

Mergers Among Private Higher Education Institutions in Ecuador: Procedures and Recommendations

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ABSTRACT

This study examines the procedures and regulations governing the merger of private higher education institutions in Ecuador, taking into account legal and administrative aspects. The research focuses on a review of the Organic Law of Higher Education and its regulations, which allow for two types of mergers: creation mergers (where the original entities are dissolved to form a new one) and absorption mergers (where one institution absorbs another, which ceases to exist as an independent entity). The necessary administrative steps are identified, such as academic and patrimonial compatibility and approvals by the institutions' internal governing bodies and the Higher Education Council. Although the legal framework is clear, mergers among private institutions are uncommon in Ecuador, being more frequent among public entities. This limited practice in the private sector presents additional challenges and highlights the need for documentation and precedents to guide future integrations. The study provides recommendations to enhance procedural clarity and encourage a greater use of mergers as a sustainable growth strategy in Ecuador's private education sector.

Keywords: educational merger, legislation, Ecuador

Introduction

Mergers are popular means for the growth of companies (Luypaert & Huyghebaert, 2008), but among private Higher Education entities they are not so frequent, especially in the Ecuadorian context. So it makes sense to ask: Is this type of integration possible in Ecuador? What legal framework would regulate them? What are the stages in an inter-institutional merger?

To answer these questions, a review of the laws and other legal instruments that regulate Higher Education Institutions (HEIs) in Ecuador will be carried out. An analysis will also be made of the two types of mergers contemplated by the corresponding regulations and procedures. With this research, it is hoped to provide clear guidance on how mergers between particular institutions should be executed.

It should be clarified that the purpose of this study is not to understand the economic, academic or any other type of incentives behind mergers. For example, (Ahmadvand et al, 2012), they analyzed the motivations that universities or higher education institutions may have to merge. However, this research will focus exclusively on the regulatory framework that governs this legal phenomenon in Ecuador. The reasons that drive educational organizations to make these decisions can be the subject of a separate study.

Materials and methods

The paper describes the methodological approach and the legal sources used to analyze the regulatory framework of mergers between higher education institutions in Ecuador. The research is based on a documentary analysis, reviewing relevant laws and regulations, especially the Organic Law of Higher Education and its regulations. Previous studies and relevant academic literature on mergers in the education sector and other sectors are also included, to contextualize the concepts of compatibility and feasibility in the merger process. In addition, the criteria for the selection of legal documents and academic sources are described, considering their direct applicability to mergers of private institutions of higher education. The methodology highlights that no economic or academic incentives were considered in this study, but that the approach is exclusively normative.

Results-discussion

1. Legal Regime of Higher Education: Mergers

Article 351 of the Constitution of Ecuador establishes that laws shall govern the coordination mechanisms of the higher education system (National Constituent Assembly of Ecuador, 2008). In this sense, the Organic Law of Higher Education (LOES) is the fundamental law in terms of regulation of the system. To understand the nature of HEIs, the concept given by Article 159 of the LOES (National Assembly of Ecuador, 2010) must be understood. In this regulation, HEIs are granted their own legal personality. It can be inferred, therefore, that these entities are (legal) persons that can contract obligations and rights. As Cantor Rosales (2020) puts it, legal persons can express will: always pursuing the interests allowed by the legal system.

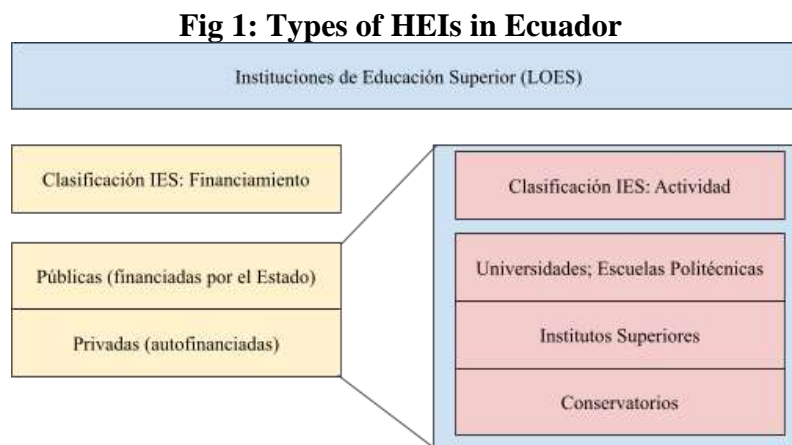
Article 161 of the LOES adds that HEIs will always be non-profit entities. The financing of HEIs can be public or private, as can be seen throughout the regulations that govern this system. However, this study will focus only on mergers of self-financing institutions. (National Assembly of Ecuador, 2010)

Two IES Classifications

- By their financing: The first distinction, based on Article 357 of the Constitution (National Constituent Assembly of Ecuador, 2008) and Article 23 of the LOES (National Assembly of Ecuador, 2010), is based on the origin of the financing of Higher Education Institutions. Private institutions must be self-financing in order to operate. On the other hand, public institutions receive their funds from the State, a constitutional obligation as expressed by the Constitutional Court of Ecuador (Constitutional Court of Ecuador, 2023).
- By their activities: Article 14 of the LOES distinguishes three types of institutions by the type of higher education they provide (academic programs, approach, evaluation and accreditation), a separate study could be dedicated to these classifications but, for the purposes of this study, it is enough to understand them superficially. (National Assembly of Ecuador, 2010)

The three types of HEIs according to this criterion are: universities and polytechnic schools; the technical, technological, pedagogical and arts institutes; and the higher conservatories. Rojas (2011) in his study on the LOES, includes the last two classifications as part of the same one: higher institutes and conservatories. For the purposes of this study, the same will be done. When talking about universities, the entire category will be included, which also includes polytechnic schools. Similarly, when higher institutes are mentioned, conservatories will also be included.

Figure 1 summarizes the classifications:



Source: Own elaboration. In original language Spanish

Mergers between particular HEIs in Ecuador

The LOES Regulations establish that two HEIs can be merged with the aim of diversifying the academic offer (National Assembly of Ecuador, 2011). This implies that two legal persons (whether public or private) become a single entity for this purpose. It is important to consider that, regardless of the type of

merger, the final consequence must be the existence of a single HEI. Given this, the question arises: should the entity resulting from the merger be an institute, a university, or is this distinction not relevant?

General mechanism of fusion between HEIs and their result

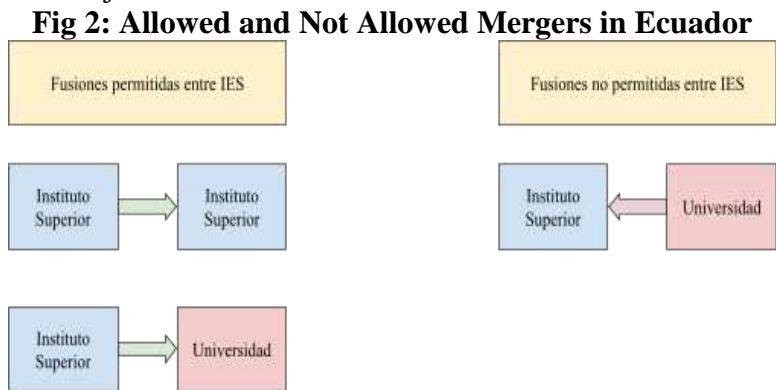
Article 39 of the Regulations is very clear in this regard: the university must integrate the institute, the institute cannot integrate the university. Due to the wide range of activities allowed to a university, it is logical that this HEI would be the dominant entity in a merger (understood as "dominant" is understood to be the entity that incorporates and manages the operations of the other merged HEI). (National Assembly of Ecuador, 2011)

It should be clarified that, in addition to being able to be integrated into universities, higher institutes can also merge with each other, as long as they belong to the same hierarchical category. In the cases documented in Ecuador on institutional mergers (Council of Higher Education, 2020), mergers have been carried out between higher institutes of equal hierarchy. In practical terms, mergers are not allowed in which two HEIs of different hierarchies come together to form a lower-ranking institution. For example, a university cannot merge with a higher institute to form a higher institute, as this would imply a decrease in the category of the resulting HEI.

To summarize this section, according to the LOES, its Regulations and practice, mergers of HEIs in Ecuador can occur between:

1. A higher institute that is integrated into a university.
2. A higher institute that is integrated into another higher institute.

Figure 2 shows which HEIs can be merged and under what mechanism. The direction of the arrows represents the institution that joins the dominant one.



Source: Own elaboration. In original language Spanish

Secondments between IES are not mergers

Before describing the types of mergers, it is necessary to clarify a category mentioned in the regulations: affiliations between HEIs. The Regulation of Higher Education Institutions and Technological Training regulates cases similar to mergers in terms of the expansion of the academic offer, but with different legal effects. When a higher education institute is attached to a university, both institutions expand their academic offerings, but maintain their independent legal personality. This means that secondments are not the subject of this study.

2. Particular mechanisms: merger by creation and merger by absorption

Articles 33 and 34 of the Regulations of Higher Education and Technological Training Institutions regulate the two types of mergers allowed between HEIs in Ecuador. The main difference lies in the resulting legal entity: it can be a pre-existing entity or a new entity (National Assembly of Ecuador, 2011). Other important differences will be reviewed below.

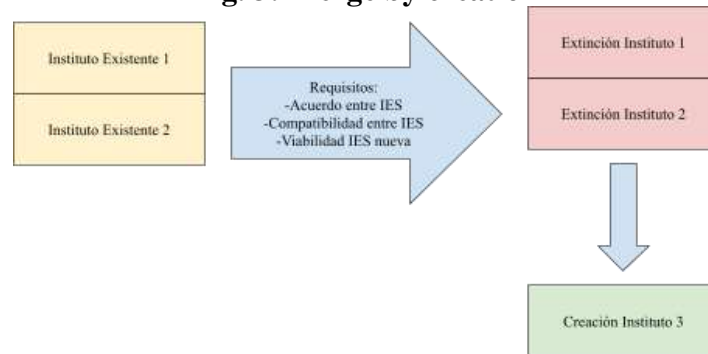
Merger by creation

According to Article 33, only higher institutes may merge through this mechanism. The intention of the merger by creation is, as the name suggests, to give rise to a new entity that did not exist before the integration. As a result, the two legal entities are extinguished and a new entity emerges. The regulations

establish several formal requirements for this process, which can be summarized in (Figure 3) (National Assembly of Ecuador, 2011):

1. The rectors, representing the governing bodies of the HEIs, must express their willingness to merge.
2. The compatibility of the merger must be demonstrated in terms of assets and academics.
3. The long-term viability of the new entity must be demonstrated.

Fig. 3: Merge by creation



Source: Own elaboration. In original language Spanish

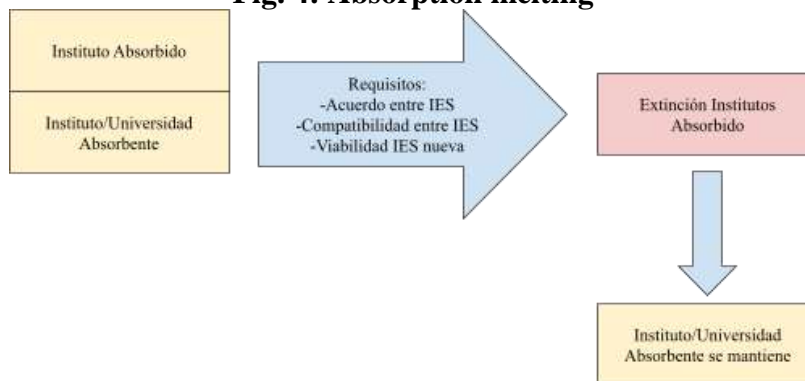
As can be seen in the graph, the two HEIs that existed cease to exist and a third institution appears. The extinction of HEIs is regulated in the same legal body.

Merger by absorption

This type of merger is regulated in Article 34 of the aforementioned regulation. Its main characteristic is that only one of the entities becomes extinct, while the other survives. The regulation allows the merger by absorption of different categories of HEIs, always following the criterion of hierarchy. The requirements for this type of merger are similar to those in the previous section (see figure 4) (National Assembly of Ecuador, 2011):

1. The rectors, representing the governing bodies of the HEIs, must express their willingness to merge.
2. The compatibility of the merger must be demonstrated in terms of assets and academics.
3. The long-term viability of the new entity must be demonstrated.

Fig. 4: Absorption melting



Source: Own elaboration. In original language Spanish

In the case of the institute-university merger, it is the university that has dominance, since it is the one that remains as a legal entity, by legal mandate. In the case of an institute-institute type merger, dominance is at the discretion of the parties, because the agreement between the HEIs determines which institution remains.

The Higher Collegiate Body: (internal) approval of mergers between private HEIs

The Superior Collegiate Body (OCS) must approve the merger for the Rector to present the agreement. This applies to both institutions involved in the merger. From this requirement it can be inferred that, although the Rector of the HEI (as representative) is the one who presents the agreement that expresses

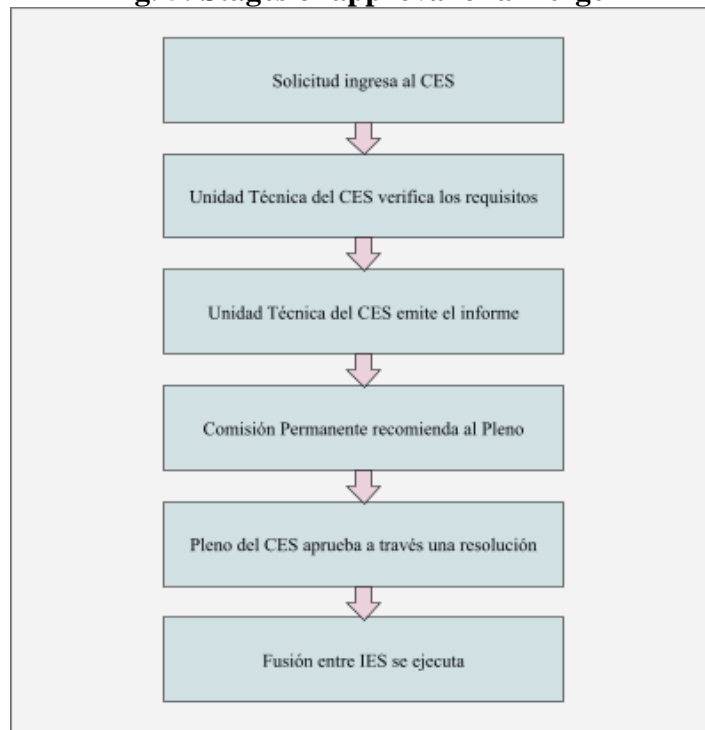
the will of both institutions, the OCS must be in charge of analyzing in depth the requirements of compatibility and viability before approving the merger. The first approval is made by the OCS.

The Council of Higher Education: (administrative) approval of mergers between private HEIs

The Council of Higher Education receives the request for merger between institutions and is in charge of approving or denying said request. Initially, a technical unit prepares a report on compliance with the requirements established by the regulations. Once the applications have been analysed, the report is sent to the Permanent Commission of Higher Institutes and Conservatories. Based on the technical report, the Commission recommends or not the approval of the merger to the Plenary of the Council of Higher Education.

Figure 5 is presented below, which summarizes the process of approving a merger. This chart should be understood as an illustrative tool that assumes that the application meets all requirements. Therefore, it does not consider what would happen if any of the requirements were not met. In addition, the graph does not detail the specific deadlines mentioned in Article 35 of the Regulation, as in the case of reforms, it will be more useful to know mainly the phases of the approval process. (National Assembly of Ecuador, 2011)

Fig. 5: Stages of approval of a merger



Source: Own elaboration. In original language Spanish

Requirements for approval of mergers between HEIs

As mentioned, compliance with the requirements is essential for both private HEIs and the CES. This compliance is crucial because, from the moment the governing bodies of the institutes or universities consider a merger as part of their institutional strategy, they must observe these legal parameters. Although these requirements were mentioned above, they are detailed more precisely below.

To analyse these parameters, the Regulations on Higher Education and Technological Training Institutions have been taken as a reference. In addition, to complement this study, resolutions of the Council of Higher Education related to mergers have been revised. Although these resolutions mainly refer to mergers between public HEIs, they are equally useful because they address the relevant requirements.

Will of the parties

The first requirement for both types of mergers is full will. In the case of mergers by creation, an application must be submitted signed by the rectors of both institutes. For the merger by absorption, an agreement signed by both representatives must be submitted. It is important to note that mergers cannot be carried out if one of the parties does not agree, at least between particular HEIs. This requirement, although it is the first formally, represents the final step of the possible negotiations between the HEIs involved. The presentation of the agreement implies that the merger has been accepted by the Superior Collegiate Bodies of both institutions, so the approval of these bodies is a formal requirement of the Regulations.

Compatibility and Viability among the merged HEIs

Although the term "compatibility" is not explicitly mentioned in the Regulation, some of the formalities required by this body of law serve to demonstrate that both institutions are compatible. For example, institutions are required to demonstrate that the management of their assets and resources allows for effective collaboration. Before reviewing the future plan, the regulations require an objective analysis to determine whether the two institutions can be integrated into a single entity. In addition to compatibility, it is crucial to consider the feasibility of the merger to ensure the long-term success of the new resulting entity.

To better understand these requirements, a report by the Council on Higher Education on a merger between institutions has been reviewed. In this report, four key indicators are considered to evaluate the compatibility and viability of HEIs: academic, administrative, financial and organizational. HEIs that intend to merge must demonstrate that they are strengthened in one of these aspects. Academically, they must show that they can improve their educational programs and research resources. Administratively, it is essential that the governance structures and processes of both institutions can be integrated without significant conflicts (Council of Higher Education, 2021).

In financial terms, they must ensure that their resource management systems are compatible and that the new entity will be viable in the long term, with clear financial projections. Organizationally, it is crucial that the missions, visions, and cultures of both institutions are aligned to avoid internal conflicts and ensure harmonious integration. Viability is assessed by the financial and operational capacity of the new entity to sustain itself and grow in the long term.

The importance of compatibility and viability in mergers is widely recognized in the academic literature. Although it is not necessarily literature on mergers in higher education, these concepts are very useful. Other authors talk about the need for compatibility between merged companies in terms of their cultures, operating practices, and strategic objectives is crucial to the success of the merger. (Hitt et al., 2012).

On the other hand, (Sirower, 1997 cited in Weng, 2020) in turn, exposes elements about the lack of compatibility in key areas such as corporate culture, operational processes, and strategic objectives can trap companies in a cycle of poor performance and failed integration efforts. In addition, financial and operational viability is essential to ensure that the merged entity not only survives, but thrives in the long term.

3. The reality of mergers between particular HEIs in Ecuador

The regulations contemplate the possibility of two particular HEIs merging with each other. However, the reality is very different, since in the last five years only mergers of public institutions have been carried out. This trend is observed in the accountability reports issued annually by the Higher Education Council (2019-2023). In addition, all the mergers by absorption carried out have been between institutes, not with universities. This implies a difficulty: there is no clear notion of how mergers between private parties should be carried out in practice. Although the legal framework is present, precedents are scarce. Beyond the reasons why it is not a common practice in Ecuador, it is clear that this situation generates a lack of useful documents and practical experiences on the subject.

The regulations cover the types of mergers that can be carried out, as well as their mechanisms and prohibitions. However, there are some issues that become complex as it is not a frequent practice. First,

it is unclear whether two universities can merge with each other, especially considering that they comply with the principle of being in the same hierarchy. Second, there is a lack of deep understanding of the margin for negotiation between particular HEIs. Finally, the question arises as to what administrative and financial continuity implies when it comes to self-financed institutions that have managers and SCOs with an established administration.

Conclusions

Mergers between Private Institutions of Higher Education in Ecuador are a multifaceted issue that involves several legal and administrative aspects. HEI rankings are critical to understanding merger possibilities. HEIs are classified mainly by their funding and activities, distinguishing between public and private institutions, and between universities, colleges and conservatories. This classification is crucial for defining the types of mergers allowed and the hierarchies that must be respected.

Ecuadorian regulations contemplate mergers between HEIs through the LOES, the LOES Regulations and the Regulations of Higher Institutes and Conservatories. There are two main types of mergers: creation merger and absorption merger. Merger by creation allows two higher institutes to merge to form a new entity, extinguishing the original entities. Merger by absorption, on the other hand, allows one entity to absorb another, maintaining its legal existence while the absorbed entity is extinguished. The approval procedure for mergers is clearly defined. It involves the submission of applications and agreements signed by the rectors of the HEIs involved, the evaluation of compatibility and feasibility, and approval by the Higher Collegiate Bodies and the Council of Higher Education. This process ensures that all mergers are carried out in accordance with legal parameters and that the resulting new entities are sustainable in the long term.

Despite the regulatory clarity, reality shows that mergers between private HEIs are rare in Ecuador. The CES accountability reports indicate that in the last five years there have only been mergers between public institutions. In addition, all documented mergers by absorption have been between colleges, not universities. This lack of practice creates additional challenges, as there is little precedent and documented experience on how to execute mergers between private HEIs effectively.

Bibliographic references

- Ahmadvand, A., Heidari, K., Hosseini, S., & Majdzadeh, R. (2012). Challenges and success factors in university mergers and academic integrations. Archives of Iranian Medicine, 15(12), 736-740. <https://pubmed.ncbi.nlm.nih.gov/23199243/>**
- National Constituent Assembly of Ecuador. (2008). Constitution of the Republic of Ecuador. Official Register No. 449. <https://www.cec-epn.edu.ec/wp-content/uploads/2016/03/Constitucion.pdf>
- National Assembly of Ecuador. (2010). Organic Law of Higher Education. Official Register No. 298. <https://www.ces.gob.ec/documentos/Normativa/LOES.pdf>
- National Assembly of Ecuador. (2011). General Regulations to the Organic Law of Higher Education. Official Register Supplement 526. <https://www.ces.gob.ec/wp-content/uploads/2019/10/Reglamento-General-a-la-LOES.pdf>
- Cantor Rosales, M. J. (2020). The legal person as a beneficiary of fundamental rights and constitutional protection in the Honduran justice system. Revista de Derecho, 20(1), 135-151. <https://doi.org/10.5377/lrd.v41i1.10496>**
- Council of Higher Education (2020). CES Accountability Report 2020. https://www.ces.gob.ec/?page_id=3997
- Council of Higher Education. (2019-2023). Accountability Report. <https://www.ces.gob.ec>
- Council of Higher Education. (2021). Academic Technical Report regarding the Merger by Absorption of the Vicente Rocafuerte Higher Technological Institute, Academic Planning Coordination. https://www.ces.gob.ec/doc/historico_LOTAIP/Rendicion_de_cuentas/Rendicion2021/Fase3/Informe%20de%20Rendici%C3%B3n%20de%20Cuentas%202021.pdf

- Constitutional Court of Ecuador. (2023). Judgment No. 15-20-AN/20. <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=15-20-AN/20#:~:text=MOTIVO%3A,privadas%20que%20reciben%20rentas%20estatales.>
- Hitt, Michael A. et al. (2012). Creating Value Through Mergers and Acquisitions: Challenges and Opportunities, in David Faulkner, Satu Teerikangas, and Richard J. Joseph (eds), The Handbook of Mergers and Acquisitions (online edn, Oxford Academic). <https://doi.org/10.1093/acprof:oso/9780199601462.003.0004>
- Luybaert, M., & Huyghebaert, N. (2008). Determinants of growth through mergers and acquisitions: An empirical analysis. 25th Erasmus finance day, Rotterdam (The Netherlands). Working paper.**
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097508
- Rojas, Jaime E. (2011). University reform in Ecuador. Transition stage. Educational Innovation, 11(57), 59-67. <https://www.redalyc.org/pdf/1794/179422350008.pdf>
- Weng, H. (2020). Review of Managerial Overconfidence and Corporate Acquisition Goodwill Impairment Research. Open Journal of Social Sciences, 8, 121-128. <https://www.scirp.org/journal/paperinformation?paperid=97810>