The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

The Merger Control Review

The Merger Control Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Merger Control Review - Edition 6
(published in July 2015 – editor Ilene Knable Gotts)

For further information please email
Nick.Barette@lbresearch.com

The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, Felicity Bown

ACCOUNT MANAGER
Joel Woods

PUBLISHING MANAGER
Lucy Brewer

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL COORDINATOR
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Caroline Herbert

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-60-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ARAQUEREYNA

ARNTZEN DE BESCHE ADVOKATFIRMA AS

ASHURST

AZB & PARTNERS

BENTSI-ENCHILL, LETSA & ANKOMAH

BPV HÜGEL RECHTSANWÄLTE OG

BREDIN PRAT

CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE

CASTRÉN & SNELLMAN ATTORNEYS LTD

CHAPMAN TRIPP

CMS VON ERLACH PONCET LTD

CUATRECASAS, GONÇALVES PEREIRA, RL

DLA PIPER

EGOROV PUGINSKY AFANASIEV & PARTNERS

ELIG, ATTORNEYS-AT-LAW

ENSAFRICA (EDWARD NATHAN SONNENBERGS)

GIBSON, DUNN & CRUTCHER LLP

GROSS, KLEINHENDLER, HODAK, HALEVY, GREENBERG & CO

HOUTHOFF BURUMA

JEFF LEONG, POON & WONG

KARANOVIĆ & NIKOLIĆ

KAYE SCHOLER LLP

KING & WOOD MALLESONS

LCS & PARTNERS

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY SPÓŁKA KOMANDYTOWA

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

MOTIEKA & AUDZEVIČIUS

NAVIGANT ECONOMICS

PACHECO, ODIO & ALFARO

PELIFILIP

PÉREZ BUSTAMANTE & PONCE

POLENAK LAW FIRM

SAYENKO KHARENKO

SLAUGHTER AND MAY

STRACHAN PARTNERS

TORYS LLP

VALDÉS ABASCAL ABOGADOS, SC

WACHTELL, LIPTON, ROSEN & KATZ

WEERAWONG, CHINNAVAT & PEANGPANOR LTD

WILMER CUTLER PICKERING HALE AND DORR LLP

WILSON SONSINI GOODRICH & ROSATI

YULCHON LLC

CONTENTS

EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Greece, Portugal, Ukraine and the US). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EU model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are to be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the Authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multijurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the US and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2015

Chapter 9

ECUADOR

Diego Pérez-Ordoñez, Luis Marín Tobar and Natalia Almeida[1]

I INTRODUCTION

The Organic Law for the Regulation and Control of Market Power (Law) was enacted in October 2011, implementing the first domestic competition regime in the country. The Law 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, *inter alia*, issuing governing regulations and sector-wide recommendations, and implementing economic thresholds for mergers.

Merger notifications are made to the Intendancy for Concentration Control (Merger Control Intendancy), an investigative authority that must issue a recommendation report for resolution by the First Instance Resolution Commission. The Merger Control Intendancy is vested with the powers of investigation of notified transactions and non-notified transactions, as well as for issuing its recommendation report to clear or deny transactions subject to its control. The Intendancy is authorised to act *ex officio* in the case of non-notified transactions that come to its attention. This intendancy has been one of the busiest in the past year within the administrative structure of the Superintendency, with a large number of clearances and investigations.

The Superintendency is organised into four investigative intendancies. These intendancies perform their analysis and investigations independently and issue recommendation reports to the decision-making authority, the First Instance Resolution Commission. The Merger Control Intendancy is in charge of analysing notified transactions and issuing final recommendation reports, which contain economic analysis

1 Diego Pérez-Ordoñez is a partner and Luis Marín Tobar and Natalia Almeida are senior associates at Pérez Bustamante & Ponce. The authors would like to acknowledge the contribution of José Urizar to the previous version of this chapter.

of the competitive landscape, the transaction's potential impact on this competitive structure, and its final recommendation as to the clearance, conditional clearance subject to conditions or denial of the transaction. The First Instance Resolution Commission, a three-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 the line of the recommendation reports.

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 merger control. Although 'exemplary acts' are broadly defined, any act granting control of or substantial influence in another party exceeding either of the economic or market share thresholds may be subject to mandatory merger control notification and prior approval before its execution in Ecuador. Mergers and acquisitions, joint-venture and administration agreements, and assignments of the effects of a trader, *inter alia*, are defined as 'concentration operations', although 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.

In addition to the competition perspective, under which merger control regulation has only been effective since October 2011, mergers and acquisitions where a local business presence exists may also be subject to corporate and tax implications, and governed by the Superintendency of Companies and the Internal Revenues Service. It is worth noting, however, that even if the parties do not have a direct business presence in Ecuador, the merger control regulation may be mandatory, considering the effects-based approach instated by the Law.

II ECUADOREAN LEGISLATION

The Law was enacted on 13 October 2011. On 23 April 2012, the President signed Executive Decree No. 1152, published in the Official Register of 7 May 2012, comprising Regulations to the Law (Regulations). The Superintendent of Market Power Control was appointed in July 2012, at which time the administrative structure of the Authority began to be organised and the Law was implemented.

i Transactions subject to prior control

Ecuador's prior control and approval regime for concentration operations can be generally summarised as follows:

a economic concentrations are defined as a change in or takeover of control in one or several economic operators through the following acts:
- mergers;
- assignment of assets of a trader;
- direct or indirect acquisition of shares, equity or debt certificates if they grant influence over the other operators' decisions, thereby giving the acquirer control or substantial influence in the other operator;
- joint-venture and administration agreements; or

- any other act or agreement transferring the assets of an economic operator, or granting control or determinant influence on an economic operator's adoption of regular or extraordinary administration decisions;

b the above-mentioned exemplary acts, and others falling within this scope, will require the prior authorisation of the Superintendency before their execution; and

c 'control' is defined by the Law as control over any contract, act or, bearing in mind the *de facto* and *de jure* circumstances, circumstances that confer the possibility of exercising substantial or determinant influence over an enterprise or an economic operator. This control may be joint or exclusive.

ii Thresholds

When an act is considered to be a 'concentration agreement' under the terms of the Law, notification and prior approval will be mandatory if either of the following alternative thresholds is exceeded:

Economic threshold

The economic threshold will be reached in cases where 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 22 October 2013, effective as of 27 November 2013.[2] The turnover threshold is currently as follows:

Type	*Amount of unified basic remuneration**	*Value (in US$)*†
a Concentrations involving financial institutions and entities that participate in the stock exchange	3.2 million	1,132,800,000
b Concentrations involving insurance and reinsurance companies	62,000	21.948 million
c Concentrations involving undertakings not contemplated in (a) and (b)	200,000	70.8 million

* The basic unified remuneration in Ecuador for 2015 is US$354

† The unified basic remuneration changes yearly; thus, the amount in US dollars provided above will change on a yearly basis

Market share threshold

The market share threshold will be reached in the case of concentrations where the parties will acquire a market share equal to or greater than 30 per cent within the relevant market in Ecuador.

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

iii Timing

Concentration operations that exceed either of the above-mentioned thresholds require clearance from the regulator to be executed. Notification must be made within eight calendar days from the date of the 'conclusion of the agreement'. Generally, conclusion of the agreement will take place on the date when the general terms and conditions of a transaction are decided by the parties through a letter of intent, memorandum of understanding, joint-venture agreement or share purchase agreement. The Regulations to the Law, however, provide further guidance in respect of the 'conclusion' concept, and stipulates that it should occur at the following times:

a for mergers: from the time when at least one of the participants at the shareholders' meeting has agreed to the merger;

b for an assignment of assets of a trader: from the time the entities agree to the operation, and determine the form, term and conditions thereof. In the case of companies, as of the moment that the assignment is approved by the shareholders' meeting;

c for a direct or indirect acquisition of shares, equity or debt certificates: from the time that the participants consent to the operation giving rise to the concentration, and 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 for joint-venture and administration agreements: from the time that the administrators have been designated by the shareholders' meeting; and

e for any other act or agreement that 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.

iv Requirements for notification

Merger notifications must be submitted by the party that acquires control. If several undertakings are acquiring joint control, notice must be given jointly through a common attorney in fact. The Superintendency issued a filing form template on 9 May 2013, which must now be completed and used in all mandatory merger control filings. The requirements and mandatory accessory documents are fixed by the Regulations of the Law, and generally require information regarding, *inter alia*, the notifying entities, the transaction, the market structure, barriers to entry, efficiencies and the rationale for the transaction. Accompanying documents principally relate to the corporate existence of the parties to the transaction, their financial statements, a power of attorney 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.

v Deadlines and filing fee

As of the date of admittance to file as complete, the Superintendency has 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 Merger Control Intendancy issues one or more requests for information (RFIs) prior to the admittance of the file as complete. Hence, the starting of the clock is frequently delayed for several weeks following the original submission, or the term is suspended, while new RFIs are issued. In practice, it can take an average of between four to six months from the date of filing until a clearance decision is issued for a merger.

The Regulations grant the Superintendency the right to determine official fees for the evaluation of a concentration notification. On 9 May 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 the following:

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 the undertakings' 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 Intendancy 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.

vi Exemptions

Article 19 of the Law establishes that the following operations are exempted from the obligation to notify:

a acquisitions of shares without voting rights, bonds, securities or any other right convertible to shares without voting rights; and
b acquisitions of undertakings or economic operators that have been liquidated, or that have not had economic activity in the country in the past three years.

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

III CONCENTRATION OPERATIONS

At the time of writing, the regulator has approved more than a dozen mandatory notifications, one of which was originally denied on formal grounds but approved on appeal, and has only denied one transaction based on anti-competitive concerns. These transactions have been focused in the following industries: insurance, financial, food and beverage, container liner shipping, steel processing, oxygen production and telecommunications.

IV FINES

The Law is very severe in its 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 its investigation into the lack of notification. Late notification (that is, notification outside the eight-day term from execution) is considered a minor offence under the Law, whereas execution prior to notification, or prior to approval, is considered a serious offence under the Law. Execution of acts or agreements prior to notification or prior to approval is considered a serious offence under the Law. Minor offences are subject to a fine amounting to 8 per cent of the annual turnover in Ecuador of the combined entities in the year preceding the imposition of the fine; serious and very serious offences are subject to 10 per cent and 12 per cent fines 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 cases where the effects of the non-notified transaction are considered anti-competitive in order to restore the competitive process. The statute of limitations of the authority to gain knowledge of non-notified transactions expires four years from the date when it comes to know that a transaction subject to its control was not notified, thus making the risk of lack of notification or gun jumping practically indefinite.

V THE MERGER CONTROL REGIME

Mergers and acquisitions of commercial companies are governed by the Companies Law and the Commercial Code. The following types of procedures are available under local law: mergers by union or takeover; acquisitions by assignment of business; and acquisitions by assignment of shares or share participations.

i Merger procedures

According to corporate legislation, a merger can take place in one of two ways: two or more companies join to form a new company that succeeds them regarding their rights and obligations (merger by union); or one or more companies are taken over by another company that continues post-takeover (merger by takeover).

For a merger of any company (or companies) into a new company (merger by union) to take place, it is first necessary to agree the former's dissolution and then to transfer all the corporate assets in bulk to the new company. If the merger results from a takeover of one or more companies by another existing company, the existing company must likewise acquire the assets of the company or companies taken over by means of capital increase.

In the event of a merger by takeover, the company taking over must approve the basis for the operation and the amended incorporation charter during a special shareholders' meeting specifically called for that purpose. The companies that will be taken over or that merge to create a third company must likewise approve the merger in the same manner (that is, by calling a shareholders' meeting).

Either type of merger must be recorded in a public deed to which the balance sheets of the absorbed companies must be attached. The Superintendency of Companies must approve such public deed. Finally, for the merger to take effect, an excerpt of the deed must be published, and the deed must subsequently be registered with the Mercantile Registry.

The effects of a merger of two or more companies, as the case may be, are the following:

a in the case of a merger by union, the major effect is the appearance of a new juridical person that is the successor of the rights and obligations of the merged companies; and

b in the case of a merger by takeover, the company that takes over will be in charge of paying the liabilities of the company taken over, and must assume the responsibilities inherent to a liquidator with respect to the creditors of the company that was taken over.

From a taxation standpoint, the Tax Code provides that those who acquire businesses or enterprises are responsible as successors of the absorbed company's liabilities, and thus will be liable for all taxes owed by the transferor, and for the taxes generated from the business or enterprise being transferred during the year the transfer takes place and for the two preceding years. Liability is limited to the value of the assets.

Merger transactions are not taxable, except for tax on immoveable property transfer in some types of mergers. For instance, merger by union of capital stock companies shall not bear any tax on immoveable property transfer; however, the merger by union of limited liability companies and mergers by takeover of limited liability companies and of capital stock companies is subject to a 1 per cent tax on the immoveable property transfer price.

Transfers of assets and liabilities in mergers are not subject to income tax, and the greater or lesser value reflected in the value of the shares of merged companies is not taxable or deductible. Transfers of assets (tangible or intangible) may take place at present value or at market value.

ii Acquisition by assignment of business

Another form of acquisition that differs from the already-mentioned merger alternatives is the sale of all or part of the business of a business person, which is governed by the Commercial Code. In practice, this system has been used to purchase and sell all assets and liabilities of a commercial corporation (i.e., a company controlled by the Superintendency of Companies) or of the branch of a foreign company.

It should be noted that this system does not result in the union of two or more juridical persons, or in the takeover of one or more of them by a third party, such as is the case for mergers ruled by the Law on Companies; rather, it is a commercial purchase and sale contract provided that it involves all the merchandise or assets of a business person.

The only formality to perfect these contracts is that, under penalty of annulment, they must be executed through a public deed. It is not necessary to register them with the Mercantile Registry.

From a taxation standpoint, the acquirer of the businesses is responsible as successor for the taxes generated from the business or enterprise being transferred during the year the transfer takes place and for the two preceding years. Liability is limited to the value of the assets.

The sale of a business transferring all assets and liabilities is not subject to value added tax. However, it is subject to income tax withholding at a rate of 2 per cent in a local transfer.

iii Acquisition by assignment of shares or share participations

Shares assignment

Another way to acquire an Ecuadorean commercial company is through a transfer of shares (capital stock companies) or share participations (limited liability companies).

Shares – whether common or preferred – are freely transferable, and their transferability cannot be avoided even in the case of a contract between parties limiting their transferability. For instance, in cases of a breach of a contractual limitation of the transferability of shares, the transfer cannot be undone, but there can be a contractual penalty applicable against the default party.

Ownership of shares in a stock corporation is transferred by means of an assignment letter signed by the transferor or by a securities trading company that represents the transferor. The assignment must be written on the corresponding share certificate or on a sheet attached thereto. In the case of share certificates delivered for custody at a centralised securities clearing and liquidation deposit, the assignment may take place pursuant to mechanisms established by such centralised deposits. An assignment of shares or a transfer of ownership takes effect via the company and third parties only as of the date it is registered in the book of shares and shareholders of the company. Registration is made with the signature of the company's legal representative upon delivery of a joint (or individual) communication from the assignor and the assignee.

If the shares are immobilised in a centralised securities clearing and liquidation deposit, they will be registered in the book of shares and shareholders by the centralised deposit upon submission of an assignment form signed by the securities trading company acting as an agent. The centralised deposit must keep files and records of transfers, and must give notice thereof to the company on a quarterly basis.

Stock corporations must be incorporated with at least two shareholders. The company's legal existence begins upon such registration.

If the shares of a stock corporation are not listed in a stock exchange, their transfer requires no formality other than that described above (that is, by means of an assignment document and registration of the assignment in the book of shares and shareholders). On the other hand, if the shares are listed in a stock exchange, several Stock Market Law rules must be observed.

From a taxation standpoint, shares assignment is subject to income tax.

Share participations assignment

Given the different juridical nature of limited liability companies – that is, they are partnerships involving persons and not capital – the assignment of share participations is governed by different rules with respect to an assignment of shares. Share participations that are not moveable properties or assets cannot be freely assigned or transferred. Share participations are quotas (contributions) in the company's capital. Since share participations are not documents of title, they lack the characteristics inherent to shares (e.g., their free circulation and valuation in the market).

Share participations are transferable by an act *inter vivos* for the benefit of another partner or partners of the company or of third parties if the unanimous consent of the capital is obtained according to Article 113 of the Law on Companies.

An assignment of share participations must be carried out by means of a public deed. The notary will include in the protocol a certificate from the company's legal representative evidencing that the requirement mentioned in the preceding paragraph has been met. The assignment will be recorded in the books of the company.

From a taxation standpoint, share assignment is subject to income tax.

Thus, mergers and acquisitions are governed in Ecuador by the Law on Companies and the Commercial Code with respect to their formalisation, and in most cases they require prior authorisation. All of the above-described forms of concentration are subject to notification and authorisation by the Superintendency if they surpass the thresholds set in the Law.

VI OUTLOOK AND CONCLUSIONS

From the competition and corporate perspective, two separate rules are in force in Ecuador, and they are subject to different procedures and clearance processes. From the competition perspective, however, considering the few years of practice and the high degree of turnover of regulator staff, practice can at times be unpredictable and deadlines may be extended further than anticipated. From the perspective of global transactions being cleared in different jurisdictions, it will likely be the case that a merger notification will be filed in Ecuador far in advance of other jurisdictions, merely because of the country's strict deadlines for notification and prior approval. In our opinion, a reform should take place regarding Ecuador's strict eight-day deadline, considering that it is in the parties' interest to submit complete notifications as far in advance as possible, and considering the requirement to have approval in order for the closing of transactions. The unpredictable nature of the regulator, and cases that have seen transactions being denied, or being considered withdrawn due to a lack of submission of exhibits, have greatly concerned practitioners, and it is hoped that the regulator shifts from an overly formalistic approach regarding accompanying documents to a more diligent and thorough review of the fundamental economic reality of the transaction.

Appendix 1

ABOUT THE AUTHORS

DIEGO PÉREZ-ORDOÑEZ

Pérez Bustamante & Ponce

Diego Pérez-Ordoñez was admitted to practise in 1996 and holds a doctor of law from the Catholic University of Quito. He completed an undergraduate microeconomics course at the London School of Economics in 1990. Mr Pérez-Ordóñez is a partner with Pérez Bustamante & Ponce (and a member of its M&A antitrust practice). On the academic front, he is a professor of constitutional law (1999–present) at the Universidad San Francisco de Quito.

LUIS MARÍN TOBAR

Pérez Bustamante & Ponce

Luis Marín Tobar was admitted to practise in 2007 and is a senior associate at Pérez Bustamante & Ponce (and also a member of the IP & antitrust practice). He obtained his JD at the Universidad San Francisco de Quito, Ecuador, a master's degree in international legal studies from Georgetown University Law Center and a postgraduate diploma in economics for competition law from Kings College London. Mr Marín Tobar worked as an international associate with the competition disputes team of White & Case LLP in Brussels during 2013.

NATALIA ALMEIDA

Pérez Bustamante & Ponce

Natalia Almeida's practice is focused on financial and commercial law. She assists banks and insurance companies in regulatory and compliance matters. She also advises financial and non-financial entities in designing financial products, and structuring and implementing credits, collateral and derivatives. She also participates in merger and acquisition processes.

PÉREZ BUSTAMANTE & PONCE
Av República de El Salvador
1082 y Naciones Unidas
N36-140, Edificio Mansión Blanca
Torre Londres, Piso 9
Quito, Pichincha
Ecuador
Tel: +593 2 382 7800
Fax: +593 2 382 7800
dperez@pbplaw.com
lmarin@pbplaw.com
nalmeida@pbplaw.com
www.pbplaw.com