

The Antitrust Review of the Americas

2014

Published by Global Competition Review
in association with

BakerHostetler

Bennett Jones LLP

Borden Ladner Gervais LLP

Coronel & Pérez

Davis Polk & Wardwell LLP

Demarest Advogados

Fasken Martineau DuMoulin LLP

Freshfields Bruckhaus Deringer US LLP

Machado Associados Advogados e Consultores

Mattos Muriel Kestener Advogados

McCarthy Tétrault LLP

Norton Rose Fulbright Canada LLP

Paul Hastings LLP

Perkins Coie LLP

Souza, Cescon, Barrieu & Flesch Advogados

Thompson Hine LLP

Von Wobeser y Sierra, SC

Wilson Sonsini Goodrich & Rosati PC

Zurcher Odio & Raven

GCR |
GLOBAL COMPETITION REVIEW

Ecuador

Daniel Pino Arroba with Montserrat Sánchez Alvarez and Jaime Arosemena Coronel Coronel & Pérez

Antitrust regulation is relatively new in Ecuador. Less than two years ago, on 13 October 2011, Ecuador enacted the Organic Law for the Regulation and Control of Market Power (the Law)¹ and a few months later, on 7 May 2012, the president issued the implementing regulation of the Law (the Regulation).²

Prior to the enactment of the Law and Regulation, Ecuador did not have antitrust regulation of its own. Instead, as allowed by Decision 616 of the Andean Community (AC),³ Ecuador applied Decision No. 608 of the AC in its domestic territory, which sets forth the rules for the protection and promotion of free competition in cross-bordering transactions among AC countries. In order to regulate the local application of Decision 608, in March 2009, the president issued Executive Decree 1614 (Decree 1614).

The Law created a new entity, the Superintendency for the Control of Market Power (the Superintendency), in order to:

- investigate and sanction antitrust matters and violations, restrictive practices and abuse of market power;
- approve and clear operations of economic concentration; and
- investigate and sanction unfair trade practices.

The Superintendency is chaired by Pedro Paez.

The Law regulates the market and competition practices in four separate sections: abuse of market power; restrictive practices or cartelisation; unfair competition; and economic concentration.

Abuse of market power

Market power is the ability of economic operators to influence the market. The acquisition of market power is not itself considered a violation of the Law. However, the abuse of market power is subject to sanctions.

The abuse of market power is caused when one or more economic operators, by any means, prevent, restrict, falsify or distort competition or affect the economic efficiency of the market and the well-being of consumers.

The abuse of market power includes, among others, the following conducts:

- limiting the participation of other competitors and their ability to enter and expand in a relevant market;
- increasing profit margins by unreasonably extracting surplus of consumers;
- predatory pricing practices;
- unjustifiable alteration of production levels;
- price discrimination;
- unjustifiable denial to satisfy purchase or acquisition demands;
- unjustifiable imposition, limitation or placing of conditions for the purchase, sale and exclusive distribution of goods and services;
- cross-subsidies;
- conditioned discounts; and
- unjustifiable implementation of legal actions to restrict the access or continuation in the market of current or potential competitors.

Restrictive practices

Restrictive practices are those agreements, contracts and acts in general between two or more economic operators with the purpose of preventing, restricting, falsifying or distorting competition, or that negatively affect the economic efficiency of the market or the well being of consumers.

Restrictive practices include, among others:

- price fixation;
- price or discount manipulation;
- agreements to control the production, distribution or commercialisation of goods and services;
- sharing and distributing clients and providers, including geographical areas and supply sources;
- unjustifiable price discrimination;
- tied or conditions sales; and
- boycott.

Agreements that contribute to the improvement of the production or commercialisation and distribution of goods and services, when they allow consumers to share the benefits of the agreement, and which do not impose restrictions that are not necessary to achieve the stated objectives nor not grant economic operators the possibility to eliminate competition regarding a substantial part of the products, may be allowed by the Superintendency even if in principle they constitute a restrictive practice.

If the exemption is granted, the Superintendency will still be required to permanently monitor the execution of the agreement, and will terminate it if the conditions set forth in the exemption are not complied with.

These prohibitions do not apply to economic operators of small or limited scale activity which are not capable of significantly affecting the competition.

Unfair practices

Unfair practices are those actions and practices contrary to honest practices that take place in the market. There is no need to prove bad faith of the violator, and the claimant does not need to prove actual damage; potential damage or threat is sufficient. Unfair practices are sanctioned when competition is prevented, restricted, falsified or distorted, or when the economic efficiency of the market or well being of the consumers is threatened.

Unfair practices include, among others:

- acts that confuse, deceive, imitate or denigrate other competitors;
- acts that exploit the reputation of others;
- violation of trade secrets;
- induction to breach a contract;
- violate rules; and
- harassment, wrongful influence and exertion of duress against consumers.

Economic concentration

Operations of economic concentration are those that have the potential to affect the structure of a particular market, by limiting the number of competitors or the means of production.

Operations of economic concentration include:

- mergers;
- transfer of all effects of a merchant;
- direct or indirect acquisition of the property or of any other right over the shares or interests in the capital or securities that grant any type of right to be converted into shares or interests in the capital, or to have any type of influence in the decisions of the person that issues them, when such acquisition grants to the acquiring party the control of, or a substantial influence over it;
- economic concentration through appointment of common managers or directors; and
- any other agreement or act that transfers to a person or to an economic group the assets of an economic operator, or that grants such person or economic group a decisive control or influence in the adoption of the decisions of the ordinary or extraordinary management of an economic operator.

Operations of economic concentration require prior approval from the Superintendency before taking effect. The prior approval is required in the following cases:

- when the total amount of business in Ecuador of all participants in the transaction in the prior financial year of operation exceeds the amount of Basic Unified Salaries set forth by the Regulating Board;⁴ and
- when the transaction involves economic operators with a combined market share of 30 per cent or above in the relevant market of products or services.

No prior approval is necessary if one of the aforementioned conditions is not met. Nevertheless, the Superintendency, ex officio or a requesting third party, may request that the economic operators involved in a transaction not meeting the conditions set forth above make a notification of it if the Superintendency deems it appropriate. In these cases, the economic operators will have 15 days to file the notification.

The application for approval must be filed in writing by the acquiring party and in general by the party gaining control of the economic operators involved in the transaction. In case the transaction involves several economic operators, the application must be made jointly through the appointment of a common proxy. The application must be filed within eight days from the date of occurrence of the following events:

- In case of a merger between two companies or economic operators, from the moment that the shareholders or members of at least one of the companies or economic operators, or the competent body pursuant to the by-laws of the company, agree to undertake the merger.
- In case of a transfer of the effects of a merchant, from the moment the economic operators involved agree to perform the operation and determine the manner and the terms and conditions in which such transfer will be executed. When the participants are companies, the triggering event will be the date when the general meeting of shareholders or members, or the competent body pursuant to the bylaws of such company, resolves to undertake the transfer or acquisition.
- In case of direct or indirect acquisition of the property or of any other right over the shares or interests in the capital or securities

that grant any type of right to be converted into shares or interests in the capital, or to have any type of influence in the decisions of the person that issues them, from the moment the participants agree to undertake the operation of economic concentration and determine the manner and the terms and conditions in which the transaction will be executed. When participants are companies, the triggering event will be the date when the general meeting of shareholders or members, or the competent body pursuant to the by-laws of such company, resolves to undertake the transfer or acquisition.

- In case of economic concentration through the appointment of common managers or directors, from the moment the managers or directors have been designated by the general shareholders or members meeting, or the competent body, pursuant to the bylaws of such company.
- In case of any other agreement or act that legally or in fact transfers the assets of an economic operator to a person or economic group, or grants them decisive control or influence in the decision-making process of the ordinary or extraordinary management of an economic operator, from the moment the participants agree to undertake the operation of economic concentration and determine the manner and the terms and conditions under which the transaction will be executed. When participants are companies, the triggering event will be the date when the general meeting of shareholders or members, or the competent body pursuant to the by-laws of such company, resolves to undertake the transaction.

If the parties decide not to continue or to close the operation of economic concentration anytime between the date of application and the date of approval by the authority, the applicant must immediately communicate such decision to the Superintendency, after which the Superintendency may decide, without further action, to file the case.

The Superintendency has 60 working days to issue its approval. The Superintendency may extend this term once by up to 60 days, and may suspend the term for up to 60 days under exceptional circumstances. If the Superintendency fails to issue a decision during this term, the operation will be deemed authorised.

The decision of the Superintendency may include a full approval, a conditional approval upon fulfilment of certain requirements, or a rejection.

Economic operators are authorised to enquire in writing before the Superintendency if a particular transaction requires prior approval if they have doubts regarding the need to apply for approval.

Some operations of economic concentration are exempted from applying for prior approval, including:

- the acquisition of shares without voting rights;
- the acquisition of bonds, obligations or any other securities convertible into shares without voting rights;
- the acquisition of liquidated economic operators; or
- the acquisition of economic operators that have not had any local activity for the past three years.

If a particular operation of economic concentration is executed without prior approval, the Superintendency may request an explanation from the economic operators involved in the transaction. The economic operators will have a term of 30 days to provide explanations. If the explanations provided by the operator are not satisfactory to the Superintendency, or no response is given by the operator, the Superintendency will initiate an investigation proceeding for a period of 60 days, which may be extended once for a similar term. At

the end of the proceeding, the Superintendency may confirm that the operation of economic concentration was not subject to mandatory prior notification and approval, or it may declare that a failure to notify and obtain prior approval violated the law. In this latter case, in addition to applicable fines, the Superintendency may order a de-concentration, or any other necessary measure, to revert the effects of the operation of economic concentration.

Filing an application for prior approval outside the applicable time frame set forth in the Law, and the failure to notify an operation of economic concentration required ex officio by the Superintendency, are both considered minor violations of the Law and as such are subject to a fine of up to 8 per cent of the total amount of the business of the company or economic operator, in the prior financial year.

Closing an operation of economic concentration subject to approval before applying for approval or before being approved by the Superintendency are both considered serious violations of the Law and as such are subject to a fine of up to 10 per cent of the total amount of the business of the company or economic operator, in the prior financial year.

The execution of acts or contracts by the resulting economic operator before applying for approval or before being approved by the Superintendency are both considered very serious violations of the Law and as such are subject to a fine of up to 12 per cent of the total amount of the business of the company or economic operator, in the prior financial year.

Procedure of investigation and penalties

The Superintendency is the competent authority to investigate violations to the Law and to impose fines and other sanctions for those violations.

During the course of an investigation, the Superintendency may: request information from economic operators; order those involved, or those involved in a case under investigation, to provide their statement; and undertake audits and inspections in the premises of the economic operators.

In general, the burden of proof lies on the part of the Superintendency, except if the economic operator denies, obstructs or impedes the access to information. In determining the conduct of the economic operator, the Superintendency has to rely on the facts and on the economic effects of a particular conduct, and not on the juridical form adopted by the economic operator.

An investigation procedure may be initiated ex officio upon request of a public authority, upon report or complaint of an affected party or upon report or complaint of any third party.

The Superintendency may grant preliminary measures before or during any stage of the investigation process. These measures may include:

- the suspension of the alleged conduct;
- the imposition of conditions upon the alleged violator;
- the suspension of the effects of any legal act related to the alleged conduct; and
- any others deemed necessary by the authority to preserve competition in the market and to avoid damages.

These measures may not include imprisonment, prohibition to leave the country or house arrest. In case of violation of the imposed measures, the authority may order the closure of the premises where the investigated activity is being performed, for a term of up to 90 days.

The power to initiate administrative actions ex officio or at the request of a third party has a statute of limitations of four years from the date the violation became known or, if the violation has

continued over time, from the date such violation ceased. Penalties imposed have a statute of limitation of eight years.

In addition to fines, other sanctions such as corrective measures may be imposed. These include any measure required to re-establish competition, prevent, stop, suspend, correct or revert conduct that is contrary to the Law and to avoid future violations.

Fines imposed to an association, union or group of companies or economic operators may be collected by the authority from the association and from their respective members who participated in the violation, including their representatives in the controlling bodies of the association. In general, the conduct of an economic operator is also attributable to the operators or individuals that control it and who participate in the decision-making process.

Violations are classified as minor, serious or very serious. Penalties vary according to the violation, as follows:

- fines for minor violations may be up to 8 per cent of the total turnover of the company or economic operator in the prior financial year;
- fines for serious violations may be up to 10 per cent of the total turnover of the company or economic operator in the prior financial year; and
- fines for very serious violations may be up to 12 per cent of the total turnover of the business of the company or economic operator in the prior financial year.

If the total amount or volume of the business cannot be determined:

- minor violations will be fined with between 50 and 2,000 basic unified salaries (between approximately \$15,900 and \$636,000);
- serious violations will be fined between 2,001 and 40,000 basic unified salaries (between approximately \$636,318 and \$12,720,000); and
- very serious violations will be fined over 40,000 basic unified salaries (over \$12,720,000).

Aggravating circumstances include:

- the recurrence or repetition of violations;
- the instigation to commit a violation;
- the adoption of measures to impose or force the commission of a violation; and
- the failure to collaborate in the investigation proceeding.

Alleviating circumstances include:

- the voluntary adoption of measures to cease the violation of the Law;
- failure to effectively incur in the prohibited practices;
- execution of acts with the intention to repair damage caused; and
- the active and effective collaboration with the Superintendency in the investigation proceeding.

Companies or individuals who first contribute with evidence or other elements that allow the Superintendency to initiate an investigation proceeding, or that allow, at discretion of the Superintendency, to prove the existence of practices contrary to the Law, are exempted from the payment of fines.

Notes

- 1 Published in Official Registry 555, Supplement.
- 2 Published in Official Registry 697.
- 3 The Andean Community is formed by Bolivia, Colombia, Ecuador and Peru.
- 4 The Regulating Board has not yet established such amount.



Daniel Pino Arroba

Coronel & Pérez

Daniel Pino graduated as attorney from the Catholic University of Santiago de Guayaquil and later obtained an LLM in international and comparative law from the University of Georgetown, Washington, DC. He also obtained a specialist degree in telecommunications law from the Universidad Andina Simón Bolívar in Quito.

In addition to being admitted to practice in Ecuador, Mr Pino is member of the New York State Bar and has been acknowledged as attorney before the Supreme Court of the United States of America. He is allowed to practice law before both federal and state courts in New York. Mr Pino mainly advises foreign clients on a wide range of corporate matters both when they enter the Ecuadorean market and also after their establishment here. He has extensive practice in all transactions related to mergers and acquisitions, both in industries that are hardly regulated and in highly regulated business sectors, such as telecommunications and energy. Mr Pino has been a visiting professor of corporations law and arbitration law at the Catholic University of Santiago de Guayaquil, as well as of international law at the Universidad de Especialidades Espíritu Santo.

His practice areas include telecommunications, oil, energy and mining; corporate and M&A, antitrust and anti-dumping.

He speaks Spanish and English.



Montserrat Sánchez Alvarez

Coronel & Pérez

Montserrat Sánchez obtained her law degree from the Universidad de Especialidades Espíritu Santo in Guayaquil, in 2005, where she graduated magna cum laude. In 2004, she spent one year at the University Kansai Gaidai in Osaka, Japan, where she minored in Asian studies. Ms Sánchez is currently studying for a masters in taxation at the ESPAE Graduate School of Management.

Ms Sánchez has been working in Coronel & Pérez's Guayaquil offices since 2002, and she has achieved extensive experience in several practice areas, including corporate and commercial law; tax law; civil law; administrative and constitutional law.

She speaks Spanish and English and has a working knowledge of French and Japanese.

CORONEL & PEREZ

ABOGADOS

Av 9 de Octubre No. 100
Edificio La Previsora, piso 24
Guayaquil
Ecuador
Tel: +593 4 2519900
Fax: +593 4 2320657

Daniel Pino Arroba
dpino@coronelyperez.com

Montserrat Sánchez Alvarez
mcsanchez@coronelyperez.com

Jaime Arosemena Coronel
jarosemena@coronelyperez.com

www.coronelyperez.com

Since its founding in 1975, Coronel & Pérez has become one of Ecuador's most renowned law firms for its high standards of professionalism, ethics and reliability, which characterise its service towards its clients.

Experience and reliability

Our professional staff includes some of the most respected legal professionals working in Ecuador, who have handled cases involving almost every major field of the law. Our attorneys include former bank executives, advisers to government entities, executives from international organisations, and distinguished academics. Our broad experience and diverse practice areas allow us to better understand our clients' legal needs and to serve them in the most efficient manner possible.

An international firm with solid national presence

One of our firm's distinguishing features is our experience in the international practice of law. Most of our attorneys speak more than one language and some are admitted to practise law in jurisdictions abroad. Among our clients, there are many foreign companies doing business in Ecuador, and we regularly work together with leading firms in Latin America, Europe and the United States, in international and multi-jurisdictional transactions, litigations or arbitrations.

Arbitration and litigation

The firm has successfully represented national and foreign clients in litigations before Ecuadorean courts, and has actively participated in the design of strategies for multi-jurisdictional litigations. We are very active in the field of arbitration, having represented our clients in national and international proceedings at the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID), among others. Several members of our firm are also arbitrators or mediators in arbitration centres such as the Centre for Arbitration of the Chamber of Commerce of Guayaquil, the International Chamber of Commerce, ICSID and LCIA.



Jaime Arosemena Coronel

Coronel & Pérez

Jaime Arosemena graduated as an attorney from the Catholic University of Santiago de Guayaquil in 2003, and later obtained his LLM degree in intellectual property, commerce and technology at the Franklin Pierce Law Center in Concord, New Hampshire, United States.

Mr Arosemena is in charge of the intellectual property department at Coronel & Pérez. His practice areas include consultancy in matters of protection of copyrights, trademarks and patents, as well as intellectual property management. He also advises clients in the areas of general civil and commercial law.

Before joining Coronel & Pérez, Mr Arosemena worked as adviser to the governor of the Guayas Province, from 2000 to 2001. From 2006 to 2007, he worked as an international intern at Fulbright & Jaworski LLP in Houston, Texas.

Practice areas include intellectual property (trademarks, patents, copyrights, trade secrets), unfair competition, corporate law, arbitration and litigation.

He speaks Spanish and English.



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association

Law
Business
Research