New merger control regime: implications for foreign investors.

新的兼并控制制度：对外国投资者的意义

Until 13 October 2011, Ecuador was one of the last remaining countries in Latin America to lack legislation regulating merger control or unfair competition. The recently enacted Competition Law sets the obligation to give prior notice of the transaction when it may affect the Ecuadorian market. Potentially restricted deals include concentration between two non-resident companies when it may reduce competition for any product within the Ecuadorian market.

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On 13 October 2011, the Ecuadorian Official Gazette published the "Organic Law on the Regulation and Control of Market Power" (the "Competition Law"), which is the first piece of legislation in Ecuador governing Competition law. Regulating competition matters has been necessary in Ecuador for a long time as it was one of the only countries in Latin America in which Competition was still unregulated. However, this new legislation has not come without criticism, especially regarding its legal uncertainty.

Although Andean legislation regulated competition issues in a broader sense, and was directly applicable in Ecuador even before the publication of the Competition Law, this regulation was clearly deficient as it was limited to abuse of market power and anti-competitive agreements and did not encompass unfair competition restrictions or a merger control system. Moreover, the authority in charge of implementing the Andean legislation, the Competition Sub-secretariat, had very limited investigation powers, which reduced the effectiveness of the legislation. Therefore, competition regulations will only become really effective when control mechanisms are established and enforced, for which an operational competition authority needs to be created.

The new merger control regulation has important implications for international investors, as it is a preemptive control mechanism over potential mergers and acquisitions that may affect the Ecuadorian markets. Investment through these channels has traditionally been an important source of income in Ecuador. This means that if two companies to a merger (or that wish to consolidate by other means such as through the acquisition of the majority stake of a company) are domiciled outside Ecuador and the merger may potentially reduce competition for any

given product in the Ecuadorian market, the parties will have to notify the competent Ecuadorian competition authority about the merger.

The Competition Law establishes a dual threshold to determine whether a merger should be notified and accepted by the competition authority, such threshold is exceeded: (i) whenever the combined sales of the companies that plan to merge exceed the monetary limit to be established by the competition authority (whether this limit will vary depending on the sector in question remains uncertain); or, (ii) whenever the combined market shares of the companies exceeds 30% of the relevant market. According to the Competition Law, only one of these requirements needs to be met for notification to be compulsory and the Law does not provide a de *minimis* rule to exclude small transactions. This could prove problematic, as the "relevant market" is undefined, and the competition authority will be free to decide whether the relevant market in question is broader or narrower than that considered by the parties. Therefore, the authority may penalize the merging parties for failing to notify even when they considered that notification was not mandatory in view of the conditions of the transaction. The recently published regulations for the application of the Competition Law include a de *minimis* rule, but the minimum value for merger transactions to be subject to notification has not yet been set, as this will be established by the future competition authority (the Competition Superintendency).

Once the Competition Superintendency has been created, there should be more clarity regarding specific mergers, as the regulations for the application of the Competition Law establish that merging parties may consult the authority to determine whether a merger is subject to compulsory notification. However, due to the uncertainty of the wording of the Competition Law, it seems that the Competition Superintendency will be flooded with these consultations. Therefore, the authority's response time is likely to delay the process even further.

Another issue for the competent competition authorities is the merger transactions currently underway. Given that the new competition authority, the Competition Superintendency, has not yet been created, it is unclear who should be notified of current mergers. The former national competition authority, the Competition Sub-secretariat, which is still operational, has refused to receive several notifications of ongoing mergers. This situation leaves ongoing mergers, particularly those above the thresholds established by the Competition Law, at a standstill due to the possibility of them being considered unlawful in the future. To make maters worse, the first transitional provision of the regulations on the application of the Competition Law states that all mergers carried out following the publication of the Competition Law will have to be notified to the Superintendency, once it is created. If, after this ex post notification, the authority considers that a merger should not be authorized, the parties will have to reverse the transaction and could be severely penalized by the authority.

The uncertainty derived from the lack of technical rigor of the provisions of the Competition Law is worsened by the significant economic penalties established in the Law. The Competition Law establishes three categories of offenses: minor, serious and very serious offences. Minor offences will be penalised with up to 8% of the combined sales of the merged companies, serious offences will face penalties of up to 10% and very serious offences of up to 12%. Article 78 of the Competition Law establishes that late notification is a minor offence, whereas the completion of the merger without notification is a serious offense. Finally, very serious offences include the company resulting from the unauthorized merger executing contracts or carrying out business transactions.

Until the Competition Superintendency is established and operational, mergers and acquisitions in Ecuador will continue to be trapped in a legal limbo, as the future competition authority is likely to impose sanctions on mergers that were completed after the publication of the Competition Law, and may also reverse mergers altogether, leaving companies in a very vulnerable position.

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