From object to effect and from reason to *per se:* The RECAPT decision and the standard of proof to sanction cartels in Ecuador

By: Mario Navarrete Serrano*

On October 19, 2017[1], the Supreme Court of Justice of Ecuador heard and decided its first competition law case[2]. The decision is nothing less than radical, and its effects will have profound impacts on the work of the Ecuadorian regulator, the Superintendence of Market Power Control. The Court decided that under Ecuadorian law there is no *per se* rule when assessing restrictive agreements covered by Art. 11 of the Organic Law of Regulation and Control of Market Power - LORCPM (the equivalent to Article 101 (1) of the TFEU), and that the Superintendence must prove specific effects in all cases, even those where the object of the restriction is clearly anti-competitive.

This decision is exceptional if we consider the development, acceptance and usefulness of the distinction between *per se* and the rule of reason under the Sherman Act, and object and effect under European competition law. But the decision is even more outlandish if we consider that the Ecuadorian competition law is virtually identical to the Spanish law, and that there is no mention to the rule of reason or *per se* prohibitions in its text, but rather the European distinction between object and effect. In this short commentary, we will analyze the origin of the Ecuadorian legislation, a short explanation about the problem of analyzing a European inspired law considering the *per se*/reason rule dichotomy, and the enormous impact that the decision of the RECAPT case could have in the near future.

The Ecuadorian LORCPM is inspired by the Spanish Competition Law[3], and generally follows its architecture. While some substantial differences are apparent[4], there are several specific coincidences that cannot be overlooked. For example, the LORCPM incorporates the exceptional Spanish regime by which unfair competition, under qualified circumstances, can be judged and tried as a violation of free competition. Similarly, the LORCPM incorporates from the Spanish regime the prohibition of four exteriorizations of restrictive practices: agreements, decisions of associations, concerted practices and conscious parallelisms. This last exteriorization of horizontal restrictions is a

* Associate in the Competition Department at Pérez Bustamante & Ponce; Professor of Competition Law and director of the Competition Law Group of the Institute of Legal Research at *Universidad San Francisco de Quito*; LL.M. in Competition, Information and Innovation Law by New York University School of Law; J.D. by Universidad San Francisco de Quito.

[1] Case number 17811-2016-01271, Recuperación de Capital Contact Center RECAPT v. Superintendencia de Control del Poder de Mercado ("**RECAPT**").

[2] Under Ecuadorian law, *cassation* is exceptional, and is only granted when there is a significant mistake in the interpretation of law by lower courts. Other undertakings petitioned *cassation* in competition-related cases but the Court denied the petitions. *See* files 09802-2016-00738 (CONECEL v. Superintendence of Control of Market Power) and 17811-2016-01347 (CONECEL v. Superintendence of Control of Market Power.

[3] Law 15/2007 of July 3 on Defense of Competition, published on July 4, 2007 (hereinafter "**LDC**").

[4] The LORCPM differs from the LDC, for example, in the prohibition of abuse of market power in a situation of economic dependence. The LORCPM includes it as an individual conduct, specifically as abuse of relative market power, while in the Spanish regime it is part of the Unfair Competition Law.

peculiar prohibition that exists, as far as we know[5], only in Spain and Ecuador. Among the points that the Ecuadorian legislator took from Spanish law is the classic European distinction of restrictions by object or effect. Article 1 of the LDC and 11 of the LORCPM, when addressing restrictive practices, state:

- Art. 1 LDC: Any collective agreement, decision or recommendation, or concerted or consciously parallel practice, **which has as its object, produces or may produce the effect of...**

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- Art. 11 LORCPM: Any agreement, decision or collective recommendation, or concerted or consciously parallel practice, and in general all acts or conducts carried out by two or more undertakings are prohibited and will be sanctioned in accordance with the rules of this law, related to the production and exchange of goods or services, **whose object or effect is or could be...**

After the enactment of the Law in Ecuador, which clearly included this European-inspired distinction, the Regulation to the LORCPM seemed to further deepen the choice of the legislator. Specific articles were included in the Regulation indicating that agreements restrictive by their object are presumed anticompetitive and cannot benefit from the *de minimis* doctrine. It seemed obvious, at this moment, that Ecuadorian law had set aside the *per se*/rule of reason distinction, as it has been in Europe, and basically for the same reasons: the Ecuadorian competition law is bifurcated between article 11 (the equivalent to article 101 (1) of the TFEU) and 12 (the equivalent to article 101 (3) of the TFEU), and it would be paradoxical to apply a rule of reason under article 11 when the exemptions of article 12 state specific rules of economic analysis with respect to restrictive practices[6]. Furthermore, the Ecuadorian law is complemented with the *de minimis* doctrine and exemptions, which also sets it apart from American antitrust. However, and although it seems that this point had been settled, the history of the LORCPM complicates the analysis.

The first legislative debates, despite being centered around articles that recognize the European distinction, discuss at length the *per se*/rule of reason approach, pointing out that adopting a *per se* rule for unlawful and naked restraints may result in the following risks and difficulties:

- It is impossible to establish a restrictive list of anticompetitive practices per se[7].

- With a *per se* rule, anticompetitive practices with insignificant effects on the market which do not merit an investigation may be fined[8].

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- Fines could be imposed on coordinated efforts that have praiseworthy purposes[9].

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[5] The prohibition of conscious parallelisms, which the doctrine addresses as a form of tacit collusion, is not prohibited in the United States or under European competition law. Although there are laws that provide specific remedies for interdependent oligopolistic markets, we do not know of other regimes that simply fine the existence of an oligopoly where firms act in a parallel manner such as Spain and Ecuador. *See*, Fox, Eleanor, Cases and Material on U.S. Antitrust in Global Context, Third Edition, 2012, West, pg. 591.

[6] Whish, Richard; Bailey, David; Competition Law, 8th edition, Oxford University Press, 2012, pg. 143.

[7] This conclusion, to which above the Ecuadorian National Assembly, shows that the discussion was never completely clear; the report says that "it is impossible a priori to establish a list of practices whose sole purpose and effect is to injure competition.".

[8] The example proposed by the National Assembly is that of two small bakeries which agree on a supra-competitive price. According to the report, this conduct does not generate effects of substantial importance in the market and therefore should not be fined. This position is questionable for two reasons. The first, unless switching costs are exceptionally high for consumers of said bakeries, a price increase does not make economic sense, and if the price rise makes sense, then the behavior must be fined because the bakeries could be dominant in a relevant market of limited geographical dimension. In any case, a horizontal agreement that has as its object the restriction of competition effect does not possess any redeeming value that makes it worthy of legal protection, so it should not be tolerated from a public policy perspective.

[9] The National Assembly illustrates its point using a Peruvian case where several cinemas agree to lower prices to deal with piracy. This, we believe, is a bad example to argue that there should be no *per se* restrictions. A cyclical or structural crisis in a market is not resolved by allowing operators to coordinate and affect fundamental competitive mechanisms. The Assembly suggests that a restriction is tolerable when the colluding undertakings are facing a crisis; this conclusion is dangerous, because it ultimately allows firms to take justice into their own hands and

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- It does not allow investigated undertakings to respond to accusations, affecting their right to defense[10].

Although the minutes demonstrate that the debate centered on the existence of a *per se*/reason dichotomy, this is not enough to argue that this is the regime that should govern the investigations of the Ecuadorian regulator. After all, the axiom that prohibits neglecting the clear text of a statute in search of legislative intent is a rule of statutory interpretation in Ecuador[11], and it seems that the LORCPM and its Regulations clearly establish a system which differs from the American approach. Articles 11 and 12 of the LORCPM (which, as we explained, reflect the relation of articles 101(1) and 101(3) of the TFEU), and articles 8 and 9 of the Regulations seem sufficiently clear. How, then, do we end up with a Supreme Court decision that forbids analyzing a case as *per se* restriction? As we shall see, the mistake stems from the discussion before lower courts.

RECAPT is a company specialized in the recovery of overdue loans and, together with SOLNET and CRONIX, bid in a public tender organized to award a contract with the Ecuadorian Social Security Institute. After the tender, CRONIX accused RECAPT and SOLNET of bid rigging, and the Superintendence produced enough evidence to confirm the accusations without proving effects since it was a hardcore restriction. The fine was appealed by RECAPT before ordinary judges arguing that the Superintendence did not prove a damage to competition. The administrative court of first instance, at the request of RECAPT, appointed an expert who, among its conclusions, argues that in Ecuador there is no *per se* rule. The court, correctly, departed from the conclusions of the expert and interpreted the LORCPM, concluding that there are hardcore restrictions where it is not required to prove specific damages to confirm a finding of collusion. The administrative court does not analyze the restrictions considering the European distinction of object and effect, even though the Superintendence argues and points to the articles of the Regulations that should lead to that interpretation; the administrative court decided that even though the evidence supports a finding of *per se* infringement of the Law, the fine was disproportionate and must be recalculated by the Superintendence considering all relevant facts. The Court expressly stated that no effects needed to be demonstrated.

All parties appealed and the Supreme Court admitted the case. In its ruling, the Court addresses the case under the *per se*/rule of reason dichotomy and not under the object/effect distinction. In what we consider an unfortunate interpretation, the Court asserts that the *per se* rule is anachronistic and highly relative[12]. It goes so far as to say, departing from the tradition that inspired the LORCPM, that to prove a restriction of competition by object it is necessary to demonstrate a positive intention to affect competition[13], and concludes, on the basis of the expert testimony[14], that all the restrictive practices of Article 11 must be assessed only under the rule of reason. The Court, *in dicta*, argues that there is a theoretical possibility that some antitrust violations can be assessed under the *per se* rule, without detailing under what circumstances this could happen (this argument is especially troublesome since the Court denied the application of the *per se* rule for restrictive agreements).

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not using available judicial and administrative channels to deal with the issue. The opinion of the Assembly is worrying and only casts doubts regarding the legal standard that must followed; where should the line of permissible coordination be drawn? Can an undertaking coordinate with impunity in case of economic crisis or only when a group of competitors are violating a law? We believe the correct approach to the problem is the one suggested by Advocate General Verica Trstenjak and the European Court of Justice in the case of the Beef Industry Development Society and Barry Brothers (Carrigmore) Meats.

[10] Although we believe that the LORCPM should not be interpreted under the *per se* rule, we believe the Ecuadorian Supreme Court errs in its interpretation. Under American antitrust, the *per se* rule seeks to balance the investigative and evidentiary burden against an agreement that, by all accounts, does not provide an economic or social benefit worthy of judicial protection. It does not represent a violation of the right to defense, but an efficient approach to a clearly illegal agreement.

[11] Art. 18.1 of the Ecuadorian Civil Code says: When the meaning of the law is clear, its text shall not be ignored, on the pretext of seeking legislative intent.

[12] The National Court does not justify this position, it simply mentions it in *dicta*.

[13] European competition law has stated several times that restrictions that has as its object the restriction of competition do not require evidence showing that the intent of the parties was the distortion of competition.

[14] We believe the Court should not have appointed an expert to interpret the LORCPM. The Law, in a judicial process, must be interpreted by the judges and such power cannot be left to the opinion of a third party.

The Supreme Court thus radically departs from the European competition law regime and substantially raises the standard of proof for the Superintendence. It declares that the word "object" in the Law must be interpreted as a requirement to prove an intention to harm competition, it orders that prohibitions regarding restrictive agreements can only be assessed under the rule of reason and it opens the possibility to analyze other conducts as per se anticompetitive without elaborating under which circumstances. From a public policy perspective the decision is abysmal, it substantially hinders the investigative powers of the regulator and the deterrence effect against cartels, while leaving a number of questions unanswered.