The Merger Control Review

Fifth Edition

Editor
Ilene Knable Gotts

Law Business Research

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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. 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 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. 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 either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). 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). 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; and Hungary, Ireland and Romania have a 30-calendar-day time limit from 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., United States, Ukraine, Greece, and Portugal). Brazil issued its first 'gun jumping' fine this year. 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 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 European Union 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 even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically 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 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. 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 Chile. 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 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., 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 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. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., 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. As discussed in the last chapter, International Merger Remedies, 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 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 year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). 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 2014

Chapter 12

ECUADOR

Diego Pérez-Ordóñez and José Urízar[1]

I INTRODUCTION

The Organic Law of Market Regulation and Control (Law) was enacted in 2011. The Superintendency of Control of Market Power (Superintendency or Authority) was created pursuant to the Law. The Superintendency is in charge of overseeing the application of the Law, and, among other faculties, has a mandate to review, approve, deny or condition concentration operations, and to punish undertakings that fail to comply with the obligation to notify a concentration. In spite of a slow start, the Superintendency has gained momentum, and is currently very active.

The Superintendency is organised into four indendencies with a high degree of independence. The Intendency of Concentration Control (Intendency) is in charge of analysing concentration operations and issuing reports containing its technical findings and recommendations. The Resolution Commission of First Instance – another independent organ of the Superintendency – will endeavour to approve, deny or condition a concentration on the basis of the Intendency's report; however, it is empowered to deviate from the findings and recommendations of the Intendency.

Section 4 of Chapter II of the Law lays down the basic rules applicable in the concentration control regime. The first provision of the Section 4 contains a definition of 'concentration operations'. Section 4 also contains provisions regarding, *inter alia*:

a the powers of the Superintendency regarding concentrations;
b the applicable rules to calculate an undertaking's turnover;
c the thresholds over which a concentration must be notified;
d the criteria to be used in decisions; and
e the penalties applicable in cases of non-compliance.

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1 Diego Pérez-Ordóñez is a partner and José Urízar is an associate at Pérez Bustamante & Ponce.

Some provisions in other sections of the Law complement the rules contained in Section 4.

In addition to the recently adopted concentration control regime administered by the Authority, it must be noted that a commercial regime that regulates mergers exists and is applied by the Superintendency of Companies. There are, however, many forms of concentration other than mergers that are not controlled by the Superintendency of Companies, but that will be subject to approval by the Authority in cases where the thresholds set in the Law are exceeded.

II ECUADORIAN 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).

i Prior control

The Law includes several provisions relating to prior control of mergers and acquisitions. Their major characteristics are:

a economic concentration is defined as a change or takeover of one or several enterprises or economic operators;

b the prior authorisation from the Superintendency must be requested when the thresholds set in the Law are exceeded. The Superintendency is the authority in this matter;

c actions on economic concentration are broad and provide examples of:
- mergers;
- transfers of all the assets of a business person;
- direct or indirect acquisition of shares or share participations or debt certificates giving rise to the right to control;
- links through common administration, openly and as an example; and
- any 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; and

d the Regulations state that 'control' is to be understood as control over any contract, act or otherwise that, bearing in mind *de facto* and *de jure* circumstances, confer the possibility of exercising substantial or determinant influence over an enterprise or an economic operator. Control may be joint or exclusive.

ii Conditions

Bearing the foregoing in mind, two conditions must exist to request authorisation.

First, the total turnover in Ecuador of all participants in the transaction (target and purchaser) should exceed – during the fiscal year prior to the operation – the amount of unified basic remunerations in force established by the Regulation Board.

The Regulation Board set the 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 (US$340)**	*US$ (2014)†*
a Concentrations involving financial institutions and entities that participate in the stock exchange	3.2 million	1.088 billion
b Concentrations involving insurance and re-insurance companies	62,000	21.08 million
c Concentrations involving undertakings not contemplated in (a) and (b)	200,000	68 million
* The unified basic remuneration in Ecuador for 2014 † The unified basic remuneration changes yearly; thus, the amount in US dollars provided above will change on a yearly basis		

Second, concentrations must involve economic operators undertaking the same economic activity and, as a consequence of the concentration, a quota equal to or greater than 30 per cent of the relevant market of the goods or services in Ecuador or in a specific geographic market must be acquired or increased.

iii Timing, terms and requirements – notice as of completion of the agreement

Concentration operations that require prior authorisation must be notified for prior examination within eight days of the completion date of the agreement (draft act or contract). The Regulations to the Law provide that 'completion of agreement' is defined as follows:

a in the case of mergers – from the moment when at least one of the participants at the shareholders' meeting has agreed to the merger;

b in the case of a transfer of a business person's assets – 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 transfer is approved by the shareholders' meeting;

c in the case of the purchase of ownership of or rights over shares or share participations or debt instruments – 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;

d in the event of a link through common administration – from the time the administrators have been designated by the shareholders' meeting; and

e any other agreement that factually or legally transfers the assets of an entity or that grants the entity a determinant influence or control on decision making – from the time the parties consent to the operation giving rise to the concentration and determine the form, term and conditions for its performance.

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

Officially, or upon petition of the economic entities involved in a concentration operation, the Superintendency may request notification even if the aforementioned conditions have not been met. The entities will be allowed 30 days to justify their failure to notify if the Superintendency considers the concentrations exceeded the thresholds set in the Law. Following this, a 60-day investigation will commence (extendable for 60 additional days). Additionally, even if the aforementioned conditions have not been met, undertakings can choose to voluntarily notify their concentrations to the Superintendency; these concentrations will not require approval by the Superintendency.

iv Requirements for notification

Notice must be given by the operator who makes the acquisition or acquires control, except when several operators acquire joint control. In that case, notice must be given jointly through a common attorney in fact.

The Regulations to the Law provide for 11 information points and five specific documentary requirements for each such notice. Notifications were previously not made in any form, although they had to contain these information points and documentary requirements. However, on 9 May 2013, the Superintendency published a form that must be filled in to file a concentration notification; this form also contains these information points and documentary requirements.

v Terms and charges

The Superintendency is allowed 60 days to approve, deny or impose conditions on the transaction. That period is extendable for a further 60 days (it is not clear in the Law if the 60 additional days are business days or calendar days). The Regulations grant the Superintendency the right to determine charges as established in the Law and in the Organic Code on Planning and Public Finances, providing that an analysis of concentrations is the event that gives rise to the charge. 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:

a 0.25 per cent of the income tax (paid in the previous fiscal year);
b 0.005 per cent of turnover (achieved in the previous fiscal year);
c 0.01 per cent of the assets; or
d 0.05 per cent of the net assets.

However, the Regulations do not specify which of the involved undertakings' figures these parameters will apply to. In practice, these calculations are currently made on the basis of the target undertaking's figures, and we do not anticipate this interpretation of the relevant provision to change.

vi Exemptions

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

a an acquisition of shares without voting rights, bonds, securities or any other right convertible to shares without voting rights; and

b an 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.

vii Concentrations that have taken place since 13 October 2011 prior to the creation of the Superintendency

A vacuum existed in the Law: while it created the obligation to notify concentrations from the time it was enacted, it failed to determine the entity in charge of taking cognisance of such notices until the Regulations were issued and the Superintendency was created. The Superintendency only began to accept concentration notifications several months after the enactment of the Law.

To fill that vacuum, under the first transitory provision of the Regulations, all operations performed between the enactment of the Law and the creation of the Superintendency ought to be notified *ex post* to the Superintendency, following the regular procedure for investigation pursuant to Articles 26 and 27 of the Regulations when notices were not given. Although it was clearly impossible to notify operations at a time when no competent entity was empowered to receive notices, failure to notify *ex post* could, in theory, lead to the imposition of fines. However, the imposition of a regulatory obligation to obtain *ex post* authorisation from an authority that did not exist at the time of an operation being performed is doubtful and questionable. Notwithstanding the above, to the best of our knowledge, this situation has not generated problems to date.

III CONCENTRATION OPERATIONS

At the time of writing this chapter, the Authority has resolved seven mandatory notifications of concentration, and has cleared all of them. Two of these approvals have been granted subject to conditions.

IV PENALTIES

Late notification of a concentration and failure to notify a concentration as required by the Authority *ex officio* constitute mild violations of the Law, and are punishable with a fine of up to 8 per cent of the undertaking's turnover in the previous fiscal year.

Consummating a concentration subject to approval before a notification has been made or before receiving approval from the Authority constitutes a serious violation of the Law, and is punishable with a fine of up to 10 per cent of the undertaking's turnover in the previous fiscal year.

Furthermore, in addition to the fine that may be imposed, the Authority could order corrective measures, such as ordering the concentration to be reverted, if it considers such measures appropriate and necessary to restore the competitive process.

V THE MERGER CONTROL REGIME

Mergers of commercial companies are ruled by the Law on Companies. According to corporate legislation, a merger of companies may take place in two ways:

a when two or more companies join to form a new company that succeeds them regarding their rights and obligations (merger by union); or

b when one or more companies are taken over by another that continues its existence (merger by takeover).

i Procedures for a merger

For a merger of any company into a new company to take place, it is first necessary to agree its 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).

Without prejudice to the control of mergers specified herein, the Superintendency of Companies must approve the public deed comprising the merger of commercial companies and, 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.

ii Effects of a merger

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, when two or more companies join to create a new company, 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 and who are responsible in the capacity of acquirers or successors of assets 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. On the other hand, the Code also provides that companies substituting other companies will be liable as acquirers or successors of properties and must be in charge of the assets and liabilities, in whole or in part, by reason of merger, transformation, takeover or otherwise. Liability includes the taxes owed up to the date of the corporate action concerned.

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.

iii Acquisition by assignment of business

Another form of acquisition that differs from the already-mentioned merger varieties is the sale of all the merchandise or assets of a businessperson, which is governed by the Commercial Code. In practice, this system has been legally used to purchase and sell all assets and liabilities of a business person, that is, of an individual capable of entering into contracts and who usually performs commercial activities 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 taken into account that this system does not result in the union of two or more juridical persons or the takeover of one or more of them by a third party, such as in the case of 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. According to Ecuadorian professional practice, this system has been used mainly to sell the assets and liabilities of the branch of a foreign company to a third party (e.g., a stock corporation or a limited liability company). In this case, the use of such contracts is due to the impossibility of using the classical merger form, because branches of foreign companies do not have a capital stock divided into shares or share participations. Besides, it is considered that branches of foreign companies are under the same legal capacity as their parent companies.

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

From a taxation standpoint, the sale of a business transferring assets and liabilities is not subject to value added tax.

iv Acquisition by assignment of shares or share participations

Another way to acquire an Ecuadorian commercial company is through a transfer of shares or share participations. The capital of corporations that are capital stock companies is divided into shares. The capital of limited liability companies or partnerships is divided into share participations.

Non-financial stock corporations are subject to the Law on Companies and are controlled by the Superintendency of Companies. Their capital is divided into common, registered and indivisible shares. They may issue preferred shares for up to 50 per cent of the subscribed capital. Preferred shares may grant special rights upon liquidation of the company or for profit sharing, but they cannot grant fixed dividends or interest.

Shares – whether common or preferred – are freely transferable. This is a general principle established by Ecuador's corporate legislation by reason of the very nature of a stock corporation. Ownership of shares in a stock corporation is transferred by means of an assignment letter signed by the transferor or by a person or 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 for 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 may have an authorised capital that cannot be greater than twice the amount of the subscribed capital. It must be noted that stock corporations that do not belong to the financial sector must be incorporated with at least two shareholders, but may validly continue with just one shareholder after being duly registered with the Mercantile Registry. 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.

v Limited liability companies

Given their different juridical nature – that is, they are partnerships involving persons and not capital – limited liability companies are governed by different rules with respect to an assignment of share participations. The capital of those companies is divided into share participations that are not moveable properties or assets and cannot be freely assigned or transferred, unlike the shares of stock corporations. 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).

Since limited liability companies comprise persons (and not capital), the circulation of share participations would result in the company not considering its members (i.e., it would no longer be an *intuito personae* company). According to the definition of the Law on Companies (Article 102), share participations are the partners' contributions to the limited liability company.

vi Transfer of share participations

Share participations held by a partner in a limited liability company 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. This is the first legal limitation: the necessary unanimity of consent for a transfer.

An assignment of share participations must be carried out by means of a public deed. The notary will include in his or her protocol, or in the public deed, 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. This is the second legal limitation: the formality of executing the assignment by means of a public deed.

Thus, mergers and acquisitions are governed in Ecuador by the Law on Companies and the Commercial Code with respect to their formalisation, but they are limited and controlled by the Law with respect to their 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

The Law is now fully applicable, and the Superintendency is wholly functional. However, because the process is still new to most of the Superintendency's officers, internal procedures are being drafted and are in the process of being implemented. As such, delays can be expected. Ecuador has no traditions or customary practices regarding antimonopoly legislation, and any policies implemented by the authorities in the future will be essential for the prosperity of local entrepreneurs and for attracting foreign investment. Control of mergers and acquisitions in the local market will be especially important, because mergers carried out in the past were subject to minimal regulatory supervision, while acquisitions were not subject to state intervention at all.

Appendix 1

ABOUT THE AUTHORS

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Diego Pérez-Ordóñez was admitted to practise in 1996 and is 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.

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