Ecuador: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Ecuador.

For a full list of jurisdictional Q&As visit here
1. Overview

In October 13th, 2011 the Organic Law for the Regulation and Control of Market Power (Antitrust Law) was enacted regulating the competition regime in the country. The Antitrust Law created the Superintendency of Market Power Control (SCPM) which is the authority in relation to the control regime and the entity in charge of the application of the Antitrust Law, as a separate regulatory body, the SCPM has a Regulation Board in charge of issuing government regulations.

The National Economic Concentrations Investigation and Control Intendancy is the entity in charge of investigating and processing economic concentrations’ control procedures and the First-Instance Resolution Committee is in charge of approving, rejecting or subordinating approval to compliance with behavioral or structural conditions.

According to article 1 of the Antitrust Law, the main objective of the competition regime in the country an the Antitrust Law is to “prevent, correct, eliminate and sanction the abuse of economic operators with market power; the prevention, prohibition and sanction of collusive agreements and other restrictive practices; the control and regulation of economic concentration operations; and the prevention, prohibition and sanction of unfair practices, seeking efficiency in the markets, fair trade and the general welfare of consumers and users, for the establishment of a social, supportive and sustainable economic system.”

Merger Control in Ecuador applies: i) whenever a change or taking of control of one or more undertakings or economic operators occurs within Ecuadorian jurisdiction, despite the acquirer does not carry any economic activities in the local market (economic concentration), and ii) if the proposed transaction meets the market or Ecuadorian turnover thresholds.

2. Is notification compulsory or voluntary?

An economic concentration is subject to mandatory filing and needs to obtain the authorization from the Authority prior the conclusion of the transaction, provided that the proposed transaction has effects in the Ecuadorian market and complies with one of the following thresholds:

(a) That the total “volume of business” of the participants’ organization in Ecuador exceeds the amount established in current Basic Unified Remunerations by the Regulation Council.

(b) Concentrations involving economic operators who are dedicated to the same economic activity and who as a consequence of the concentration acquire or increase a quota equal to or greater than 30% of the relevant national market of the product or service, or of a geographic market within the same market.

The Antitrust Law also establishes that when an economic concentration exceeds the
thresholds but involves the acquisition of shares, bonds, obligations or other convertible bonds without voting rights, as well as acquisitions of economic operators liquidated or that have not reported any activities in the country in the last three years, it is exempt from the mandatory notification to the SCPM.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

   Yes, if the transaction is subject to mandatory filing, the parties to the agreement cannot close or complete the transaction without activating the Antitrust Law gun jumping provisions. Ecuador’s Antitrust Law sanctions for gun jumping can range from a fine of the 10% of the net sales of the parties to the disinvestment, division or splitting in the cases where such action is the only way to re-establish competition.

4. **What are the conditions of the test for control?**

   For the purposes of the Antitrust Law, economic concentration is understood as the change or taking of control of one or more companies or economic operators through acts such as:

   1. The merger between companies or economic operators
   2. The transfer of the totality of the effect of a merchant
   3. The acquisition, directly or indirectly, of the property or any right over shares or equity holdings or debt securities that give any type of right to be converted into capital shares or participations
   4. Affiliation based on common administration
   5. Any other agreement or act that transfers in fact or legal form to an economic person or group the assets of an economic operator or gives in the control or decisive influence in the adoption of decisions of ordinary administration or extraordinary of an economic operator.

5. **What are the conditions on minority interest in your jurisdiction?**

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   1. The merger between companies or economic operators
   2. The transfer of the totality of the effect of a merchant
   3. The acquisition, directly or indirectly, of the property or any right over shares or equity holdings or debt securities that give any type of right to be converted into capital shares or participations
   4. Affiliation based on common administration
   5. Any other agreement or act that transfers in fact or legal form to an economic person or group the assets of an economic operator or gives in the control or decisive influence in the adoption of decisions of ordinary administration or extraordinary of an economic operator.
6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

The Antitrust Law establishes that an economic concentration operation must be subject to mandatory filing if reaches the following thresholds:

(a) That the total “volume of business” of the participants’ organization in Ecuador exceeds the amount established in current Basic Unified Remunerations by the Regulation Council.
(b) Concentrations involving economic operators who are dedicated to the same economic activity and who as a consequence of the concentration acquire or increase a quota equal to or greater than 30% of the relevant national market of the product or service, or of a geographic market within the same market.

As to the volume of business threshold, according to Resolution 009 of the Board of Regulation of September 25, 2015, the proposed transaction is subject to mandatory filing whenever it reaches a volume of business according to the next table:

<table>
<thead>
<tr>
<th>TYPE OF OPERATION</th>
<th>RBU AMOUNT (US$ 394 by 2019)</th>
<th>US$ AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Concentrations involving institutions of the national financial system and the securities framework</td>
<td>3.200.000</td>
<td>US$ 1,260,800,000</td>
</tr>
<tr>
<td>b. Concentrations involving insurance and reinsurance entities</td>
<td>214.000</td>
<td>US$ 84,316,000</td>
</tr>
<tr>
<td>c. Concentrations involving economic operators that are not detailed in subparagraphs a and b.</td>
<td>200.000</td>
<td>US$ 78,800,000</td>
</tr>
</tbody>
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7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

For the purposes of the Antitrust Law, the total volume of business of one or more economic operators is understood as the revenue received from product sales and the provision of services during the last fiscal year, after deducting Value Added Tax and other taxes levied on end users that are directly related to the business.

In addition, for the purpose of merger control, to calculate the total volume of business of the affected economic operator, the volume of business of the following companies or economic operators will be included:

(a) The undertaking or economic operator in question.
(b) Any economic undertaking or operator in which the undertaking or economic operator concerned has, directly or indirectly:

1. more than half of the subscribed and paid-up capital.
2. the power to exercise more than half of the voting rights.
3. the power to appoint more than half of the members of the administrative, supervisory or legal bodies of the company or economic operator; or,
4. the right to direct the activities of the undertaking or economic operator.

(c) Those undertakings or economic operators which have the rights or powers listed in subparagraph (b) with respect to an undertaking or economic operator concerned.
(d) Those undertakings or economic operators in which an undertaking or economic operator referred to in subparagraph c) has the rights or powers listed in subparagraph b).
(e) The undertakings or economic operators in question in which several undertakings or economic operators referred to in a) to d) have jointly the rights or powers listed in b).

8. **Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

Yes, joint ventures that produce effects in Ecuador, surpass the thresholds established in the Antitrust Law and cause a change in the control in one of the economic operations by decisively influencing the decisions of the other are obligated to notify the SCPM. The scope of application of the Antitrust Law includes state-owned enterprises. Therefore, joint ventures involving this kind of economic operation are also subject to prior control by the SCPM.

9. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

Provided that the foreign-to-foreign mergers produce effects in Ecuador, the operation must be notified to the SCPM and request authorisation. It should be noted that the thresholds established in the Law for determining whether an economic operation is subject to notification are calculated based on economic figures in Ecuador.

10. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable in this jurisdiction.

11. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

The SCPM considers the followings to assess whether or not to clear the merger:

1. The state of competition in the relevant market;
2. The degree of market power of the economic operator in question and that of its main competitors;
3. The need to develop and/or maintain free competition among economic operators in the following areas the market, considered its structure as well as current or potential competitors;
4. The circumstance of whether, as a result of the concentration, market power is generated
or strengthened, or whether there is a significant reduction, distortion or obstacle, clearly foreseeable or proven, to the free competition of economic operators and/or competition;

5. The contribution that the concentration may make to:

a) The improvement of production or commercialization systems;
b) The promotion of the country's technological or economic advancement;
c) The competitiveness of the national industry in the international market as long as it does not have a significant effect on the economic well-being of national consumers;
d) The welfare of national consumers;
e) If such contribution is enough to compensate certain and specific restrictive effects on competition; and,
(f) Diversification of social capital and worker participation.

12. Are non-competitive factors relevant?

When analyzing and deciding on economic concentration interests, the SCPM always looks at the public interest or general interest of consumers and users. This is because the purpose of the Antitrust Law is precisely to procure the general well-being of consumers and users.

Despite of the above, the SCPM has, in certain cases, considered the rights of the workers of the parties to the agreement.

13. Are there different tests that apply to particular sectors?

The regulation for all kinds of economic concentrations (including economic concentrations outside Ecuador that produce effects in the country) is found in the Antitrust Law, and the entity that analyses and resolves in that regard is the SCPM. Therefore, the analysis undertaken by the local regulator is always the same, regardless of the sector.

14. Are ancillary restraints covered by the authority’s clearance decision?

Yes, ancillary restraints are covered under the authority’s decision.

15. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

Concentrations that require prior authorization according to the Law and its Regulations, shall be notified to the SCPM, for prior examination, within eight (8) days from the date of the conclusion of the agreement which will result in the change or taking of control of one or more undertakings or economic operators.

16. What is the earliest time or stage in the transaction at which a notification can be made?
(a) In the case of a merger between companies or economic operators, since the general meeting of the shareholders or members of at least one of the venturers, or the competent body in accordance with the relevant statute, have agreed to put the merger into effect.

(b) In the case of the transfer of a trader’s entire bill of exchange, from the moment the economic operators involved agree to carry out the transaction and determine the form, period and conditions under which it is to be carried out. When the venturers are companies, the agreement shall be deemed to exist when it has been adopted by the general meeting of shareholders or members, or the competent body, in accordance with the relevant statute.

(c) In case of the acquisition, directly or indirectly, of ownership or any right over shares or holdings in capital or debt securities giving any type of right to be converted into shares or holdings in capital or to have any type of influence over the decisions of the person issuing them, when such acquisition grants the acquirer control of, or substantial influence over the person issuing them, there is a concentration agreement from the moment the participants consent to carry out the operation giving rise to the concentration, and determine the form, term and conditions under which it is to be carried out, and determine the form, term and conditions under which it is to be carried out. When the venturers are companies, the agreement shall be deemed to exist when it has been adopted by the general meeting of shareholders or the competent body in accordance with the relevant statute.

(d) In case of joint administration, there is a concentration agreement as soon as the directors have been appointed by the general meeting of shareholders or partners, or the competent body in accordance with the relevant statute.

(e) In the case of any other agreement or act that effectively or legally transfers the assets of an economic operator to a person or economic group or grants it control or determining influence in the adoption of decisions of ordinary or extraordinary administration of an economic operator, there is a concentration agreement from the moment where the participants consent to carry out the operation that gives rise to the concentration, and determine the form, terms and conditions in which it is to be executed. When the participants are companies, the resolution shall be deemed to exist when it has been adopted by the general meeting of shareholders or associates, or the competent body, of conformity with the corresponding statute.

17. **What is the basic timetable for the authority’s review?**

In accordance with the Antitrust Law, the SCPM has to issue its decision with respect to the economic operation within a term of 60 working days from the date the SCPM acknowledges receipt of the submitted notification. The SCPM may suspend the term for up to 60 calendar days. In addition, the initial term of 60 working days may, on an exceptional basis, be extended for up to 60 working days. The SCPM usually takes about three months between the date of the notification of the economic operation and the date of the resolution. The economic concentration operation can neither be closed nor perfected until authorization
from the SCPM is secured.

18. **Under what circumstances the basic timetable may be extended, reset or frozen?**

The 60-day deadline for deciding may be extended once, up to an additional sixty (60) day term, if the SCPM needs to gather information for the market. Meeting with local actors, requests to private and public entities, etc.

If the authorization has been subordinated to the fulfillment of conditions, these must be adopted within a maximum term of ninety (90) days of the notification of the resolution that establishes them.

The Superintendency may grant an additional term for compliance with the following conditions where the economic operator on whom such conditions were imposed demonstrates that, having mediated all the necessary efforts, it has been impossible for him to fulfill them in the proposed term.

If the conditions have not been met within ninety (90) days or within the additional term granted by the Superintendency of Control of Market Power, the latter shall deny the merger operation.

The time table may be frozen in the following cases:

a. When any interested party is requested to provide documents and other necessary elements of judgment, for the time between the notification of the request and its effective performance by the addressee, or, failing that, the expiry of the period granted.

b. When reports or acts of simple administration that are mandatory and determine the content of the resolution must be requested from a body of the same or a different administration, for the time between the request, which must be communicated to the interested parties, and the receipt of the report, which must also be communicated to them.

This suspension period may in no case exceed sixty (60) days.

19. **Are there any circumstances in which the review timetable can be shortened?**

Yes, if the SCPM considers it has all the necessary information for the competitive assessment.

20. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**
The following parties are responsible for submitting the notification:

1. The absorber, in the event of a merger between companies or economic operators.
2. The economic operator to whom the entire bill of exchange of a trader will be transferred.
3. The economic operator who is going to acquire the property or any right over shares or capital participations or debt securities.
4. The economic operator whose members of the administrative organ, either one or all of them, will also become part of the administrative organs of another economic operator.
5. The economic operator to whom the assets of another economic operator will be transferred or who will acquire control over the adoption of ordinary or extraordinary administrative decisions.

When several economic operators are acquiring control over another economic operator or intend to carry out the concentration, notification shall be made jointly. To this end, a general attorney will be appointed to represent them throughout the procedure for the authorization of the economic concentration.

21. **What information is required in the filing form?**

1. The names or corporate names of the economic operators or companies involved.

2. The address of the economic operators or companies involved.

3. Nature of the activities carried out by the economic operators or companies involved, indicating specifically the goods or services marketed by each of them.

4. Relevant market or markets in which those involved in the concentration operate. In this respect, there will be considered at least the market for the product or service, the geographic market and the relevant characteristics of the specific groups of sellers and buyers participating in that market.

5. Calculated attendees’ turnover. The calculation must be broken down, indicating the turnover corresponding to each of the economic operators established in the Law.

6. Shares in the relevant market of each of the participants in the concentration.

7. A detailed description of the relationship of each of the operators with companies belonging to the same group operating in any of the markets affected by the economic concentration, indicating their address and specifying the nature and means of control with respect to those companies or economic operators belonging to the group.

8. Description of the structure of the offer in the relevant market in which each of the parties
is involved.

9. Description of the structure of demand in the relevant market in which each of those involved intervene.

10. Description of the operation containing:
   a. Description of the act through which the economic concentration operation will be carried out.
   b. Where applicable, a list of the assets, securities or other effects being transferred, their amount and their method of payment if this information is not included in the draft legal act giving rise to the concentration.
   c. The structure of ownership and control of the participating economic operators after the completion of the operation.
   d. The goods or services expected to be marketed after the merger.

11. The contribution that the operation may make in accordance with the Law.

22. **Which supporting documents, if any, must be filed with the authority?**

   The following documents shall be attached to the notification of concentration:

   1. Copy of the documents related to the proposed legal act which will give rise to the concentration operation.

   2. Financial statements for the last financial year of each of the economic operators involved in the concentration.

   3. Analysis, reports and studies considered relevant.

   4. Request for confidentiality with respect to the information provided or part of it. The SCPM, after the corresponding analysis, shall decide on the request.

   5. Sworn statement that the information provided in the notification and its annexed documents are true and that the opinions, calculations and estimates have been made in good faith.

   The notification and its annexed documents must be submitted in two copies, one physical and the other digital. The respective translation of the documents drawn up in a foreign language must be submitted, and which are delivered as part of the notification of the economic concentration.
23. **Is there a filing fee? If so, please specify the amount in local currency.**

For the notification of economic concentrations, the economic operator providing notification must pay filing fees to the SCPM in a sum equal to the higher outcome of the following: 0.25 per cent of income tax, 0.005 per cent of sales volume, 0.01 per cent of assets, or 0.05 per cent of equity. These sums are calculated taking the economic operators with presence in Ecuador into account. The fee payment voucher must be attached to the notification.

24. **Is there a public announcement that a notification has been filed?**

No. The SCPM only informs to the public once the operation has been authorized, authorized with conditions or denied. All the process up to that point, is confidential.

25. **Does the authority seek or invite the views of third parties?**

Yes, it does. In its analysis, the SCPM reviews the information provided by the notifying party with regard to its competitors and providers, as well as the supply and demand structure at the market in question. Furthermore, when analyzing an economic concentration, the SCPM will repeatedly require information from competitors of the economic operators involved. Clients or competitors with a legitimate interest are entitled to file a special review appeal against the economic concentration resolution issued by the SCPM.

26. **What information may be published by the authority or made available to third parties?**

Only the final resolution that authorizes, authorizes with conditions or denies the transaction, without the information that the parties have requested to be considered as classified.

27. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

The SCPM has signed cooperation agreements with other antitrust authorities to collaborate in this type of cases. To date, the SCPM has cooperation agreements signed with antitrust authorities from Argentina, Austria, Brazil, Chile, the Dominican Republic, El Salvador, France, Greece, Honduras, Italy, Mexico, Paraguay, Russia, Spain, Tunisia and Uruguay. The SCPM frequently holds meetings with sister authorities to exchange opinions and benefit from the experience of other countries in antitrust matters. The SCPM may sign agreements with sister authorities to share information that could be of benefit to both parties.

28. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

The Antitrust Law provides the resolution entity with the power to implement structural and behavioural remedies to stop an economic concentration from causing distortions at the
market in question. This power is broad, and the Antitrust Law does not specifically describe the type of conditions that the SCPM could order.

With respect to structural remedies, the SCPM has ordered the sale of industrial plants, assets for product distribution, transfer of intellectual property rights, intellectual property licenses and so on. Also, regarding behavioural remedies, the SCPM has banned the implementation of exclusivity clauses and agreements with clauses conditioning the obligation of clients to acquire a minimum percentage of monthly purchases or clauses aimed at giving benefits to the concentrated economic operator to the detriment of its competitors, suppliers or clients.

The SCPM has adopted behavioural remedies more often that its US and EU counterparts.

29. **What procedure applies in the event that remedies are required in order to secure clearance?**

The conditions are clearly described in detail in the SCPM resolution, subjecting approval of an economic concentration to comply with such conditions. The resolution grants the notifying economic operator a term of 90 days to sign and submit a commitment that must specifically describe how each condition will be met and executed, to the SCPM. During that term, the notifying party must compose the commitment and send it to the SCPM for its review. Approval by the SCPM must be given within a maximum term of 90 days from the date of issuance of the resolution. There must be a time period for implementing and complying with each condition.

30. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

The Antitrust Law stipulates that executing an economic concentration operation that must be notified but has not been authorised by the SCPM is a serious offence. This kind of offence, pursuant to the Law cited above, is sanctioned with a fine of up to 10 per cent of the breaching economic operator’s total turnover in the fiscal year preceding that of the fine. The sanctions described in this question also apply to foreign-to-foreign economic concentrations that produce effects in Ecuador.

31. **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

Notified and authorized concentrations can be subsequently challenged by the Superintendency or by those with an interest therein in administrative courts on the basis of information and documentation verified by the Superintendency. But only when said resolution has been obtained on the basis of false or incomplete information given by the applicant, without prejudice to the corresponding civil and criminal actions.
In addition, it is considered as a serious infraction to “Submit false or deceitful information to the Superintendence of Market Power Control”, according to article 78 of the Antitrust Law.

32. **Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

Yes, administrative resolutions can be appealed at the judicial level before the Administrative Litigation Jurisdiction, if a third party demonstrates a legitimate interest.

33. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

In view of the seven years the Antitrust Law has been in effect and the six years of operation of the SCPM, we may conclude that the majority of economic concentration notifications in Ecuador have been approved by the authority with conditions, and some, around 1%, of the notifications have been denied.

Considering that the SCPM has been operating a little under seven years, the economic concentration system in Ecuador faces many challenges, particularly with regard to educating economic operators about the rules governing this area of the law and the prior concentration notification processes. In this regard, the SCPM has focused on training and has also published a technical guide for analysing economic concentration operations. The guide is a public document containing a clear explanation about how concentrations are examined, the thresholds for notification, definition of relevant market, turnover calculations, offences, sanctions and so on.

The treatment given to foreign-to-foreign mergers is the same as that of a local merger, as explained above.

Especially in terms of concentration indexes, the SCPM has ongoing analyses being performed in the following economic sectors: food, biotechnology, clothing, footwear, energy, pharmaceutical, metal mechanic, transportation, construction, forest timber products, environmental services, technology, automobile and petrochemical.

34. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

No.