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### Ecuadorean Merger Control Regulation

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### I. INTRODUCTION

As of October 2011, Ecuador became a jurisdiction where merger control review and prior authorization is required prior to a change in control. The Organic Law for the Regulation and Control of Market Power (“the Law”) was enacted in October 2011, implementing the first domestic competition regime in the country. The Law also created the Superintendency of Market Power Control (“Superintendency” or “Authority”) as its governing administrative authority in charge of the application of the Law, and a separate regulatory body, the Regulation Board, in charge of issuing governing regulations, sector-wide recommendations, and economic thresholds for mergers, among other powers.

Merger notifications are made with the Intendency for Concentration Control (“Intendancy”), an investigative authority who must issue a recommendation report for resolution by the First Instance Resolution Commission (“Commission”). The Merger Control Intendancy is solely vested with the powers of investigating notified and non-notified transactions, and for issuing its recommendation report to the Commission. This report contains an economic analysis of both the competitive landscape as well as the transaction’s potential impact on the competitive structure, and a final recommendation as to whether to clear the transaction, issue a conditional clearance subject to conditions, or deny the transaction. The First Instance Resolution Commission, a 3-person resolution panel, must then evaluate this recommendation report and issue its final decision. Although empowered to issue an independent decision, the majority of cases have been issued in line with the recommendation report.

The Intendancy is also authorized to act *ex officio* in the case of non-notified transactions that come to its attention. The Intendancy has been one of the busiest groups in the past year within the administrative structure of the Superintendency, with a large number of clearances and investigations.

The basic principles of the merger control regime are set forth in Chapter II, Section 4 of the Law, making any act deemed a “concentration operation,” subject to the merger control. Although exemplary acts are broadly defined, any act granting **control** or **substantial influence** in another party, exceeding either of two alternative thresholds, may be subject to mandatory merger control notification and prior approval before its execution in Ecuador. Among others, mergers and acquisitions, joint-venture and administration agreements, assignments of the effects of a trader, and other acts that lead to a change in control, or substantial influence, are defined as “concentration operations.”

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The broad scope of the law may determine that other forms of agreements could be subject to notification in this jurisdiction and may therefore merit further legal analysis with local counsel when the economic or market share thresholds are met. It is worthy to note that even if the parties do not have a direct business presence in Ecuador, merger control regulation may be mandatory, considering the effects-based approach instated by the Law.

## II. NOTIFIABLE TRANSACTIONS

Jurisdiction is subject to a prior control and approval regime of concentration operations, which can be generally summarized as follows:

1. Economic concentrations are defined as a change or taking of control in one or several economic operators through the following acts:
  - Mergers;
  - Assignment of assets of a trader;
  - The direct or indirect acquisition of shares, equity, or debt certificates if they grant influence in others' decisions, giving the acquirer control or substantial influence in the other;
  - Joint-venture and administration agreements; or
  - Any other act or agreement transferring the assets of an economic operator, or granting it control or determinant influence on an economic operator's adoption of regular or extraordinary administration decisions.
2. The aforementioned exemplary acts, and others falling within this scope, will require the prior authorization of the Superintendency before their execution.
3. "Control" is defined by the regulation of the Law, as control over any contract, act or, bearing in mind *de facto* and *de jure* circumstances, circumstances which confer the possibility of exercising substantial or determinant influences over an enterprise or an economic operator. This control may be joint or exclusive.

## III. THRESHOLDS

When an act is considered a "concentration agreement" in the terms of the Law, notification and prior approval will be mandatory if either an economic or market-share threshold is met:

### A. Economic Threshold

When the combined annual turnover of the parties in Ecuador in the year preceding the transaction exceeds an amount fixed by the Regulation Board. The Regulation Board set this threshold through Resolution No. 002 of October 22 2013, effective as of November 27, 2013.<sup>2</sup> The turnover threshold is currently as follows:

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<sup>2</sup> Resolution No. 002 of the Regulation Board was applicable after its publication in Official Registry No. 132 of 27 November 2013.

| Type  | RBU       | Value                |
|---|-----------|----------------------|
| (a) Concentrations involving financial institutions and entities that participate in the stock exchange   | 3,200,000 | U.S. \$1,132,800,000 |
| (b) Concentrations involving insurance and re-insurance companies   | 62,000    | U.S. \$21,948,000    |
| Concentrations involving undertakings not contemplated in (a) and (b)   | 200,000   | U.S. \$70,800,000    |
| <p>* The basic unified remuneration in Ecuador for 2015 is U.S. \$354.<br/> † The unified basic remuneration changes yearly; thus, the amount in U.S. dollars provided above will change on a yearly basis.</p> |           |                      |

### B. Market Share Threshold:

Concentrations involving economic operators undertaking the same economic activity and where the concentration will result in a market share equal to or greater than 30 percent being acquired or increased.

### IV. TIMING

Concentration operations that meet, or exceed, either of the aforementioned thresholds require clearance from the regulator in order to be executed. Notification must be made within eight calendar days from the date of “conclusion of the agreement.” Generally, conclusion of the agreement will take place on the date where the general terms and conditions of a transaction are decided by the parties, through a “letter of intent,” “memorandum of understanding,” “joint-venture,” or “share purchase agreement.”

The Regulation to the Law, however, provides further guidance in respect to the “conclusion” concept, and stipulates that it should occur at the following times:

- a) **Mergers:** From the moment when at least one of the participants at the shareholders’ meeting has agreed to the merger;
- b) **Assignment of assets of a trader:** From the moment the entities agree to the operation and determine the form, term, and conditions thereof; in the case of companies, as of the moment the assignment is approved by the shareholders’ meeting;
- c) **Direct or indirect acquisition of shares, equity or debt certificates:** From the time the participants consent to the operation giving rise to the concentration and they determine the form, term, and conditions for its performance; in the case of companies, as of the moment the assignment is approved by the shareholders’ meeting.

- d) **Joint-venture and administration agreements:** From the time the administrators have been designated by the shareholders' meeting; and
- e) **Any other act or agreement which grants control or determinant influence:** From the time the parties consent to the operation giving rise to the concentration and determine the form, term, and conditions for its performance.

## V. REQUIREMENTS FOR NOTIFICATION

Merger notifications must be submitted by the party who acquires control, unless several undertakings are acquiring joint control in which case notice must be given jointly through a common attorney in fact. The Superintendency issued a filing form template on May 9, 2013, which must now be completed and used within all mandatory merger control filings.

The requirements and mandatory accessory documents are fixed by the regulation of the Law, and generally require information regarding the notifying entities, the transaction, the market structure, barriers to entry, efficiencies, and rationale for the transaction, among others. Accompanying documents principally relate to the corporate existence of the parties to the transaction, their financial statements, power of attorneys to represent the entities in the merger notification, and a sworn affidavit attesting to the veracity of the information being provided and the good faith calculation of the figures submitted to the authority.

## VI. DEADLINES AND FILING FEE

As of the date of admittance to file as complete, the Superintendency is entitled to 60 working days to approve, deny, or impose conditions on the transaction. That period can be extended by the regulator for an additional 60 days, although it is still under discussion whether this additional term is a calendar or working day calculation. It is frequently the case that the Intendency issues one, or several, requests for information ("RFI's") prior to the admittance of the file as complete. Hence, the beginning of the clock is frequently delayed for several weeks following the original submission, or the term is suspended, while new RFI's are issued. In practice, merger control clearances can average between four-to-six months from the date of filing until a clearance decision is issued.

The Regulation grants the Superintendency the right to determine official fees for the evaluation of a concentration notification. On May 9, 2013, the Superintendency published Regulations containing the parameters that will be used to determine the fee that will be charged for the processing of each concentration notification. The Regulations establish that the processing fee will be the greatest of:

- a) 0.25 per cent of the income tax (paid in the previous fiscal year in Ecuador);
- b) 0.005 per cent of sales (obtained in the previous fiscal year from its activities in Ecuador);
- c) 0.01 per cent of the assets in Ecuador; or
- d) 0.05 per cent of the book equity in Ecuador.

Although the Regulations do not specify which of the involved undertakings' figures these parameters will apply to, it has been the reiterated practice of the Intendency to apply these figures to the combined entities in the case of mergers, and to the acquired or target entity in the case of acquisitions.

## VII. EXEMPTIONS

Article 19 of the Law establishes that the following operations are exempted from the obligation to notify a) the acquisition of shares without voting rights, bonds, securities, or any other right convertible to shares without voting rights; and b) the acquisition of undertakings or economic operators that have been liquidated, or that have not had economic activity in the country in the past three years.

Fixing a serious practical issue that arose from the fact that merger control was instated on October 13, 2011, but the Superintendent was only appointed in July 2012 and took office on November 2012, the regulation of the Law created a legal obligation for companies that, while they could not notify during this period, still had to submit these notifications for control. It remains to be seen how this transitory provision of the regulation is applied, if transactions that were closed during these period were notified clearly out of deadline or investigated by the regulator for lack of notification in the future.

## VIII. APPROVAL STATISTICS

At the present date, the regulator has (i) approved more than a dozen mandatory notifications, one of which was originally denied on formal grounds, but approved on appeal, (ii) issued a single denial of a transaction based on anticompetitive concerns, and (iii) issued a denial of a transaction on formalistic grounds, which had already been subject to the divestment of the acquired business and approval of such divestment. Industries where these transactions have been focused are the insurance, financial, food & beverage, container liner shipping, steel processing, oxygen production, and telecommunications industries, as can be summarized below from the publically available information:

| Operators               | Industry                 | Approval Date | Conditioned |
|-------------------------|--------------------------|---------------|-------------|
| Nutreco/Gisis           | Balanceados              | 31/05/2013    | No          |
| Metlife/Genesis         | Insurance                | 02/08/2013    | No          |
| Veolia/Interagua        | Water Services           | 18/11/2013    | No          |
| Arca/Toni               | Food & Beverages         | 14/02/2014    | Yes         |
| Cabcorp/Tesalia         | Beverages                | 19/02/2014    | Yes         |
| Bimbo/Supan             | Bread                    | 24/06/2014    | Yes         |
| Proamerica/Produbanco   | Financial                | 25/02/2014    | No          |
| Aercap/Aig              | Aircraft Financing       | 25/03/2014    | Inadmitted  |
| Hapag-Lloyd/Csav        | Container Liner Shipping | 03/09/2014    | No          |
| Indura/Swissgas         | Industrial Gas           | 25/08/2014    | Denied      |
| AT&T/Directv            | Telecommunications       | 04/11/2014    | Yes         |
| Banco Del Pacifico/Iece | Financial                | 05/01/2015    | No          |
| Burlingtown/Chiquita    | Banana Production        | 02/03/2015    | No          |
| Hamburg Sud/Ccni        | Container Liner Shipping | 03/09/2014    | No          |
| Conecel/Ecuadortelecom  | Telecommunications       | 04/05/2015    | No          |
| Hebei Iron & Steel/Ipac | Steel Processing         | 07/05/2015    | No          |
| Bayer/Merck             | Consumer Care Products   | 08/07/2015    | No          |

## IX. FINES

The Law is very severe on the application of fines for lack of, or late notification of, transactions subject to its control. The amount of fines will depend on the state of execution of the transaction once the regulator commences the investigation on the lack of notification. Late notification (outside of the eight-day term from execution) is considered a minor offense to the law. Execution prior to notification, or prior to approval, is considered a serious offense to the law. Execution of acts or agreements prior to notification, or prior to approval, is considered a very serious offense to the law. Minor offenses are subject to an 8 percent of the annual turnover, in Ecuador, of the combined entities in the year preceding the imposition of the fine, while serious and very serious offenses are subject to 10 percent and 12 percent corresponding to the annual turnover, respectively.

In addition to these exorbitant fines, the Authority can also order the divestment or unwinding of the transaction in case the effects of the non-notified transaction are considered anticompetitive, in order to restore the competitive process. The statute of limitations of the Authority to take knowledge of non-notified transactions expires four years from the date when it comes into its knowledge that a transaction subject to its control was not notified, thus making the risks of lack of notification, or gun jumping, practically indefinite.

## X. CONCLUSION

Considering the Superintendency has had only a few years of practice, as well as a high degree of staff rotation, its practice can at times be unpredictable and deadlines may be extended further than anticipated. From a perspective of global transactions being cleared in different jurisdictions, merger notification should be filed in Ecuador far ahead of other jurisdictions, primarily because of the strict deadlines for notification and prior approval.

A reform may well be in place with regards to this strict eight-day deadline, although it remains in the parties' own interest to submit complete notifications as far in advance as possible given the requirement to have approval in order for the closing of transactions. The newest Merger Control Intendent has been viewed positively by practitioners, considering his predecessors' overly formalistic approaches to the application of inconsequential requirements in detriment of both approval times and the general investment climate in the country. And it is hoped that the regulator will be able to retain new qualified officials who are gaining practical experience in the field.

Finally, it is anticipated that greater predictability and clearer rules, which favor expeditious review and approval, particularly of non-problematic transactions or mere changes in control where a null impact on the market is anticipated, will be established.