

Mergers & Acquisitions

Contributing editor
Alan M Klein



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GETTING THE
DEAL THROUGH

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Mergers & Acquisitions 2016

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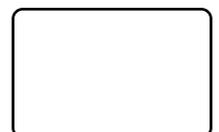


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Ecuador

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1 Types of transaction

How may businesses combine?

The Ecuadorian market is increasingly becoming the stage for several types of business combinations. These are mainly horizontal combinations that have brought competing firms together under single ownership; and vertical combinations, resulting from the integration of businesses that are engaged in different stages of production. The main structures available for business combinations are the following:

- Statutory mergers – resulting from a combination where one company continues to operate and the other is liquidated into the survivor.
- Statutory consolidations – resulting from a business combination resulting from two companies being liquidated into a newly created organisation.
- Acquisition of shares – where a company acquires a percentage of another company's stock in order to be able to set and enforce operating policies.
- Acquisition of assets – acquisition of assets rather than stock.
- Spin-offs – which result in the creation of an independent company through the sale or distribution of new shares of an existing business or division of a parent company.
- Joint ventures – a contractual agreement that results in two parties joining to undertake a particular business.

The Ecuadorian Companies Act establishes the following two types of mergers:

- when two or more companies merge to form a new one that acquires its rights and obligations; and
- when one or more companies are absorbed by another that continues to subsist.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Depending on the type of company, its industry or the sector of the economy in which it operates, different laws and regulations will be applicable to business combinations. In general, the legal framework governing business combinations in Ecuador is composed of the following laws and regulations:

- the Ecuadorian Companies Act, enacted on 5 November 1999;
- Antitrust regulation: The Organic Law for the Regulation and Control of Market Power, enacted on 13 October 2011;
- Resolution No. 4 issued by the Superintendency of Companies for the Regulation of the Transfer of Shares, enacted on 8 May 2013;
- the Internal Tax Regime Law, enacted on 17 November 2004;
- the Regulation of the Internal Tax Regime Law, enacted on 8 June 2010;
- the Organic Act for Production Incentives and Tax Fraud Prevention, enacted on 29 December 2014; and
- the Reformatory Law for Fair Taxation, enacted on 29 December 2007.

3 Governing law

What law typically governs the transaction agreements?

All business combinations that take place in Ecuador or involve Ecuadorian entities are bound by local laws and regulations. However, parties can

typically choose the applicable law during the transaction, as long as these do not contravene Ecuadorian legislation. The parties are bound by domestic law in order to enforce contractual obligations and indemnifications before Ecuadorian courts. In order to enforce an award, granted by a foreign judge or arbitrator, Ecuadorian judges will analyse the case's substance and form subject to Ecuadorian law. Thus, parties will often choose Ecuadorian law for transaction agreement. However, parties usually feel more comfortable and prefer a neutral foreign jurisdiction for arbitral procedures.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In Ecuador, government or stock exchange filings are merely for informational purposes; therefore, there are no filings required before the Superintendency of Companies in order to get clearance for business combinations. As per the Ecuadorian Companies Act, transfers of shares of companies incorporated in Ecuador need to be notified to the Superintendency of Companies within eight days of the closing date.

As per article 35 of the Financial and Monetary Act, when the transaction involves 10 per cent or more of the shares of a corporation listed in the Public Registry of the stock market, the parties must inform the Superintendency of Companies, five business days prior to the transaction completion date.

With regards to partnerships, the transfer of shares is completed when the public deed of transfer of shares along with the shareholders' meeting minutes stating that there has been unanimous consent for the transfer the shares, is duly executed in the mercantile registry.

Regardless of the type of company being affected, other institutions may be notified, ex-post, about the business combination; such as labour, environmental institutions and tax authorities. Additionally, depending on the industry in which the company operates, additional filing and fees may be necessary prior to a business combination. In Ecuador, the sectors that are particularly regulated are natural resources, telecommunications and public services.

With regards to stamp taxes, article 352 of the Companies Act establishes that transfers of assets and liabilities, made in spin off or merger processes are not subject to any provincial or municipal taxes, including income taxes and taxes on the gains from the sale of real estate.

However, request for clearance for the business combination must be filed with the antitrust authority when the following thresholds are met:

Operations where the total turnover exceeds 2,000 basic salaries (basic salaries are subject to adjustments every year).

Operations where economic operators that are engaged in the same economic activity obtain a market share of 30 per cent or more.

Antitrust regulation in Ecuador is relatively new considering that the Organic Law for Market Power Control and Regulation (LOCPM) was enacted on 13 October 2011. This law created the Superintendency of Control of Market Power, the governmental authority in charge of enforcing the LOCPM. The LOCPM establishes an ex ante system for requesting authorisation for mandatory economic concentration operations. According to the LOCPM, the Superintendency of Control of Market Power can impose conditions or deny the operation.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public during a business combination will depend on the type of company. In the case of corporations, there is no need to disclose the transaction documents to complete the transaction; however, when it comes to partnerships transaction documents as well as the minutes of the general shareholders' meeting where shareholders unanimously approved the business combination are needed.

Even though it is not a requirement for business combinations, the tax authorities may request the disclosure of the transaction documents such as the share purchase agreement for tax purposes.

In the case of transactions that require clearance from the antitrust authorities, parties will have to disclose the full transaction agreements.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

According to the Companies Act, every January Ecuadorian companies must disclose the following information related to foreign shareholders:

- Certification given by the corresponding authority from the country of origin where the foreign company has domicile, accrediting its legal existence. Such certification must be apostilled or legalised at the Ecuadorian consulate.
- List of all of the shareholders (individual persons or legal entities) of the foreign company. This list must contain full names, domicile, nationality and civil status (if applicable). Should the foreign shareholder trade its shares on the stock market, the list of individual shareholders does not need to be presented, but rather a sworn statement by the corresponding official of the foreign company, indicating that all of its capital is represented by nominative shares.

The obligation to disclose the information previously mentioned with regards to shareholdings is not affected if the issuer is a party to a business combination.

Additionally, the Ecuadorian tax authorities require the disclosure of the ultimate beneficiary of the shares, this being an individual or a publicly traded company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Ecuadorian law does not require companies to have a board of directors; however, the Companies Act establishes that when the administration of the company is jointly entrusted to several persons, they constitute a board of directors and all the relevant provisions regarding rights, obligations and responsibilities of managers are applicable to the board members.

By law companies in Ecuador require a legal representative that will be held liable and is responsible for all of the company's obligations against third parties. This legal representative needs to be Ecuadorian or a foreigner with residence in Ecuador.

Managers may either hold or share the legal representation of the company, owing fiduciary duties to the company's shareholders, including that of acting in their best interest. Managers are elected by shareholders and their responsibilities and limitations are established in the company's by-laws. Managers who hold the legal representation of the company are in charge of registering the transfer of shares in the Book of Shares and Shareholders. Ecuadorian law establishes that the transfer of ownership of shares will only take effect against the company or third parties from the date of registration in the Book of Shares and Shareholders. This entry shall be made valid with the sole signature of the legal representative of the company.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights depend on the type of company subject to a business combination.

In partnerships, in order for shares to be transferable, *inter vivos*, the party interested in transferring its shares must obtain the unanimous consent of the shareholders, while in corporations there are no limitations to the transfer of shares.

Even though appraisals are not contemplated in Ecuadorian laws, a minority of shareholders representing at least 25 per cent of the total paid in capital may appeal decisions taken by majority. This appeal must be presented before the civil judge of the district where the defendant company is domiciled, within 30 days of the general shareholders' meeting where the decision was taken. Appeals are not applicable for business combinations due to the fact that in corporations, there are no limitations to the transfer of shares and shareholders do not require the general shareholders' meetings consent for the transfer of shares.

Commonly, in Ecuador, appraisals are subject to foreign jurisdictions and are established in shareholders' agreements that aim to protect minority shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Ecuadorian legislation does not provide special considerations for hostile transactions. There are no specific legal provisions governing these types of transactions.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no specific legal provisions in Ecuadorian legislation for break-up or reverse break-up fees. However, parties can always agree to establish an indemnity in a private agreement such as an MOU.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than competition regulators or specific industries where business are regulated, government agencies may not influence or restrict the completion of business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

There are no specific legal provisions in Ecuadorian legislation regulating conditions to a tender offer, exchange offer or other forms of business combinations. However, parties can agree on private documents with similar conditions as those applicable to a tender offer, exchange offer or other forms of business combinations.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In Ecuador, there are no obligations of the seller to assist in the buyer's financing. Every business combination agreement must indicate the

Update and trends

Overall, the investment climate shows an upward tendency and Ecuador is determined to position itself among the most attractive Latin American economies. The Ecuadorian legal framework has proven to be totally open and friendly towards foreign investment.

Ecuador is an attractive market for business combinations primarily because it is not highly regulated. Investors have the flexibility to structure business combinations with very few limitations, and there is legal security to make contracts and agreements enforceable. The General Code of Procedures, which will come into effect in May 2016, is expected to further improve the judicial system by regulating processing delays, unpredictable judgments and limited access to courts. The reforms aim to improve its efficiency and provide investors with a judicial system that facilitates contract enforcement.

Additionally, one of the key aspects that make Ecuador an appealing country for foreign investment is its currency. Having the US dollar as the official currency diminishes exchange rate risks related to business combinations and make Ecuadorian companies an attractive target for M&A activity.

Furthermore, the recent enactment of the Organic Code for Production, Trade and Investment is a clear attempt to promote business combinations as it sets the ground for investment by providing legal security and equal conditions for domestic and foreign investors. The applicability of these incentives to a particular business

combination must be analysed on a case-by-case basis; however, the main incentives available include the following:

Income tax

- Defer payment of income tax for up to five years by opening the capital of the company for workers;
- advance on income tax exemption for five years; and
- 10 percentage point reduction in the income tax rate for amounts reinvested in productive assets.

Environmental

100 per cent additional deduction in depreciation expenses for acquisition of cleaner production machinery for the income tax calculation.

Taxes on foreign trade

Periods of up to two years for the payment of taxes on foreign trade for the import of capital goods exceeding US\$10,000.

Cash outflow tax

Cash outflow tax exemption for the payment of the principal and interests on foreign loans granted by financial institutions to finance investments stipulated in the Production Code.

consideration to be paid; however, there are no specific legal provisions regarding the financing of the transaction.

There are no legal obligations for the seller to assist in the buyer's financing and in Ecuador, it is not customary for sellers to provide assistance in the buyers financing. However, parties can agree on financing conditions on private documents.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

There are no legal provisions in Ecuador authorising the squeeze-out (ie, mandatory sale of shares) of minority shareholders.

However, the Companies Act establishes that minority shareholders are entitled to separation when in disagreement with certain shareholders' meeting decisions such as mergers or transformations. Thus, the company will have to reimburse the separating shareholder's shares.

In Ecuador, a majority position may accomplish a squeeze-out through capital increases by diluting minority shareholders. Ecuadorian law allows for corporation shareholders to participate in any call for additional capital in proportion to their ownership; therefore, dilution would occur only when the minority shareholder is unwilling or incapable of contributing further capital.

With regards to partnerships, article 114 of the Companies Act states that shareholders have a right to not be forced to a capital increase. Thus, limitations to capital increases can be established in the company's by-laws protecting minority shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions involving Ecuadorian companies can be structured rather flexibly, as long as they comply with Ecuadorian law. However, these types of transactions are not a prevalent practice in our jurisdiction, given that Ecuadorian companies are regularly the target companies of foreign cross-border transactions.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As mentioned previously, in Ecuador, government or stock exchange filings are merely informative when it comes to Corporations. As per the Ecuadorian Companies Act, transfers of shares of companies incorporated

in Ecuador need to be notified to the Superintendency of Companies within eight days of the closing date.

However, with regards to partnerships, the transfer of shares is completed when the public deed of transfer of shares, along with the certificate issued by the legal representative of the company stating that there has been unanimous consent from the shareholders to transfer the shares, is duly executed in the mercantile registry.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

In the past seven years, laws that specifically regulate business combinations for media, mining, hydrocarbons and financial institutions have been enacted.

In 2012, the Ecuadorian National Assembly passed the Regulation for the Transfer of Shares of Media Companies, prohibiting directors or major shareholders of private national communication companies from holding, directly or indirectly, stocks and shares in companies outside the communicational activity.

In 2009, the Mining Act was enacted, requiring that any business combinations involving the direct or indirect transfer of shares or equity rights of mining concessionaries that represent more than 10 per cent voting rights must be registered in the Mining Registry. For this purpose, the legal representative of the concessionary companies must inform the line ministry within 30 days of recording the transfer of shares in the corresponding corporate books.

Hydrocarbons are also subject to additional regulations, as per the Hydrocarbons Act, the transfer or assignment of rights of the contracts for exploration and exploitation of hydrocarbons, as well as its related activities such as transport, storage, processing and marketing of hydrocarbons, is subject to an authorisation that must be issued by the corresponding line ministry. With regards to financial institutions, as per Resolution No. 3034 of the Superintendency of Banks, for business combinations involving institutions of the private financial system, the Superintendency of Banks and Insurance must qualify the responsibility, adequacy and solvency of the assignee, whether it is a national or foreign financial institution, prior to the registration of the transaction in the Book of Shares and Shareholders.

18 Tax issues

What are the basic tax issues involved in business combinations?

Though tax implications may vary on a case-by-case scenario, the basic tax issues involved in business combinations in Ecuador are the following:

Income tax on capital gains

The Organic Act for Production Incentives and Tax Fraud Prevention, enacted on 29 December 2014, established that capital gains generated from the direct or indirect transfer of shares is subject to income tax.

Capital outflow tax

The Reformatory Law for Fair Taxation introduced a 5 per cent capital outflow tax on the value of all operations and monetary transactions made abroad; thus applicable to all transfers of funds made abroad with or without the intermediation of financial institutions pertaining to the Ecuadorian financial system.

Whenever the consideration of a business combination is paid abroad, it is subject to a 5 per cent capital outflow tax, even if the transfer of funds occurs aside the Ecuadorian financial system.

Value added tax on the sale of assets

The sale of fixed assets triggers a value added tax.

19 Labour and employee benefits**What is the basic regulatory framework governing labour and employee benefits in a business combination?**

The Ecuadorian Labour Code provides the regulatory framework governing labour and employee benefits in business combinations. As a general rule, whether the business combination results in a company that continues to operate and the other is liquidated into the survivor, or results in two companies being liquidated into a newly created organisation, the employer may not diminish employee's rights, benefits or seniority.

After the business combination takes place, the employer is responsible for labour obligations arising prior, during or after the transaction.

20 Restructuring, bankruptcy or receivership**What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?**

The Financial Restructuring Law enacted on 21 December 2006 provides companies potentially facing bankruptcy with a procedure that enables debtors to renegotiate with the creditors and avoid bankruptcy proceedings. Should the business combination take place during a financial restructuring proceeding the acquiring company shall be liable for the debts of the company that is being acquired.

21 Anti-corruption and sanctions**What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?**

The Ecuadorian legal framework lacks specific anti-corruption, anti-bribery regulations for the private sector, while the public sector is highly regulated with regards to such practices. Anti-corruption regulations applicable for business combinations in the private sector include the Inter-American Convention against Corruption and the United Nations Convention against Corruption.

Since the recent enactment of the Organic Criminal Act in February, 2014, legal entities are responsible for crimes committed by those individuals acting on behalf of or under instructions of the legal entity, committed for its own gain or its associates' gain.



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