



## **Peruvian Merger Control Legislation (May/June 2021)**

Through Law N° 31112, a Law that establishes the prior control of concentration operations (“Law”), and Supreme Decree N° 039-2021-PCM, the regulations of the Law (“Regulation”), the Peruvian Congress and Government, respectively, approved the new merger control regime applicable to concentrations occurring in all fields of economic activities.

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.<sup>1</sup>

The Law and its Regulation **will enter into force on June 14th, 2021**. 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 regime comes into force.

A summary of the new merger control regime is described below.<sup>2</sup>

### **Summary Breakdown**

**Scope.** The new merger control regime will apply to concentrations that produce effects in Peru, including acts of concentration carried out abroad that directly or indirectly link economic agents who carry out economic activities in Peru.

**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 Defense of Competition at INDECOPI (“Tribunal”) will act as an appellate body.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the aforementioned economic agents must submit the authorization request to the Superintendency of Banking, Insurance and Pension Fund Administrators (“SBS”). The SBS determines whether the operation involves economic agents that present relevant and imminent risks that compromise the stability of the aforementioned economic agents or of the systems they comprise. If the SBS

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<sup>1</sup> Law N° 26876, the Antitrust and Anti-oligopoly Law for the Electricity Sector, in force since 1997.

<sup>2</sup> More detailed information regarding the Law and its Regulation in the following links: <https://prcp.com.pe/en/client-alert-new-peruvian-merger-control-legislation-january-2021/> (Law) and <https://prcp.com.pe/en/new-peruvian-merger-control-complementary-regulations/> (Regulation)

determines that the operation is not in the aforementioned assumption (relevant and imminent risk), the SBS informs the requesting economic agents that they must evaluate the presentation of an authorization request to INDECOPI (otherwise, only the SBS authorization is necessary). The concentration operation proceeds if authorization by the SBS and INDECOPI is obtained, provided that the latter is required (as well as the thresholds are fulfilled).

The economic agents, who have been granted authorization to operate by the Superintendency of the Securities Market (“SMV”) and who participate in concentration operations, must obtain from the SMV the authorizations that are required according to the special regulations on the matter that regulate them. Said request must be submitted to the SMV prior to or simultaneously with the request for authorization from INDECOPI. The concentration operation proceeds if the authorization of the SMV and INDECOPI is obtained.

**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.
- The acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

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 acquisitions do not require notification unless they confer control.

**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 140.32 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 21.4 million in 2021) in Peru.

The authority will consider as a single 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.

**Voluntary notifications and prior consultations.** If the parties do not meet the abovementioned thresholds, the notification will be voluntary.

Likewise, in any scenario, the parties may file a consultation to the Technical Secretariat in order to receive orientation of any kind. The opinions from the Technical Secretariat are not binding.

**Threshold determination.** In order to calculate the sales, gross income, or value of the assets in Peru obtained by the companies involved in the fiscal year prior to the one in which the concentration operation is notified, the following rules shall be considered according to each type of operation:<sup>3</sup>

- a) For: (i) mergers of 2 or more independent economic agents, under any form of corporate organization of the merging entities or of the entity resulting from the merger; or (ii) the constitution by 2 or more independent economic agents of a joint company, joint venture or other similar modality that implies the acquisition of joint control over one or more economic agents that perform functions of an autonomous economic entity; the annual sales, gross income or the book value of the assets of the economic agents participating in the operation and their respective economic groups are considered.
- b) For acquisitions by one or more economic agents, direct or indirectly, of the rights that provide control over the whole or part or other economic agent; the annual sales, gross income or the book value of the assets of the acquiring agent and the economic group of the latter, and the annual sales, gross income

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<sup>3</sup> Only one of the two parameters shall be used (i.e sales or gross income or book value of assets) in order to calculate both thresholds. For example, the use of the sales or gross income for the individual threshold and the book value of the assets for the aggregate thresholds is forbidden.

or the book value of the assets of the target and the companies that are controlled by the latter are considered.

- c) For acquisitions by an economic agent, by any means, who have direct or indirect control over productive operating assets of other economic agents; the annual sales, gross income, or the book value of the assets of the acquiring agent and its economic group; and, the sales or gross income that have been generated by the acquired operating productive assets or the book value of such assets are considered.<sup>4</sup>

**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. In order to be registered in the Peruvian Public Registry, any concentration act will require a sworn statement issued by the involved agents before a notary and the registrars and declaring that such operation either: (i) does not require an authorization from INDECOPI; or (ii) has been approved by INDECOPI, as well as the SBS and SMV when appropriate.

**Analysis ex-officio.** The Technical Secretariat is entitled to act ex officio in cases where reasonable indications or special circumstances are identified that the concentration operation can generate a dominance position or affect competition in the relevant market.<sup>5</sup> The resolution to initiate this type of action is published on the INDECOPI website. The Technical Secretariat may request the opinion of public entities and private sector agents regarding said operation (without qualifying them as third parties to the procedure).

The Technical Secretariat may exercise this power in those acts of concentration that have an impact on the Peruvian market, that is, those that involve economic agents who have carried out economic activities or generated income, sales or cash flows in the country in the 12 months prior to the formal closing of the operation. Likewise, the Technical Secretariat may only ex officio review any act of concentration until one year after its formal closing.

If the Technical Secretariat determines that the concentration operation could generate possible significant restrictive effects on the competition, the Commission may issue orders or measures it deems pertinent to eliminate or mitigate them, which includes, if applicable, the sale of the shares or assets acquired. Only the economic agents involved in the concentration may file an appeal.

The Technical Secretariat will not be able to review ex officio those operations that have completed the closing acts necessary to make the transfer or change of control effective before the entry into force of the Law.

**Notification form and application requirements.** The Regulation details the documents required for the concentration application. Among the most relevant documents required are a copy of the minutes or sessions of the management and administration bodies of the companies involved in which the concentration operation is discussed and the reasons for its execution and/or effects, as well as a copy of the reports, studies, presentations and/or internal or external reports that have been prepared or commissioned in order to evaluate or analyze the concentration operation and the reasons for its execution and/or effects, among others. Likewise, the Regulation requires the financial statements of the agents involved and the identification of the countries where the operation will be reported (and the status of the process, which may be reported later). Additionally, diverse economic information related to the markets involved in the operation must be sent.

INDECOPI issued a standard form detailing the content and structure of the notification.

**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.

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<sup>4</sup> For these purposes, operating productive assets will be considered as tangible or intangible assets to which income, income, cash flows or business volume can be assigned and that have the potential to develop or increase the participation of an economic agent in the market. An asset is considered operational if it has generated income, income, cash flows or business volume in the year prior to the notification of the concentration operation.

<sup>5</sup> Special circumstances are considered, among others, the cases detailed below:

- Horizontal concentration operations carried out in concentrated markets.
- Horizontal concentration operations that involve the acquisition of an economic agent with a small market share, but with growth potential; or, of an innovative economic agent that has recently entered the market.
- Horizontal concentration operations in which the acquiring economic agent or its economic group has previously carried out concentration operations that involved the acquisition of a competitor.
- Other concentration operations that have the potential to generate possible significant restrictive effects on competition.

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.** Neither the Law nor the Regulation 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, Conditions and Commitments.** INDECOPI may deny clearance if it determines in a second phase review that the transaction will generate “significant restrictive effects upon competition in the market”. Likewise, INDECOPI may authorize the concentration with or without conditions.

When the authorization of a concentration operation is subject to the fulfillment of a condition of conduct, the authority establishes a period for its review. The Commission itself determines whether upon expiration the condition is maintained, overturned, or modified, and said decision may be appealable. In said procedure, the Commission may request information from other public entities and/or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorized economic agent than the one previously imposed. During the review the condition remains in force.

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.

The commitments may be filed within 15 business days from the date after the authorization request is admitted for processing (which may be extended by 15 additional business days) and be modified within 10 business days after its submission, if applicable, (Phase 1). In Phase 2, commitments may be submitted within 40 business days after such phase has begun and could be modified within 10 business days after said period. The Commission may consult private sector agents and public entities for their opinion regarding the proposed commitments.

Likewise, the parties may ask for a meeting with the Technical Secretariat to receive guidance regarding the commitments offered and to request hearings to support said commitments. In case of approval, the Commission will provide a non-confidential preliminary decision in advance for comments from private sector agents, public entities consulted and others that they consider of interest in the resolution of the procedure (both in Phase 1 or Phase 2) to receive comments. Likewise, when appropriate, the final decision will include a work and supervision schedule, as well as the election of a compliance monitor for said commitments. In the case of rejection, the decision shall be deemed final and not subject to appeal.

**Participation of third parties.** Third parties with a legitimate interest may access the file and present relevant information to the Commission provided that they have attended the procedure within a period of 10 business days from: (i) the day after the publication of the resolution to initiate the second phase of an application; or, (ii) the publication of the resolution to initiate the ex officio review of concentrations on the INDECOPI website.

Private sector agents, who have not requested to be part of the procedure, and public entities can only send an opinion on the concentration operation when the competition authority requires it or when they wish to formulate it in the second phase of the authorization procedure.

**Confidentiality.** 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.



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