluation of respective regulations. (Emphasis added).

However, in practice, it has been evidenced that many public institutions unknown of this obligation and therefore do not apply it.

What does *regulatory improvement* entail? The concept include the existence of a high-quality legal framework that provides appropriate incentives to boost economic activity, simplify processes, and reduce administrative burdens. This is aimed at ensuring that the measure imposed (regulation) conforms to the principles of good regulation within the framework of an impact analysis, thereby better guaranteeing that there are no obstacles preventing the proper functioning of markets (Contreras Delgado, 2019).

Within a framework of fair competition, public administration intervention must be justified by the pursuit of specific objectives. In this way, efforts are made to prevent these actions from distorting or hindering economic activities more than strictly necessary to achieve their legitimate objectives (Spain, National Commission on Competition, 2018).

Such is its importance that *regulatory improvement* was declared a state policy by Executive Decree No. 1204 (2020) (hereinafter 'Decree No. 1204'):

[...] in order to ensure adequate governmental regulatory management, improve the quality of life of the population, **promote competitiveness and entrepreneurship, strive for economic efficiency**, and guarantee legal transparency and certainty. (Emphasis added) (Article 1).

Additionally, this regulation specifies the objectives of *regulatory improvement*:

- a. To ensure proper regulatory management in all entities of the Executive Function;
- b. To improve the quality of regulations to enhance the business and investment climate, promote innovation, promote the solidarity economy and entrepreneurship of small and medium-sized enterprises, while reducing compliance costs;**
- c. To strengthen institutional capacities to effectively manage regulatory improvement processes;
- d. To ensure legal certainty through regulatory environment improvement, thereby strengthening citizens' trust in public administration;
- e. To improve the quality of life of citizens in their interactions with the public sector; and,
- f. To democratize decision-making in public policy within the regulatory area through consultation processes with stakeholders. (Emphasis added) (Article 2).

On the other hand, Executive Decree No. 68 (2021) establishes:

Declare it a priority public policy of the Republic of Ecuador to **facilitate international trade, promote and attract investments through fostering competitiveness, implementing good regulatory practices, and simplifying, streamlining, and ensuring transparency in administrative processes.** (Emphasis added) (Article 1).

The above is consistent with the COPCI (2010), which establishes that:

Art. 241. Quality of Information.- Regulations shall be based on scientific, technical, economic, or academic information that supports them. Regulatory authorities shall identify such information, unless it is classified as reserved or confidential. (Emphasis added).

Art. 246. Regulatory Impact Assessment. - Regulatory impact assessment is a tool to assist regulatory authorities in evaluating the necessity and impacts of regulatory projects. Regulatory authorities shall conduct an impact assessment for any proposal that creates compliance costs, in accordance with parameters established by the central regulatory coordination body. (Emphasis added).

It is important that regulations stimulate competition and efficiency in markets, aiming specifically to address market failures in cases where effective competition is not feasible. In this context, initiatives intended to more precisely apply competition defense should incorporate cost-benefit analysis into the regulatory impact assessment processes of normative projects (Spain, National Commission on Competition, 2018).

On the other hand, Article 81 of the Statute of the Legal and Administrative Regime of the Executive Function (2002) (hereinafter 'ERJAFE', acronym in Spanish), defines the process of formation of regulatory acts:

Regulatory acts shall be issued by the respective competent authority. **The initiative for their issuance must be accompanied by the necessary studies and reports that justify their legitimacy and timeliness.**

[...] (Emphasis added)

It is also worth remembering that General Provision Four of the LORCPM (2011), regarding sectoral regulation, states that:

Within their jurisdiction, public entities responsible for regulation shall observe and apply the precepts and principles established in this Law and shall contribute to fostering, promoting, and preserving competitive conditions in the corresponding markets.

In addition to what is stated in the COPCI (2010), the cited executive decrees, and the ERJAFE (2002), the LORCPM (2011) also imposes an obligation on regulatory bodies to incorporate principles aimed at promoting market growth and, consequently, enhancing economic activity when issuing regulations within their competencies. However, it is common to observe that regulations do not necessarily align with the interests they aim to guarantee and, in many cases, result in more burden than relief in addressing current issues.

As a proposal for the evaluation and monitoring of regulations, both from a legal and economic perspective, the SCE in its Methodology (2020) establishes two macro levels of review. The first corresponds to legality analysis, which includes, on one hand, verifying that the issuing body had the specific competencies to regulate the subject matter, and on the other hand, ensuring that the regulation does not contradict the legal framework.

Likewise, in order to verify that public administration actions are technically supported and justified, the second level is conducted, known as the *proportionality analysis*, where it is verified that the regulations are based on:

- Suitability: existence of a relationship between the means and ends of the regulation.
- Necessity: proposal and analysis of less restrictive alternatives.
- Strict proportionality: evaluation of the expected benefits from the application of the regulation, and those presented over the period of validity.

Board of Regulation and Control of Market Power

It is also essential to note the powers that the LORCPM includes and that belong to the Executive Function, specifically to the Board of Regulation and Control of Market Power (hereinafter 'JRCPM', acronym in Spanish):

Art. 35. Powers of the Executive Function. - The Executive Function is responsible for leadership, planning, formulation of public policies, and regulation within the area of this Law.

Regulation shall be under the jurisdiction of the Regulation Board, whose powers shall be established in the General Regulation of this Law, exclusively within the framework of the duties, powers, and attributions set forth for the Executive Function in the Constitution. The Regulation Board shall have the authority to issue regulations that are generally binding in matters within its competence, without altering or innovating legal provisions.

[...] (Emphasis added) (2011)

The above is consistent with the provisions established in the Regulation to the Organic Law of Regulation and Control of Market Power (hereinafter 'RLORCPM', acronym in Spanish):

Art. 42. Powers of the Regulation Board.-

The Regulation Board shall have the following powers:

- a) Exercise leadership in the formulation of public policies and their planning within the scope of the law, in accordance with the duties, powers, and attributions established for the Executive Function in the Constitution of the Republic;

[...]

- b) Authorize, by reasoned resolution, the establishment of restrictions on competition, in accordance with Article 28 of the Law;**
[...]. (Emphasis added) (2012)

The Board may issue such a resolution only for reasons of public interest:

Art. 28. Application of Restrictions.- It shall be permissible to establish restrictions on competition by reasoned resolution of the Regulation Board, for reasons of public interest, in any sector of the national economy, in the following cases:

1. To establish a state monopoly in favor of the public interest;
2. To develop strategic sectors in accordance with the Constitution of the Republic;
3. For the provision of public services in accordance with the Constitution of the Republic;
4. For the technological and industrial development of the national economy; and,
5. For the implementation of affirmative action initiatives in favor of the solidarity and popular economy.

The establishment of restrictions on competition shall proceed when specific, concrete, and significant benefits are generated for the satisfaction of the general interest within the sector or industry concerned, efficiency is increased, and benefits are generated for consumers or users that justify their application. Public aids and restrictions on competition shall be subject to evaluation in accordance with regulations on good regulatory practices.

(Emphasis added) (LORCPM, 2011)

On this point, the reasoned resolution must be preceded and justified by a cost-benefit evaluation, which shall consider the suitability and necessity of the restriction measure to be adopted. (Regulation to the Organic Law of Regulation and Control of Market Power [RLORCPM], 2012, art. 32)

On the other hand, Article 4 of the LORCPM (2011) outlines guidelines for regulation and public policy formulation under the Law, including: '[...] 5. The right to engage in economic

activities and the free entry of undertakings into the market. [and] [...] 10. The need for transparent and efficient markets. [...].¹ Therefore, the JRCPM (in accordance with its powers and attributions) must address issues related to regulatory barriers that may restrict competition or hinder market functioning, since public policies should aim to comply with the outlined guidelines for *regulatory improvement*.

Additionally, the JRCPM has the obligation to comply with the following:

Art. 51. Cooperation.- In fulfilling their respective functions, the **Regulation Board and the regulatory and control agencies** or competent public bodies empowered to issue sector-specific regulations in accordance with the law shall **work closely together and ensure the compatibility of their policies**. To this end, they shall exchange information in a timely manner and engage in prior consultations regarding their respective areas of specialization.

[...]. (Emphasis added) (RLORCPM, 2012)

In this sense, in addition to the work being carried out by the SCE through the recommendations issued, the JRCPM has been urged to involve itself in the regulation control of public policies, as determined by the legislation cited in this document, since this could be a crucial support in the implementation of regulatory improvement and, consequently, in enhancing national regulatory quality.

Finally, it is important to note that since the recommendations issued by the SCE as a result of its reports and analyses do not yet have binding effect on regulatory entities, the support from the media and the promotion of competition has been crucial to achieve an impact in public administration, but still insufficient.

Conclusion

The evaluation and monitoring of the law constitute a fundamental part of the normative and regulatory exercise carried out by public administration. Therefore, ensuring that regulatory issuance complies with the precepts established by the concept of *regulatory improvement* is mandatory, particularly given its endorsement not only in one but in several legal provisions that reinforce its importance. Just as *ex ante* regulation is necessary, the *ex post* evaluation is also embedded in our legal system.

To sum up, it has been evidenced that efficient regulation, which achieves its intended objectives and includes impact analysis, among other aspects, is crucial for stimulating economic activity. Such regulation serves to attract investment and foster market growth.

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