The Merger Control Review

Eleventh Edition

Editor
Ilene Knable Gotts

The Law Reviews

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Ilene Knable Gotts

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CONTENTS

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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent 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.

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. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. 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 has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). 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, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. 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., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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 competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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 provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. 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, Indonesia 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., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). 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 Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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 EC model than the United States 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 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 processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC 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 must 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 EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), 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 antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States 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, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC 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 competition authority, 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 European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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 EC 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 United Kingdom 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 stand-alone 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. Multi-jurisdictional 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 United States 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 enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. 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 EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping 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* and 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.

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Part II

Jurisdictions

Chapter 14

ECUADOR

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I INTRODUCTION

The Organic Law for the Regulation and Control of Market Power (Law) was enacted on 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 regulations and sector-wide recommendations, among them implementing economic thresholds for mergers.

Merger notifications are filed with the Intendancy for Concentration Control (the Merger Control Intendancy), an investigative authority that issues a recommendation report for resolution by a three-person resolution panel, the First Instance Resolution Commission (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, condition 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. The Superintendency is organised into four investigative intendancies. These intendancies perform their analysis and investigations independently and issue recommendation reports to the Commission. The Merger Control Intendancy is in charge of analysing notified transactions and issuing final recommendation reports, which contain an economic analysis of the competitive landscape, the transaction's potential impact on the competitive structure, and its final recommendation as to the clearance, conditional clearance subject to remedies, or denial, of the transaction. The agency recently created a fast-track procedure for transactions that do not pose substantive risks to competition, which is a welcome change for a regime that took, on average, five to six months from filing to clearance.

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 on a lasting basis exceeding either of the economic or market share thresholds may be subject to mandatory merger control notification and prior clearance before its execution in Ecuador. Mergers and acquisitions, full-function joint ventures, administration agreements and asset sales, inter alia, are defined as 'concentration operations',

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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 turnover or market share thresholds are met.

II YEAR IN REVIEW

The most consequential recent development in the Ecuadorian merger regime was the 22 April 2020 resolution by which both a fast-track merger procedure and a three-pronged failing firm defence were created. The failing firm defence is part of the fast-track procedure.

To benefit from the fast-track procedure:

a the undertaking acquiring control should not, directly or indirectly, carry out economic activities in Ecuador;

b in horizontal mergers:
- the parties' joint share in each relevant market must be less than 30 per cent; and
- the Herfindahl–Hirschman Index (HHI) in each relevant market shall be less than 2,000 points and generate, as a consequence, an increase of less than 250 points;

c in vertical mergers, the HHI of the affected relevant market shall be less than 2,000 points; or

d the undertakings must be at risk of bankruptcy. This possibility, known as failing firm defence, is a new feature in the Ecuadorian competition regime. Following EU guidelines, the competition authority created a three-step test to determine the applicability of this criteria:
- the failing firm would, in the near future, be forced out of the market due to financial difficulties;
- there are no less anticompetitive alternatives than the proposed merger; and
- in the absence of the merger, the assets of the failing firm would inevitably exit the market.

Although the effects of this new fast-track procedure are not yet apparent in practice, this regime will generate significant advantages for undertakings by reducing waiting times. Inevitably, as this regime is implemented, several practical questions requiring answers from the competition agency will arise.

III THE MERGER CONTROL REGIME

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. The first term of the Superintendent Pedro Páez expired in 2017, and a new Superintendent, Danilo Sylva Pazmiño, was appointed in November 2018.

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 on a lasting basis, with an impact on the structure of the market, 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 undertaking. This control may be joint or exclusive. Substantial influence has been defined as the possibility of making or blocking strategic commercial decisions of an undertaking (positive or negative control).

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 undertakings in Ecuador in the year preceding the transaction exceeds an amount fixed by the Regulation Board. The Regulation Board modified the previous threshold through Resolution No. 009 of 25 September 2015. 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	1.28 billion
b	Concentrations involving insurance and reinsurance companies	214,000	85.6 million
c	Concentrations involving undertakings not contemplated in (a) and (b)	200,000	80 million
*	The unified basic remuneration in Ecuador for 2020 is US$400		
†	The unified basic remuneration changes yearly; thus, the value 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. Contrary to turnover information, the notifying undertakings must produce updated market share information.

A transaction must be notified if one of the parties holds a share equal to or superior to 30 per cent of the market share, regardless of whether the transaction reinforces this share.

iii Execution and filing

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 accepted by the parties through their governing bodies or the appointment of local administrators. The Regulations provide further guidance in respect of the 'conclusion' concept, and stipulate 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 Waiting periods and time frames

As of the date of admittance to file as complete, the Superintendency has 60 working days to approve, deny or impose conditions on a transaction. That period can be extended by the regulator for an additional period, although it is still under discussion if this additional term is of 60 or 120 days. 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 five and seven months from the date of filing until a clearance decision is issued for a relatively complex merger, and eight to 12 months if there is a need to negotiate remedies.

On 20 April 2020, the agency enacted a resolution by which a fast-track procedure has been created (see Section II). Although influenced by the European regime, the specific criteria may be different. It takes at least 37 business days from the filing of the notification to complete the new procedure.

The Regulations grant the Superintendency the right to determine official fees for the evaluation of a concentration notification. In 2013, the Superintendency published regulations containing the parameters to be used to determine the fee 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.

The current rules for fees require parties to validate their methodology of payment prior to making any disbursements. The figures must be applied to the combined entities in the case of mergers, and to the acquired or target entity in the case of acquisitions. However, this validation period tends to take several weeks, generally delaying the completion of the review period by two or three weeks. As a consequence, the Authority is currently considering new rules that would set a fixed fee subject to discounts depending on specific circumstances of the parties. These new rules have not yet been made public.

v Exemptions

Article 19 of the Law and Article 13 of the Regulations establish 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;
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;
c acquisitions of shares with the intent of reselling them within a year (any holding of more than a year must be authorised by the regulator);
d acquisitions of failing firms. In Ecuador, the failing-firm doctrine requires prior authorisation of a public authority. It has not been clarified what public body must authorise the acquisition of a failing undertaking; and
e acquisitions of undertakings in the course of judicial or administrative proceedings, such as seizure.

Even though it is highly likely that several undertakings will argue failing firm defences in the coming months, it is worth noting that in Ecuador this is not a proper defence, but rather a prior exemption granted by a (still undefined) public authority. Before considering a failing firm argument in Ecuador, consulting with local counsel is recommended.

These exceptions have served as a safe harbour for recent global transactions where the acquiring entity alone exceeded the mandatory thresholds, but the acquired entity did not have economic activity in the past three years.

vi Third-party access to the file and rights to challenge mergers

The Authority tends to be overzealous with the confidentiality of all files. No public excerpt or declaration is made regarding any pending cases, and only public versions of decisions are published when formally requested and after the statute of limitations for ordinary appeals runs out (20 business days). Unfortunately, the regulator does not even publish the public versions and Freedom of Information Act requests must be filed to obtain them.

This practice complicates any challenge to mergers. Since the decision is published only after the statute of limitation of ordinary appeals runs out, third parties have only exceptional recourse, basically arguing gross misapplication of the law, new evidence or a material change in circumstances. These high bars have proven difficult to meet, and, therefore, few challenges have been proposed and even less have been at least partially successful.

vii Substantive assessment and remedies

The substantive test under Ecuadorian law is modelled on the European significant impediment to effective competition standard. However, the Authority has not fleshed out the contours of the practical application of the test, and at times the decisions seem to apply a more stringent and harder to satisfy substantial lessening of competition test. This is definitely an area that needs more clear development from the Authority.

The Ecuadorian Authority may impose both behavioural and structural remedies. Even though the Merger Control Intendant has voiced his preference for structural remedies (as he deems these more effective), because of their complexity behavioural remedies are often imposed in lieu of these. Furthermore, the largest structural remedy ever imposed by the Authority – the divestiture of the second largest beer brand as part of the *SABMiller/AB InBev* transaction – was annulled by the judiciary. This case resulted in a more restrained approach and reinforced the practical preference for behavioural remedies.

IV RECENT PRACTICE

The regulator has approved a large number of global transactions subject to multi-jurisdictional control and that required prior approval in Ecuador. Only one transaction was denied on formal grounds but was later approved on appeal, and only a handful of transactions were denied due to anticompetitive concerns. To date, few global transactions have been subjected to structural remedies: one was subsequently closed because of the termination of the original merger, another is still pending completion after the implementation of a monitoring trustee to supervise compliance with the imposed remedies, and others have been cleared after complying with the proposed conditions.

In 2019, the regulator processed 24 merger control cases (there are no statistics for 2020 yet), among the most relevant being the acquisition of several independent clinics by the Ecuadorian subsidiary of Fresenius Medical Care and the clearance of HBO's divestiture in a partnership with Ole Communications Inc. Unfortunately, the agency does not regularly publish its decisions.

V 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. These amounts have been moderated by Regulation 012, which mandates that the fines should be calculated only taking into account turnover in the relevant market, along with other aggravating or mitigating factors. The Regulation has been interpreted as an effort to moderate fines and respect the constitutional guarantee of proportionality after several courts annulled large fines related to abuse of dominance. However, the Regulation may have gone too far and several commentators argue that the fines have now lost their deterrent effect.

The regulator has initiated several *ex officio* proceedings to pursue alleged gun-jumping following publication of global transactions in international news, and has summoned parties to justify the lack of notification in relation to global transactions with a direct or indirect impact in Ecuador.

In addition to these fines, in especially serious cases the Authority can also order the divestment or unwinding of the transaction in cases where the effects of the non-notified transaction are considered anticompetitive in order to restore the competitive process and impose personal fines over the directors or legal representatives of the company. 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.

The first gun-jumping investigation began in 2018, resulting in a decision in 2019. The infringing undertaking was Unión Cementera Nacional UCEM, an Ecuadorian subsidiary of the Peruvian-based Gloria group. After identifying the potential gun-jumping, UCEM tried to reach a commitment with the agency, which stated that commitments are not applicable for gun-jumping cases, since the only way to cease the conduct would require unwinding the transaction. After setting aside the commitment request, the regulator proceeded with its investigation, which resulted in a fine of US$123,494.21, calculated over a turnover of US$13.9 million in the relevant market. The relatively small fine resulted from the aforementioned Regulation.

VI MERGER PROCEDURES

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 Mergers by union or takeover

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, Securities and Insurance 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 immovable property transfer in some types of mergers. For instance, merger by union of capital stock companies shall not bear any tax on immovable 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 immovable 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, Securities and Insurance) or of the branch of a foreign company.

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 Ecuadorian 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 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.

VII 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 for the closing of transactions. A bill was sent to the National Assembly in 2018 proposing to eliminate the monetary threshold, in an alleged effort to simplify contracting procedures in Ecuador. We believe this would generate uncertainty in global transactions where relevant market analysis is not typically performed in the local market until after a filing obligation based on the monetary threshold is met. It would likely lead to parties having to notify otherwise non-notifiable transactions, based on the concern that a different market definition could lead them to a contingency for gun-jumping in Ecuador. More importantly, this bill contradicts global efforts of eliminating market share thresholds, which tend to be much more subjective than monetary thresholds. Recently, members of the Intendancy have written academic papers suggesting that a better way to move forward requires eliminating the market share threshold and leaving the turnover threshold in place.

Appendix 1

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