

Kluwer Competition Law Blog

COVID-19: New, fast-track merger review procedure introduced in Ecuador

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Historically, crises have been catalysts of legal and political change. On occasion of the COVID-19 emergency, this week (April 20th, 2020) the Ecuadorian competition agency (*Superintendencia de Control del Poder de Mercado*) (“SCPM”) has arguably made one of the most important legal reforms since that country’s competition act was enacted in 2011.

Ecuador has a mandatory pre-completion notification and clearance regime. Up to this day, all notifiable transactions[1] have had to follow the same regular scheme, whose minimum legal duration is of 84 working days (four and a half months)[2], regardless of the likelihood of detrimental effects on competition. Now, via reform of secondary legislation, the SCPM has implemented a fast-track merger review proceeding, whose minimum duration is expected to be of 35 working days from the date of filing, which equates the 25 working days duration of the EU’s Phase I.

In order to be admitted to the new procedural course, at least one of the following five criteria must be met:

1. The operator taking control shall not, directly or indirectly, conduct business in Ecuador.
2. The parties’ joint share in each of the relevant markets (both in horizontal and vertical mergers) shall be of less than 30%.
Put differently, when a transaction requires the prior authorization from the SCPM because of meeting the turnover threshold[3], but without fulfilling the market share one[4], it will be analyzed through this expedited proceeding.
3. For horizontal mergers, in each relevant market the pre-merger Herfindahl-Hirschman Index (HHI) shall be of less than 2000 points and the post-merger variation shall be of less than 250 points.
4. For vertical mergers, in each relevant market the pre-merger Herfindahl-Hirschman Index (HHI) shall be of less than 2000 points.
5. The operation shall involve economic operators that are in risk of bankruptcy, i.e.:
 - The target company shall not be able to meet financial obligations in the near future.
 - There shall not be alternatives that are less restrictive of competition.
 - Absent the merger, the target company would cease to participate in the market.

The latter scenario – the ‘failing firm’ one – is also an innovation for the Ecuadorian competition

regime, which seems aiming to adopt the international practices on the matter. Previously, distressed M&A cases were only marginally tackled by legislation.

This new proceeding will remain in force when the health emergency is over. Furthermore, during the health crisis, the suspension of terms that affects most competition proceedings will not apply to fast-track merger reviews.

Although undoubtedly a response to the current environment, the change is one that has been long asked for by economic players in Ecuador. From a strictly practical perspective, the initiative of the competition agency will surely be welcomed by undertakings looking to adequately respond to the business demands of one of the most affected countries by COVID-19 in the region. Nevertheless, some questions will still have to be answered in the following days and weeks, e.g. the convenience of establishing the same market share threshold for both vertical and horizontal concentrations; what exactly comprehends ‘the near future’ criterion within the ‘failing firm defence’, as well as the required breadth of evidence to support it; whether the failing firm alternative implies the recognition of the existence of certain anti-competitive effects; the legal competence of the SCPM for making these modifications in the first place, etc. In any case, the first step toward a more efficient competition system, aligned with the broader national policies, has been taken.

In context

On March 11th, 2020, a state of health emergency was declared in Ecuador due to the COVID-19 pandemic. On March 13th, 2020, the SCPM started working remotely. On March 16th, 2020, the Ecuadorian competition agency decided to stop the clock for all its proceedings, including notifications of economic concentrations. On April 20th, 2020, the suspension was lifted for certain merger review proceedings, and the fast-track one was instituted.

[1] An operation is subject to merger control authorization when the transaction has effects within the Ecuadorian market, and one of two conditions is met: a) the turnover of the resulting entity is over the amount set by the Regulatory Board (see footnote 3 below); b) as a result of the transaction, the company reaches or increases a market share of 30% or more within the relevant market in which the company operates.

[2] In practice, merger reviews in Ecuador take approximately between four and twelve months, depending on the circumstances.

[3] For deals involving financial institutions, the turnover threshold for 2020 is US\$1.28 billion; for deals involving insurance and re-insurance companies, US\$85.6 million; for other deals, US\$80 million.

[4] Acquisition or reinforcement of a market share equal or greater than 30%.

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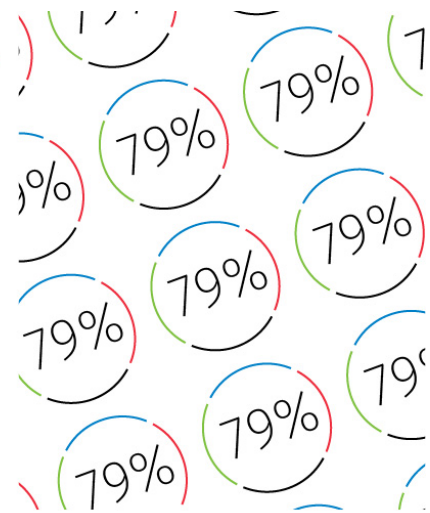
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