

PANORAMIC

MERGER CONTROL

Peru



LEXOLOGY

Merger Control

Contributing Editor

Thomas Janssens

Freshfields Bruckhaus Deringer

Generated on: October 14, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Contents

Merger Control

QUICK REFERENCE TABLE

LEGISLATION AND JURISDICTION

Relevant legislation and regulators
Scope of legislation
Thresholds, triggers and approvals

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities
Pre-clearance closing
Public takeovers
Documentation
Investigation phases and timetable

SUBSTANTIVE ASSESSMENT

Substantive test
Theories of harm
Non-competition issues
Economic efficiencies

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers
Remedies and conditions
Ancillary restrictions

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights
Publicity and confidentiality
Cross-border regulatory cooperation

JUDICIAL REVIEW

Available avenues
Time frame

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record
Reform proposals

UPDATE AND TRENDS

Key developments of the past year

Contributors

Peru



[Payet Rey Cauvi Pérez Abogados](#)

[Carlos A Patrón](#)

[David Kuroiwa](#)

cap@prcp.com.pe

dkh@prcp.com.pe

QUICK REFERENCE TABLE

The table below is for quick reference only.

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 (UITs) (584.1 million soles). • 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, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UITs (89.1 million soles). <p>There is no filing deadline. Reportable concentration acts must be notified to the Competition Commission (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOP) and cannot be implemented unless and until INDECOP grants clearance.</p>
Clearance deadlines (Phase I/Phase II)	<p>The first-phase review period is 30 business days, which 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 has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 120 business days.</p>

Substantive test for clearance	The substantive test for clearance requires the evaluation of the effects of the transaction 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 of 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.
Remarks	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.

Law stated - 20 mayo 2024

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

What is the relevant legislation and who enforces it?

The legislation relevant to merger control comprises [Law No. 31112](#) (the Merger Act), which establishes the prior control of corporate mergers, 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 government enforces a mandatory merger control regime that is applicable to all fields of economic activities and derogates from [Law No. 26876](#), which only imposes mandatory pre-notification and clearance requirements for vertical or horizontal concentrations in the fields of electricity generation, transmission and distribution.

The National Institute for the Defence 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 investigates and sanctions anticompetitive practices, is in charge of conducting the initial phases of review and issuing clearance decisions.

The National Directorate of Investigation and the Promotion of Competition (formerly the Technical Secretariat of the Commission) will provide administrative support, issue guidelines and conduct non-compliance investigations. The Tribunal for the Defence of Competition at INDECOPI 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 does not present a relevant and imminent risk, it informs the requesting economic agents that they must present an authorisation request to INDECOPI; otherwise, only the SBS's 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 relevant thresholds 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 in accordance with the special regulations on the matter. The 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.

Law stated - 20 mayo 2024

Scope of legislation

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.

Law stated - 20 mayo 2024

Scope of legislation

What types of joint ventures are caught?

The Merger Act and the Regulation apply to 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.

Law stated - 20 mayo 2024

Scope of legislation

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 competition 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.

Law stated - 20 mayo 2024

Thresholds, triggers and approvals

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). According to the [Threshold Guidelines](#), the UIT applicable for the analysis of the thresholds is the one in force the year prior to the notification; hence, if a concentration is filed in 2024, the applicable UIT will be the one for 2023.

In 2023, the value of one UIT is 4,950 soles. The value of the UIT is updated each year.

A concentration is subject to the prior control procedure when the following is 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 during the fiscal year prior to that in which the operation is notified is equal to or more than 118,000 UITs. If a concentration is filed in 2024, the applicable UIT will be the one for 2023; hence, this threshold is equivalent to 584.1 million soles; or
- 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 UITs. If a concentration is filed in 2024, the applicable UIT will be the one for 2023; hence, this threshold is equivalent to 89.1 million soles.

To calculate the sales, gross income or value of the assets in Peru obtained by the companies involved, the following rules are considered, depending on the 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 of 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, which has direct or indirect control over the 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). Likewise, if there is another currency besides the sol in the financial statements or documents to be provided, the exchange rate that will be used is the average exchange rate of the 12 months prior to the notification issued by the Peruvian Central Bank.

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 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 that may generate a dominant position or affect competition in the market are identified. This allows the authority to conduct a review regardless of whether the concentration exceeds the thresholds.

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

- horizontal concentrations carried out in concentrated markets;
- horizontal concentrations 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 concentrations in which the acquiring economic agent or its economic group has previously carried out concentrations that involved the acquisition of a competitor; or
- other concentrations that have the potential to generate possible significant restrictive effects on competition.

INDECOPi may exercise this power in respect of concentrations that have an impact on the Peruvian market (ie, 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). INDECOPI may only ex officio review any act of concentration within one year of its formal closing.

INDECOPI cannot review ex officio operations that completed the closing acts necessary to make the transfer or change of control that were effective before the Merger Act came into force.

Law stated - 20 mayo 2024

Thresholds, triggers and approvals

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 relevant thresholds. Concentrations that do not fulfil these requirements may be notified voluntarily. In either case (mandatory or voluntary filing), the concentration cannot be implemented until INDECOPI grants clearance.

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

To date, no exceptions to notification have been developed by the Merger Act or the Regulation.

Law stated - 20 mayo 2024

Thresholds, triggers and approvals

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 relevant thresholds; and
- directly or indirectly link economic agents who carry out economic activities in the country or include 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 carve-outs that set specific legal requirements allowing parties to close a transaction outside Peru before clearance has been issued by INDECOPI.

Law stated - 20 mayo 2024

Thresholds, triggers and approvals

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

No special regulations have been developed that describe 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 whether 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 relevant thresholds are fulfilled).

Economic agents who have been granted authorisation to operate by the SMV and participate in a concentration must obtain authorisation from the SMV and INDECOPI.

Law stated - 20 mayo 2024

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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 (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) and cannot be implemented unless and until INDECOPI grants clearance.

The authority will consider as a single concentration operation the set of acts or operations carried out between the same economic agents (including their economic groups) within a period of two years. The concentration operation must be notified before the final transaction or act that would exceed the relevant thresholds is carried out.

Failing to file a reportable operation may be subject to a fine of up to 500 Peruvian tax units (UITs), which is equivalent to 2.58 million soles for 2024 (for fining purposes, the current UIT equivalent to 5,150 soles should be considered), provided that the 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 break up the unauthorised concentration.

No infringement cases have been analysed at the time of writing; however, in 1999, INDECOPI imposed sanctions (150 UITs) for not filing under Law No. 26876.

Law stated - 20 mayo 2024

Filing formalities

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 control over the other economic agents.

A fee will be required for filing. The value of the fee is 91,629.40 soles.

Law stated - 20 mayo 2024

Filing formalities

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 has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second phase review that may last for up to 120 business days (90 business days that may be extended for another 30 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 may be appealed 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.

Law stated - 20 mayo 2024

Pre-clearance closing

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

Closing or integrating the activities of the merging businesses before clearance is subject to fines up to 1,000 UIT, equivalent to 5.15 million soles for 2024, provided that the 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 because a decision has not been issued upon the expiration of the review periods.

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

No infringement cases have been analysed at the time of writing; however, in 2009, INDECOPI imposed sanctions (100 UITs) for gun-jumping practices under Law No. 26876 (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 concentration denied 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 their economic activities in the year prior to the issuance of the sanctioning decision by INDECOPI.

Law stated - 20 mayo 2024

Pre-clearance closing

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.

However, in 2009, INDECOPI imposed a sanction (100 UITs) for gun-jumping practices under Law No. 26876 for a cross-border operation that had local effects. In that 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.

Law stated - 20 mayo 2024

Pre-clearance closing

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

Law No. 31112 (the Merger Act) and Supreme Decree No. 039-2021-PCM (the Regulation) do not contain explicit provisions on carve-outs that set specific legal requirements allowing parties to close a transaction outside Peru before clearance has been issued by INDECOPI.

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

Law stated - 20 mayo 2024

Public takeovers

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.

Takeover bids have specific regulations issued by the Superintendency of the Securities Market in the relevant field.

Law stated - 20 mayo 2024

Documentation

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 and the notification forms detail 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 other things, documents that support the following information:

1. Identification data of the notifying economic agent.
2. 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.
3. Description and objective of the concentration operation and identification of the economic agents involved in it. For these purposes, the following must be included:
 - a copy of the final or most recent version of the agreement or contract signed on the concentration operation or, 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 (eg, a memorandum of understanding or letter of intent);
 - a copy of the minutes of the meetings of the management and administration bodies of the companies involved at which the concentration operation, the reasons for its execution and its effects have been discussed; and
 - a 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.
4. Description of the ownership and control structure of each of the economic agents involved in the operation, and their respective economic groups.
5. Identification of the kinship, property or management ties existing between each of the economic agents described in point (4) with respect to other companies operating in the country.
6. Identification and description of the markets involved in the concentration operation. For such purposes, 'markets involved' are understood to be the markets in which the economic agents that directly intervene in the concentration operation and their respective economic groups participate. A copy of studies, reports, analyses, 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.

7. 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.
8. 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 the authorities must be provided. This may be reported after the application is submitted.
9. 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 UITs, which is equivalent to 2.58 million soles for 2024, provided that the 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 may be subject to a fine of up to 1000 UIT, which is equivalent to 5.15 million soles for 2024, provided that the amount does not exceed 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.

Law stated - 20 mayo 2024

Investigation phases and timetable

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 National Directorate of Investigation and the Promotion of Competition (formerly the Technical Secretariat of the Commission) 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 National Directorate 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, it would be advisable to file a voluntary notification.

Prior approval proceedings are organised in phases. The first-phase review period is 30 business days, which 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 has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 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.

Law stated - 20 mayo 2024

Investigation phases and timetable

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 has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 120 business days. It is not possible to speed up a request.

To date, the authorisations filed before INDECOPI have been granted without conditions, during the first phase, within two and a half months of the date of filing. In second phase cases, authorizations have been granted, with conditions, within 10 months of the date of filing.

Law stated - 20 mayo 2024

SUBSTANTIVE ASSESSMENT

Substantive test

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 competition in the markets involved.

This test should include, among other things:

- 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, investment, horizontal or vertical restrictions) that impede access to the market;
- the economic and financial power of the companies involved;
- the creation or strengthening of a dominant position; and
- the generation of economic efficiencies.

Law stated - 20 mayo 2024

Substantive test

Is there a special substantive test for joint ventures?

No.

Law stated - 20 mayo 2024

Theories of harm

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

There are no specific theories of harm contained in Law No. 31112 or Supreme Decree No. 039-2021-PCM. However, under Law No. 26876, the National Institute for the Defence of Competition and Protection of Intellectual Property has usually analysed the market concentration, unilateral effects, vertical foreclosure, common ownership effects and conglomerated effects, among other things.

Law stated - 20 mayo 2024

Non-competition issues

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

To date, no cases have been decided on explicit non-competition issues.

Law stated - 20 mayo 2024

Economic efficiencies

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 on 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.

Law stated - 20 mayo 2024

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

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

Law No. 31112 (the Merger Act) establishes that concentrations that have been closed before clearance will not have any legal effects in Peru.

Law stated - 20 mayo 2024

Remedies and conditions

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

The Merger Act authorises parties to offer commitments to remedy competition concerns that arise owing to the concentration. Neither the Merger Act nor Supreme Decree No. 039-2021-PCM describe any of the remedies that could be offered.

INDECOP may authorise a concentration subject to the fulfilment of a condition of conduct.

Law stated - 20 mayo 2024

Remedies and conditions

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 competition concerns that arise during the evaluation within 15 business days of the date the authorisation request is deemed complete. Commitments can be modified within 10 business days of the submission, if applicable.

The first phase will be suspended by up to 15 business days, which may be extended by 15 additional business days. After this period, the Competition Commission at INDECOP (the Commission) may deny or authorise the commitments.

In the latter case, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Those parties will submit their comments within five business days, after which the Commission will issue its final decision.

In the second phase, commitments may be submitted within 40 business days of the beginning of the phase and can be modified within 10 business days after that period. The second phase will be suspended by up to 15 business days (this period may be extended by

30 additional business days). After this period, the Commission may deny or authorise the commitments.

In the latter case, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Those parties shall submit their comments within 10 business days, after which the Commission will issue its final decision.

Regarding the conditions imposed by INDECOPI, the authority establishes a period for its review. The Commission determines whether upon expiration the condition is maintained, overturned or modified, and the decision may be appealable. During the 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 an economic agent considers that there is a change in the conditions of competition in the market during the review period established, it may request the Tribunal for the Defence of Competition at INDECOPI (the Tribunal) (second instance) to reverse or modify the referred condition.

In that 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).

Law stated - 20 mayo 2024

Remedies and conditions

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

No foreign-to-foreign mergers in which the authority has required remedies have been observed at the time of writing.

The Merger Act is applicable to any operation that produces 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).

Law stated - 20 mayo 2024

Ancillary restrictions

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

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

Law stated - 20 mayo 2024

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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 (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPi). This must be done within 10 business days of 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 INDECOPi website.

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 authority requires it or when they wish to formulate one.

Law stated - 20 mayo 2024

Publicity and confidentiality

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.

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 that decision.

The involved parties may request that the information provided is kept confidential. This must be approved by the Commission. If so, only a non-confidential version will be made public.

Law stated - 20 mayo 2024

Cross-border regulatory cooperation

Do the authorities cooperate with antitrust authorities in other jurisdictions?

Within the framework of an international agreement or an arrangement with a foreign competition authority, INDECOPi may investigate anticompetitive conduct in the national territory of Peru and may exchange information, including confidential information, with the competent authorities of countries that are part of the agreements or conventions.

INDECOPI has cooperated with many international authorities and jurisdictions to uncover anticompetitive practices in Peru and abroad.

Law stated - 20 mayo 2024

JUDICIAL REVIEW

Available avenues

What are the opportunities for appeal or judicial review?

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

A decision issued by the Tribunal may be questioned or appealed via judicial review within three months of its notification.

Law stated - 20 mayo 2024

Time frame

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

At the time of writing, since Law No. 31112 (the Merger Act) and Supreme Decree No. 039-2021-PCM came into force on 14 June 2021, no cases have been appealed; however, the Merger Act establishes that the Tribunal shall issue its final decision within 90 business days of the date the appeal was filed.

Judicial review does not have a clear time frame.

Law stated - 20 mayo 2024

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

At the time of writing, 40 cases have been approved in the first phase without conditions and two in second phase with conditions. There are presently two first-phase cases and three second-phase cases pending. No cases have been rejected to date.

To date, there have been no cases in which sanctions have been issued, or ex officio investigations carried out.

Law stated - 20 mayo 2024

Reform proposals

Are there current proposals to change the legislation?

No.

Law stated - 20 mayo 2024

UPDATE AND TRENDS

Key developments of the past year

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

No updates at this time.

Law stated - 20 mayo 2024