CPI Columns

September 2022

Latin America

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Ecuador has had a standing competition law since October 13, 2011, when the Organic Law for the Regulation and Control of Market Power ("Competition Law") was enacted. This legal framework includes provisions which prohibit unjustified Non-Compete agreements, marking them as a form of abuse of dominance in Art. 9, as well as an agreement restricting competition in Art. 11. Non-Compete agreements, however, are generally accepted within the context of Merger and Acquisition transactions, particularly when the value of a transaction may be affected by the possibility of the sellers engaging in competing activities after their sale of shares or interests in a company. Ten years after the implementation of Ecuador's competition law, the Superintendence for the Control of Market Power ("SCPM") has issued highly relevant decisions in their evaluation of merger control, providing guidance regarding the limits and justifications to the inclusion of non-compete clauses as part of M&A operations. This article will provide an analytical evaluation of these restrictions, and how these have been analyzed and accepted for transactions subject to merger control.

I. Theory and Justification for Non-Compete Agreements

We must point out that non-compete clauses touch upon both competition law and the constitutional rights to work and engage in economic activity. The analysis in both cases is similar, focusing mainly on the reasoning behind the reach of these restrictions in allowing them to safeguard a company's interests, without imposing excessive burdens to those subjected to the clause or affecting the market's structure.

As exposed above, non-compete clauses are not illegal in themselves. They are legitimate when limited to: (i) a reasonable time frame, (ii) a reasonable geographical space, and; (iii) protecting the legitimate rights of the company requesting their inclusion.[1]

Considering how reasonable a decision is must be done case by case. However, generally speaking clauses must keep to a reasonable time span, be limited to specific regions, and not interfere unreasonably with the right to freedom to engage in economic activities of whomever may be subject to them:

> *"Ultimately, "reasonableness" is a balancing act between the three different kinds of restrictions that covenants not to compete offer: the duration of the restriction, the size of the geographic area where the restriction applies, and breadth of activity to be restricted. The broader any one of these restrictions is, the more narrow the others will need to be in order for the covenant to be reasonable, and all three will be assessed within the perspectives of the employer, the employee, and the general public."*[2]

Non-compete clauses must, first, protect rights worthy of legal protection and avoid becoming mechanisms to protect oneself from competition. Legitimate rights worthy of including these clauses have been thought to include the exchange of sensitive information acquired by one party through the normal course of their commercial relationship. Yet even when the intention is to protect sufficiently important legal assets, the restriction must still be measured against the rights to freely engage in economic activities of those subjected to this obligation; as well as against protecting the competitive process, which may be affected when competition is limited. Considering the above, one of the fundamental through-lines for non-

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[1] This standard has been repeated in numerous jurisdictions, including: United States, Mexico, Puerto Rico, Chile, Brazil and, with certain modifications, Italy, Spain, Germany, and France.

[2] General Counsel. The "Reasonable" Covenant Not To Compete. https://www.generalcounsellaw.com/the-reasonable-covenant-not-to-compete/.

compete clauses is, precisely, to safeguard the legitimate interests of an economic agent to protect, via confidentiality clauses, any trade secrets or sensitive information regarding their employees or other agents once the commercial relationship has been terminated.[3]

In this sense, Article 27, No. 7 of the Organic Law for the Regulation and Control of Market Power (hereafter "LORCPM") recognizes the protections granted to trade secrets and disseminated information in order to preserve competitivity and innovation in the market.[4] Thus, as per the LORCPM, trade secrets include "*any non-divulged information that a natural or legal person may legitimately possess, which may be used as part of a productive, industrial, or commercial activity, and which is susceptible to being transmitted to a third party.*"[5] For information to gain this quality it must therefore be (i) secret, meaning, not generally known or easy to access by people belonging to the groups that normally handle this information, (ii) potentially or practically commercially valuable, because being secret; and (iii) have adopted reasonable measures to keep it secret.[6]

In order to find a balance in the application of non-compete clauses, foreign legislation and doctrines have developed specific tests for measuring their reasonableness. These tests have three projection dimensions: (i) temporal, (ii) geographical, and (iii) substantial (related to the knowledge and competitive capacity of a company). We will analyze these later. Regrettably, Ecuador lacks any specific rules that could guide us as to how these limitations to non-compete clauses should be understood. Therefore, we remit to international doctrine and to the early precedents provided by the SCPM, which may serve as guidelines for practitioners in Ecuador.

A. Temporal Projection

The temporal projection of non-compete clauses must be analyzed in light of the limitation placed on the enterprise on engaging in economic activities. On this subject, international jurisprudence is split. On one hand, some have considered that non-compete obligations shall be permitted as long as these last for no more than one year. This was the ruling of the Puerto Rico Supreme Court of Justice in the *Paciv c. Pérez Rivera* case, determining that "*The object must be limited to similar activities to those carried out […] and the term must be no longer than twelve months.*" These same criteria have been used by the European Commission in its guidelines regarding vertical restrictions.[7]

The above notwithstanding, in certain cases, and depending on the facts, the European Commission has strayed from the one-year standard for non-compete clauses. In the case of *Nutricia Remia* "*the Commission claims that it took into account the totality of criteria detailed in its Decision and carefully considered all the particular circumstances of the case in reaching the conclusion that the ten-year duration of the prohibition on competition ultimately reached by the parties, was absolutely excessive, and could only be objectively justified for a duration of four years.*"[8] The Commission reached its conclusion because a business line acquisition had taken place, stating that: "*the determination of the admissible duration of a non-compete clause included in a company transmission agreement demands of the Commission a complex economic appraisal.*"[9] Finally, in the Commission's statement on restrictions directly

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[3] Marisol VICENS BELLO. *Las cláusulas de no competencia: una realidad no regulada en la legislación nacional.* http://vlex.com/vid/clausulas-no-competencia-Ecuador: ALPINA PRODUCTOS ALIMENTICIOS C.A. – Brand concession report "DISEÑO TRIDIMENSIONAL DE ENVASE" international class No. 30 realidad-644894469.

[4] European Community Commission. Directive on the protection of technical knowledge and non-public business information (commercial secrets) against their obtention, utilization, and illicit revelation. June 8, 2016.

[5] Article 27, No. 7. Ley Orgánica de Regulación y Control del Poder de Mercado. Article 27, No. 7. Official Registration Supplement 555 October 15, 2011.

[6] *Idem*.

[7] "These obligations are not usually covered by the Exemption by Categories Regime, unless said obligation is indispensable for protecting technical knowledge transferred by the provider to the buyer, is limited to the point of sale where the buyer operated during the period under contract, and limited to a maximum of 1-year." European Communities Commission. Vertical Restriction Guidelines. http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_notice_es.pdf.

[8] Sentence from the Court of Justice, Fifth Chamber, in the case of Remia BV, F.A. de Rooij, NV Verenigde Bedrijen Nutricia vs. European Community Commission. Issue 42/84. Sentence of 11 June 1985.

[9] *Idem*.

linked to a merger operation, a 2 or 3-year term is accepted whenever a 'Know How' or 'Goodwill' transaction is accredited.[10] This criterion has been adopted by Mexico's Federal Competition Commission, which has said that "While the Commission has held that, in most cases three years is a sufficient term for protecting the transaction, it has frequently authorized terms of up to five years."[11] Jurisprudence and legislation in Germany,[12] Spain, the United States and Brail, have determined that non-compete clauses may have a validity of up to two years. The Spanish Worker's Statute states, in its Article 21.2, that "the non-compete once the labor contract has been extinguished, which may not have a duration greater than two years."[13] On the other hand, cases such as *Unisource Worldwide, Inc. v. South Central Alabama Supply, LLC, Colonial Life & Acc. Ins. Co. v. Sisco, Girard v. Rebsamen Ins. Co and All-State Supply, Inc. v. Fisher UARCO, Inc. v. Lam*[14] determined that the two-year terms contained in the non-compete clauses were reasonable. Brazil, meanwhile, in a sentence issued on May 18th 2004, established that the ideal term for a non-compete clause will be two years.[15] This temporal limitation is justified because "The longer the restriction lasts, the more likely it will be considered unreasonable."[16]

Due to variation in the duration of non-compete clauses, doctrine has established that the maximum duration should be established by taking into consideration the time that will "allow the buyer to be protected from the inappropriate use of intangible assets by the buyer as long as these intangible assets have a positive value."[17] In order to ease the casuistic analysis, non-competition clauses may last between one and five years in the following cases:

1. *The purchasing company has greater power, prestige, reputation, experience, and knowledge of the market than the seller, and so the latter could hardly act in an opportunistic way taking advantage of confidential information related to intangible assets.*
2. *The transaction only involves intangible assets such as market knowledge, a company's reputation, or customer loyalty (in this case, a two-year term is generally sufficient.)*
3. *The transaction involves intangible assets involving knowledge in Research and Development, but the market is such that it experiences extremely fast technological change (as is the case for today's telecommunications and technology industries) which quickly make other goods and services obsolete.*[18]

Exceptionally, "non-compete clauses with a duration greater than five years may only be valid when the assets subject to the transaction are related to Research and Development activities, or to sectors which require large investments and involve long return periods."[19]

B. Geographical Projection

Geographic projection is also important. Again, geographic scope must be reasonable and applicable only for those areas where those imposing the clause have a legitimate interest in their protection. The European Commission, in the case *Nutricia/de Rooij* and *Nutricia/Zuid-Hollandse Conservenfabriek* established the rule that the geographic scope of non-compete clauses "should generally only cover markets

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[10] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XC0305%2802%29#ntc21-C_2005056EN.01002401-E0021.
[11] Mexico's Federal Competition Commission. March 2011.
[12] Doris-Maria SCHUSTER & Christian MATHIAS. Post-contractual non-compete restrictions in Germany. http://whoswholegal.com/news/features/article/30586/post-contractual-non-compete-restrictions-germany. L&E Global Knowledge Center. Restrictive Covenants in Germany. http://knowledge.leglobal.org/restrictive-covenants-in-germany/. Bettina Goletz. Limits on non-compete and non-solicitation clauses under German law. https://www.globalworkplaceinsider.com/2013/06/limits-on-non-compete-and-non-solicitation-clauses-under-german-law/.
[13] Workers Statute Law. Article 21.2. Real Decreto Legislativo 2/2015 on 23 October.
[14] Fenwick & West LLP. *Summary of Covenants Not to Compete: A Global Perspective.* https://www.fenwick.com/FenwickDocuments/_Summary-of-Covenants.pdf.
[15] Tribunal Regional del Trabalho da 2 Regiao (São Paulo), May 18, 2004.
[16] Rob GALLO. *Drafting enforceable covenants not to compete.* https://www.cbia.com/resources/hr-safety/issues-laws/drafting-enforceable-covenants-not-to-compete/.
[17] Javier Aguilar ÁLVAREZ DE ALBA. La libre Competencia. Mexico D.F: Oxford, 2000, p. 100.
[18] Javier Aguilar ÁLVAREZ DE ALBA. La libre Competencia. Mexico D.F: Oxford, 2000, p. 100.
[19] Javier Aguilar ÁLVAREZ DE ALBA. La libre Competencia. Mexico D.F: Oxford, 2000, p. 100.

where the products in question were made or sold at the time of the agreement."[20] In this concrete case, the Commission determined that, due to the extent covered by clause XI, *Zuid-Hollandse Conservenfabriek* had vilated the Treate on the Functioning of the European Union ("TFUE") as the geographical scope of said clause included "all European countries." From the Commission's point of view, this clause should have been limited to the Belgian, Dutch, and German markets, and therefore determined that the non-compete clause, in failing to specify a definite territory, violated the TFEU's terms. Based on this precedent, French jurisprudence has considered that "the determination of the area of prohibition depends on the place where competition can really be generated. This can be an international space (if the company is present in several countries), national territory, or a smaller territory."[21] Finally, the Commission's communications on restrictions directly linked to a merger operation have determined that "the geographical scope for the application of a clause inhibiting competition must be limited to the area where the seller offered the referred products or services before the transaction took place" and that "this geographical scope can be expanded to those territories where the seller had planned to enter at the time of carrying out the transaction, as long as investment's have already been made to that end."

C. Substantial Projection

The final requirement is, really, a double one. First, that a company is not prevented from performing commercial activities that are ventral to their survival. For instance, if one wishes to protect industrial secrets, one must forbid an accountant from working with competitors for a year. However, they cannot be forbidden from performing *any* accounting work for a year.

We must point out that the basis for non-compete clauses is the conservation of the company. Therefore, the aim of the clause may only "comprise tasks that are related to their business, as this is the area where the [economic operator] or worker could generate competition that endangers the original company's economic interest."[22]

Second, and directly related to the above, the imposition of a non-compete clause should seek the protection of legitimate rights, but not to harm competition. In this sense, "for industrial or commercial interests to be effective, it will be necessary that the activities that the worker can perform take place within the same scope of action they performed in the company to which they lent their services, insofar as it's directed towards a potential and identical customer base."[23]

And so, when the non-compete clause is directly focused on protecting business secrets that have been shared, it has a solid foundation. This has been ratified in the case of *Dr. Gottfried Reuter v. BASF AG*. This case involved the sale of the company Elastomer AG, in which Dr. Gottfried owned 50 percent of stocks, to buyer BASF AG. Considering the Doctor had full knowledge of Elastomer AG's *know*-how, BASF AG decided to include a non-compete clause. Upon analysis, the Commission determined that this is well founded insofar as, once technical knowledge has been transferred, the company receiving the *know how* should be able to enjoy the benefits that such a transfer of information affords. "Unlike third parties, the one who transfers information from a company remains aware of the contents of any transferred know-how, as they cannot rid themselves of their own knowledge*. For this reason, it seems legitimate to protect the party that receives this information so that, for a certain time, it will allow them to purchase the company without reducing its competitive position.*"[24]

What can be gathered from the jurisprudence quoted above, is that when faced with transactions or acquisitions that involve the exchange of business secrets, non-compete

[20] European Communities Commission. N*utricia/de Rooij* and *Nutricia/Zuid-Hollandse Conservenfabriek.* Asunto 83/670/EEC. Sentence on December 12 1983. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31983D0670&from=ES.

[21] Alfredo SIERRA HERRERO. *La cláusula de no competencia post-contractual en el contrato de trabajo.* Revista Ius et Praxis, Año 20, No. 2, 2014, p. 119.

[22] Alfredo SIERRA HERRERO. *La cláusula de no competencia post-contractual en el contrato de trabajo.* Revista Ius et Praxis, Año 20, No. 2, 2014, p. 118.

[23] *Id*. p. 115.

[24] European Communities Commission. Reuter/BASF Case. Issue 76/743. Sentence from July 26 1976. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31976D0743&from=EN.

clauses can be an ideal and legitimate tool. Companies must have the opportunity to protect the *know*-how they have acquired. So, acquired trade secrets are seen as a legitimate right for the company in order to maintain their competitive level and prevent possible economic damages. This reduces the chances that the company who purchased these trade secrets will (i) damage the economic agent who sold them and (ii) affect the competitive process.

The Commission's criteria in this case has been emulated for the *Pronuptia* and *Nutricia Remia* cases. In the former, it was determined that "clauses that are indispensable for preventing competitors from benefitting from the transferred patrimony of knowledge and techniques (know-how) and the assistance provided by the seller will not constitute restrictions to competition/"[25] In the latter, "The commission held that in the sale of the company Remia, which implied the sale of technical knowledge, four years of no competition would be sufficient, while regarding the sale of the other company, Luycks, which did not involve technical knowledge but merely a transfer of assets and customers, a two-year restriction would suffice"[26]. The Commission veered away from the standards mentioned above, based on how important Remia's technical know-how was for the transaction.

We should note that the Commission draws a distinction between transferred know-how and any knowledge developed later, on the back of said know-how. Thus, the Commission expressed that a non-compete clause that extends to new or posterior developments must have a shorter duration.[27] On this subject, the Commission's statement on restrictions directly linked to a merger operation determines that "clauses that inhibit competition will be limited to products (included improved versions, product updates and successive models) and services that make up the merged company's economic activity."

Along with the criteria that has been developed through jurisprudence regarding non-compete clauses that seek to protect technical knowledge, the doctrine has developed an analysis based on the proportionality principle. This principle emerges because, with this clause, a restriction is placed upon the constitutional right to work. It therefore requires an objective measurement for this kind of clauses.

The Proportionality Principle is divided into three sub-principle: (i) the principle of adequacy or relevance, (ii) principle of necessity; and (iii) principle of proportionality in the strict sense. These sub-principles are applied in staggered succession.[28]

Regarding the first principle, a non-compete clause may be fitting insofar as it pursues a legitimate end, "consisting in guarding the patrimony of knowledge and experience that constitute one of the most important components of a company's economic and productive potential."[29] "*The patrimony of knowledge and experience indicated are intended to be protected from competition that may be posed by a former employee [or economic agent]. Since they, taking advantage of the training, knowledge, experience, and customer relations acquired during their time providing services to their former employer, may engage, for their own benefit or that of a third party, in activities likely to harm the position of the former within the market they themselves are actors in.*"[30]

In that sense, non-compete clauses are those that seek to protect trade secrets as a precautionary measure, reinforcing the protections granted by confidentiality clauses.[31] Regarding the second principle, a non-compete clause must be configured in consideration of the subject it applies to. That is, it will be applicable

[25] European Court of Justice. Pronuptia de Paris GmbH c. Pronuptia de Paris Irmgard Schillgalis. Issue 161/84, par. 27. Sentence from January 28, 1986.

[26] Adame Goddard *¿Deben ser válidas las cláusulas de no competencia en el Derecho Mexicano?* Boletín Mexicano de Derecho Comparado. Número 102.

[27] *Ibid*.

[28] Alfredo Sierra Herrero. *La cláusula de no competencia post-contractual en el contrato de trabajo. Op. cit.,* p. 135.

[29] Alessandro Boscati. Patto di nonconcorrenza Art. 2125. Torino: Giuffré, 2010, p. 74.

[30] Abdón Pedrajas Moreno. *El pacto de no concurrencia postcontractual: Aspectos prácticos para su instrumentalización, desde la óptica jurisprudencial.* Aranzadi Social (Nº 5), 2002, p. 34.

[31] Alfredo Sierra Herrero. *La cláusula de no competencia post-contractual en el contrato de trabajo. Op. cit.,* p. 137.

when applied to a natural or legal person who has had contact with customers or confidential information. Finally, regarding the final sub-principle, this requires the clause to be proportional to the goal of "avoiding an imbalance between the obligations assumed by the employee and the legitimate interests that the employer seeks to protect."

Based on the above, non-compete clauses have plenty of justification. However, their implementation should be reviewed on a case by case basis in order to determine the time frames and elements that can be reasonably admitted.

II. Analysis of Non-Compete Clauses Under the Competition Law

Non-compete agreements are prohibited, both as an abuse of market power by Art. 9, no. 10; and as an agreement or practice restricting competition by Art. 11, no. 19. Most of the banned behaviors allow for "justification," but there are now guides or specific regulations that identify these justifications and conducts forbidden by the law, which forces us to look at and compare the practice in order to draw conclusions at the local level.

Considering our Competition Law has a conceptual foundation that is similar to EU and Spanish law, we can focus our analysis of justifications for non-compete agreements for economic mergers on the "*Commission's Communication on Restrictions Directly Linked to the Execution of a Merger and Necessary for That End,*"[32] particularly paragraphs 18 to 26.

In these lines, the Authority recognizes that "clauses restricting competition that are imposed on the seller within the context of their cession, in whole or in part of a company, may be directly linked to the realization of the merger and be necessary for that end. In order to receive the full value of transferred assets, the buyer must enjoy some kind of protection against the Seller's competition that will allow them to gain customer loyalty, and assimilate and exploit technical knowledge. Clauses that restrict competition guarantee the full value of transferred assets are ceded to the buyer, generally comprising both material and immaterial assets, such as Goodwill and technical know-how *(3) developed by the seller. These clauses are not only directly linked to the merger, they are also necessary for its realization, as there are good reasons to believe that without them, the sale of the totality or part of a company would not be possible.*[33]*"* This statement also determines the following regarding the maximum duration of this kind of restriction: "Clauses that restrict competition are justified for a maximum of three years[34] *whenever the company's cession includes the transfer of loyal customers, such as Goodwill and Technical know-how.*[35] *When only Goodwill is included, periods of up to two years are justified."*[36]

A. The De Minimis *Rule*

Finally, we must consider that even when an agreement or practice that restricts competition cannot be justified, they may be subject to the application of the *de minimis* rule included in Art. 13 of the Competition Law. This applies to the prohibitions contained in the aforementioned Art. 11 and, as per the dispositions of the Regulatory Board on July 17, 2014, said prohibitions are not applicable to competitors (horizontal agreements) whose share does not exceed 14 percent of the relevant market.

III. SCPM Precedents in Merger Operations

The SCPM has issued a number of resolutions within the context of the authorization of merger operations referring to the justification and acceptable time frame for non-compete clauses. Below, we quote the most relevant passages from these resolutions:

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[32] https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=EN.

[33] Paragraph 18. Commission's Communication on Restrictions Directly Linked to the Realization of a Merger and Necessary to that End.

[34] For exceptional cases that may justify longer periods, see for example the Commission's Decision from September 1 2000 (COMP/M.1980 — *Volvo/Renault V.I.*, pt. 56); Commission's Decision from July 27, 1995 (IV/M.612 — *RWE-DEA/Enichem Augusta*, pt. 37); as well as Commission's Decision from October 23 1998 (IV/M.1298 — *Kodak/Imation*, pt. 74).

[35] Commission's decision April 2 1998 (IV/M.1127 — *Nestlé/Dalgety*, pt 33); Commission's Decision September 1, 2000 (COMP/M.2077 — *Clayton Dubilier & Rice/Iteltel*, pt. 15); Commission's Decision March 2, 2001 (COMP/M.2305 — *Vodafone Group PLC/EIRCELL*, pts. 21 y 22.

[36] Commission's Decision April 12, 1999 (IV/M.1482 — *KingFisher/Grosslabor*, pt 26); Commission's Decision December 14, 1997 (IV/M.884 — *KNP BT/Bunzl/Wilhelm Seiler*, pt. 17).

Valuable Transport Case:[37]

"(80) included in the Contract for the Sale and Transfer of Shares and Brands was a non-compete clause, as follows:

(81) A non-compete clause such as the transcribed is not in itself prohibited by free competition regulation. The current Commercial Code allows for such schemes, so long as they do not infringe upon competition rules. This is included in the Commercial Code, article 382.

(83) Along this line, the INICCE, based on a resolution from the Superintendence for Industry and Commerce, adopted the requirements for a case by case analysis of whether non-compete clauses were restrictive:

(i) That the condition is accessory

(ii) That the uncompetitive effect is not severe

(iii) That it does not close off the market

(iv) That it is necessary and proportionate

(v) That it is temporary

(85) The clause is necessary, proportionate and accessory, since by the nature of the operation, the large investment proposed, the structural knowledge of the sector, and the conditions of competition in Ecuador, this stipulation would guarantee the efficiency of the sale of shares and brands. Should this clause not exist, the transaction could not have been completed as the purchasing companies would be unable to take on the risk of the seller becoming an immediate competitor, taking advantage of their former clientele and knowledge of the functioning of the sold companies and the sector in particular. It is accessory as its's aim is to allow for the main operation to take place.

(87) It is a temporary clause, as there is an agreement for three (3) years for its compliance, which is proportionate to the ends being pursued."

It is relevant to note that this Resolution refers to Article 382 of the Commercial Code – reformed on May 2019 – which itself establishes, as a general rule, that "Whoever transfers a company is obligated, **unless having agreed to the** contrary, not to develop on their own or on behalf of a third party any activities which, due to their goal, location, or other circumstances, would impede the conservation of integrity of the value of the company being transferred." (emphasis our own).

It would appear, then, that the obligation not to compete is well understood and part of general legal dispositions. The same Code goes on to point out that non-compete agreements can be struck, so long as they do not violate rules for the Control of Market Power. An interesting aspect of this rule is that it establishes, in the absence of any explicit stipulation, that the non-compete agreement may have a 2-year duration.

Lastly, it determines that the parts may freely agree on stipulations they deem convenient. We should not lose sight of this last point, as ultimately it is the parties to a transaction who truly know which situations or elements may significantly affect the company's operations, and this is why it becomes necessary to establish non-compete agreements. These are not imposed, but mutually accepted for the benefit of the transaction.

Medical Services Case[38]

(81) In the Sales Contract (...) was included a non-compete clause, as follows:

(86) The clause is necessary, proportional, and accessory, since by the nature of the operation, the investment proposed, the structural knowledge of the sector, and the conditions of competition in Ecuador, said stipulation would guarantee the efficacy of the sale and cession of shares. Should this clause not exist, the transaction could not have been completed since the purchasing company could not take on the risk of the seller immediately becoming a competitor, taking advantage of former clientele and knowledge about the workings of the company. It is accessory because it's

[37] File SCPM-CRPI-026-2019. Resolution from December 27 2019.
[38] File SCPM-CRPI-029-2019 February 4, 2020.

purpose is to allow for the main operation to take place.

Food Catering Case[39]

(162) The Sales Contract signed on August 8th, 2019 (...) establishes a non-compete clause, as follows:

138. Regarding the temporal dimension of the clause analyzed, the contract of the 08th of August of 2019 considers a ***five (5) year duration, a term which is excessive, both for European and South American law****, as per the doctrine cited above, which justifies non-compete clauses for up to three (3) years so long as the object of the transaction is the company's know-how. In this case, the time frame established exceeds the maximum time frame contemplated by the doctrine. However, the INICCE considered that, given the absence of concerns for any horizontal or vertical effects, the clause's duration should not generate risks for competition.*

142. From what is presented in this analysis, we conclude that the non-compete clause contained in the legal act that gives way to the notified economic merger operation would be justified as necessary and accessory to the main legal business, would not harm competition despite exceeding its temporality (non-compete clause under the terms set in the Sale contract risks affecting the competitive process and free competition in the markets involved in the merger)."

IV. Conclusions

Ecuadorian legislation and practice both serve as evidence that non-compete agreements in M&A transactions are completely valid, and do not represent a *per se* attack on free competition or the markets.

This analysis points us towards the focus that competitive restrictions should have when sales or other contracts are elaborated that may lead to concerns in the context of the authorization for an economic merger, leading to conditions or further merger control.

While there is no specific criteria in our market power control laws regarding their admissibility, and while the concept of "reasonableness" is subjective and under the authority's analysis, it is important to take comparative legislation into account, and their decisions regarding specific cases issued by the SCPM, as this article has summarized.

The challenge lies precisely in finding a middle ground, an equilibrium between the freedom of work and association; and the protection of the market ant market competitors. This is why it is vital to have clear precedents and directives that will contribute to building a legal framework that establishes and creates judicial certainty when embarking in one of these transactions. For these first few cases, where the SCPM has evaluated the international standards for justifying limits to competition within the context of mergers, they have also carried out an analytical exercise on their effects, considering that despite exceeding the generally-accepted time frames, the absence of possible concerns over horizontal or vertical effects, may justify expanding the duration of a non-compete clause.

[39] File SCPM-CRPI-039-2019 May 7, 2020.