

Merger Control 2022

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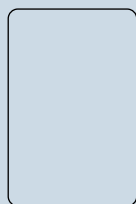
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Merger Control 2022

Contributing Editor

Thomas Janssens

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Lexology Getting The Deal Through is delighted to publish the twenty-sixth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Peru, South Korea, Taiwan, Uzbekistan and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.



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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant merger control legislations are the recently approved Law No. 31112, Law that establishes the prior control of corporate mergers (the Merger Act), and its Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation).

The Merger Act and the Regulation were approved in January and March 2021 and entered into force on 14 June 2021.

Through this legislation, the Peruvian government will enforce a mandatory merger control regime applicable to all fields of economic activities and will derogate Law No. 26876, which only imposed mandatory pre-notification and clearance requirements for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution.

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Peru's multipurpose market overseer, consolidates all merger review responsibilities. The Competition Commission at INDECOPI (the Commission), which already investigates and sanctions anticompetitive practices, will be charged with conducting the initial phases of review and issuing clearance decisions. The Technical Secretariat of the Commission (the Technical Secretariat) (whose name has changed to the National Directorate of Investigation and the Promotion of Competition) will provide administrative support, issue guidelines and conduct non-compliance investigations. The Tribunal for the Defence of Competition at INDECOPI (the 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 economic agents must submit an authorisation request to the Superintendency of Banking, Insurance and Private 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 economic agents or of the systems they comprise. If the SBS 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 authorisation request to INDECOPI (otherwise, only the SBS authorisation is necessary). The concentration operation proceeds if authorisation by the SBS and INDECOPI is obtained, provided that the latter is required (and if the thresholds described below are fulfilled).

The economic agents who have been granted authorisation to operate by the Superintendency of the Securities Market (SMV) and participate in concentration operations, must obtain from the SMV the authorisations that are required according to the special regulations on the matter that regulate them. That request must be submitted to the

SMV prior to or simultaneously with the request for authorisation from INDECOPI. The concentration operation proceeds if the authorisation of the SMV and INDECOPI is obtained.

Scope of legislation

2 | What kinds of mergers are caught?

The Merger Act defines 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 of 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; and
- the acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

3 | What types of joint ventures are caught?

The Merger Act and the Regulation will be applicable to those operations in which two or more independent economic agents incorporate a joint company, a joint venture or any other form of association agreement in which the independent economic agents share control over a new autonomous entity that performs an economic activity.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Merger Act 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. Such influence may be exercised through ownership or rights of use over all or part of the assets of a company; or rights or agreements that may allow to control the undertaking's decision-making bodies.

Minority acquisitions do not require notification unless they confer control.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Merger Act has two concurrent financial thresholds that are determined by the value of a Peruvian tax unit (UIT). For the year 2021, the value of the UIT is 4,400 Peruvian soles or approximately US\$1,190 (using an exchange rate of 3.7 Peruvian soles per dollar). The value of the UIT is updated each year.

A concentration operation is subject to the prior control procedure when the following is concurrently fulfilled:

- The total sum of the value of annual sales or gross income or the value of assets in Peru of the companies involved in the concentration operation during the fiscal year prior to that in which the operation is notified, is equal to or more than 118,000 UIT, which is equivalent to 519.2 million Peruvian soles or approximately US\$133.13 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021.
- The value of annual sales or gross income or the value of assets in Peru of at least two of the companies involved in the concentration operation, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UIT, equivalent to 79.2 million Peruvian soles or approximately US\$20.3 million (using an exchange rate of 3.9 Peruvian soles per dollar) by 2021.

To calculate the sales, gross income or value of the assets in Peru obtained by the companies involved, the following rules shall be considered according to each type of operation:

- For mergers of two or more independent economic agents, under any form of corporate organisation of the merging entities or of the entity resulting from the merger, or the constitution by two 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.
- 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 or the book value of the assets of the target and the companies that are controlled by the latter are considered.
- 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.

When determining the value for both the individual and combined threshold, only one of the two parameters must be used (ie, only sales or gross income, or the book value of assets).

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 years. The concentration operation must be notified before the last transaction or act that would exceed the thresholds indicated above is carried out.

INDECOPI may act ex officio where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. This power allows a review by the authority regardless of whether the concentration exceeds the thresholds or not.

The Regulation identifies the special circumstances that would motivate action by INDECOPI, including:

- 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; or
- other concentration operations that have the potential to generate possible significant restrictive effects on competition.

INDECOPI 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, INDECOPI may only ex officio review any act of concentration until one year after its formal closing.

INDECOPI 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 Merger Act is in force.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing system is mandatory for operations that produce effects in Peru, qualify as concentrations under the Merger Act and meet the thresholds.

Concentrations that do not fulfil the above-mentioned requirements may be notified voluntarily. In either case (mandatory or voluntary filing), the concentration cannot be implemented unless and until INDECOPI grants clearance.

Economic agents may also consult INDECOPI to determine if the operation must be notified. The opinion issued by INDECOPI in this consultation is not binding.

No exceptions to notification have been developed so far by the Merger Act or the Regulation.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Merger Act is applicable to any operation that produce effects in Peru (ie, local effects test). Hence, any operations carried out abroad must be notified if they qualify as a concentration under the Merger Act; fulfil the thresholds described above; and directly or indirectly link economic agents who carry out economic activities in the country or includes economic agents that offer or demand goods or services in the market and carry out acts of concentration that produce or may produce effects in all or part of Peru.

The Merger Act does not contain explicit provisions on carveouts, setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

No special regulations have been developed describing additional rules for foreign investment.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the economic agents must submit the authorisation to the SBS to determine if the operation only requires an authorisation from the latter (if it involves economic agents that present relevant and imminent risks that compromise the stability of the economic agents or of the systems they comprise) or also from INDECOPI (provided that the latter is required and if the thresholds are fulfilled).

In the case of economic agents who have been granted authorisation to operate by SMV and participate in a concentration operation, they must obtain an authorisation from the SMV and INDECOPI.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline. Reportable concentration acts must be notified to the Competition Commission at INDECOPI (the Commission) and cannot be implemented unless and until the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) grants clearance. As mentioned before, 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 years. The concentration operation must be notified before the last transaction or act that would exceed the thresholds is carried out.

Not filing a reportable operation may be subject to a fine of up to 500 Peruvian tax units (UIT), equivalent to 2.2 million Peruvian soles or approximately US\$564,102 (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceed 8 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI. INDECOPI may also seek to void and breakup the unauthorised concentration.

No infringement cases have been analysed at the time of writing this article. However, INDECOPI has previously imposed sanctions (150 UIT) for not filing under the Law No. 26876 in 1999.

10 | Which parties are responsible for filing and are filing fees required?

In mergers or concentrations that involve the acquisition of joint control, the application must be filed by the economic agents involved in the transaction. For all other cases, the application must be filed by the economic agent acquiring the control over the other economic agents.

A fee will be required for filing. The value of such fee will be 91,629.40 Peruvian soles or US\$23,494.71 (using an exchange rate of 3.9 Peruvian soles per dollar).

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The first phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 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, they can initiate a second phase review that may last up to a maximum of 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 for the Defence of Competition at INDECOPI (the Tribunal). The Tribunal must issue its determination within 90 business days.

Reportable concentration acts cannot be implemented unless and until INDECOPI grants clearance.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The expiration of the review periods is subject to fines up to 1,000 UIT, equivalent to 4.4 million Peruvian soles or approximately US\$1.1 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceed 10 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI, if executing a concentration operation before:

- it has been submitted to the prior control procedure;
- the decision of the Commission has been issued; or
- the transaction is deemed to have obtained clearance.

INDECOPI may also seek to void and break up the unauthorised concentration.

No infringement cases have been analysed at the time of writing. However, INDECOPI has previously imposed sanctions (100 UIT) for gun-jumping practices under the Law No. 26876 in 2009 (the concentration itself was approved).

Concentrations that have been closed before clearance will not have any legal effects in Peru.

Finally, the implementation of a denied concentration by INDECOPI is subject to fines of up to 12 per cent of the gross revenue of the offender or its economic group from all of their economic activities in the year prior to the issuance of the sanctioning decision by INDECOPI.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Foreign-to-foreign mergers that produce effects in Peru may be subject to sanctions if they are closed before clearance.

No infringement cases have been analysed at the time of writing this article.

However, INDECOPI has previously imposed sanctions (100 UIT) for gun-jumping practices under Law No. 26876 in 2009 for a cross-border operation that had local effects. In this case, the sanctioned party was a Peruvian company controlled by a European group that acquired control over another European company with a controlling share over another company in Peru.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Merger Act and the Regulation do not contain explicit provisions on carveouts setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI.

Economic agents may also consult INDECOPI to determine if the proposed solution might be acceptable to permit closing before clearance. The opinion issued by INDECOPI in this consultation is not binding.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No specific rules have been issued for public takeover bids in the Merger Act or the Regulation. Hence transactions that involve a transfer or change of control and fulfil the thresholds shall be notified to INDECOPI.

Public takeover bids have specific regulations issued by the Superintendency of the Securities Market (SMV) on the respective field.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) details the documents required for the concentration application. The request for authorisation of the concentration operation submitted to the Commission must include (in addition to the date and number of the payment receipt), among others, the documents that support the following information:

- Identification data of the notifying economic agent.
- Identification data of the legal representative of the notifying economic agent, as well as the indication of their powers. If the powers granted abroad are not registered, they must be endorsed by the Peruvian consul and the Ministry of Foreign Affairs of Peru, or apostilled, as appropriate.
- Description and objective of the concentration operation and identification of the economic agents involved in it. For these purposes, the following must be included:
 - Copy of the final or most recent version of the agreement or contract signed on the concentration operation. If an agreement or contract on the concentration operation has not yet been signed, documents that evidence the real and serious intention of the economic agents to execute the operation, such as a memorandum of understanding or letter of intent.
 - Copy of the minutes of the meetings of the management and administration bodies of the companies involved where the concentration operation, the reasons for its execution and its effects have been discussed.
 - Copy of the reports, studies, presentations or internal or external reports that have been prepared or commissioned to evaluate or analyse the concentration operation, the reasons for its execution and its effects.
- Description of the ownership and control structure of each of the economic agents involved in the operation and their respective economic groups.
- Identification of the kinship, property or management ties existing between each of the economic agents described in the previous point with respect to other companies operating in the country.
- Identification and description of the markets involved in the concentration operation. For such purposes, markets involved are understood to be those markets in which the economic agents that directly intervene in the concentration operation and their respective economic groups participate. A copy of studies, reports, analysis, surveys and any comparable document corresponding to the identification and definition of the markets involved, the structure of supply and demand, differentiation of goods or services and intensity of competition, entry barriers and exit from the market and the existence of cooperative agreements must be provided.
- When applicable, a detailed description of the efficiencies related to the concentration operation, and how these are transferred to consumers, as well as the opportunity to transfer such efficiencies.

- Identification of the countries in which the concentration operation has been or will be notified; and, if applicable, its processing status. When appropriate, the pronouncements of said authorities must be provided. This may be reported after the application is submitted.
- The financial statements of the economic agents involved for the fiscal year prior to the date of the notification.

Failure to provide information within the period determined by the authority may be subject to a fine of up to 500 UIT, equivalent to 2.2 million Peruvian soles or approximately US\$564,102 (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceed 8 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior to the issuance of the decision by INDECOPI.

Failure or denial to provide information or supplying wrong or missing information is subject to fines up to 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior to the issuance of the decision by INDECOPI.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

For notification, the Merger Act establishes that, prior to the initiation of the control procedure, economic agents may consult the Technical Secretariat for guidance purposes to determine whether the transaction is within the scope of the law or what information is required for prior control, among other aspects. The opinions of the Technical Secretariat are not binding.

If there is no certainty about the potential effects of the concentrations or if there is a potential risk that the authority may analyse the concentration ex officio (eg, the concentration involves a sensitive or high exposure market), regardless of whether the concentration act exceeds the thresholds or not, we would suggest filing a voluntary notification.

Prior approval proceedings are organised in phases. The first phase review period is 30 business days. Said period commences only after a notification is deemed complete. The Commission has up to 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 up to a maximum of 120 business days. In the latter case, the Commission will issue a publication announcing the beginning of the second phase to allow third parties to file relevant information.

18 What is the statutory timetable for clearance? Can it be speeded up?

The first phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 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 up to a maximum of 120 business days. It is not possible to speed up a request.

No cases have been analysed at the time of writing. However, under Law No. 26876, INDECOPI has usually applied prolongations, particularly in complex cases.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test requires the evaluation of the effects of the transaction to identify whether it produces a significant restriction on the competition in the markets involved.

This test should include, among others, the following factors:

- the structure of the involved market;
- the actual or potential competition of the economic agents in the market;
- the evolution of the supply and demand of the products and services in market in question;
- the distribution and commercialisation sources;
- legal or other barriers (technological, investments, horizontal or vertical restrictions) that impede access to the market;
- the economic and financial power of the companies involved;
- the creation or strengthen of a dominant position; and
- the generation of economic efficiencies.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

There are no specific theories of harm contained in the Merger Act or the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation). Likewise, no cases have been analysed at the time of writing. However, under Law No. 26876, the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOP) has usually analysed the market concentration, unilateral effects, vertical foreclosure, common ownership effects and conglomerated effects, among others.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

No cases have been analysed at the time of writing. However, under Law No. 26876, there are no cases that have been decided on explicit non-competition issues.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

One of the factors that the authority considers in the substantive test is the generation of economic efficiencies through the transaction.

In the case of economic efficiencies, the parties shall evidence that the efficiencies:

- are a part of concentration;
- compensate for the identified restrictions over the competition and focus on increasing the wellness of the consumers;
- can be transferred to the consumers; and
- are verifiable by the authority.

If successful, the transaction will be cleared.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOP) is entitled to void and breakup an unauthorised concentration (ie, by ordering the dissolution of operation that involved the merger or the acquisition of assets or shares) to revert the anticompetitive effects of said operation.

Likewise, the Merger Act establishes that concentrations that have been closed before clearance will not have any legal effects in Peru.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The Merger Act authorises parties to offer commitments to remedy competitive concerns that arise due to the concentration. Neither the Merger Act nor the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) describe any of the remedies that could be offered.

Likewise, INDECOP could also authorise a concentration subject to the fulfilment of a condition of conduct.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the first phase, parties may offer commitments to remedy competitive concerns that arise during the evaluation within 15 business days from the date after the authorisation request is deemed complete. Commitments could be modified within 10 business days after its submission, if applicable. The first phase will be suspended up to 15 business days (such period may be extended by 15 additional business days). After such period, the Commission may deny or authorise the commitments. In the latter, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Such parties shall submit their comments within five business days. After such period, the Commission will issue their final decision.

In the second phase, 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 second phase will be suspended up to 15 business days (such period may be extended by 30 additional business days). After such period, the Commission may deny or authorise the commitments. In the latter, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Such parties shall submit their comments within 10 business days. After such period, the Commission will issue their final decision.

Regarding the conditions imposed by INDECOP, 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 or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. During the review the condition remains in force.

On the other hand, if the Commission or economic agent considers that there is a change in the conditions of competition in the market during the review period established, they may request the Tribunal for the Defence of Competition at INDECOP (the Tribunal) (second instance)

to reverse or modify the referred condition. In said procedure, the Tribunal may request information from other public entities or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. If the Tribunal does not issue its final resolution within the legal term, positive administrative silence will be applied (for which the order made at the request of a party would proceed).

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign merger scenarios have not been observed yet at the time of writing this article.

As we mentioned before, the Merger Act is applicable to any operation that produce effects in Peru (ie, local effects test). However, under Law No. 26876 there are no cases involving foreign-to-foreign mergers with no effects in Peru (or with no corporate vehicles in the country).

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

No cases regarding ancillary restrictions have been analysed yet at the time of writing.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties with a legitimate interest may access the file and present relevant information to the Competition Commission at INDECOPI (the Commission) provided that they have attended the procedure within a period of 10 business days from: the day after the publication of the resolution to initiate the second phase of an application or the publication of the resolution to initiate the ex officio review of concentrations on the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) website.

Likewise, the Commission may consult private sector agents and public entities for their opinion regarding the commitments offered by the parties.

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 one.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The final resolutions of merger control operations will be published on INDECOPI's website, which is publicly accessible to any user.

Until the procedure is completed at the administrative level, only the parties involved in the concentration and third parties with legitimate interests may know the status of the file. However, if a transaction qualifies for the second phase, the authority will issue a summary of such decision.

The involved parties may request the confidentiality of the information provided which must be approved by the Commission. If so, only a non-confidential version will be made public.



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Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Within the framework of an international agreement or arrangement with a foreign competition authority, INDECOPI may investigate anti-competitive conducts developed in the national territory and may exchange information, including confidential information, with the competent authorities of the countries that are part of such agreements or conventions.

In practice, INDECOPI has cooperated with many international authorities or jurisdictions to discover antitrust practices in Peru and abroad.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The final decision issued by the Competition Commission at INDECOPI (the Commission) may be appealed within 15 business days after its issuance. The Tribunal for the Defence of Competition at INDECOPI (the Tribunal) will act as an appellate body. The final resolution issued by the Tribunal will end the administrative procedure.

The decision issued by the Tribunal may be questioned or appealed in the judiciary within three months from their notification.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Since the Merger Act and the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) came into force on 14 June 2021, no case has been concluded yet at the time of writing. However, the Merger Act establishes that the Tribunal shall issue their final decision within 90 business days from the date the appeal has been filed.

The judicial review does not have a clear time frame.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS**Enforcement record**

- 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

No cases have been analysed at the time of writing.

However, under Law No. 26876 no case has been rejected and only a few transactions have been accepted with conditions. Most of the cases have been approved without any kind of conditions.

Reform proposals

- 35 | Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS**Key developments of the past year**

- 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No cases have been analysed at the time of writing.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Peru	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	<p>Transactions that involve a transfer or change of control over a company or part of it and fulfil concurrently the following thresholds:</p> <ul style="list-style-type: none"> • The total sum of the value of annual sales or gross income or value of assets in Peru of the companies involved in the concentration operation has reached during the fiscal year prior to that in which the operation is notified, a value equal to or more than 118,000 Peruvian tax units (UIT), equivalent to 519.2 million Peruvian soles or approximately US\$133.13 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021. • The value of annual sales or gross income or value of assets in Peru of at least two of the companies involved in the concentration operation have reached, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UIT, equivalent to 79.2 million Peruvian soles or approximately US\$20.3 million (using an exchange rate of 3.9 Peruvian soles per dollar) by 2021. <p>There is no filing deadline. Reportable concentration acts must be notified to the Competition Commission at INDECOPI (the Commission) and cannot be implemented unless and until INDECOPI grants clearance.</p>
Clearance deadlines (Stage 1/Stage 2)	The first phase review period is 30 business days. Said period commences only after a notification is deemed complete. The Commission has up to 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 up to a maximum of 120 business days.
Substantive test for clearance	The substantive test for clearance requires the evaluation of the effects of the transaction, in order to identify whether it produces a significant restriction of competition in the markets involved. This evaluation includes different economic factors.
Penalties	Depending on the seriousness of the infringement, fines up to 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.
Remarks	<p>The Peruvian authority INDECOPI 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. This power allows a review by the authority regardless of whether the concentration exceeds the thresholds or not.</p> <p>The Merger Act and its Regulation are not yet in force and the date of elaboration of this document. Hence, mandatory pre-notification and clearance is required only for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution (in accordance with Law No. 26876).</p>

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