CPI Columns

Latin America

August 2021

Merger Control and the Implementation of Remedies in Ecuador: A Case Study from 2012-2021

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Introduction

Ecuador is close to reaching the ten-year anniversary of its first domestic competition law, the "*Organic Law for the Regulation and Control of Market Power,*" which entered into force on October 11, 2021, and brought about the country's first merger control regime with characteristics that set it apart from global merger control. Notwithstanding the existence of the law, it became applicable in practice from September 2012, when the first Superintendent of Market Power Control was appointed and sworn into office and began structuring the Authority, composed of 4 Intendencies charged with investigations and advocacy, as well as a resolutory body. Among the investigative intendencies, the Merger Control Intendency was charged with investigating and issuing recommendations for the clearance of transactions subject to merger control.

Characterized mainly by a rigid, 8-day deadline for filing and approval prior to closing along with intense scrutiny of all cases, the merger control practice of the Authority has evolved throughout these years and only recently, in 2020, implemented changes[2] to expedite review times and facilitate the clearance of transactions which do not pose competitive risks, while undertaking to perform more in-depth reviews of those which merit phase two review and the adoption of remedies. This article will explore the practice of the Authority through its decisions while investigating more than 140 mandatorily notified transactions, 13 of which were subject to remedies during this first decade of practice, with the aim of providing guidance as to the trends and focus of the regulator in its decisions.

According to the Organization for Economic Co-Operation and Development and IDB ("OECD-IDB") in its first peer review examination published on March 31, 2021, the Intendency's work has been intense, showing that from a sample between 2014-2019, 108 mandatory notifications were analyzed, 11 of which were subject to conditions, as presented in Table 11 of the peer review examination[3]:

Table 11. Merger review statistics for mandatory notifications

Year	Total mandatory notifications	Total clearances	Total clearances with conditions	Total prohibitions	Total withdrawn notifications*	Total pending cases
2019	23	11	1	0	1	11
2018	16	13	0	0	2	0
2017	22	17	3	0	2	0
2016	16	12	3	0	1	0
2015	16	13	3	0	0	0
2014	15	12	1	2	0	0
Total	**108**	**78**	**11**	**2**	**6**	**11**

Note: *In six other cases, the merger parties withdrew the notification during the investigation phase
Source: ICC

Source: OECD (2021), OECD-IDB Peer Reviews of Competition Law and Policy: Ecuador. http://www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-lawand-policy-ecuador-2021.htm.

A further review of public sources by the author found that a total sample of approximately 140 notified transactions were subject to merger control scrutiny from 2012-2021, 13 of which have been subject to conditions until 2021, and 2 were prohibited. From the mentioned OECD-IDB peer review, the average review time of mandatory merger notification was 65 days for unconditional clearance, 128 days for conditional clearance, and 83 days for prohibited mergers.[4]

It is interesting to note that the analysis in Ecuador relies on a dominance test, as is explained in the report:

Ecuador's regime relies on a dominance test. According to Article 15 LORCPM, SCPM must assess whether the merger creates, strengthens, or alters market power. However, the vast majority of competition authorities

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[2] https://globalcompetitionreview.com/ecuador-adopts-two-phase-merger-review-process.
[3] OECD (2021), OECD-IDB Peer Reviews of Competition Law and Policy: Ecuador http://www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021.htm.
[4] OECD Peer Review report, page 107.

across the world use the substantial lessening of competition (SLC) test[5]. The SLC test focuses on the effects of the merger on the market (whether prices are likely to rise post-merger) and on the loss of competition among firms, rather than on structural issues such as market shares, which is the focus of the dominance test.[6]

As noted above, Art. 15 of Ecuador's competition law focuses on addressing the creation, modification or reinforcement of market power through the merger operation, rather than determining the impact of the transaction on the basis of a substantial lessening of competition (SLC) test:

> *In the event that an economic concentration operation creates, modifies or reinforces market power, the Superintendency of Market Power Control may deny the concentration operation or determine measures or conditions for the operation to be carried out. Having concluded without prior notification, or while the corresponding authorization has not been issued, the Superintendency may order the divestment measures, or corrective measures or the cessation of control by an economic operator over another or others, when the case warrants it, without prejudice of the sanctions to which there may be place in accordance with articles 78 and 79 of this Law.*

Transactions Subject to Remedies

In this section we identify and summarize the 13 transactions subject to remedies implemented by the Ecuadorean regulator. The peer review examination describes the typical structural and behavioral remedies implemented throughout the regulator's practice, stating that:

> *Typical structural remedies would be divestiture of production plants, productive assets, intangible assets, or long-term licensing for the use and exploitation of a brand. Behavioral remedies can be communications to clients, limits on marketing spending, granting access to distribution channels to third-party economic operators, extending the validity of contracts and terms and conditions with clients, maintaining price levels for providing services, and liberalizing prices established in franchise contracts. Remedies that are neither structural nor behavioral are, for example, making the operation conditional upon the decision of another regulator, granting benefits to SMEs, worker share participation in a company, and requiring notification to SCPM before entering new markets.[7]*

It is worth noting that the only two transactions subject to full refusal by the local authority are the *Holcim/Lafarge*[8] transaction and the *Indura/Swissgas*[9] transaction. The first case was denied given that the parties had already divested the local portion of Lafarge's operation in Ecuador and the notification was requested to be archived and closed, but the regulator chose to deny the merger instead. The second case was refused on the basis of a highly concentrated market and regulator concerns over the potential for collusion.

1. Coca-Cola/Arca Continental's Acquisition of Tonicorp (2014)

Market and Parties. Foreign beverage

[5] See the executive summary of the Roundtable on Standard of Merger Review (2009): " jurisdictions have changed and others are contemplating changing the legal standard for the review of mergers from a standard based on the creation or strengthening of a dominant position to an SLC standard. No country reported changing over the last twenty years from the SLC standard to the dominance standard" OECDIDB PEER REVIEWS www.oecd.org/competition/abuse/46503256.pdf. OF COMPETITION LAW AND POLICY: ECUADOR © OECD 2021

[6] OECD Peer Review report, page 65.

[7] OECD Peer Review report, page 66.

[8] See https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/RESOLUCION-044-SCPM-CRPI-2014.pdf.

[9] See https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/RESOLUCION-032-SCPM-CRPI-2014.pdf.

company and its local bottling company's (with business presence in Ecuador) acquisition of local dairy products and snacks company, with a limited overlap in certain relevant markets. Regulator focused mainly on freezer or cabinet exclusivity as noted below.

Remedies: Transparency in compliance with obligations: Clarity in written agreements in relation to payments, compensation or advantages; **Transparency in the termination of obligations**: Clarity with regards to terms and conditions for termination, including terms for payment of dues.; **Exclusivity:** Limitations on exclusivity clauses with clients, including express limitation on conditions to assign exclusive spaces for its goods. **Minimum purchase requirements are prohibited; Maximum purchase requirements of competing goods are prohibited; Technical Equipment Supply; Gratuitous supply of refrigeration devices**: Rules for freezer exclusivity, only allowed for gratuitous devices where client has other devices or space for them; obligation to allow 20% space on company refrigeration devices on gratuitously assigned devices where client has no further capacity.

Rent of refrigeration devices: Rules for granting client's possibility to use 20% of freezer in rented refrigeration devices for goods sold under Ecuadorean brands, or locally produced goods. **Purchase of refrigeration device:** Rules for purchased refrigeration devices whereby the client has the freedom to determine space and use.

2. **Cabcorp Ecuador Beverages Company LLC's Acquisition of Tesalia Bottling Company 2014**

Market and parties. A foreign beverage bottling company (with no business presence in Ecuador) acquired a local beverage company. There was no overlap in the activities of both companies in the Ecuadorian market. Regulator focused mainly on freezer or cabinet exclusivity as noted below.

Remedies. The decision replicated the *CocaCola/Arca/Toni* conditions, with the inclusion of two conditions. **Tying:** The acquiring company will not execute or keep in force in any of its agreements or commercial relations clauses which condition the provision of any of the goods of this company or acquired entity, to the obligation of the client to purchase one or more additional beverages from these companies; **Agreements relating to competing goods:** The acquiring company will not execute or keep in effect in any of its agreements clauses which condition the provision of any of its goods, or those of the acquired entity, or the availability, extension of payment or advantages, subject to the client's obligation to discontinue, reduce, or vary the terms of its agreements with competitors, or to refrain from executing these agreements.

3. **AT&T's Acquisition of DirecTV, 2014**

Market and parties. Foreign telecommunications companies' global acquisition of television counterpart DirecTV, with local presence.

Remedies. The goods and/or services offered by the acquiring entity, which are different to satellite TV, cannot enter the Ecuadorian market. To do so, the companies who operate through the acquired entity must notify the Superintendency in advance to avoid potential distortions in the market. The Superintendency allegedly did this so that the merging parties were not able to bring new products and leverage their dominance in pay TV to related markets.

4. **Grupo Bimbo's Acquisition of Supan, 2014**

Parties and market: Bimbo, a Mexico-based multinational bread producer with no business presence, purchases a local bread company.

Remedies: The transaction was subordinated to the issuance of a pro-competitive statement relating to a) Transparency in the markets; b) Exclusivity clauses; c) Minimum purchase requirements; d) Bundling; e) Agreements regarding competing goods

5. **Halliburton's Acquisition of Baker Hughes, 2015**

Parties and market: Two foreign oil service companies with local operations in Ecuador and competing services in the oilfield services market. This transaction was terminated globally prior to closing, and local clearance was withdrawn by the notifying parties. These conditions were negotiated and accepted by the regulator prior to said global termination.

Remedies: a) Divestiture of Halliburton's fixed cutter and roller cone drill bits, LWD/MWD business; b) Divestiture of Halliburton's expandable liner hanger business; c) Divestiture of Baker Hughes core completion business

6. **AbInbev's Acquisition of SabMiller, 2016**

Parties and market: Global beer company acquired rival global beer company in a transaction involving very significant overlaps in the local market and acquisition of an almost complete dominance over the local beer market.

Remedies: a) Divestiture of a production plant, other interests and distribution channel of Ambev Ecuador; b) Sale of trademarks Zenda, Dorada, Biela and Maltin; c) License to use and exploit the trademark Brahma and for the production, distribution and commercialization of the products under said brand; d) Use of the commercialization line of Dinadec; e) Limit on the investment on advertising of the brands PILSENER, CLUB, BUDWEISER, BUD66 and PONY MALTA; f) Space on freezers for artisan and craft beers and alcoholic beverages and non-alcoholic beverages for operators of the popular and solidary economy; g) Subscription of a non-compete and "hold-separate" agreement while conditions a-d are implemented; h) Process of implementation, by AB-InBev of an e-commerce platform for the commercialization of artisan and craft beers; i) Ponderation of the participation of employees in the joint stock of the combined entity and work stability; j) Access to the bottling, bottle design, distribution, training, and promotion of craft and artisan beer; k) Limitation of exclusivity;

It is important to note that in this case the Superintendent decided to re-open the case a couple of months after the authorization and imposed an additional structural remedy requiring divestiture of the "Club" brand. This additional structural remedy was subject to constitutional protection actions, causing the remedy to be blocked by Ecuadorean courts which thereafter ratified the annulment of the remedy intended to result in the divestiture of the "Club" beer brand[10].

The rest of the conditions were implemented through a monitoring trustee, as well as a "citizens surveillance" procedure[11] performed by the Council for Citizens Participation and Social Control ("CPCCS")

7. **Ecuador – Bayer's Acquisition of Monsanto (2017)**

Parties and market: Global pesticide and agrochemical company acquired a rival agrochemical company, both participating in the local market with small participation in overlapping markets.

Remedies: Prohibit the production, introduction, and commercialization of seeds and transgenic products, as well as the application of modern, risky, and experimental biotechnologies, to protect the genetic heritage of Ecuador and prevent the entry of genetically modified organisms to the Country.

8. **Productos Familia's Acquisition of Inpaecsa (2017)**

Parties and market: Multinational Productos Familia (related to the Nordic Svenska Cellulosa Aktiebolaget Group) acquired maverick firm Inpaecsa, an incipient player in the local market for production of toilet paper products.

Remedies: a) Sale of a brand (Hada) belonging to the economic agent INPAECSA within a period of 4 years from the resolution; b) INPAECSA must terminate the investment

[10] https://lexlatin.com/opinion/la-batalla-cervecera-termina-en-ecuador-club-se-queda-con-cerveceria-nacional.
[11] http://www.cpccs.gob.ec/wp-content/uploads/2017/01/819.pdf.

contract signed with the Ministry of Productivity; c) Commitment that economic agents will continue to commercialize tissue paper reels to third parties.

9. **Unilever/Quala (2018)**

Parties and market: Multinational in the consumer products market acquired multinational companies' hair care products business unit with an overlap in hair care products.

Remedies: a) Limits placed on the prices of hair cream; b) Commitment to restrict advertising in the hair cream segment under the Savital, Ego, and Bioexpert brands for 5 years; c) Commitment to limit advertising expenditure by brands Savital, Ego, and Bioexpert for 3 years; d) Access by a third party to the use of production and advertising means; e) Commitment to limit the number of references (available presentations) of hair cream products in Ecuador for brands Savital, Ego, and Bioexpert for 5 years; f) Maintain the quality of hair cream products for 3 years.

10. **Tevcol's Acquisition of G4S (2019)**

Parties and market: Local armored vehicle company acquired armored vehicle business of rival multinational G4S with significant overlaps.

Remedies: a) Tevcol will continue with the contracts that G4S had with the financial sector for one year; It will not be able to participate in the sectors of transportation of securities and cash management for the non-financial sector; b) Withdrawal of the Operation Permit for 45 armored vehicles and vehicle removal from the TEVCOL operator; c) List of the 10 armored vehicles, and specific characteristics of the vehicles that will be used for escorting vehicles to be presented to the SCPM; d) Progressive scrapping of 12 armored vehicles belonging to TEVCOL and 3 armored vehicles destined for spare parts; e) The economic agent TEVCOL will maintain their price level for three years; f) TEVCOL will not increase the client portfolio that it currently maintains with entities belonging to the national public and private financial system; g) TEVCOL will retain at least 68 G4S jobs.

11. **Walt Disney Company's Acquisition of Twentieth Century Fox (2019)**

Parties and market: Global merger between entertainment and TV content companies with overlaps in the digital TV content business and sports channels.

Remedies: a) The Walt Disney Company will extend the term of validity of all contracts / licenses related to sports channels signed with small subscription television operators or their intermediaries, for 5 years or while the sports channels are on the air for subscription television operators; b) During the extension of validity, all commercial terms, and other conditions of the distribution / licensing contracts of sports channels will be maintained; c) In the case of small subscription television operators that have not signed distribution / licensing contracts for sports channels, The Walt Disney Company will guarantee that they contain, at least, the same conditions as the average prices paid for small subscription television operators that do have contracts; d) Small subscription television operators will receive from The Walt Disney Company the best signal quality that they can access according to their technical capabilities, during the term of the extension of the contracts.; e) The Walt Disney Company will maintain a direct negotiation channel that small subscription television operators will be able to access for the licensing of sports channels, during the term of the extension of the contracts; f) The Walt Disney Company may offer all subscription television operators the possibility of signing distribution / licensing contracts for sports channels, individually for each of the channels or as part of a package, according to the needs of each operator of TV.

12. **Ib Opco Holding S.L / Iberia / Globalia, Air Europa (2019)**

Parties and market: Foreign air transportation companies in combination transaction with overlaps in routes from South America to Europe.

Remedies: a) IB OPCO Holding undertakes that Air Europa renounces the SkyTeam Alliance, within a maximum period of up to 24 months; b) Facilities to generate Interline Agreements with third parties for the benefit of consumers; c) Control over the Base Rates of the annual Structure; d) Termination of the commercial cooperation agreement between Iberia and Aerolane; e) Competition Compliance Program or Compliance Policy

13. **Synlab/Interlab (2020)**

Parties and market: Multinational company in the lab services market acquired rival lab with overlaps in competing businesses.

Remedies: a) Publication of an open catalog of tests of medium and high complexity, with universal rates; b) For 5 years, it is prohibited to raise fees for medium and high complexity clinical analysis tests; c) Limitation on the application of the non-competition clause included in the share purchase agreement; d) Refrain from acquiring the branches of INTERLAB S.A. located in Milagro and Quevedo; e) Limitations, for 5 years, on the opening of sampling centers, units, and mobile points in the province of Guayas and in the cantons of Machala, Manta, and Portoviejo. In the rest of the country, the prohibition will be in force for three (3) years; f) Modification of the code of conduct of SYNLAB SOCIEDAD ANÓNIMA, particularly regarding the express prohibition of payment of commissions or the granting of other incentives to doctors for the directed prescription or over-prescription of clinical analysis tests.

Comments About Remedies

The 13 cases provide us with a sample of the trends in merger control remedies implemented by the Ecuadorean regulator, where the Authority has generally preferred behavioral remedies rather than structural remedies, and where the sale of assets and brands has proven complex and costly. However, we find that several remedies do not relate to the objectives of competition law, even though our competition law pursues a broader social objective which was promoted during a different political atmosphere, during the promotion and legislative approval of our law in 2011.

Of the remedies mentioned above, remedies relating to the protection of worker benefits and jobs, such as those included in the G4S/TEVCOL, and ABI/SABMiller portray a vision of social responsibility rather that promotion of free competition and should be revised for future transactions. Other conditions, such as the one implemented in the Bayer/Monsanto, is simply a condition to comply with a limitation already included in Ecuador's constitution, meaning the company will not import seeds and transgenic products, as well as the limitation for the application of modern, risky, and experimental biotechnologies. Finally, several implemented remedies constitute regulatory and pricing restraints rather than remedies focused on addressing competition concerns, examples of these are the limitation on prices of hair cream products, limitations on advertising (which constitutes a barrier to competition), maintenance of quality of products (Unilever/Quala), restraints on entry to non-financial sector services (a barrier to entry), withdrawal of operating permits for armored vehicles and scrapping of vehicles (both constituting a reduction of availability and service offering) (Tevcol/G4S),

It is worth noting that all these limitations derive from the first administration of the SCPM and were generally accompanied by public workshops[12] to discuss seeds and pesticides from a political perspective, while a decision was yet to be rendered. A condition which generates complexities is the one implemented in the AT&T/Directv transaction which strictly speaking generates an entry barrier for future interests of AT&T to invest in Ecuador, whereby it must notify the regulator of its intention to enter the market, even though such entry would not constitute a "concentration operation" as

[12] https://www.scpm.gob.ec/sitio/boletin-de-prensa-no-97-conversatorio-mercado-de-herbicidas-y-semillas-en-ecuador-se-desarrollo-en-quito/.

per the terms of our law.

Several of these remedies would likely not align with the recommendations issued by international networks and guidelines, such as those included in the "Merger Remedies Guide" published in 2016[13] by the International Competition Network ("ICN"), which distinguishes the key principles for remedies action: need for remedy; tailored to harm, effectiveness, transparency, and consistency. The key principle to assess the aforementioned remedies, is "*tailored to harm,*" whereby the ICN stated that *"To be effective, remedies must resolve the competition concerns the merger gives rise to so that competition can be maintained or restored in the markets affected by the merger. Therefore, competition authorities should require a merger remedy that is directed at and proportionate to ("tailored to") addressing the competitive harm."* Other key concerns have arisen from the fact that the Merger Control Intendency has very limited resources, which should be assigned with a priority to reviewing notifications, especially those which will require Phase II review, and the supervision of compliance with remedies, especially those with a long or indefinite duration which force the regulator to devote resources to frequent supervision, along with the private costs involved for companies who must retain monitoring trustees and auditing companies to demonstrate compliance with these remedies.

In conclusion we consider that, generally, the Merger Control Intendency has been one of the most active, technical, and reasonable within the institution, with our concern regarding the first administration of the Superintendency and the clear influence by the Superintendent seen in its advocacy interests and the decisions rendered by the Intendencies, particularly including those remedies which did not align with the recommendations, already addressed. As of the new administration, we have been positively surprised to see the return of several officials who had left the regulator during the first administration and by their openness to a peer review by the OECD and to effectively addressing several concerns included in their report, including changes to the merger control procedure such as the new two-phase review and the possibility of holding prior work meetings to assemble case teams and find the most effective path for notification and review of notified transactions. These changes were already implemented by the time the peer review report was made public in March 2021, including several recommendations from the merger control point of view.

[13] https://centrocedec.files.wordpress.com/2015/07/merger-remedies-guide.pdf.