

WITH THE SUPPORT OF



# THE MERGER CONTROL REGIME IN PERU

STATE OF PLAY COMING UP  
TO EIGHTEEN MONTHS IN FORCE

GARRIGUES

## NOVEMBER 2022

This document was prepared with the participation of members of the Antitrust, Economic Regulation and Intellectual Property Department at the Garrigues office in Peru: Ivo Gagliuffi and Javier Coronado, project leaders, along with María Isabel Alvarado, Regina de la Cruz, Eduardo Ubaldo, Andrea Ho and Marcello Otárola.

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# 1. INTRODUCTION

## REASONS, CONTRIBUTION AND OBJECTIVES

Roughly eighteen months ago, on June 14, 2021, Law 31112 came into force, which introduced merger control definitively in Peru, applicable across all the country's sectors of economic activity and markets; because until then it only existed for the electricity industry<sup>1</sup>.

The Peruvian merger control regime is led by INDECOPI, and the components of its regulatory framework are Law 31112 and its Regulations, approved by Supreme Decree 039-2021-PCM, as well as the Guidelines for Calculating the Notification Thresholds and others that the Antitrust Commission will continue issuing to provide better guidance to users<sup>2</sup>.

The Spanish Chamber of Commerce, in conjunction with Garrigues, has drawn up this executive report to provide a straightforward and user-friendly description of the regime and of the state of play after its first steps.

## WHAT ARE THE OVERALL OBJECTIVES OF MERGER CONTROL?

Although a large majority of mergers between businesses usually take place to achieve business growth and have positive effects on the economy, it is also a fact that these types of transactions can sometimes affect the efficiency of the markets if they have the effect of reducing competition significantly.

- <sup>1</sup> The first piece of Peruvian legislation connected with merger control was actually Law 26876, the 1997 Antimonopoly and Antioligopoly Law on the Electricity Industry, but it only applied to the electricity industry.

Also, the first national piece of legislation to lay down merger control across the board, in other words applicable to all economic sectors, was not Law 31112 but Urgency Decree 013-2019 issued by the Executive Branch of Government on November 19, 2019, during the parliamentary power gap that took place as a result of the dissolution of Congress.

Later, both Law 26876 and Urgency Decree 013-2019 were repealed by Law 31112 (although Urgency Decree 013-2019 had repealed Law 26876 earlier).
- <sup>2</sup> Currently a project is awaiting approval, involving Guidelines for the Assessment and Analysis of Mergers, after a draft was published for comments.

The easiest way to understand this last option is to imagine a scenario in which a market has only two competitors, A and B. A merger between these companies could create company C which would have a monopoly.

Naturally, a company which obtains a monopoly or acquires a significant size in the market, as a result of a merger, may have the ability, and the incentives, to increase its prices, reduce its production volume or even cease to feel market pressure to improve its services, introduce innovations or new varieties of products or services.

This all has an adverse effect on the efficient functioning of the market and may be harmful to consumer wellbeing.

A merger control regime allows an authority to assess certain economically large-scale transactions, to determine whether they are expected to generate a significant restrictive effect on competition, principally due to acquisition of, or increase in, dominant power in the market of the companies involved.

## MERGER CONTROL AND ANTICOMPETITIVE PRACTICES CONTROL: SUPPLEMENTARY TOOLS

What is the point of having merger control if anticompetitive practices control already exists?

In Peru anticompetitive practices control is governed by Legislative Decree 1034, the Law on Containment of Anticompetitive Practices, which is aimed at preventing business strategies that could generate adverse effects on competition and the end consumer, along with levying penalties on business players who become involved in them.

The targeted practices mainly fall into either of two types: a) collusive practices, and b) abuse of a dominant position.

Collusive practices are widely known as concerted practices or cartels, which can either occur between direct competitors (*horizontal* collusion), or between players at different stages of the chain (*vertical* collusion). The most serious and damaging types of collusion are agreements to fix prices, limit production, or allocate customers or territories, or engaging in collusive tendering.

In relation to abuse of dominant position, in Peru the law only targets practices by companies with dominant positions which are able to block the entry of new competitors or shut them out of the market (*exclusionary* effects), although it does not target the exercise of market power, meaning a company's ability to materially increase its prices above its costs (*exploitative* effects).

Merger control allows the antitrust authority to assess whether following the merger, prices could rise due to weaker competitive dynamics, or whether the merger might be expected to create scenarios in which companies may develop strategies that will affect competition. In other words, merger control can prevent the unilateral exercise of market power, something that anticompetitive practices control cannot do.

For that reason, it is widely accepted that merger control (control of structures), which implies an *ex ante* assessment exercise, is supplementary to anti-competitive practices control, a tool that is used *ex post*, when the practice has already occurred.

# 2. THE MERGER CONTROL REGIME

## WHAT DOES PERU'S MERGER CONTROL REGIME SEEK TO ACHIEVE?

In Peru this regime seeks to achieve effective competition and economic efficiency in the market, which is why the authority assesses whether a merger or acquisition is capable of affecting efficiency in a way that will be harmful to consumer wellbeing.

## WHO HAS THE AUTHORITY OVER MERGER CONTROL?

In Peru, that authority is held by the Antitrust Commission (“Commission”) attached to INDECOPI. This Commission has four independent professional members who base their decisions on their own judgment and on the information drawn up by the National Directorate for Investigation and Promotion of Competition (the “Directorate”) which, as its name suggests, is responsible for conducting technical investigation work on the potential consequences of a merger.

The Supervisory and Regulatory Authority for Banking, Insurance and Pension Fund Private Managers (“SBS”) and the Securities Market Supervisory Authority (“SMV”) also participate in the approval of mergers in certain circumstances (See **Table 1**).

**Table 1 |** Institutions responsible for the approval of mergers and acquisitions

Transaction Sector	Institution responsible for approval within its powers
Mergers and acquisitions involving business players generally.	

Mergers and acquisitions involving business players falling under the regulation and supervision powers of the SBS.



Mergers and acquisitions involving business players authorized by the SMV.



Mergers and acquisitions involving deposit-taking companies in the financial system, insurance companies which have significant and imminent risks that may compromise the soundness or stability of those companies or of the systems to which they belong.



\* The SBS determines whether a transaction fulfills these characteristics.

## WHICH TRANSACTIONS ARE SUBJECT TO THE MERGER CONTROL REGIME?

The Commission's prior clearance is mandatory for mergers or acquisitions which simultaneously fulfill the three conditions described in **Chart 1**.

### Chart 1 | Conditions in the merger control law

#### First Condition: Geographical Nexus

They must have effects in Peru, even if they are carried out in other countries

#### Second Condition: Change of Control

They must imply that the strategic control of a business player or a productive asset (a factory, for example) comes into the hands of another business player

#### Third Condition: Economic Thresholds

The business players involved meet the revenues/sales or assets thresholds defined in the Law

## WHICH TRANSACTIONS ARE CONSIDERED TO BE MERGERS OR ACQUISITIONS?

The Law has provided a list of transactions that are considered to be mergers or acquisitions, along with a list of transactions that are not classed as such (See **Chart 2**).

**Chart 2** | Transactions that are considered to be mergers or acquisitions and which are not

Transactions that are mergers or acquisitions: 	Transactions that are not mergers or acquisitions: 
<ul style="list-style-type: none"><li>• Merger between independent business players.</li><li>• Direct or indirect acquisition of rights enabling full or partial control over another business player.</li><li>• Creation of joint ventures or any other similar contractual arrangement.</li><li>• Acquisition of direct or indirect control of operating productive assets of one or more other business players.</li></ul>	<ul style="list-style-type: none"><li>• Corporate growth of a business player as a result of transactions performed exclusively within the same business group</li><li>• Internal corporate growth achieved by own investment or external financing.</li><li>• Temporary control conferred by law.</li><li>• Temporary control that financial institutions have acquired over shares of other players so as to resell them, provided that they do not exercise the voting rights.</li></ul>

Only transactions considered to be mergers have to be assessed through the filter of the merger control regime, provided the other three conditions mentioned are fulfilled.

## WHAT ARE THE ECONOMIC THRESHOLD VALUES AND HOW ARE THEY CALCULATED?

Since the practical objective of merger control is to assess whether a transaction may significantly restrict competition in the markets, the regime presupposes that only transactions involving large business players could generate those risks.

This is why two relatively easy to calculate target economic thresholds were designed to determine which transactions must apply for clearance. They must be fulfilled on a combined basis (See Table 2):

**Chart 2 | Economic thresholds in the merger control law**

Type	Calculation Method	Approximate Value inUS\$
Combined threshold	Total sum of gross annual sales or revenues figures or the carrying amount of the assets of companies involved in the transaction is equal to or above 118,000 UIT2 in Peru in the fiscal year before the transactions.	US\$ 136 million.
Individual threshold	Value of gross annual sales or revenues or carrying amount of the assets in Peru in the previous fiscal year of at least two of the companies involved in the transaction is, <u>for each one</u> , equal to above 18,000 UIT	US\$ 21 million.

NB: The interbank buy exchange rate for October 2022 was used to obtain the threshold figures in dollars.

It is enough for any one of the thresholds not to be met for there to be no obligation to apply for prior clearance for the merger or acquisition. The analysis for calculation of the two thresholds changes according to the type of transaction performed (See Table 3).

**Table 3 | Analysis of economic thresholds by transaction type**

Transaction Type	Sum of Gross Sales or Revenues or Assets of:
Merger in which one company absorbs another(A+B=A)	The companies involved and of their respective business groups
Creation of a new company by merging two or more companies (A+B=C)	
Takeover of one company by another	The acquiring company and its business group, as well as of the acquired company and the players over which it exerts control
Direct or indirect acquisition of the assets of one or more companies by a company	The acquiring company and its business group as well as the gross sales or revenues generated by the acquired operating productive assets

There are also a few technical details relating to practical application of the calculation of economic thresholds; a few examples are contained in Table 4.

**Table 4 |** Other principles for calculation of the economic thresholds

Variables	Principles
Exports	Not added to gross sales or revenues
Export-oriented assets (plant, equipment, etc.)	If more than 50% of the sales generated by the assets are exports, the carrying amount of those assets is not included to calculate the thresholds
Business relationships between companies in the same business group	Sales between companies in a same business group are not included to calculate the thresholds

## WHAT IS INDECOPI'S PROCEDURE ?

The procedure may be conducted in one or two phases, depending on whether the transaction does not give cause for competition concerns or whether, to the contrary, there are indications that it will cause significant effects on competition which will have to be studied further.

Transactions less likely to cause significant restrictive effects on competition will be approved in the first phase (Phase I), for which the decision period is 30 business days. This period may be extended to 65 business days as a result of a range of steps that may be required by the authority. Transactions that give cause for concern over their potential significant effects on competition will have to continue their assessment in the second phase (Phase II), for which the decision period is 90 business days, a period that may be extended up to 145 business days.

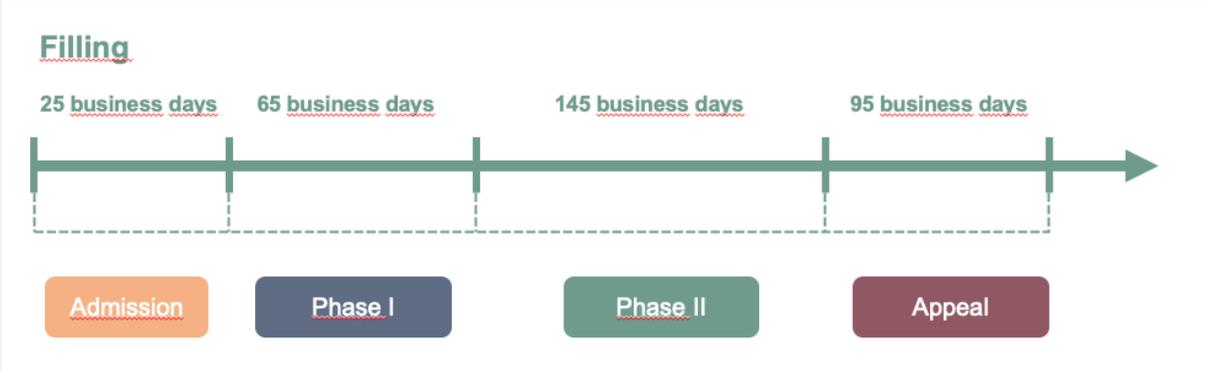
Any extensions to these periods will be for reasons relating to any steps taken in the procedure (requests from third parties, verbal reports, filing of commitments, notification periods, among others). If the institution does not deliver a decision in the clearance procedure within the legally determined period, it will be considered that the transaction has been approved under the “approval by administrative silence” principle.

At any point in both phases, companies may file commitments to prevent or reduce the potential anticompetitive effects linked to the transaction.

The decision adopted at first instance by the Commission may be appealed and will be settled within an approximate period of up to 95 business days by the Special Antitrust Chamber of the INDECOPI Tribunal which is the second instance under public law.

In more complex cases, the merger control procedure, plus the prior admission stage, plus both first-instance phases (Phase I and Phase II) and a potential second instance procedure could take up to 330 business days (See Chart 3).

**Chart 3 | Stages and maximum periods in the procedure**



\* These periods include any additional steps with respect to the regular procedure specified in the merger control legislation, as well as the periods for notifying steps.

## WHAT DECISIONS MAY THE ANTIRUST AUTHORITY ADOPT?

Table 5 shows the potential conclusions that may be drawn by the authority and the decisions it may adopt in each case, depending on whether the procedure ends in Phase I or moves into Phase II.

**Table 5 | INDECOPI decision scenarios by investigation conclusions**

Investigation Conclusions	Commission’s Decision
Phase I The merger does not cause a significant restriction to competition	Give clearance to the transaction without conditions
Phase II The merger could generate a significant restriction to competition	1) Give clearance to the transaction without conditions
	2) Give clearance to the transaction with conditions or commitments. The efficiencies associated with the transaction do not outweigh the anticompetitive effects.
	Conditions or commitments are identified and laid down to prevent or mitigate the potential anticompetitive effects arising from the transaction. These conditions may be reviewed in the future with a view to keeping, changing or removing them.
	3) Not give clearance to the transaction
	The applicant business players fail to evidence the existence of economic efficiencies that outweigh the effects of the potential significant restriction on competition.
	It is not viable to lay down conditions intended to prevent or mitigate the potential effects that could arise from the merger or acquisition.

## WHICH FACTORS DOES INDECOPI ANALYZE?

The Law provides examples of the elements or factors that the authority may assess in its investigation to determine whether a merger generates significant restrictive effects on competition. In **Table 6** we describe a few factors mentioned by the Law. We also provide a summary of the typical variables and objectives of the analysis, which have been gained from international experience and the Commission's recent decisions.

**Table 6 |** Factors that INDECOPI may analyze in relation to a merger or acquisition

Factor	Typical Variables	Objective
Market structure	Concentration indicators, number of competitors, companies' production capacity	Identify the ease with which exercise of market power may be observed in the relevant markets concerned.
Actual or potential competition	Existence of competitors with productive capacity or potential entrants.	Identify whether other companies already established in the market or the potential entrants- possibly from related industries- could discipline exercise of market power.
Evolution of supply and demand for the products involved	Growth of demand and of supply	Identify whether a demand or supply expansion cycle is in motion that facilitates exercise of market power.
Distribution and marketing sources	Importance of distribution networks, distribution and marketing agreements	Identify (i) whether having a distribution network is essential and may create a barrier to entry and/or (ii) whether exercise of market power is being facilitated, in both cases, with the existence of relationships or agreements with the supplier or distributor, which may restrict entry or expansion by other competitors.
Barriers to market entry	Structural barriers: technical  Strategic barriers: players' behavior  Regulatory barriers	Identify whether entry to the market is delayed or prevented by barriers belonging to the market such as economies of scale, economies of scope, network effects, sunk costs; or by strategic barriers, such as exclusivity agreements, discounts, price discrimination, designed to restrict entry for no justifiable reason; and/or by regulatory barriers, determined by legal requirements or legal limits on competition.

The economic and financial power of the companies involved	Even if the defined variables are not identified, they may come close in terms of asset size, capacity and borrowing costs	Identify to what extent companies could incur practices consisting of abuse of dominant position which may imply short-term losses (predatory pricing) to strengthen that position and facilitate exercise of market power in the future.
Creation or strengthening of a dominant position	Market share of the companies involved	In the analysis of market shares, shares below 20% are not generally considered to give cause for material concern. However all the foregoing factors must be analyzed to confirm that indication.
Creation of economic efficiencies	Reduction of variable production costs, or innovation costs	The companies provide evidence that there are cost reductions intrinsic to the merger, which cannot be obtained in a less anticompetitive way, and are likely to be passed to consumers quickly.

## CAN A TRANSACTION BE COMPLETED WITHOUT FILING AN APPLICATION FOR MERGER CONTROL?

The Law contains penalty rules for cases where a transaction was not notified to INDECOPI and there was an obligation to do so before it was completed or where, after a transaction has been submitted for merger control, it is completed before the authority issues a decision or before the legally stipulated period has ended.

Performing a transaction prematurely in either of these two scenarios is known as “gun jumping” in competition law.

Gun jumping is treated as a serious infringement subject to a fine of up to 1,000 UIT, as long as the fine is not higher than 10% of the gross sales or revenues received by the infringing party, or its business group, relating to all of its economic activities for the immediately preceding fiscal year.

Moreover, the Law states that if it is determined that the business players have incurred a gun jumping infringement the transaction may also be declared null and void and remedial measures may be ordered involving the cancellation or sale of all acquired shares or assets, until the situation prior to performance of the transaction has been restored. If this is not possible, the Commission may order alternative measures.

The statute of limitations for any penalty action against a gun jumping practice is four years.

## CAN THE AUTHORITIES ASSESS A TRANSACTION THAT DOES NOT FULFILL THE CONDITIONS IN THE LAW FOR PRIOR CONTROL?

The legislation contains two scenarios in which a transaction is not required to be notified. Despite this, it could be assessed by the authorities in the following cases:

- ▶ **Ex officio investigation:** The Directorate may review a transaction ex officio, in the first year after formal completion where there are reasonable indications for considering that the transaction may generate a dominant position or affect effective competition in a given market. The legislation provides a few examples that give rise to those indications:
  - Horizontal transactions, in other words, transactions between direct rivals, occurring in markets that were already concentrated among a small number of companies.
  - Horizontal transactions involving the acquisition of a business player with a small share of the market, though having the potential for growth; or, of an innovative business player that recently entered the market. In this case, it is sought to identify whether the transaction qualifies as a killer acquisition.
  - Horizontal transactions in which the acquiring business player or its business group have previously performed mergers or acquisitions involving the acquisition of a competitor.

However, the legislation leaves open the option of investigating other transactions that potentially could significantly restrict competition.

If in the ex officio investigation it is determined that the merger or acquisition may generate potential significant restrictive effects on competition, then orders or measures may be imposed as considered necessary to remove or reduce those effects, which may include (should the need arise, and it is considered viable, reasonable and proportional) sale of the acquired shares or assets.

- ▶ **Voluntary notification:** The regime gives business players the option of notifying voluntarily any mergers and acquisitions which have not been performed, do not meet the notification thresholds and are apparently capable of causing risks to competition.

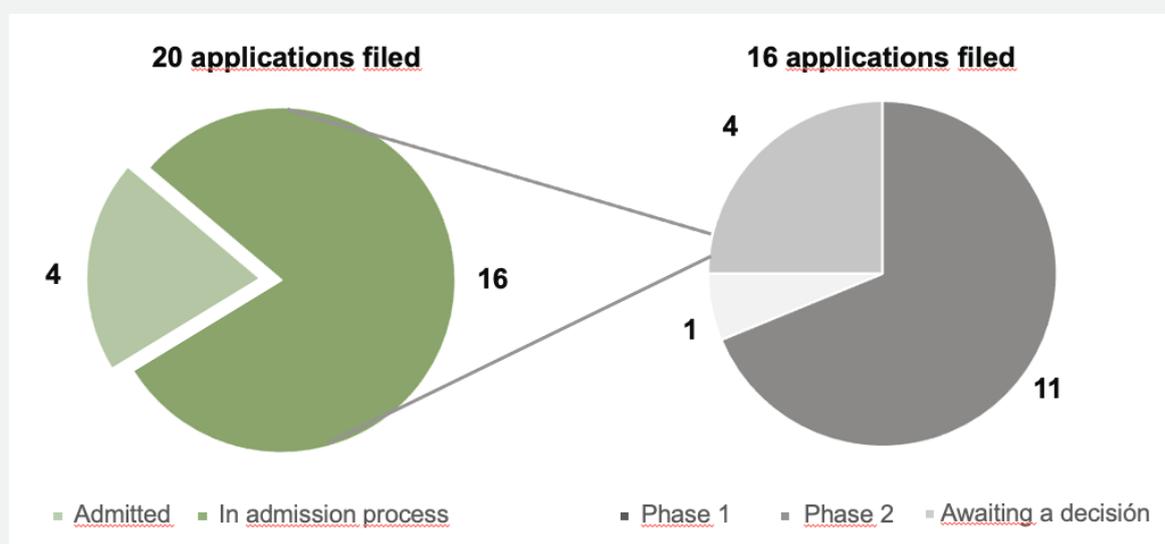
# 3. STATE OF PLAY OF MERGER CONTROL IN PERU

In this section we present the main statistics on INDECOPI's performance in the application of its merger control procedure.

## PERFORMANCE STATISTICS

**Diagram 1** shows that, as of the date of this report - that is in the first eighteen months of the regime -, INDECOPI received 20 applications for clearance of a merger or acquisition, of which 16 were admitted and 4 are currently going through the admission process. Of the 16 admitted applications, 11 transactions were approved in Phase I, meaning they did not pose risks to competition, whereas 1 was approved in Phase II, but with conditions.<sup>3</sup> In total there are 4 procedures currently in progress and awaiting a decision.

**Diagram 1 |** Filed applications and procedure status



Preparation: Own source:

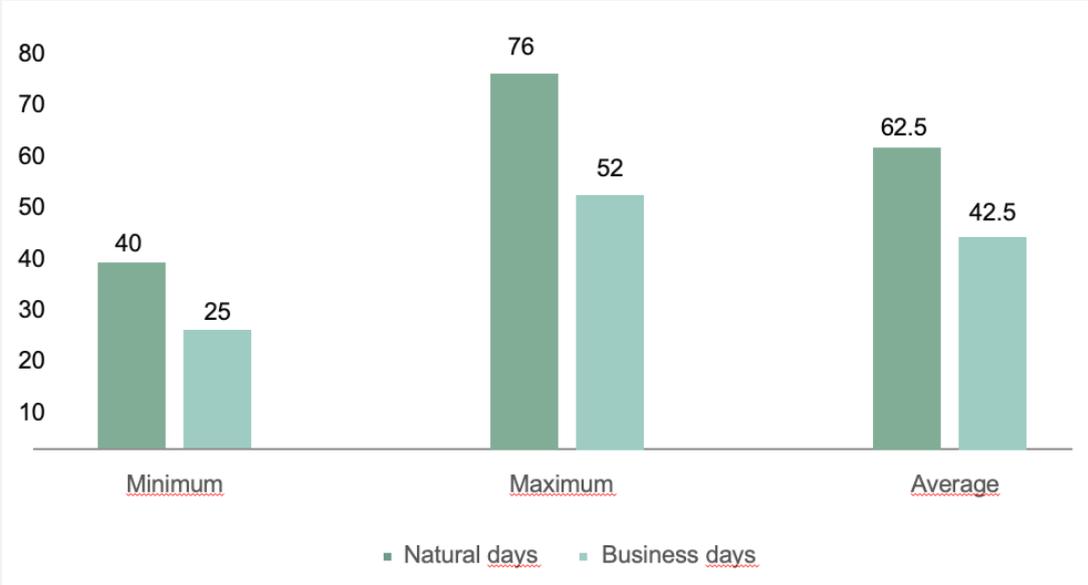
INDECOPI

<sup>3</sup> On the date of writing (November 2022) the public version of this Decision approved in Phase II was not yet available, because it was within the legal challenge period.



With regard to the decisions adopted in Phase I, the Commission delivered decisions on the applications within average periods of 42.5 business days, or 62.5 natural days (See **Diagram 2**). The legal time periods were not exceeded in any of the cases, because these figures refer to the combined number of days for the prior admission phase and Phase I.

**Diagram 2 |** Approximate decision periods in Phase 1



Preparation: Own

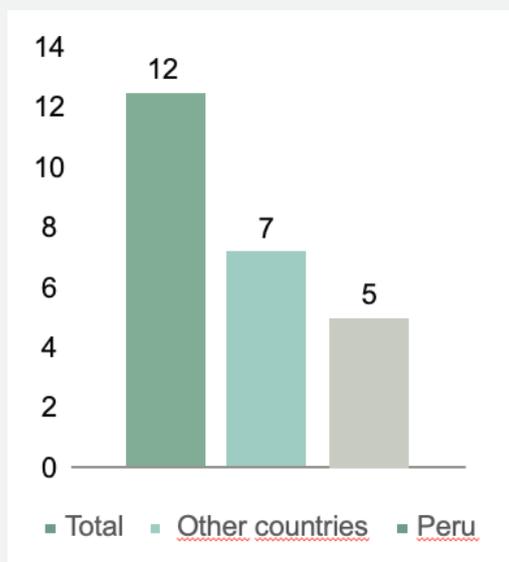
Source: Commission decisions (Public version)

## ECONOMIC STATISTICS

Of the 12 applications that already have a decision by the Commission, 7 relate to transactions originated in other countries with an impact on the Peruvian market, whereas the other 5 originated in Peru (See **Diagram 3**).

According to information made public by INDECOPI, the value of the 12 transactions that already have a decision amounts to approximately US\$ 24,075 million, of which 98.9% relates to the 7 transactions that were originated in other countries.

**Diagram 3 |** Decided applications by transaction origin



Preparation: Own

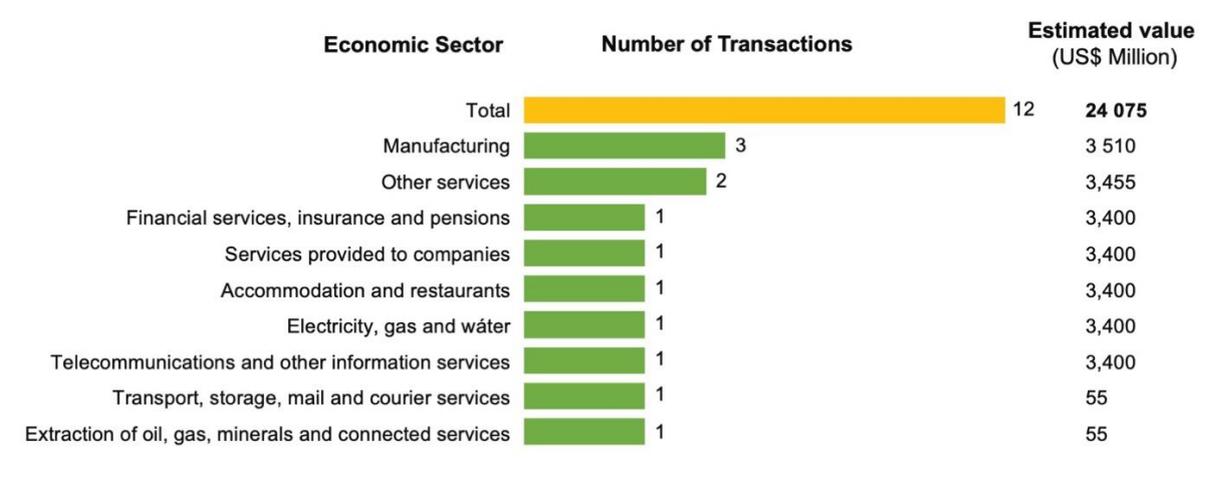
Source: Commission decisions (public version)

The economic sector with the greatest number of transactions, by reference to the sectors of the target companies, is the manufacturing sector, with 3 transactions which reportedly had a total average value of US\$ 3,510 million, which accounts for 14.6% of the aggregate value of the transactions.

In second place is the economic sector relating to Other Services, with 2 transactions which achieved on average a total value of US\$ 3,455 million, accounting for 14.4% of the aggregate value of the transactions.

**Diagram 4** shows the economic sectors of the various transactions that already have a decision by the Commission, as well as the estimated value of the transactions concerned.

**Diagram 4 |** Number of transactions by target economic sector and estimated value of the transactions



Source: Commission decisions (Public version), definitions from Peru’s National Institute of Statistics and Information Technology -INEI-, public information from Indecopi Preparation: Own

From the standpoint of the types of overlaps that may be observed in the markets, from among the activities of the acquiring companies and target companies three types of mergers and acquisitions have been identified.

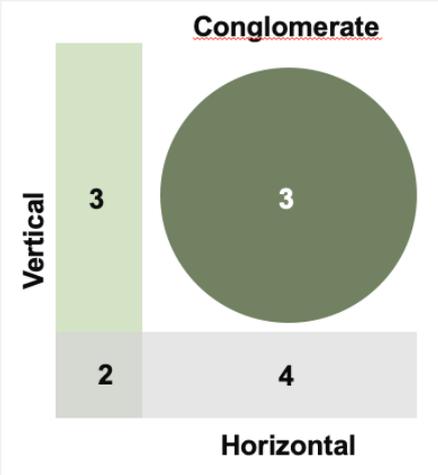
Transactions with horizontal overlaps, where the acquirer and target compete directly in the market. These types of transactions are the ones most likely to generate impacts on competition.

Transactions with vertical overlaps, where the acquirer and target company do not compete directly, but operate on markets that have a supply relationship along the value chain. Generally these types of relationships usually generate positive efficiencies in the markets; however, at times they could generate some form of risk of obstructing entry to basic supplies or to important customers.

Lastly, where the acquirer and the target company operate in unrelated markets, the transactions are conglomerate mergers or acquisitions. These types of transactions do not generally give cause for concern in relation to competition. The legislation recognizes this fact by also setting out a simplified notification process in these cases.

**Chart 4** shows the results of our analysis in relation to the 12 transactions that already have a Commission decision. Of this total, 3 transactions may be classed as conglomerate mergers or acquisitions, 3 transactions were found only to have vertical overlaps and 4 transactions were found to be horizontal mergers or acquisitions. Interestingly, for the other 2 transactions, both horizontal and vertical overlaps were identified.

**Chart 4 |** Number of decided transactions by type of competitive overlap



Preparation: Own

Source: INDECOPI (information taken from public decisions)

**Table 7 |** Origin of companies involved in the transactions

Transaction	Companies Involved	Origin
<b>1. Decision 087-2021/ CLC-INDECOPI</b>	Adquiriente: Patagonia Holdco LLC	Domiciliada: Estados Unidos de América Domiciled: USA
	Target 1: Level 3 GC Limited	Domiciliada: Estados Unidos de América Domiciled: USA
	Target 2: Global Crossing Americas Solutions, LLC	Domiciliada: Estados Unidos de América Domiciled: USA
	Target 3: CenturyLink Latin America Solutions, LLC	Domiciliada: Bermudas Domiciled: Bermudas
<b>2. Decision no 098-2021/ CLC-INDECOPI</b>	Adquiriente: Grupo Vinci S.A.	Domiciliada: Francia Domiciled: France
	Target: Cobra Servicios, Comunicaciones y S.L.U	Domiciliada: España Domiciled: Spain
<b>3. Decision no 003-2022/ CLC-INDECOPI</b>	Adquiriente: APMH INVEST XXVIII AB	Constituida: Suecia Formed: Sweeden
	Target: Unilabs Holding AB	Constituida: Suiza Formed: Switzerland

<b>4. Decision no 005-2022/ CLC-INDECOPI</b>	Adquiriente: Nugil S.A.A. (Nugil)	Constituida: Colombia Formed: Colombia
	Target: Nutresa S.A.	Constituida: Colombia Formed: Colombia
<b>5. Decision 007-2022/ CLC-INDECOPI</b>	Adquiriente: FLS Germany Holding GmbH (FLS)	Constituida: Alemania Formed: Germany
	Target: TK Mining	Constituida: Alemania Formed: Germany
<b>6. Decision 017-2022/ CLC-INDECOPI</b>	Adquiriente: Norcobre S.A.C	Domiciliada: Perú Domiciled: Peru
	Target: Contonga Minería S.A.C	Constituida: Perú Formed: Peru
<b>7. Decision 021-2022/ CLC-INDECOPI</b>	Adquiriente: Intercorp Financial Services Inc. (IFS)	Constituida: Panamá Formed: Panama
	Target: Procesos de Medios de Pago S.A.C. (PMP)	Constituida: Perú Formed: Peru
<b>8. Decision no 025-2022/ CLC-INDECOPI</b>	Adquiriente: Centro Logístico y de Fabricación S.A.C.	Belonging to Grupo Intercorp (Perú)
	Target: Ferreycorp S.A.A	Operaciones en Perú Transactions in Peru
<b>9. Decision 037-2022/ CLC-INDECOPI</b>	Adquiriente: Crystal Realty 2 S.A.C.	Domiciliada: Perú Domiciled: Peru
	Target: Edificio (activo)	Ubicado en Lima (Perú) Located in Lima (Peru)
<b>10. Decision no 043-2022/ CLC-INDECOPI</b>	Adquiriente: Al Makani- Luxembourg S.A.R.L.	Domiciliada: Luxemburgo Domiciled: Luxembourg
	Target: Holding Hotelera GHL S.A.S.	Operaciones en Perú Transactions in Peru
<b>11. Decision no 045-2022/ CLC-INDECOPI</b>	Adquiriente: Técnica Avícola S.A. (Tecavi)	Constituida: Perú Formed: Peru
	Target: Oregon	Constituida: Perú Formed: Peru
<b>12. Decision no 045-2022/ CLC-INDECOPI</b>	Adquiriente: Pharmaceutica Euroandina S.A.C.	Domiciliada: Perú Domiciled: Peru
	Target: Hersil S.A.	Domiciliada: Perú Domiciled: Peru

Source: Commission decisions (public version) Preparation: Own

# PRINCIPLES IN PRELIMINARY ECONOMIC ANALYSIS

From the Commission decisions delivered in Phase I, a few principles may be taken for distinguishing transactions that are unlikely to generate significant effects on competition, from those that might need a further study of their potential effects.

In **Table 6** we summarize the main features of a few of these principles which are based on *indicative evidence*, mainly through variables which, indirectly, give an idea of the competition conditions in the markets and how they could change as a result of a merger.

In addition to these principles, the Commission could also study the existence of *non-competition clauses*, as well as the existence of regulations that may generate barriers to entry for new competitors to the market, among other relevant matters.

**Table 8 |** A few economic principles applied by the Commission

Type of Overlap	Market Shares	Concentration Indicators and other Principles	Presence of Competitors
<b>Horizontal</b>	<p>The notification form states that for combined market shares below 20% it is not necessary to file detailed information on the market, which could indicate that transactions generating combined market shares below that figure might not give rise to significant restrictions to competition.</p> <p>This indicator has been observed in practice because the Commission has taken a 20% market share as a threshold for determining potentially concerning mergers.</p> <p>The Commission has even held in practice that shares close to 30% do not give cause for concern over competition if the concentration level only increases marginally.</p>	<p>It takes into account the guidelines by the European Commission and by the Federal Trade Commission (FTC) in the U.S. for the assessment of horizontal mergers by reference to the Herfindahl-Hirschman Index (HHI).</p> <p>Broadly speaking, horizontal mergers that generate increases in concentration indexes below 100 points, would be presumed not to give rise to significant restrictions on competition.</p>	<p>The existence of competitors with greater market shares than those of the players involved may reduce the risk of anticompetitive effects.</p>

<p><b>Vertical</b></p>	<p>The notification form states that for companies' individual shares below 30% in vertically related markets, it is not necessary to file detailed information on that market. This could indicate that transactions in which there are vertically related companies with market shares below 30% will not give cause for concern as to the effects of foreclosure.</p> <p>Foreclosure implies that after the merger has taken place, the vertically related companies can shut their competitors out of either supply or customer markets.</p>	<p>The Commission has made reference to the European Commission's guidelines on the assessment of non-horizontal mergers.</p> <p>In this case, the Commission would assessability, incentives and effects with regard to generating foreclosure strategies for supply and/or customer markets.</p> <p>Generally, vertically related companies with market shares below 30% would not be able to give rise to a foreclosure of the market.</p>	<p>The diversity of independent supply with comparable technology and characteristics reduces the potential vertical anticompetitive effects.</p>
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# 4. CONCLUSIONS AND THOUGHTS

In the first eighteen months of its validity, Law 31112, which definitively introduced merger control in Peru, has left a few important lessons for the business sector and society generally.

Firstly, its application procedures and standards appear to be quite clear and straightforward, which has enabled a relatively trouble-free adoption process.

Secondly, the decisions adopted by the authority have observed the legal time periods, which shows the commitment and effort by INDECOPI's technical teams which have responsibility for this important public policy tool, in particular the Commission with technical support from the Directorate.

Thirdly, the principles adopted in practice by the authority are generally based on international standards and therefore make it easier to predict the types of transactions that could give cause for competition concerns.

The future may bring new challenges for this public policy tool. However, with clear rules, well prepared technical teams, and a close dialog between the authority and the business players, we hope that these may be overcome for the benefit of the wellbeing of society as a whole.

# GARRIGUES

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