

New Peruvian Merger Control Legislation (December 2020)

The Congress of the Republic of Peru approved, by insistence, the draft of the Law that establishes the prior control of business concentration operations, which will replace the Emergency Decree No. 013-2019, a rule that regulates the prior control of operations of business concentration ("DU"). Subject to its publication in the Official Gazette El Peruano and the complementary provisions of the Executive, it is possible that the statute will come into effect in the first quarter of 2021.

Previously, Peruvian legislation only imposed mandatory pre-notification and clearance requirements for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution.¹

Summary Breakdown

Scope. The new merger control regime will apply to concentrations occurring in all fields of economic activities, except for concentrations involving failing banks and insurance companies that endanger the stability of the financial system, which will only require clearance from the Superintendence of Banking and Insurance.

Reviewing Agency. INDECOPI, Peru's multipurpose market overseer, consolidates all merger review responsibilities. The Competition Commission at INDECOPI ("Commission"), which already investigates and sanctions anticompetitive practices, will be charged with the initial phases of review and issuing clearance decisions. The Technical Secretariat of the Commission ("Technical Secretariat") will provide administrative support, issue guidelines and conduct noncompliance investigations. The Tribunal for the Defence of Competition at INDECOPI ("Tribunal") will act as an appellate body.

Suspensory Regime and the Prohibition of Unauthorized Concentration Registrations. Reportable concentration acts must be notified to the Commission and cannot be implemented unless and until INDECOPI grants clearance. Likewise, notaries and public registrars are prohibited from registering concentrations that must be notified and can be held accountable for the registration of such operations.

Relevant Concentration Acts. The statute defines "economic concentrations" subject to clearance as transactions that involve a transfer or change of control over a company or part of it, including:

- The merger of two or more previously independent economic agents into any form of company or entity.
- The acquisition of rights by one or more economic agents that, directly or indirectly, allow the holder to, individually or in association, exercise control over another economic agent.
- The incorporation by two or more independent economic agents of a joint company, a joint venture or any other form of association agreement in which the former share control over a new autonomous entity that performs an economic activity.²
- The acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

¹ Law No. 26876, the Antitrust and Anti-oligopoly Law for the Electricity Sector, in force since 1997.

² Note: The repealed DU refers to the term "permanently performs an economic activity". The Regulation is expected to clarify this point.

In turn, the statute defines “control” as the power to exercise lasting and decisive influence over the composition, deliberations or decisions of an undertaking’s decision-making bodies, allowing it to determine the latter’s competitive strategy

Minority Interests. Minority acquisitions do not require notification unless they confer control (i.e., the power to exercise a decisive and lasting influence over an undertaking’s competitive strategy).

Thresholds. The new regime has two concurrent financial thresholds: (i) the parties to the transaction must have a combined turnover gross revenue) or assets valued of at least 118,000 Peruvian Tax Units (UITs) (PEN 519.2 million or approximately USD 148.3 million in 2021) in Peru and (ii) two of the parties to the transaction must each have a turnover or assets valued of at least 18,000 UITs (PEN 79.2 million or approximately USD 22.6 million in 2021) in Peru.

The authority will consider as a single business concentration operation the set of acts or operations carried out between the same economic agents within a period of two (2) years. The concentration operation must be notified before the last transaction or act that would exceed the thresholds indicated above is carried out.

Analysis ex-officio. The Technical Secretariat may act ex officio in cases where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. It is important to indicate that, although it is not specified in the statute, this power would allow a review by the authority regardless of whether the concentration act exceeds the thresholds or not. The regulation of the statute (“Regulation”) is expected to clarify this power.

Timing of Notification. Parties must notify their deal before the transaction has been consummated.

Notification Form. A standard notification form is expected to be issued by INDECOPI soon.

Review Period (up to 175 business days). The first phase review period is thirty (30) business days. Said period commences only after a notification is deemed complete. The Commission has up to twenty-five (25) business days to determine the completeness of the notification.

If the Commission concludes that the transaction may potentially raise “serious concerns” of generating restrictive effects upon competition, it can initiate a second phase review that may last a maximum of one hundred twenty (120) business days.

If a decision has not been issued upon the expiration of the review periods, the transaction will be deemed to have obtained clearance.

Decisions issued by the Commission are appealable to the Tribunal. The Tribunal must issue its determination within ninety (90) business days.

Ability to Carve Out and Gun-Jumping. The statute does not contain explicit provisions on carve outs, setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI. It does however explicitly sanction the implementation of the proposed transaction prior to clearance as a breach of the suspension obligation (i.e., gun-jumping).

Clearance and Voluntary Commitments. INDECOPI may only deny clearance if it determines in a second phase review that the transaction will generate “significant restrictive effects upon competition in the market”.

Parties may offer commitments to remedy competitive concerns that arise during the evaluation. If these are accepted, the Commission may issue a conditional clearance decision.

Conditions imposed are subject to periodic review by the authority and may be overturned or modified if competitive conditions have varied sufficiently to justify it.

Confidentiality. Upon the initiation of a phase two review, the Commission shall publish a summary of its decision to do so, allowing third-parties with legitimate interest to provide information. Although, according to the statute, third-parties may partake in the procedure, the Regulation is expected to clarify this point.

Commercially sensitive and reserved information provided by the notifying parties may be deemed and treated as confidential. Confidential information may not be accessed by third-parties.

Penalties for Noncompliance. Parties that close reportable deals without prior approval from INDECOPI, that engage in gun-jumping during the suspensory period or that violate conditions imposed upon clearance are subject to fines of up to 12% of gross revenue of the offender or its economic group. INDECOPI may also seek to void and breakup the unauthorized concentration.

Vacatio legis. The statute will come into force after fifteen (15) calendar days have elapsed from the adaptation of the regulation of the INDECOPI Organization and Functions Law and other management instruments. Said adjustment must be made within fifteen (15) days following the publication of the Regulation. The Regulation must be prepared and published within a period of fifteen (15) days from the publication of the statute in the Official Gazette El Peruano. Concentrations occurring prior to said date will not be subject to administrative authorizations, except for vertical or horizontal concentrations occurring in the electricity market, which will continue under their current regime until the new regulation comes into force.



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