

# Client Alert

Business Litigation & Antitrust and Latin America Practice Groups

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## Ecuador's New Competition Law

On October 11, 2011, Ecuador passed a new competition law, two weeks after it was approved by the legislature. The new Regulation and Control of Market Power Law (the Law) introduces merger control in Ecuador as well as behavioural penalties for cartels and abuse of dominance. The new law also contains provisions specifying limits to the interests that can be held in the media and banking sectors in Ecuador. The passage of the new Law has attracted criticism from the business community raising concerns that it vests excessive power to control and sanction private enterprises and may be subject to undue political pressure in its enforcement.

### Background

Until the current developments, Ecuador was one of the few remaining Latin American countries without comprehensive competition and merger control legislation. It began drafting specific legislation two years ago through the Ministry of Industries and under the supervision of President Rafael Correa.

The draft bill introducing the new law was presented to the National Assembly on August 30. Since this was presented as an "urgent" piece of legislation under presidential authority, the Assembly had 30 days to approve or reject it. Further revisions followed before the final passage of the Law.

### Key Provisions

Among the key provisions of the Law are the following:

- Mandatory merger control in Ecuador.
- Behavioral penalties for cartels and abuse of dominance. Penalties will range from 8 percent (for minor offenses), 10 percent (for severe offenses), up to 12 percent (for very severe offenses) of the total volume of business.
- Enforcement by a superintendent appointed by a citizen's council believed to be close to Correa and a regulatory committee of four Cabinet Ministers.
- Specific provisions in the media and banking sector. Shareholders, partners and directors of broadcasting and television companies and banks and their major shareholders are required to divest of holdings in other industries. The two sectors will have until July 2012 to make the divestments and will be permitted to retain no more than 6 per cent of their assets in other industries.

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## Comment

With the passage of the new Law, Ecuador joins the ranks of over 100 countries worldwide having developed merger control and competition laws. The avowed aim is to prohibit and sanction anticompetitive practices and abuse of a dominant position, and regulate economic market concentration with the goal of improving quality and reducing prices.

How effective the new Law will be will depend on the way in which it is implemented. International best practice suggests that it is essential that the enforcement authority is independent or at least subject to oversight by a judicial body to safeguard against abuse of power. A concern has been raised that the new Law could be used to promote government policies rather than competition.

Of particular concern are the provisions affecting the media and banking sectors. Correa has already attracted the criticism of the news media over the use of criminal libel laws against the opposition newspaper *El Universo*. In the financial services sector, there are already several groups with stakes in the financial and non-financial services sector such as banks holding insurance and brokerage interests which would appear to be caught by the new Law. Commentators have suggested that the introduction of ownership limits in the financial services sector is based on an assumption that related business such as insurance and brokerage are not proper financial interests for a bank and could be used to disadvantage customers. While the use of specific provisions to control ownership in certain sectors such as media and banking is not unique to Ecuador, it is important that any such regulation is applied transparently and consistently. It is fundamental also to the robust application of such laws that they are applied within a framework where there are criteria to balance competition and other 'public' interests such as prudential supervision of the financial markets and plurality of the media.

The competition law enforcement priorities have yet to emerge. However, the Ecuador market is already concentrated in a number of sectors including beer, beverages, personal hygiene products, telecommunications, and the supply of foods including sugar. A related issue concerns the ability to enforce the Law outside the media and banking sector where industries are in state hands. At this stage, it is too early to tell whether and to what extent voiced concerns of political pressure and protection of vested interests will play out in practice. However, given the history around the passage of the Law and the institutional set-up in Ecuador, the new regime will need to establish an early record for fair and robust implementation in order to gain the confidence of the local and international business and antitrust community. It would be regrettable if, in that process, the underlying and beneficial goals of modernised competition laws in terms of expanding economic progress, market opportunity and consumer welfare were lost.

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