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Conflicts of application of the Organic Administrative Code in Ecuadorian Competition Law

Los conflictos de aplicación del Código Orgánico Administrativo en materia de Derecho de Competencia Ecuatoriano

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RESUMEN: La entrada en vigor del Código Orgánico Administrativo ocasionó una diversidad de interpretaciones respecto de la aplicabilidad de sus disposiciones a los procedimientos de investigación y sanción a cargo de la Superintendencia de Control del Poder de Mercado. Varias disposiciones de este cuerpo normativo generan oportunidades para unos y riesgos procesales para otros, por lo que su aplicación fue ampliamente controvertida hasta que la Procuraduría General del Estado zanjó la controversia mediante un pronunciamiento

que resolvió que la autoridad ecuatoriana de competencia debía aplicar sus normas procedimentales propias, siendo supletoria la aplicación del Código Orgánico Administrativo. Este pronunciamiento deja nuevas interrogantes, ¿cuáles aspectos regulados por el Código Orgánico Administrativo, y cuáles no son aplicables de forma supletoria a la Ley Orgánica de Regulación y Control del Poder de Mercado, su Reglamento y el Instructivo de Gestión Procesal Administrativa de la Superintendencia de Control del Poder de Mercado?

PALABRAS CLAVE: Competencia, procedimiento legal, norma jurídica, administración pública, mercado

ABSTRACT: The entry into force of the Organic Administrative Code caused various interpretations regarding the applicability of its provisions in investigative and fining procedures before the Superintendence of Market Power Control. Several provisions of this regulatory body generated opportunities for some, and procedural risks for others, so its application was widely controversial until the State Attorney General settled the dispute through a ruling which determined that the competition authority should apply its own procedural rules, the application of the Organic Administrative Code being supplementary. This statement leaves new questions as to which aspects regulated by the Organic Administrative Code are applicable in a supplementary way to the Organic Law of Regulation and Control of Market Power, its regulations and the Instruction of Administrative Procedural Management of the Superintendence of Market Power Control, and which are not.

KEYWORDS: Competition, legal procedure, legal standard, public administration, market.

CÓDIGO JEL: D41, H5

INTRODUCTION

Since the entry into force of the Organic Law on Regulation and Control of Market Power ("LORCPM") in October 2011 and the possession of the first superintendent in September 2012, the competition authority was created for the first time in Ecuador, comprising 4 investigative bodies or intendencies[1], a resolution authority[2], and an appeals body headed by the Superintendent.

During these almost nine years of application of the regulation and exercise of the authority's powers, we have seen the application of the procedural rules provided by the LORCPM, its Regulations, and internal instructions in the various cases, generating a turning point with the entry into force of the Organic Administrative Code ("COA") on 7 July 2018. Since the application of this rule, there have been numerous interpretations regarding its applicability to the investigative and sanctioning process provided for in the LORCPM; making the emergence of incompatibilities and contradictions between the rules of the COA and the rules provided for by the LORCPM, its Regulations and the Administrative Procedural Management Instructions of the SCPM unavoidable.

This article seeks to address the evolution of this apparent problem up to the pronouncement of the Attorney General of the State ("PGE") in the face of a consultation by the SCPM in October 2019 and the analysis of the pre-legislative and legislative discussions surrounding the intended application of the COA to determine whether or not there was a real conflict

1 The intendancies are the following: Intendencia de Abuso de Poder de Mercado, Acuerdos y Prácticas Restrictivas; Intendencia de Prácticas Desleales; Intendencia de Control de Concentraciones; and Intendencia de Abogacía de la Competencia

2 The resolution body is composed of 3 commissioners and is called the First Instance Resolution Commission

between the COA and the procedural rules of the LORCPM, its Regulations, and the Instructions of the SCPM. We then analyzed which COA rules should be applied in a supplementary manner in investigative and sanctioning procedures.

1. CONFLICTS BETWEEN THE ORGANIC ADMINISTRATIVE CODE, THE ORGANIC LAW ON THE REGULATION AND CONTROL OF MARKET POWER, AND ITS REGULATIONS

The most relevant and innovative provisions of the COA, which originally could have been interpreted as applicable to the investigative and sanctioning procedure before the SCPM, are mainly the following: a) rules on abandonment, prescription, and expiry of the sanctioning power; b) deadlines for filing administrative appeals; c) deadlines for the SCPM's resolution; and d) the figure of administrative silence.

Before the decision of the State Attorney General's Office, analyzed in depth in section 2.3., articles 42 and 43 of the COA (2017), which regulate the material and subjective scope of its application, state that, in principle, this rule should apply to proceedings before the SCPM:

> Art. 42.- Material scope. This Code will be applied in 1. The administrative legal relationship between persons and public administrations. 2. The legal activity of public administrations. 3. the bases common to all administrative procedures. 4. Administrative procedure. 5. Challenging administrative acts in administrative proceedings. 6. Non-contractual liability of the State. 7. Special administrative procedures for the exercise of the power to impose penalties.
>
> 8. Challenging disciplinary proceedings except for

> those which are regulated under their own rules, and which apply this Code in a subsidiary manner. 9. Coercive enforcement. For the challenge of administrative acts, in administrative proceedings, and for the coercive procedure, only the rules provided for in this Code shall apply.
>
> Art. 43.- Subjective scope. This Code applies to the bodies and entities that make up the public sector, following the Constitution. In the case of public companies, the provisions of this Code shall apply insofar as they do not affect the special rules that govern them. When reference is made in this Code to the terms public administration or public administrations, this identifies the public bodies and entities included in its scope of application.

These two provisions determine that, in principle, the rule was designed and drafted to apply to all administrative instances of public sector bodies and entities. Unlike the Statute of the Administrative Legal Regime of the Executive Function ("ERJAFE"), which during its validity could not be applied to a body that did not belong to the Executive Function, such as the Transparency and Social Control Function, to which the SCPM belongs, the text of the articles of the COA would apply to the SCPM as it refers to all bodies and entities that make up the public sector. Futhermore, unlike what happened years ago with one of the main legal bodies of Ecuadorian administrative law, the SCPM could no longer use the argument that, since it was not the Executive Function, the SCPM's procedures enjoyed independence and autonomy from the provisions contained in the ERJAFE.

On the other hand, the repealing provisions of the COA (2018) clearly state that "all provisions concerning the administrative procedure, administrative sanctioning procedure, administrative appeals, expiry of powers and procedure and the prescription of sanctions that have been applied" are repealed (s.

p.), which, except for the pronouncement of the PGE, include those of the LORCPM, its Regulations, and the Instructions.

In this regard, the COA (2018) provides for the termination of the administrative procedure by abandonment, stating in Art. 212 that it proceeds when the interested party ceases to promote it for two months. This provision of the COA could conflict with the procedural times set out in the LORCPM, its Regulations, and the Instructions, as they have much longer investigation and resolution procedural times, and the abandonment time provided by the COA could directly undermine the investigative and sanctioning capacity of the SCPM in its investigations, as the power to investigate and the burden of proof, according to Art. 48 of the LORCPM, corresponds to the SCPM.

On the other hand, and concerning the statute of limitations, the COA provides for a different statute of limitations period to that of the LORCPM (2011), stating that it is: a) one year for minor infringements; b) three years for serious infringements; c) five years for very serious infringements. The LORCPM does not have a statute of limitations linked to the seriousness of the infringement but provides for a broad statute of limitations of four years from the date of knowledge of the infringement, or in the case of continuous infringements, from the date on which they ceased.

By way of illustration, if the statute of limitations of the COA were applied, a minor infringement, for example, the late notification or lack of notification of an economic concentration, would be time-barred after one year from "the date of the commission of the act", which would hardly allow the setting of sanctions between the time of investigation and sanction foreseen by the rule.

Regarding the expiry of the sanctioning power of the competition authority, Art. 213 of the COA (2018) provides that in proceedings initiated ex officio, the expiry occurs two months after the expiry of the maximum period for issuing the administrative act, following the rules of the COA itself. On the other hand, Art. 179 of the COA (2018) determines that, once preliminary proceedings on a given matter have been initiated, the decision to initiate them must be notified within a maximum period of six months from the time the preliminary proceedings are ordered at the end of which the exercise of the sanctioning power lapses. Considering the LORCPM, its Regulations, the Instructions, and the various investigative phases (sweeping, preliminary, and others), the COA places the authority in a very complex legal situation and the latent possibility that the sanctioning power will expire in most cases in progress.

Concerning appeals, Art. 217 of the COA (2018) only provides for an appeal to the superior hierarchical authority, while Art. 66 of the LORCPM provides for an appeal for reconsideration, granting 20 days for its formulation. Art. 67 provides for an appeal, with an identical term of 20 days, which differs from the time limits provided for in Art. 224 of the COA (2018), which regulates the time limit for appeals to a term of ten days from the notification of the administrative act.

From this perspective, there was a complex antinomy for the application of the COA in proceedings before the SCPM and confusion as to the availability of remedies and their timing.

Another recipe for chaos is the one that regulates the resolution deadlines. The COA significantly limits the resolution deadlines of the LORCPM, its Regulations, and instructions, by stipulating in Art. 203 that the maximum term for resolution is 1 month after the end of the trial period. It should be noted that this rule seeks procedural speed, considering that the authority must process the different phases with absolute dynamism, considering that failure to do so leads to the expiry of its sanctioning power or even the prescription of the sanction.

Finally, it remains to refer to the figure of administrative silence provided for by the COA. The LORCPM only foresees a possibility for it to operate with the approval of notifications of economic concentration that has not been resolved within a maximum period of 60 calendar days, extendable for an additional 60 days. For its part, the COA foresees in Art. 207 that requests must be resolved within 30 days, after which administrative silence operates. This provision would be inoperable in matters of economic competition since the resolution of petitions in such a short period would be impracticable.

All the above shows us that the application of these provisions to the special proceedings before the SCPM would have generated significant difficulties for the authority in the face of proceedings that require long periods to carry out the exhaustive assessments of each case and the economic analyses required for an investigation into infringements of free competition rules.

These apparent contradictions had to be resolved through a consultation of the SCPM to the State Attorney General's Office, which was issued almost 1 year and 4 months after the entry into force of the COA and a window of time during which there were many attempts by economic operators to use the special processes and deadlines of the COA to their advantage.

To dimension the complexity and particularities of the procedures before the competition authority, in the following section we will address these processes, their timing, and specific rules provided by the LORCPM, its regulations, and the instructions.

2. THE PROCESS PROVIDED FOR BY THE LORCPM, ITS REGULATIONS, AND THE SCPM'S ADMINISTRATIVE PROCEDURAL MANAGEMENT INSTRUCTIONS

The authority in charge of enforcing competition law in Ecuador is the SCPM, an institution that belongs to the Transparency and Social Control Function. The LORCPM, its Regulations, and the Instructions establish a special administrative procedure for those cases brought before this authority concerning cases of abuse of market power (absolute and relative), restrictive practices, unfair practices, and economic concentrations. According to the LORCPM, the proceedings before the SCPM are regulated through a specific process and are initiated in three different ways.

a. Ex officio, when the authority itself initiates an investigation, after having become aware directly or indirectly of conduct that could constitute an infringement of the legal system; or because of the results of market studies and special reports.

b. At the request of another public administration body when another public administration body requests the initiation of an administrative competition procedure after having become aware of potentially anti-competitive practice.

c. By complaint filed with the SCPM, formulated by the affected party, or by any natural person (consumers and users) or legal entity, who demonstrates a legitimate interest. (Superintendencia del Control del Poder de Mercado, 2020, s. p.)

On the other hand, investigations initiated by complaint must be qualified by the corresponding intendancy depending on the type of conduct denounced, the intendancy must verify that the complaint complies with the requirements established in article 54 of the LORCPM. If the complaint complies with the requirements, it will be notified to the accused so that they can provide explanations within fifteen days. At the end of this period, a reasoned decision will be issued to close the case or to initiate the next phase, i.e., the (formal) investigation phase.

In all three procedures, the investigation phase will last for 180 days, extendable by up to 180 days. This phase culminates in a report of findings and, if appropriate, the formulation of charges.

Once the charges and results report has been notified, the alleged offender must present his or her exceptions within fifteen days. At the end of this period, a sixty-day probation period is opened, extendable for up to thirty days, after which the final report of the investigation will be issued. The final report is sent to the First Instance Resolution Commission (CRPI), which is responsible for taking cognizance of the case, transferring the report, and issuing a decision. As soon as the CRIRC receives

the final report from the prosecutor's office, it will do the following: first, it will take cognizance of and forward the final report of the prosecutor's office to the parties. Secondly, it will draw up a work plan in which it will define estimated resolution dates. Subsequently, the parties will be able to file pleadings. The CRPI has ninety days to issue the final resolution. In the meantime, it may convene a public hearing. The final resolution will impose sanctions and/or corrective measures.

2.1. Preventive measures

Following article 62 of the LORCPM, before or at any stage of the investigation procedure, ex officio, or the request of a party, preventive measures may be requested, which will be suggested by the intendancy to the CRPI within five days. This request issued by the intendancy must be made through a duly reasoned report, based on which the CRPI will decide to dictate the appropriate measures through a reasoned resolution.

The CICR may at any time order the suspension, modification, or revocation of such measures. In addition, and at any time, the CRPI may request a report from Intendencia on compliance with the measures. While these measures are being implemented, the economic operator may request that they be modified, suspended, or revoked.

2.2. Remedial action

According to Article 73 of the LORCPM (2011), the purpose of corrective measures is "to restore the competitive process, prevent, impede, suspend, correct or reverse conduct contrary to this Law, and avoid such conduct from occurring again". Such measures may be of three types, the first, the cessation of the practice, the second, the performance of activities or

conclusion of contracts that seek to restore the competitive process, and finally, the unenforceability of anti-competitive provisions of certain legal acts.

When there is information on the commission of conduct contrary to the law, the Intendencia may suggest to the CRPI, in its final report, the application of any corrective measures it deems necessary, without prejudice to the total freedom of the CRPI to adopt the measures it deems necessary. The CRPI, when it considers it necessary to make corrections in the relevant market, will impose as many corrective measures as it deems necessary in the resolution that resolves the case. This resolution shall stipulate that the competent quartermaster shall monitor compliance with these measures.

In the event of non-compliance with the measures imposed by the economic operator, the intendancy will open an investigation file and notify the CRPI. Once the investigation is completed, the intendancy will send the final report to the CRPI for its resolution, which will issue a resolution declaring non-compliance or compliance with these measures. In case of non-compliance, the CRPI will set a new deadline for compliance with the corrective measures, as well as apply new measures, imposition a sanction, and the appointment of a temporary auditor to monitor compliance with these measures.

2.3. Termination commitments

Third, it is worth analyzing the nature of the cease-and-desist commitment provided for by competition law. During any stage of the proceedings, until before the final decision of the CIPRC, the operators under investigation may submit a proposed cease-and-desist commitment whereby they undertake to cease the conduct under investigation and to remedy the harm caused. Once the commitment has been submitted, a new file will be

opened ancillary to the main file, through which the parties to the file will be notified so that they can present their arguments within fifteen days.

In parallel, the SCPM will evaluate the proposal considering mainly three conditions:

a Operators to acknowledge the infringement.

b Offer corrective measures to verify the cessation of the anti-competitive practice.

c The damage caused to the market should be rectified.

The CIPRC, following a report by the investigative body, shall issue a resolution accepting, modifying, or rejecting the proposed commitment to terminate.

If the commitment is denied, the process will continue from the stage it was at. If the commitment is modified, the operator must submit a new proposal based on the CRPI's observations or withdraw its commitment, continuing with the stage it was at. If the commitment is accepted, the file will be closed, and the operator will have to comply with the measures imposed by the authority.

2.4. Administrative remedies

Finally, it is worth mentioning the types of administrative appeals that exist in proceedings before the SCPM (2017):

(a) Appeal for reconsideration

The appeal for reconsideration must be lodged by the economic operator under investigation within 20 days of notification of the contested administrative act. The body responsible shall decide on the appeal within 60 days.

(b) Appeal

The appeal shall be addressed to the Superintendent within 20 days of notification of the contested administrative act. The Superintendent shall resolve the appeal within 60 days from the date on which the Superintendent acknowledges the appeal. This appeal shall not be subject to any appeal except for horizontal appeals for amplification and clarification.

(c) Extraordinary review action

This appeal may only be lodged against administrative acts within 3 years after the decision that is the subject of this appeal has become final. The Superintendent shall issue his decision within 60 days from the date on which the matter was referred to him. This appeal shall not be subject to any appeal except for horizontal appeals for amplification and clarification.

As illustrated, the LORCPM and its Regulations have provided for special procedures and very specific phases for the proceedings before the SCPM.

3.PRONOUNCEMENT OF THE STATE ATTORNEY GENERAL'S OFFICE (PGE) REGARDING THE ORGANIC ADMINISTRATIVE CODE AND THE ORGANIC LAW ON REGULATION AND CONTROL OF MARKET POWER.

Given the numerous interpretations and disputes that have arisen in proceedings before the SCPM, on 17 September 2019 the Superintendent of Market Power Control asked PGE whether the entry into force of the COA tacitly repealed the administrative sanctioning procedure established in the LORCPM, as well as the administrative remedies contained therein. In this regard, the Attorney General's Office responded (Oficio No. 06578, 2019), stating that the COA did not expressly or tacitly repeal

the provisions of the special sanctioning procedure and the administrative remedies contained in the LORCPM. The basis for the PGE's response is the principle of specialty, which has been taken up by Article 39 of the Civil Code (2005) and reads: "The previous special law is not repealed by the subsequent general law if it is not expressed".

Specifically, PGE (2019) stated in its response to the consultation that:

> The conflict between the criterion of specialty and the chronological criterion. This conflict occurs when an earlier-special rule is incompatible with a later-general rule. There is a conflict because when applying the specialty criterion, the former rule prevails, and when applying the chronological criterion, the latter rule prevails. Here, too, a general rule has been established: lex posterior generalis non derogat priori speciali. Based on this rule, the conflict between the specialty criterion and the chronological criterion must be resolved in favor of the former: the later general law does not override the earlier special law. This introduces a further exception to the principle lex posterior derogat priori, since this principle disappears not only when the lex posterior is inferior, but also when (sic) it is generalis (and the lex prior is specialis). (s. p.)

If one looks closely at the acquittal of the above-mentioned consultation, it will seem that both the SCPM and the PGE have assumed that the potential derogatory effects of the COA could only be generated by way of tacit derogation of the procedural provisions of the LORCPM.

Against this background, certain questions arise. If the procedural provisions of special laws of the equal hierarchy are not understood to be expressly repealed by the First Repealing Provision of the COA, why did the legislator include two General Provisions to expressly exclude administrative procedures in tax and intellectual property matters from the application of the COA? How should the Third[3] and Third General Provisions be understood then?

Is this a legislative redundancy, or does the true intent and spirit of the law lie in them?

Undoubtedly, the entry into force of the COA raised questions about the processes and administrative provisions of the LORCPM, both for the authority and for the economic operators subject to it.

To this end, the analysis used in the Ombudsman's consultation provides insight into the application of the COA; however, to resolve any concerns, it is essential to expand on the elements considered for the formation of a sound legal opinion on the matter.

As is often the case in the process of law formation, the approved and published COA underwent some important changes concerning its primary text. Thus, the draft Organic Administrative Code presented by Assembly Member Vethowen Chica Arévalo on 15 December 2015, had the clear and express objective of unifying all administrative processes collected by

3 The third general provision states the following: "In the area of taxation, the provisions contained in the Organic Tax Code and other regulations in force are applicable, notwithstanding this, the provisions of this Code will be applied in a supplementary manner, except for the provisions of Article 185 of the Organic Tax Code, which is repealed, and the provisions of the Organic Administrative Code must be observed for the basis for the auction bids" (COA, 2019).

the Ecuadorian legal system under the new process provided for in the COA. It is sufficient to read the objectives of the norm contained in the explanatory memorandum which state:

> The main purpose of the Code is to regulate relations between individuals and the Public Administrations in their service, to establish the legal regime of administrative acts and their review in administrative proceedings, and to establish a common administrative procedure applicable by all public bodies and entities. (...)
>
> The approval of this Code represents a historic milestone in the Ecuadorian legal system, which for the first time has a general rule regulating the administrative procedure, which will apply to all public sector bodies and entities, and which disciplines all interrelations between individuals and administrations. (COA, 2019, art. 1)

In the same vein, the text of the draft included a transitional provision which read:

> Art. 413 Administrative Procedures Sanctioning. - Administrative proceedings in which a Public Administration exercises a sanctioning power, whatever their nature, and which have been initiated before the entry into force of this Code, shall expire in six months from the date of publication of this Code.
>
> If the sanctioning power in question has not expired following this Code, the competent body may initiate the corresponding administrative sanctioning procedure following the procedure provided for in this Code.

And, for the sake of clarity, the draft expressly included Reformatory and Repealing Provisions of several articles of the LORCPM (2011), namely:

> Art. 424. Amendments and repeals to the Organic Law on Regulation and Control of Market Power. - After the last paragraph of article 48 of the Organic Law on Regulation and Control of Market Power, published in the Supplement to Official Gazette No. 555 of 13 October 2011, add the following:
>
> The preliminary and investigative powers of the Superintendence for the Control of Market Power are subject to the provisions of the Organic Administrative Code, and in all matters not expressly provided for in said Code to this Law. (...)
>
> Repeal Articles 55, 57, 59, 60, 60, 61, 64, 66, 67, 68, 69 and 70. (...)
>
> Article 58, replaced by the following:
>
> Article 58 - Administrative sanctioning procedure. - Once the preliminary investigation proceedings have been concluded following the Organic Administrative Code and this Law, if there is merit to continue with the procedure, the substantiation body shall issue the administrative act of procedure with which it shall initiate the administrative sanctioning procedure and shall order the interested party to be notified with the formulation of charges. (...)
>
> Article 65 is replaced by the following:
>
> Art. 65. - Legal activity of the Superintendence for the Control of Market Power. - The actions of the

> Superintendency for the Control of Market Power are subject in all respects to the provisions of the Organic Administrative Code and the specific rules provided for in this Law.
>
> The administrative appeals that may be lodged by the interested parties are also regulated by the Organic Administrative Code (...)".

After the first debate, the repealing provisions were replaced by a provision with the same effect, which proposed the total repeal of Chapter V of the LORCPM, entitled "On Proceedings". Thus, the Report for the second debate of the Justice and State Structure Commission of 21 December 2016 included in its conclusions:

> It simplifies and unifies administrative and sanctioning procedures in public sector bodies and entities to guarantee citizens' rights and ensure the prompt and effective satisfaction of the general interest. (Commission on Justice and Structure of the State, 2016, n. p.)

Subsequently, on 17 January 2017 and 9 May of the same year, the SCPM, noting that the bill was not brought to its attention before the first debate, submitted observations regarding the derogation sought by the COA bill. As a result, in the second debate, among other changes, the repealing provision that proposed the elimination of all of Chapter V of the LORCPM was eliminated and the bill was sent to the President of the Republic for approval. The National Assembly accepted the President's partial objection with its respective alternative texts and, as a result, the final version of the Code did not include the express repeal of Chapter V of the LORCPM.

The draft Organic Administrative Code was originally intended to make administrative proceedings and the rest of the administrative provisions of the LORCPM subject to the COA; however, in the process of drafting the Code, the express provisions that produced this effect were eliminated, but very broad general and derogatory provisions remained in the Code, which produced this uncertainty regarding the application of the COA and its administrative sanctioning process in the investigations conducted by the SCPM.

Having put the analysis of the derogatory effects of the entry into force of the COA into context, let us turn to the analysis made by the State Attorney General's Office.

As highlighted by the Ombudsman's Office, it remains in doubt whether technically and legally the COA repealed the administrative procedure provisions contained in other special laws that have the character of organic laws, without having an express repeal in this regard in the COA, since its material and subjective scope of the application contains the elements to include the SCPM proceedings within its scope. At the same time, as has been established, it is also clear that the legislator's original intention was to unify all the administrative procedures contemplated in other laws, or at least most of them. However, the result is far from this intention: only five organic laws out of the existing eighty-two have been directly affected by derogations from the COA. Having included only six express derogatory provisions, the procedures, and administrative provisions of the remaining seventy-seven organic laws and codes would be understood to be in force. It is worth noting that the organic laws whose procedural norms are not affected by the COA regulate most of the administrative processes provided for in the Ecuadorian legal system and, undoubtedly, these laws regulate the most relevant administrative procedural matters.

Under these considerations, it is inevitable to question whether the COA will become the transcendental law it was intended to be or whether it will produce tangential effects compared to what was intended at the time of its conception.

In any case, the legislator deliberately excluded from the final text of the COA the express derogatory provisions of the procedural rules of the LORCPM, so it is clear that, under the principle of specialty, the entry into force of the COA does not repeal the procedures and administrative provisions of the LORCPM, so that investigations, appeals and other processes conducted by the Superintendence for the Control of Market Power must continue their processing following the provisions of the LORCPM and the COA should only be considered in a supplementary manner.

In this context, an important question remains. Beyond the specific case of the legal impact of the entry into force of the COA on the procedural provisions of the LORCPM, whose ambiguities are the result of a final text poorly assembled because of the law-making process employed by the National Assembly, do the acquittals of consultations by the PGE constitute a source of law? Should the PGE heed consultations that seek to have the PGE carry out a genuine legislative act and not an interpretative one?

4. PROVISIONS OF THE ORGANIC ADMINISTRATIVE CODE APPLICABLE TO THE SCPM PROCESS

As noted above, the First Repealing Provision of the COA (2017) reads: "All provisions concerning the administrative procedure, administrative sanctioning procedure, appeals in administrative proceedings, expiry of powers and the procedure and the prescription of sanctions that have been applied are

repealed". In literal application of the repealing rule, due to the entry into force of a special rule with a repealing provision, the procedural provisions of the LORCPM, its Regulations, and the Instructions could be interpreted as tacitly repealed, however, the SCPM continued to apply them in its procedures, in certain cases refusing to take into consideration the COA even in a supplementary manner. It remains to be defined, then, which provisions of the COA will be applicable and which will be inapplicable under the legislator's intention, the opinion of the PGE, and the legality of this exclusion.

The special processes and deadlines that govern the substantiation of the SCPM have a reason for being, as the complexity of the processes, the degree and rigor required of an investigation of this nature, and the necessary studies, require a duration that exceeds the speed promoted by the COA. It was this logic that led the SCPM itself to formulate its observations and requests to the National Assembly during the pre-legislative and legislative process of the COA, which unfortunately did not appear in the final approved text, nor were they included as exceptions to the broad derogation and were the reason for the confusing interpretation and application of the procedural rules to the Authority's procedures.

However, as we will see below, there are certain precepts of the Organic Administrative Code that could apply to proceedings before the SCPM.

Firstly, why not apply the legal principles set out in the COA to administrative proceedings before the SCPM? Using these principles would only set limits and/or rules for the parties, without conflicting with the nature of the special procedure. For example, using the principle of efficiency to facilitate the

exercise of people's rights, or the principle of proportionality to avoid excessive burdens or charges, as is often the case in competition law proceedings. The same could be applied to the rights and duties of individuals, competence, grounds for excuse and recusal, and even to the actions of the public administration and the COA's definitions of an administrative act, the act of simple administration, administrative contract, administrative act, or the normative act of an administrative nature.

As for the administrative procedure itself, there are also certain provisions of the COA that are not contrary to the provisions of the LORCPM, its Regulations, and the SCPM's instructions. For example, the provisions regarding the direction of the procedure, forms and models, reason for receipt, procedural impulse, rectification, accumulation, form of keeping the files, interested persons, representation, calculation of terms and deadlines, and form of notification, following the provisions of Articles 134 and 174 of the Organic Administrative Code. By way of example, the following:

According to COA (2017), the notification means:

> Article 164 - Notification. This is the act by which the interested person or an undetermined group of persons is notified of the content of an administrative act so that the interested persons are able to exercise their rights.
>
> The notification of the first action of the public administrations shall be made in person, by ballot, or by the means of communication ordered by them.
>
> The notification of the actions of the public administrations is carried out by any means, physical or digital, that allows the transmission and reception of its content to be recorded.

This definition could be fully applicable within the proceedings conducted by the SCPM, without altering in any way the nature and specialty of each proceeding. This form of notification is already used daily in the proceedings conducted by the SCPM.

On the computation of terms, the COA (2017) states that:

> Article 159 - Calculation of terms. Saturdays, Sundays, and declared holidays are excluded from the calculation of terms.
>
> The days declared as holidays in the jurisdiction of the person concerned shall be understood as such in the headquarters of the administrative body or vice versa.

For its part, the LORCPM contains provisions that seem to confuse this provision, for example, Art. 21 on the decision in the merger process, where it speaks of a "term of sixty (60) calendar days", confusing the concept of the term with a deadline, and later, stating that this term can be extended for an additional 60 days. This provision introduces a temporary regime of 60 days term, combined with an extension of 60 days term, subject to confusions, accentuated by the regulation that in its Art. 20 clarifies that effectively the first concept is a term, without prejudice that the regulation amends Art. 21 of the LORCPM by contradicting the moment from which the term runs, which according to the law is from "presented the request and respective documentation" and according to the regulation is computed from the moment this request is qualified as complete.

The rules of the COA (2017) would also be fully applicable concerning the statement of reasons:

> Art. 100.- Statement of reasons for the administrative act. In the statement of reasons for the administrative act, the following shall be observed: 1. The indication of the applicable legal rule or legal principles and the determination of their scope. 2. The qualification of the relevant facts for the adoption of the decision, based on the evidence contained in the administrative record. 3. an explanation of the relevance of the legal regime invoked concerning the facts established. Reference may be made to other documents, provided that the reference is incorporated in the text of the administrative act and is included in the file to which the person concerned has had access. If the decision contained in the administrative act does not derive from the procedure or does not follow logically from the grounds set out, it shall be deemed not to have been reasoned.

Finally, the SCPM itself has based its analysis on the definition of acts of the administration provided by the COA, using it to reject appeals against acts that, according to the authority, would not be administrative acts, such as, for example, a simultaneous decision to accumulate files and formulate charges.

> Art. 89.- Activity of the Public Administrations. Administrative actions are:
>
> 1. Administrative act
>
> 2. Act of simple administration
>
> 3. Administrative contract
>
> 4. Administrative action

5. Normative act of an administrative nature. (COA, 2017)

Each of these categories of actions is precisely defined by Articles 98, 120, 125, 127, and 128 of the COA.

It is therefore clear that there are many COA provisions that are not contrary to the provisions of the LORCPM, its Regulations, and the SCPM's instructions, but rather complement them and even put in writing practices that are already in use, giving greater legal certainty to those administered.

CONCLUSIONS

The analysis carried out determines that, although the legislator's original intention in promoting the enactment of the COA was to unify all the substantive and procedural administrative rules in a single body of law, during the evolution of the discussion and approval of the COA it underwent fundamental reforms, mainly the exclusion of the express repeal of Chapter V of the LORCPM.

Although this discussion is found in the original texts of the rule and an analysis of its evolution in the legislative process reveals this reality, the final approved, published and current text of the COA effectively generated a lot of justified uncertainty regarding the possible applicability of the COA due to its provisions which, on the one hand, promote the general principles of speed and efficiency in the administration's management, but on the other hand, and from the perspective of the rigor required for the SCPM's investigations, they constituted a death sentence for many investigation processes which, if the COA had been applied, would have led to the expiry of the sanctioning power or the abandonment of a large majority of cases.

The inapplicability of the COA to the proceedings before the SCPM, both due to the reading of the express exclusion made by the legislator, as well as the decision of the PGE, have been widely questioned and discussed, for example, in the article "La LORCPM frente al COA: El fin justifica los medios? (Rubio, 2020) where the author openly questions the PGE's position by arguing that the interpretation of the effects of the broad derogation does not reach the procedural rules of the LORCPM, its Regulations, and the Instructivo. On the other hand, the same article also refers to the power of the PGE to make interpretations regarding the applicability or inapplicability of a rule, as it did in this case. Without prejudice to the errors that the PGE's opinion may or may not have, what is certain is that the exclusion of the SCPM's rules goes back to the legislative process, where the legislator expressly excluded the express derogation that was originally envisaged for the procedural provisions of the LORCPM, its regulations, and instructions. However, that the legislator's intention provides clarity as to what happened in the process of enactment of the rule, but does not remedy an interpretation that could exceed the scope of a PGE opinion as to the applicability, or not, of a rule, and that a decision by a competent body with powers to make such interpretation will be needed to definitively settle the dispute as to which provisions of the COA will apply to the procedure before the Competition Authority, and which will not.

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