

New Peruvian Merger Control Complementary Regulations (March 2021)

The Peruvian Government approved through Supreme Decree N° 039-2021-PCM the Regulation of Law N° 31112 ("Regulation"), which establishes the prior control of business concentration operations. The Regulation was published in the Official Gazette El Peruano on March 4, 2021.

Subject to the adaptation of the Regulation of the Organization and Functions Law of the National Institute for the Defense of Competition and Protection of Intellectual Property ("INDECOPI") and other complementary instruments, it is possible that Law No. 31112 ("Law"), which establishes the prior control of business concentration operations, and the Regulation will enter into force in the first half of April 2021.

Summary Breakdown

Application: For all acts of business concentration 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 the country. It also includes economic agents that offer or demand goods or services in the market and carry out acts of business concentration that produce or may produce anti-competitive effects in all or part of Peru.

Threshold determination: The Law details the types of operations that qualify as concentration acts, as well as the thresholds from which these types of acts must pass through prior control. 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 business concentration operation is notified, the following rules shall be considered according to each type of operation:²

- 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.
- 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.

¹ A business concentration operation (i.e. act or operation that involves a transfer or change in control of a company or part of it) is subject to the prior control procedure when the following is concurrently fulfilled:

a. The total sum of the value of annual sales or gross income or value of assets in Peru of the companies involved in the business concentration operation has reached during the fiscal year prior to that in which the operation is notified, a value equal to or more than one hundred eighteen thousand (118,000) Referential Tax Units ("UIT"), equivalent to S/. 519.2 million or approximately USD 148.3 million for the year 2021.

b. The value of annual sales or gross income or value of assets in Peru of at least two of the companies involved in the business concentration operation have reached, during the fiscal year prior to that in which the operation is notified, a value equal to or greater than eighteen (18,000) UIT, equivalent to S/. 79.2 million or approximately USD 22.6 million by 2021.

² The Regulation establishes that one of the 2 parameters must be met, that is: (i) sales or gross income; or, (ii) book value of assets.

- 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.³

According to the Regulation, when the Law establishes that the individual thresholds must consider the value of annual sales or gross income or value of assets in Peru of at least 2 of the companies involved in the business concentration operation, such companies are referred to each economic agent and their respective economic group. The calculation of the annual sales, gross income, or the book value of the assets for each economic agent must follow the rules described above.

Consecutive operations. The Law considers as a single concentration operation the set of acts or operations carried out between the same economic agents within a period of 2 years. Such operation must be reported before the execution of a transaction or act that exceeds the thresholds. In this case, the Regulation establishes that to determine the thresholds, the annual sales or gross income earned or the book value of the assets the corresponding country in the last fiscal year prior to the operation that triggered the notification will be considered.

Ex officio review by INDECOPI: The Law establishes the possibility for the Technical Secretariat of the Antitrust Commission of INDECOPI ("Technical Secretariat") to act ex officio in cases where reasonable indications are identified that the concentration operation can generate a dominance position or affect competition in the relevant market. To this end, the Regulation details some of the special circumstances that would motivate action by the Technical Secretariat.⁴ 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 in person 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 it determines that the business concentration operation could generate possible significant restrictive effects on the competition, the Antitrust Commission of INDECOPI ("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.

In the first 75 business days after the initiation of the evidentiary stage (after notification of the initiation resolution), the Technical Secretariat and the economic agents subject to review may

³ 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 business concentration operation.

⁴ Special circumstances are considered, among others, the cases detailed below:

- a. Horizontal business concentration operations carried out in concentrated markets.
- b. Horizontal business 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.
- c. Horizontal business concentration operations in which the acquiring economic agent or its economic group has previously carried out business concentration operations that involved the acquisition of a competitor.
- d. Other business concentration operations that have the potential to generate possible significant restrictive effects on competition.

jointly formulate an agreement for the early conclusion of the procedure that incorporates measures that eliminate or mitigate the possible restrictive effects on competition that the concentration operation could generate. If the Commission approves the proposal, it issues a resolution concluding the ex officio review procedure of the business concentration operation. The resolution includes a work schedule for the implementation and supervision of the agreed measures, as well as the participation of a monitor, who may be appointed and removed, in charge of monitoring for compliance. If the Commission rejects the proposal, they will issue a resolution with its decision and continue with the ex officio review procedure of the business concentration operation.

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.

Participation of third parties: It is established that 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 business 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 business concentration operation when the competition authority requires it or when they wish to formulate it in the second phase of the authorization procedure.

Application requirements:⁵ 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 where the business 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

⁵ The request for authorization of the business concentration operation submitted to the Commission must include (in addition to the request and the date and number of the payment receipt) the documents that support the following information:

- i. Identification data of the notifying economic agent
- ii. Identification data of the legal representative of the notifying economic agent, as well as the indication of his 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.
- iii. Description and objective of the business 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, send the 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 business concentration operation, the reasons for its execution and its effects have been discussed.
 - 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, the reasons for its execution and its effects.
- iv. Description of the ownership and control structure of each of the economic agents involved in the operation and their respective economic groups.
- v. Identification of the kinship, property, and / or management ties existing between each of the economic agents described in the previous point with respect to other companies operating in the country.
- vi. Identification and description of the markets involved in the business concentration operation. For such purposes, markets involved are understood to be those markets in which the economic agents that directly intervene in the business concentration operation and their respective economic groups participate. A copy of studies, reports, analyzes, 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.
- vii. When applicable, a detailed description of the efficiencies related to the business concentration operation, and how these are transferred to consumers, as well as the opportunity to transfer such efficiencies.
- viii. Identification of the countries in which the business 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.
- ix. The financial statements of the fiscal year prior to that of the notification of the economic agents involved.

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. The format will be approved by the Commission.

Simplified requirements. A simplified form⁶ with less documentation may be used if: (i) the agents involved in the economic concentration (or their economic groups) do not develop the same economic activities in the same product or geographical market or in the same production/value chain; or (ii) the economic concentration allows the acquirer to have exclusive control over a company where the former had joint control. The format will be approved by the Commission.

Voluntary Commitments. Parties may offer commitments to remedy competitive concerns that arise during the evaluation 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.

Conditions: When the authorization of a business concentration operation is subject to the fulfillment of a condition of conduct, the authority establishes a period for its review. In this regard, the Regulation establishes that 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.

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 INDECOPI's Tribunal (second instance) to reverse or modify the referred condition. In said procedure, the Tribunal 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 that imposed previously. In case the Tribunal does not issue its final resolution within the term (counted from the day following notification of the resolution to initiate the procedure, extendable for 30 business days), positive administrative silence will

⁶ The simplified notification form contains the information indicated in numbers i, ii, iv, v, vii and ix. Likewise, in the case of the description and objective of the concentration operation, you must present: (i) a 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, send those documents that account for the real and serious intention of the economic agents to execute the operation, such as memoranda of understanding, letter of intent or similar; and, (ii) List of economic activities carried out by the companies involved. Any internal or external document that identifies the economic activities carried out by the companies involved, the goods, services and distinctive signs included in such activities, the characteristics of their supply and demand must be attached; and, the existence of cooperative agreements.

be applied (for which the order made at the request of a party would proceed).

SBS:⁷ 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 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 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 business 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).

SMV:⁸ The economic agents, who have been granted authorization to operate by the SMV and who participate in business 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.

Notifications: In the case of sanctioning procedures, the initiation resolution is reported to the economic agents involved or to any of the companies of their economic group with a legal domicile in Peru.

Administrative Sanctioning Procedures. The decision issued by the Commission in the framework of an administrative sanctioning procedure may be appealed within a period of 15 working days.⁹ The Tribunal has a period of 90 working days to resolve the appeal.

Registrations of Concentrations in the Public Registry: 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. Notaries will not be able to create a public deed of the instruments that are presented without said affidavit.

Public-Private Associations: If, within the framework of a promotion process in Public Private Associations, the competent Private Investment Promoting Agency ("OP") for the development of said projects identifies that competition has a role in the regulatory contractual design, and if the project may generate risks to the competition, a report can be requested from the Commission on the possible effects on competition that could generate business concentration operations involved in said process. The report is requested by the OP up to and including the evaluation and selection stages and before the contract is signed. If the Commission does not make a pronouncement within 30 business days of receiving the information required from the economic agents involved, the OP will validly assume that there are no effects on the competition.

The Law and the Regulations will not be applicable to those projects of public infrastructure and provision of public services under the modality of Public Private Association, by state initiative, which, on the date of entry into force of the Law, are in the structuring or transaction stage. and

⁷ Superintendency of Banking, Insurance and Pension Fund Administrators

⁸ Superintendency of the Securities Market

⁹ The term of said procedure in case of infractions is the following: (i) 25 business days for discharges; (ii) 4 months of actions by the Technical Secretariat; (iii) 20 business days to issue a final report (notified within 5 business days); (iv) 10 business days to formulate discharges and oral report (in which case the evaluation period can be extended by 15 additional business days); (v) 20 business days to issue final resolution (5 business days to be notified). The terms described above are applicable as the previous stage has been completed.

are awarded before December 31, 2021; and, to those investment projects under the same modality, by private initiative, that are in a stage after the opinion of relevance of the sector.

For any clarification or extension regarding the content of this memorandum, please contact Dr. Carlos A. Patrón, Dr. Julia Loret de Mola, Dr. David Kuroiwa or Dr. Giancarlo Baella at +51 1 612-3202. To obtain a copy of the commented regulations, please contact Mr. Paul Manrique at the following email address: pmb@prcp.com.pe.



Band 1:
Corporativo/Fusiones y Adquisiciones
Competencia/Antimonopolio
Chambers Latin America 2021



Tier 1:
Corporativo/Fusiones y Adquisiciones
Competencia/Antimonopolio
Legal 500 (2021)



Elite en:
Competencia/Antimonopolio
Global Competition Review 2021



Leading en:
Fusiones y Adquisiciones
Competencia/Antimonopolio
Leaders League (2021)

Contacts:

Carlos A. Patrón
cap@prcp.com.pe

David Kuroiwa
dkh@prcp.com.pe

Julia Loret de Mola
jld@prcp.com.pe

Giancarlo Baella
gbp@prcp.com.pe