


GARRIGUES

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# The merger control regime in Peru

State of Play after Three Years in Force

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It has also been reviewed, and received contributions and validation, by the Spanish Chamber of Commerce in Peru.



# 1. Introduction

## Reasons, contribution and objectives

Roughly three years 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.

The Peruvian merger control regime is led by National Institute for the Defense of Competition and Intellectual Property Protection (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 notification thresholds, the Guidelines for the characterization and assessment of mergers and acquisitions, and any other soft law documents that the authorities may issue at a later date to provide better guidance to users.

The Spanish Chamber of Commerce in Peru ("COPEP" - Cámara Oficial de Comercio de España en el Perú), in conjunction with Garrigues, published in 2022 the first report on the merger control regime in Peru and the state of play coming up to a year and a half in force, containing a preliminary analysis on the implementation of that legislation in Peru. Later, in 2023 a second report was published with the state of play regarding the implementation of the regime after two years in force ("2023 Report").

Now that we have come to the end of the third year of the merger control regime, COCEP and Garrigues have decided to publish an update of the state of play to include the new additions to merger control in Peru, and present the main achievements in this area in an executive and straightforward format.



## 2. The merger control regime

### What does it seek to achieve?

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







### Who has the authority over merger control?

That authority is held in Peru by the Antitrust Commission (the “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 independent 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 economic agents generally.	 Indecopi
Mergers and acquisitions involving economic agents falling under the regulatory and supervisory powers of the SBS.	 Indecopi  SUPERINTENDENCIA DE BANCA, SEGUROS Y AFP
Mergers and acquisitions involving economic agents authorized by the SMV.	 Indecopi  SMV SUPERINTENDENCIA DE VALORES Y SEGUROS
Mergers and acquisitions involving deposit-taking institutions in the financial system, or insurance companies which present significant and imminent risks, or risks posing a threat to the soundness or stability of those companies or of the systems to which they belong <sup>1</sup> .	 SUPERINTENDENCIA DE BANCA, SEGUROS Y AFP

<sup>1</sup> The SBS determines whether a transaction meets these characteristics.

## Which transactions are subject to the merger control regime?

The Commission's prior clearance is mandatory for mergers or acquisitions that simultaneously fulfill the three conditions described in [Chart 1](#).

**Chart 1**

Conditions in the merger control law

1

### First condition: geographical nexus

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



2

### Second condition: change of control

They must involve the strategic control of an economic agent or a business asset (a factory, for example) coming into the hands of another economic agent.



3

### Third condition: economic thresholds

The economic agents involved must meet the revenues/sales or assets thresholds defined in the Law.



## Which transactions are classed as mergers or acquisitions?

The Law has provided a list of transactions that are classed as mergers or acquisitions, along with a list of those that are not ([See Chart 2](#)).

**Chart 2**

Transactions that are classed as mergers or acquisitions and transactions that are not

### Transactions that are mergers or acquisitions:

- Merger between independent economic agents.
- Direct or indirect acquisition of rights enabling full or partial control over another economic agent.
- Creation of joint ventures or any other similar contractual arrangement.
- Acquisition of direct or indirect control of operating business assets of one or more other economic agents.



### Transactions that are NOT mergers or acquisitions:

- Corporate growth of an economic agent, arising from transactions performed exclusively within the same business group.
- Internal corporate growth achieved by own investment or external financing.
- Temporary control conferred by law.
- Temporary control that financial institutions have acquired over shares of other agents so as to resell them, provided that they do not exercise voting rights.



Only transactions that are classed as mergers or acquisitions have to be assessed through the filter of the merger control regime, provided the other three conditions we mentioned above are fulfilled.



## What are the economic threshold values and how are they calculated?

Because 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 economic agents could create those risks.

That 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):

**Table 2**  
Economic thresholds in the merger control law

Type	Calculation method	Approximate Value in US\$
Combined Threshold	The aggregate gross annual sales or revenues figures or the carrying amount of the assets in Peru in the previous fiscal year of the companies involved in the transaction is equal to or above 118,000 UIT <sup>2</sup> .	154 million.
Individual Threshold	The value of gross annual sales or revenues or the 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 or above 18,000 UIT.	24 million.

NB: The interbank exchange rate for June 2024 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 varies from one type of transaction to another (See Table 3).

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

Transaction type	Aggregate 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 agents 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 <b>acquired operating business assets</b>

<sup>2</sup> In 2023 the UIT was equal to S/ 4950.

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 methods for calculating economic thresholds

Variables	Methods
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 amounts of those assets are not included in the threshold calculation
Business relationships between companies in the same business group	Sales between companies in a same business group are not included in the threshold calculation

## What is Indecopi's procedure?

Before the procedure starts, there is an optional pre-filing mechanism, in which the parties involved in a transaction can request information on a guidance basis from the Directorate to determine (i) whether or not the transaction falls within the scope of Law 31112, or (ii) what information is needed to file an application for clearance. Although the law does not specify any time periods for this procedure, the Directorate usually replies to the prior request in roughly between 1 and 2 weeks, depending on the complexity of the case.

After the application for clearance has been filed, the admission stage begins, in which the Directorate reviews whether the application meets all the requirements laid down in the applicable legislation. If it does, the application is admitted for consideration and the procedure starts; otherwise, it is considered not to have been filed. This stage can last up to 25 business days.

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 80 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 to 185 business days.

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

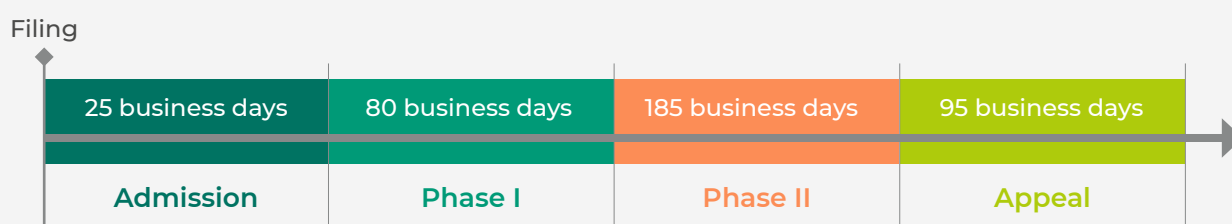
At any point in either phase, companies may file commitments to prevent or reduce any potential anticompetitive effects associated with the transaction.

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, consisting of a first-instance (Phase I and Phase II) and a second-instance procedure could take up to 385 business days (See Chart 3).

**Chart 3**

Stages and maximum periods in the procedure



\* These periods include any additional steps on top of the authority's regular procedure, as specified in the merger control legislation, as well as the periods for notifying steps. It needs to be noted that requests for hearings by the parties involved could increase the time period by a further 15 business days in Phase I or Phase 2.

## What decisions may INDECOPI adopt?

Table 5 sets out the potential conclusions that may be drawn by the antitrust 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
<b>Phase I</b> The merger does not cause a significant restriction of competition	Give clearance to the transaction without conditions



Investigation conclusions	Commission's decision
<b>Phase II</b> The merger could create a significant restriction of competition	<b>1) Give clearance to the transaction without conditions</b> Applicants have to evidence the existence of economic efficiencies that outweigh the effects of the potential significant restriction of competition.
	<b>2) Give clearance to the transaction with conditions or commitments</b> 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.
	<b>3) Not give clearance to the transaction</b> The applicant economic agents fail to evidence the existence of economic efficiencies that outweigh the effects of the potential significant restriction of 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.

## What 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 creates 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 assessment, which have been gained from international experience and the Commission's recent decisions.

**Table 6**

Factors that Indecopi may assess 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 established competitors with business capability or potential entrant competitors	Identify whether other companies already established in the market or potential entrant competitors - possibly from related industries - could discipline market power.

Factor	Typical variables	Objective
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 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 market power is being facilitated in either case by 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: technological  Strategic barriers: agents' conduct  Regulatory barriers	Identify whether market entry is delayed or prevented by <b>market specific barriers</b> 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 <b>regulatory barriers</b> , 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 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 applicable, for example, 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 statutory 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, and relating to all of its economic activities for the immediately preceding fiscal year.

Moreover, the Law states that if it is found that the economic agents have engaged in 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 position 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 authority assess a transaction that does not fulfill the conditions in the law for merger control?

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



### Own-initiative investigation

The Directorate may carry out an own-initiative review of a transaction, in the first year after formal completion, where there are reasonable indications that the transaction may create 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.
- Horizontal transactions involving the acquisition of an economic agent with a small share of the market, though having the potential for growth; or, of an innovative economic agent that recently entered the market. In this case, it is sought to identify whether the transaction qualifies as a killer acquisition<sup>3</sup>.
- Horizontal transactions in which the acquiring economic agent (or its business group) has 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 own-initiative investigation it is determined that the merger or acquisition can create 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 proportionate) the sale of the acquired shares or assets.



### Voluntary notification

The regime gives economic agents 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 posing risks to competition.

<sup>3</sup> A killer acquisition generally means an acquisition in which a company in a given market (usually, a large company that is powerful in that market) acquires a promising agent that is up and running but does not have the capital and skills needed to operate and produce, among other activities, where the purpose is to eliminate the future competitor. See: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)19/en/pdf#:~:text=A%20%E2%80%9Ckiller%E2%80%9D%20acquisition%20usually%20refers%20to%20an%20acquisition,the%20ultimate%20purpose%20of%20eliminating%20the%20future%20competitor.](https://one.oecd.org/document/DAF/COMP/WD(2020)19/en/pdf#:~:text=A%20%E2%80%9Ckiller%E2%80%9D%20acquisition%20usually%20refers%20to%20an%20acquisition,the%20ultimate%20purpose%20of%20eliminating%20the%20future%20competitor.)



### 3. Soft law in the merger control regime

In January 2023, the Commission published *Guidelines for the characterization and assessment of mergers and acquisitions*.

These guidelines contain two sections: (i) Mergers and acquisitions in the Merger Control Law and, (ii) Assessment of mergers and acquisitions.

#### Mergers and acquisitions in the Merger Control Law

In these guidelines, the Commission describes the main elements associated with the definition of a merger or acquisition, in which it determines the need for the participating agents to be independent, and therefore the merger control legislation is not applicable to mergers or acquisitions within the same business group.

The document underlines the need for there to be a change of control defined as a decisive and ongoing influence on a company's competitive strategy. It is therefore not simply a question of acquiring rights, instead these rights must give the economic agent the chance to exert that influence over the controlled company.

Along these lines, the Commission highlights the four forms that control may take. These are shown in [Table 7](#):

**Table 7**  
Types of control identified by Indecopi

Types of control	Exclusive or joint	Exclusive: exerted individually
		Joint: exerted among two or more economic agents, requiring a meeting of minds.
	Direct or indirect	Direct: a right holder can exert control.
		Indirect: control is exerted through intermediaries, acting as a bridge.
	Positive or negative	Positive: control is exerted by determining decisions on competitive strategy.
		Negative: control is exerted by blocking or vetoing decisions or steps relating to competitive strategy.
	De iure o de facto	De iure: the power to exert control arises from legal acts.
		De facto: the power to exert control arises from circumstantial factors.

The guidelines similarly describe mergers and acquisitions which include the signing of a partnership agreement such as *contratos de asociación en participación*, a type of silent partner agreement, and *consortia*. They also include shared-risk agreements and other forms of partnership arrangements implying joint control by two or more agents, and which may involve associations, unincorporated companies or any organizational structure that differs from that of its components.

The guidelines also mention that a merger or acquisition must be for a term that will allow it to create effects on the market. The factors that the Commission explains may be taken into account for this purpose are the markets involved and the cycles of economic activity, and it is a case-by-case analysis.

## Assessment of mergers and acquisitions

The Commission also explains the various methods it has been using to assess the mergers and acquisitions notified to it, which include identifying the markets involved, based on elements such as demand-side and supply-side substitutability, the characteristics of the product or service, as well as consumer characteristics.

For cases where the merger or acquisition involves companies operating in the same market (horizontal mergers and acquisitions, in other words), the guidelines explain the use of concentration indicators. The Commission looks, in particular, at the Herfindahl-Hirschman index (HHI<sup>4</sup>) and the HHI variation ( $\Delta$ HHI<sup>5</sup>), which provide a measurement of the level of concentration and how it changes as a result of the merger between rival companies.

Therefore, in the guidelines the Commission has determined a range within which in its view there is a lower likelihood of creating risks to competition, as shown in [Table 8](#).

**Table 8**  
Identification of potential risks using the HHI

Method	Scenario no 1	Scenario no 2	Scenario no 3
HHI	Below 1,500	Between 1,500 and 2,500	Over 2,500
$\Delta$ HHI	Any	Below 200	Below 100

These reference values are consistent with those used in jurisdictions with broad experience, in particular by the Federal Trade Commission (FTC) in the U.S., and the European Commission in the European Union.

This analysis of concentration indicators is not conclusive, and instead must be supplemented with market elements such as the existence of barriers to entry, the characteristics of demand, the existence of rival companies with significant market shares, among others, which allow to be assessed the extent to which the merger or acquisition may cause a significant risk to competition.

Additionally, in practice the Commission uses in its assessment of mergers and acquisitions, a method under which combined shares below 20% for horizontal mergers and acquisitions and individual shares below 30% for vertical mergers and acquisitions do not give rise to a scenario with significant risks to competition. However, this presumption must be confirmed using further elements.

The guidelines also explain the types of barriers to entry that have to be considered in an assessment of mergers and acquisitions. In this section, they mention certain strategic barriers, such as “non-competition clauses”, although they do not contain a detailed analysis of which characteristics (i.e.: term, scope of prohibition) will be considered a cause for concern for competition.

<sup>4</sup> The HHI is calculated by adding together the squared market shares of the companies operating in it, and multiplying the result by 10,000. For example, if there are four companies, each with a 25% market share, the HHI is calculated as  $(0,25^2 + 0,25^2 + 0,25^2 + 0,25^2) \times 10\,000 = 2\,500$

<sup>5</sup> The HHI variation is measured by calculating the HHI after the merger, with the addition of the market shares of the merging companies. For example, if the pre-merger HHI was 1,000 and the post-merger HHI was 1,400, the HHI variation is calculated as  $1,400 - 1,000 = 400$ .

## 4. State of play after the Law's first three years

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

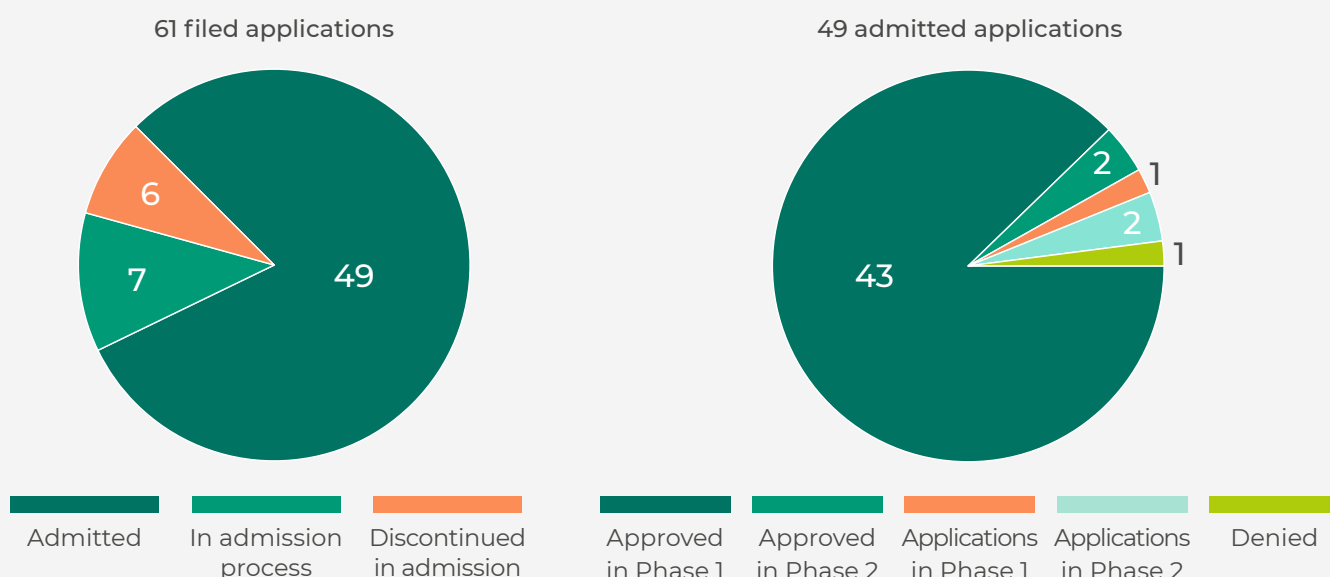
### Performance statistics

**Diagram 1** shows that, as of August 2024, Indecopi had received 61 applications for clearance of mergers and acquisitions, of which 49 were admitted, 7 were going through the admission process, and 5 had been withdrawn or discontinued.

Of the 49 admitted applications, 43 transactions were approved in Phase I, in other words they did not pose any risks to competition, whereas 2 was approved in Phase II, but with conditions. All in all there is currently 1 procedure going through Phase I and 2 in Phase II and awaiting a decision; and only one has been denied due to creating restrictions to competition.

**Diagram 1**

Filed applications and procedure status in June 2024



In this respect, of the 49 admitted applications, on the date of preparation of this report, Garrigues had had access to 40 decisions, of which 39 had publicly available versions of their rulings (see Schedule 1).

Of these 40 decisions seen by Garrigues, 37 related to transactions approved in Phase I, 2 to transactions approved in Phase II, and 1 transaction denied in Phase II. The assessment explained in the following points is based on information taken from these 40 decisions.

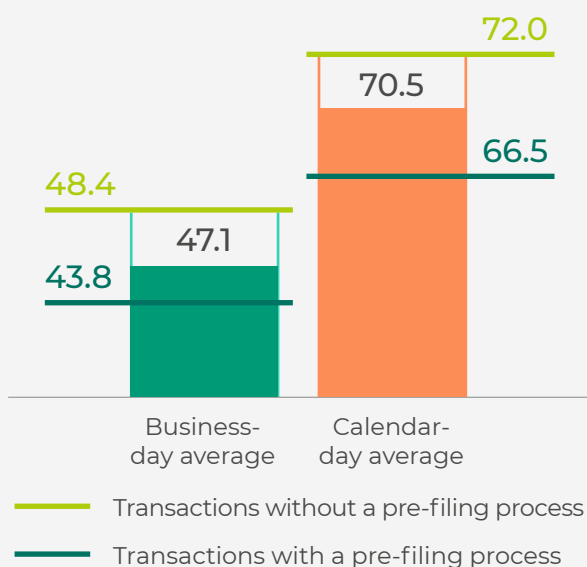
For decisions adopted in Phase I, the Commission decided on applications in average periods of 47.1 business days, or 70.4 calendar days (See Diagram 2).

We also learned that 10 of the transactions with a decision in Phase I used the pre-filing process. On average, procedures including a pre-filing process took 43.8 days in total to complete, or 66.5 calendar days, whereas the average length of procedures not using this mechanism was 48.4 business days or 72.0 calendar days; in other words, 4.6 business days or 5.5 calendar days longer than the average length of procedures with a pre-filing process.

They did not overstep the statutory time periods in any of these cases. To calculate the time periods, we took into account the whole period between when the application was filed, which means the periods include the admission phase.

**Diagram 2**

Approximate decision periods in Phase I



NB: The decision periods for transactions with a pre-filing process might be shorter, because there are uncounted days between when comments are sent to the applicant and when the notification is actually filed. Any number of days for which time periods stop running due to requests from relevant sectoral public entities have not been counted either.

Preparation: Own.

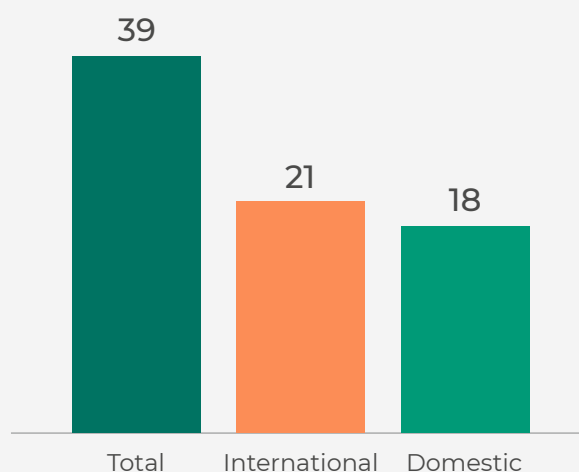
Source: Indecopi

## Cumulative economic statistics

As of July 2024, of the 39 decisions on approved mergers or acquisitions, 21 relate to transactions originated in other countries with an impact on the Peruvian market, whereas the other 18 originated in Peru (See Diagram 3). The transaction that was denied by Indecopi was a transaction in the sugar industry originated in Peru.

**Diagram 3**

Decided applications by transaction origin



Preparation: Own.

Source: Indecopi.

The 39 approved transactions amounted in aggregate to roughly US\$ 38,115 million, of which 86.4% relate to the 21 transactions originated in other countries with an impact on the Peruvian market.

The economic sector with the greatest number of transactions, by reference to the target companies' sectors, is the electricity, gas and water sector, with 12 transactions which are said to have an aggregate average value of US\$ 9,625 million; accounting for 25.3% of the aggregate value of all 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, as of July 2024

Economic sector	Number of transactions	Estimated value (US\$ million)
Total	39	38,115
Electricity, gas and water	12	9,625
Other services	3	5,507
Construction	1	5,246
Trade, maintenance and repairs ...	3	4,824
Extraction of oil, gas, minerals and...	5	3,054
Services provided to companies	3	2,341
Manufacturing	5	2,045
Telecommunications	2	1,848
Financial services, insurance and pensions	1	1,507
Telecommunications and other information...	1	1,507
Transport, storage, mail and courier services	1	448
Agriculture, livestock, hunting and forestry	1	88
Accommodation and restaurants	1	75

Preparation: Own

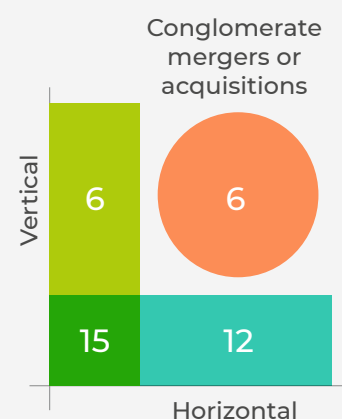
Source: Indecopi, definitions from INEI.

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.

- 1 Transactions with horizontal overlaps, where the acquirer and target company compete directly in the market. These types of transactions are the ones most likely to generate impacts on competition.
- 2 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 cause some form of risk of obstructing entry to basic supplies or to major customers.
- 3 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 39 transactions approved by the Commission. Of this total, 6 transactions may be classed as conglomerate mergers or acquisitions, another 6 were found only to have vertical overlaps and 12 transactions were found to be horizontal mergers or acquisitions. Interestingly, for the other 15 transactions, both horizontal and vertical overlaps were identified.

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



Preparation: Own.

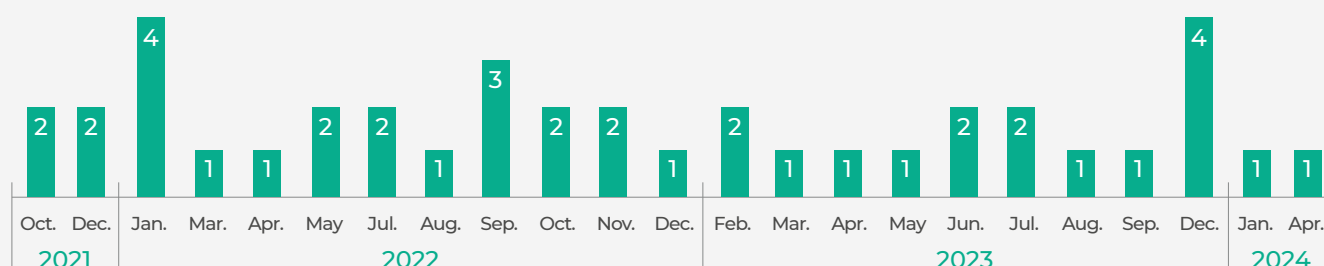
Source: Indecopi.

## Changes in the number of applications for mergers and acquisitions

Regarding the filed applications, the information as of August 2024 contains public decisions on mergers and acquisition filed until April 2024. **Diagram 5** shows that up to 4 applications have been filed a month.

**Diagram 5**

Merger and acquisition applications received

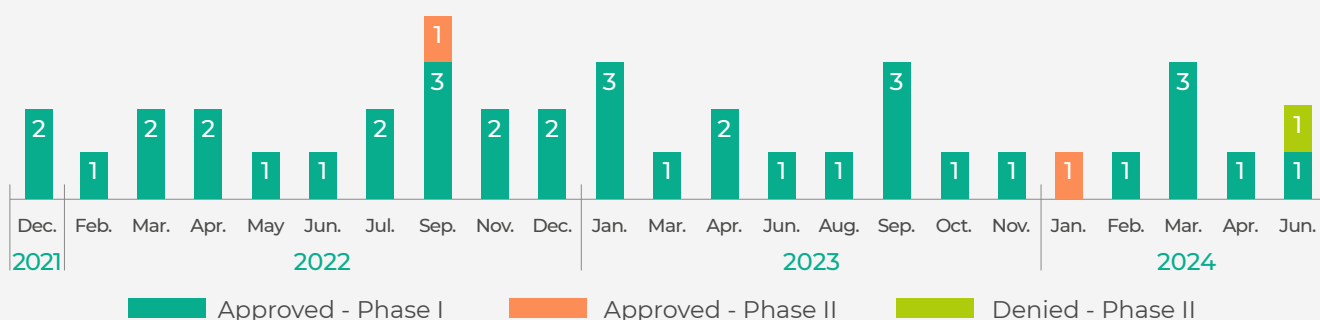


NB: The diagram does not include months in which no merger or acquisition applications were filed. | Preparation: Own. | Source: Indecopi

In line with the number of applications filed, up to 4 applications a month were completed (see **Diagram 6**). This is consistent with the fact that to date none of the applications has been decided outside the stipulated time period.

**Diagram 6**

Completed applications for mergers and acquisitions



NB: The diagram does not include months in which no merger or acquisition applications were completed. Preparation: Own. | Source: Indecopi

## Comparison between the first two years of application of the Law

Despite having information up until July 2024, the information taken from public decisions shows that these decisions were filed / completed up until June 2024 (see [Diagram 7](#) and [Diagram 8](#)).

For that reason, a comparative analysis between periods is needed. The first period runs from the implementation of Law no 31112 on June 14, 2021, to June 31, 2022 (approximately one year); the second period will be taken from July 1, 2022 to June 31, 2023 (one year); and the third period from July 1, 2023, to June 31, 2024.

It is important to mention in relation to the 2023 Report that the information on the second period has been updated, among other reasons, due to gaining access to public versions of new decisions on merger and acquisition decisions in that period.

The number of filed transactions increased from 12 to 18 between the first and second period, and reached its lowest level in the third period when only 10 transactions were filed.

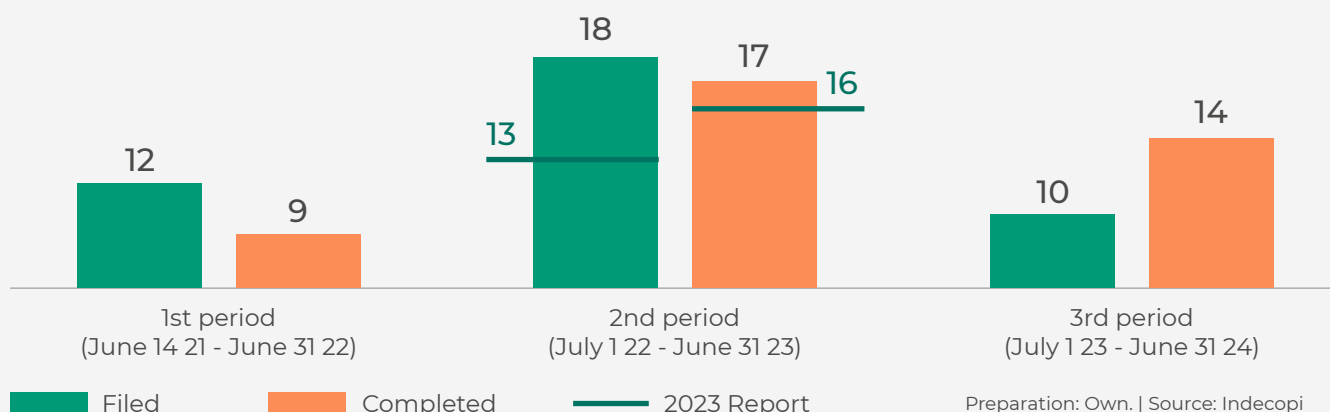
Additionally, between the first and second period the number of completed transactions almost doubled from 9 to 17. Whereas between the second and third period there was a slight decrease from 17 to 14.

It is important to mention that the final figures for the third period could be updated, in the same way as those for the second period between this report and the previous one (see the red lines on figures reported in the previous report), so we are expecting that both filed transactions and completed transactions will increase for the third period.

As things stand, the second period shows a greater number of filed and completed transactions.

**Diagram 7**

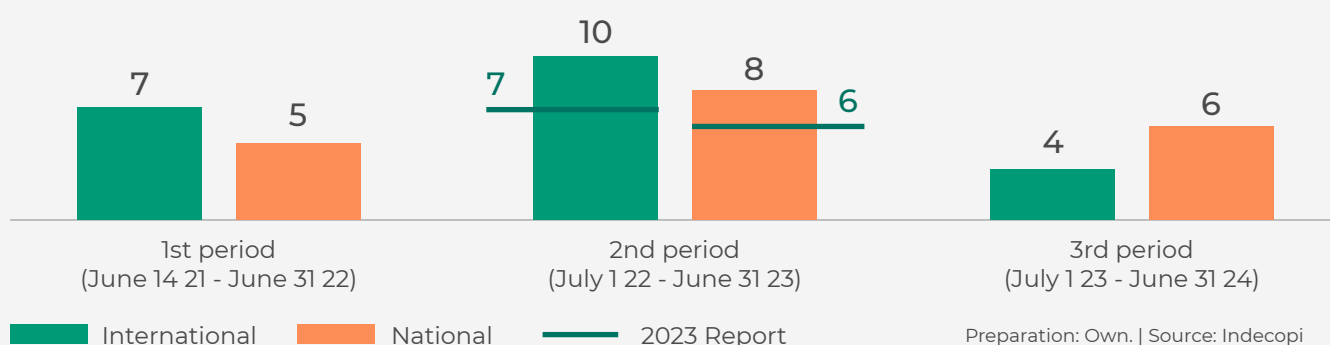
Filed and completed merger and acquisition applications



Elsewhere, by origin, the number of transactions that originated in other countries with an impact in Peru and the number of domestic transactions has been at its lowest level since the merger and acquisitions regime has been in force, and a considerable decrease has been observed in the number of transactions originated in other countries along with little change in the number of domestic transactions. These figures may increase, however, as the information on decisions in the third period is updated.

**Diagram 8**

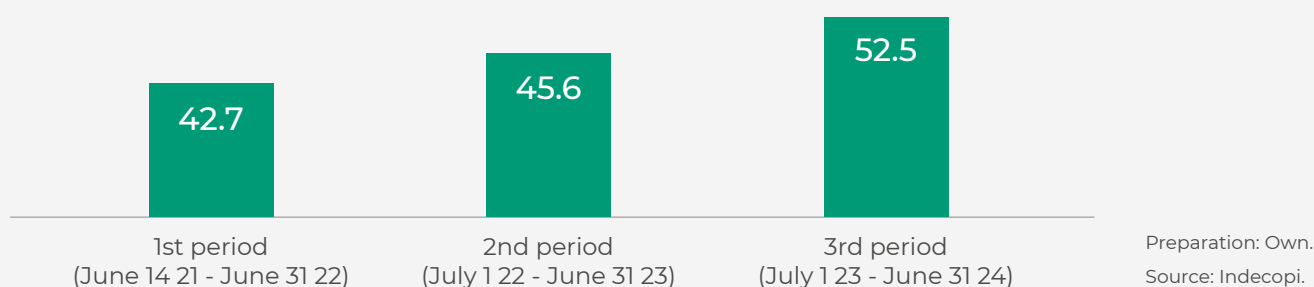
Merger and acquisition applications, by transaction origin and filing period



For decisions on applications in Phase I, the actual decision period increased by 3 business days between the first and second period, as well as by 7 business days between the second and third period. This means that decision periods increased in aggregate by 10 days between the first and third period (Diagram 9).

**Diagram 9**

Average decision period in number of business days for decisions in Phase I, by filing period





## 5. Methods in the assessment of mergers and acquisitions

In this section we describe the methods explained by the Commission in its decisions on the merger control regime. This provides a way of identifying how the authority has been assessing mergers and acquisitions and of tracking the predictability of its decisions, especially in its economic assessment.

### Preliminary economic assessment methods

The 38 decisions made publicly available by the Commission showed important methods which were part of an economic assessment geared towards building theories as to how a transaction could affect competition and dismissing assumptions of a significant effect on competition.

**Table 9** provides a main-point summary of the main methods made public by the Commission, in the decisions reviewed to date.

**Table 9**

Economic assessment: a few methods used by the Commission

Element of assessment	Method
Market definition	<ul style="list-style-type: none"> <li>■ The Commission has stuck to a conservative method for defining markets and has even defined markets at the level of a specific product.</li> <li>■ The conservative method is not based on an analysis of a low demand substitution between products involved in a transaction, but rather on verifying how market shares and the HHI behave under this approach.</li> </ul>
Barriers to entry	<ul style="list-style-type: none"> <li>■ It can be seen how the authority pays particular attention to paperwork barriers, especially in relation to permit and license procedure times.</li> <li>■ Among other elements, the authority considers that brand reputation can be a major barrier.</li> </ul>
Characteristics of demand	<ul style="list-style-type: none"> <li>■ The costs of change, meaning the ease with which consumers or clients may change supplier, may be an important element to be considered in the economic assessment.</li> </ul>
Presence of rivals	<ul style="list-style-type: none"> <li>■ The authority has taken the view that the presence of rivals with similar or greater market shares than those of the companies involved can mitigate risks to competition.</li> <li>■ It is not clear, however, whether one rival with those characteristics is sufficient or whether more than one rival needs to be identified.</li> </ul>

Source: The Commission's public decisions.

## Conditions and remedies

As mentioned above, only two transactions were approved in Phase II over these first three years (although a further three transactions moved to Phase II, of which 2 are awaiting a decision on the date of writing), and behavioral type conditions were applied, namely restrictions on what the companies involved in the transaction can or cannot do. To date, the Commission has not laid down any structural conditions, such as divestitures or the sale of rights<sup>6</sup>.

In particular, the Commission has designed as a remedy the obligation to license trademarks owned by the companies involved to third parties for minimum time periods. Additionally, it has imposed as a conduct constraint, a prohibition on increasing prices of products for which trademarks are ordered to be licensed, until the first mandatory license takes place.

The Commission has also imposed behavioral conditions on economic agents' methods of supply, by ordering that supplies must be obtained using tender processes conducted by the regulatory entity for the economic sector concerned or by means of transparent and competitive bidding processes appropriately notified to the Directorate. These types of conditions are aligned with those imposed by the Commission under the previous merger control regime (only applicable to the electricity industry).

## Non-competition clauses

In the Commission's decisions, a few methods are inferable relating to non-competition clauses adopted as part of the agreements concluded in the merger or acquisition. Those methods look at the reason behind these clauses, the standard parameters for that type of agreements on a comparative basis, and at the applicable scenarios for assessing higher-than-standard scopes.

In [Table 10](#) we provide a summary of the elements considered by the authority. This information is particularly relevant and needs to be taken into account in any negotiations conducted between the various agents involved in a potential merger or acquisition subject to notification.

**Table 10**  
Non-competition clauses: a few methods used by the Commission

Type of clause	Scope	Conditions	Methods
Non-competition clause	Personal	As a supplementary agreement to a main agreement, it should include only the agents bound in the transaction.	A party may be either the agent directly involved in the transaction or the economic agents controlled by it.
	Material	Should be confined to operations which are strictly necessary to ensure the validity of the transaction.	The economic activity carried on by the Target may be taken into account.
	Spatial	Should be confined to the geographic area in which the transaction has effects.	The geographic area where the Target carries on its economic activities may be taken into account.

<sup>6</sup> It needs to be mentioned that, in certain cases, the Commission has proposed and assessed structural remedies during the negotiation of commitments, although these were not ultimately implemented.

Type of clause	Scope	Conditions	Methods
Non-competition clause	Temporal	It should not go above a term that is strictly necessary to ensure the aims of the transaction	<p>A period of up to 3 years is not considered risky to competition.</p> <p>Where it involves a longer period, the reasons for going over the time limit will have to be given.</p> <p>As a general rule, the reasons should be based on the existing likelihood of breaching this obligation, affecting the value of the transaction. The main elements analyzed for this purpose are: (i) the existence of important know-how, and (ii) the specific characteristics of the market involved.</p>

## First denial of an application for clearance under Law 31112

By Resolution 148-2024/CLC-INDECOPI issued on June 27th, 2024 the Commission blocked the authorization for an operation in the sugar industry. The Commission argued that such operation would have caused a significant restriction to competition in two markets linked to the sugar industry in Peru and that supposedly the remedies offered by the applicant would not mitigate the alleged effects.

In particular the Commission claimed that it identified possible restrictive effects over competition in the following markets:

- 1 | Market for purchasing of sugar cane from independent cane growers in the Piura, Lambayeque and La Libertad regions.
- 2 | Market for selling domestic sugar in the wholesale chain in Peru

The Commission claim was based on the presumption that the operation might have increased market concentration. Other presumptions were the existence of barriers to entry and a supposed closeness of the acquirer's brands to the Target's brand regarding their prices and characteristics.

The applicant offered remedies aim at reducing or eliminating the preliminary competition concerns identified by the authority. The remedies included both behavioral and structural commitments, however according to the Commission's criteria they would not be effective to restore the competition conditions that it considered could have been affected by the operation.

## 6. Conclusions and thoughts

In the roughly three years of application of Law 31112, from the way in which merger control has been implemented we have been able to identify a number of important elements from a corporate and competition law standpoint.

Firstly, its application procedures and standards have been kept quite clear and straightforward, which has enabled a relatively trouble-free clearance process. This is in keeping with the authorities' ongoing efforts to publish soft law tools providing stakeholders with the methods used to apply the legislation.

Secondly, the decisions adopted by the authorities have continued to observe the legal time periods, which shows the commitment and effort by Indecopi's technical teams responsible for this important public policy tool; the Commission mainly, with technical support from the Directorate. Although the average time periods for clearance of a transaction have continued increasing in the third year by close to 7 business days compared with the second year, they have stayed below the maximum statutory time period, which shows the authority's efforts to be efficient in its assessment of transactions, as well as the level of complexity of recently notified transactions.

Thirdly, the methods adopted in practice by the authority continue to be based on international standards, affording predictability over the elements that could give rise to cause for concern about competition such as, for example, the clauses or agreements forming part of a merger or acquisition. Accordingly, parameters are put in place to be reviewed for each specific case, providing predictability to stakeholders.

Over the coming years new challenges will continue to be faced in the application of this instrument of public policy. So, as long as we see a continuing of the issuing of clear methods and rules, of the ongoing work of capable technical teams, and close dialog between the authorities and economic agents, these challenges will be dealt with in a way that benefits open competition, by creating more competitive markets that enhance consumer welfare.



**Schedule 1****Origin of companies involved in the transactions**

No	Transaction	Companies involved	Origin
1	Decision no 087-2021/CLC-INDECOPI	Acquirer: <i>Patagonia Holdco LLC</i>	Domiciled in: USA
		Target no 1: <i>Level 3 GC Limited</i>	Domiciled in: Bermuda
		Target no 2: <i>Global Crossing Americas Solutions, LLC</i>	Domiciled in: USA
		Target no 3: <i>CenturyLink Latin America Solutions, LLC</i>	Domiciled in: USA
2	Decision no 098-2021/CLC-INDECOPI	Acquirer: <i>Grupo Vinci S.A.</i>	Domiciled in: France
		Target: <i>Cobra Servicios, Comunicaciones y Energía, S.L.U.</i>	Domiciled in: Spain
3	Decision no 003-2022/CLCI-INDECOPI	Acquirer: <i>APMH INVEST XXVIII AB</i>	Formed in: Sweden
		Target: <i>Unilabs Holding AB</i>	Formed in: Switzerland
4	Decision no 005-2022/CLC-INDECOPI	Acquirer: <i>Nugil S.A.A (Nugil)</i>	Formed in: Colombia
		Target: <i>Nutresa S.A.</i>	Formed in: Colombia
5	Decision no 007-2022/CLC-INDECOPI	Acquirer: <i>FLS Germany Holding GmHb (FLS)</i>	Formed in: Germany
		Target: <i>TK Mining</i>	Formed in: Germany
6	Decision no 017-2022/CLC-INDECOPI	Acquirer: <i>Norcobre S.A.C</i>	Domiciled in: Peru
		Target: <i>Contonga Minería S.A.C</i>	Formed in: Peru
7	Decision 021-2022/CLC-INDECOPI	Acquirer: <i>Intercorp Financial Services Inc. (IFS)</i>	Formed in: Panama
		Target: <i>Procesos de Medios de Pago S.A.C. (PMP)</i>	Formed in: Peru

No	Transaction	Companies involved	Origin
8	Decision no 025-2022/CLC-INDECOPI	Acquirer: <i>Centro Logístico y de Fabricación S.A.C.</i>	Belonging to the Intercorp Group (Peru)
		Target: <i>Ferreycorp S.A.A</i>	Transactions: Peru
9	Decision no 037-2022/CLC-INDECOPI	Acquirer: <i>Crystal Realty 2 S.A.C.</i>	Domiciled in: Peru
		Target: <i>Edificio (activo)</i>	Location: Peru
10	Decision no 043-2022/CLC-INDECOPI	Acquirer: <i>Al Makani -Luxembourg S.A.R.L.</i>	Domiciled in: Luxembourg
		Target: <i>Holding Hotelera GHL S.A.S.</i>	Transactions: Peru
11	Decision no 045-2022/CLC-INDECOPI	Acquirer: <i>Técnica Avícola S.A. (Tecavi)</i>	Formed in: Peru
		Target: <i>Oregon</i>	Formed in: Peru
12	Decision no 060-2022/CLC-INDECOPI	Acquirer: <i>Ashmore Management Company Colombia S.A.S.</i>	Formed in: Colombia
		Target: <i>Ferreycorp S.A.A (porcentaje de acciones)</i>	Formed in: Peru
13	Decision no 062-2022/CLC-INDECOPI	Acquirer: <i>Z Power Perú S.A.C.</i>	Formed in: Peru
		Target: <i>Orazul Energy Perú S.A.</i>	Formed in: Peru
14	Phase I: Decision no 018-2022/CLC-INDECOPI	Acquirer: <i>Pharmaceutica Euroandina S.A.C.</i>	Domiciled in: Peru
	Phase II: Decision N° 076-2022/CLC-INDECOPI	Target: <i>Hersil S.A.</i>	Domiciled in: Peru

No	Transaction	Companies involved	Origin
15	Decision no 079-2022/CLC-INDECOPI	Acquirer: <i>Cretaceous Bidco Limited</i>	Formed in: UK
		Target: <i>ContourGlobal PLC</i>	Formed in: UK
16	Decision no 088-2022/CLC-INDECOPI	Acquirer: <i>Alpayana S.A.</i>	Formed in: Peru
		Target: <i>Los Quenales S.A.</i>	Formed in: Peru
17	Decision no 090-2022/CLC-INDECOPI	Acquirer: <i>Transportadora de Gas del Perú S.A.</i>	Formed in: Peru
		Target: <i>Compañía Operadora de Gas S.A.C. (COGA)</i>	Formed in: Peru
18	Decision no 096-2022/CLC-INDECOPI	Acquirer: <i>CWE (Hong Kong) Company Limited</i>	Formed in: Hong Kong
		Target: <i>Hydro Global Investment Limited</i>	Formed in: Hong Kong
19	Decision no 098-2022/CLC-INDECOPI	Acquirer no 1: <i>Inchcape plc</i>	Formed in: UK (Inchcape business group)
		Acquirer no 2: <i>Inchcape Automotriz Chile S.A.</i>	Formed in: Chile (Inchcape business group)
		Acquirer no 3: <i>Índigo Chile Holdings SPA</i>	Formed in: Chile (Inchcape business group)
		Target no 1: <i>Dercorp CL SpA</i>	Formed in: Chile
		Target no 2: <i>Dercorp EX SpA</i>	Formed in: Chile
20	Decision no 008-2023/CLC-INDECOPI	Acquirer no 1: <i>Ultratug ApS</i>	Formed in: Denmark (part of the Ultrनाव group)
		Acquirer no 2: <i>Remolcadores Ultratug Ltda.</i>	Formed in: Chile (part of the Ultrनाव group)
		Target: <i>Holding Transoceánica S.A.</i>	Formed in: Peru

No	Transaction	Companies involved	Origin
21	Decision no 011-2023/CLC-INDECOPI	Acquirer: <i>Chambers Capital Holding Ltd</i>	Domiciled in: UK
		Target no 1: <i>Inkia Americas II S.A.C.</i>	Domiciled in: Peru
		Target no 2: <i>SAMAY I S.A.</i>	Domiciled in: Peru
22	Decision no 013-2023/CLC-INDECOPI	Acquirer: <i>Solenis Colombia S.A.A.</i>	Formed in: Colombia
		Target no 1: <i>GI Industria Perú S.A.C.</i>	Formed in: Peru
		Target no 2: <i>Grupo Andino de Inversiones S.A.C.</i>	Formed in: Peru
		Target no 3: <i>Andino Servicios Montajes Industriales S.A.C.</i>	Formed in: Peru
23	Decision no 036-2023/CLC-INDECOPI	Acquirer: <i>ATN S.A.</i>	Formed in: Peru
		Target: <i>Ecorer S.A.C.</i>	Formed in: Peru
24	Decision no 045-2023/CLC-INDECOPI	Acquirer: <i>Compañía Eléctrica El Platanal S.A. (CELEPSA)</i>	Formed in: Peru (part of the Unacem group)
		Target: <i>Termochilca S.A.</i>	Domiciled in: Peru
25	Decision no 049-2023/CLC-INDECOPI	Acquirer: <i>Canada Inc.</i>	Formed in: Canada
		Target: <i>Hortifrut</i>	Formed in: Chile
26	Decision no 062-2023/CLC-INDECOPI	Applicant: <i>UNACEM Corp. S.A.A.</i>	Formed in: Peru
		Applicant no 2: <i>Grupo Calidra S.A. de CV</i>	Formed in: Mexico (invests in Peru through Calidra Perú S.A.C.)
		Target: No tiene nombre	Domiciled in: Peru

No	Transaction	Companies involved	Origin
27	Decision no 074-2023/CLC-INDECOPI	Acquirer: <i>FQM Holdings Ltd.</i>	Formed in: Canada
		Target: <i>Rio Tinto Perú Limited</i>	Formed in: UK (part of the Rio Tinto Holdings group)
28	Decision no 080-2023/CLC-INDECOPI	Acquirer: <i>Alpayana Corporativo S.A.C.</i>	Formed in: Peru
		Target: <i>Compañía Minera Argentum S.A.</i>	Formed in: Peru
29	Decision no 084-2023/CLC-INDECOPI	Acquirer: <i>Luz del Sur S.A.A.</i>	Formed in: Peru
		Target: <i>Sojitz Arcus Investment S.A.C.</i>	Formed in: Peru
30	Decision no 096-2023/CLC-INDECOPI	Acquirer: <i>Ardian Clean Energy Evergreen Fund S.C.A., SICAV-RAIF (ACEEF)</i>	Formed in: Luxembourg
		Target: <i>Latin America Power Holding B.V. (LAP)</i>	Formed in: The Netherlands
31	Decision no 117-2023/CLC-INDECOPI	Applicant no 1: <i>Mitsui &amp; Co.</i>	Formed in: Japan
		Applicant no 2: <i>Komatsu Ltd.</i>	Formed in: Japan
		Target: <i>Joy Global (Perú) S.A.C.</i>	Formed in: Peru
32	Decision no 130-2023/CLC-INDECOPI	Applicant no 1: <i>Ace II Renewable Holding Usd S.À R.L.</i>	Formed in: Luxembourg
		Applicant no 2: <i>Solarpack Corporación Tecnológica S.A.U.</i>	Formed in: Spain
		Target no 1: <i>Tacna Solar S.A.C.</i>	Formed in: Peru
		Target no 2: <i>Panamericana Solar S.A.C.</i>	Formed in: Peru
		Target no 3: <i>Moquegua FV S.A.C.</i>	Formed in: Peru



No	Transaction	Companies involved	Origin
33	Phase I: Decision no 072-2023/CLC- INDECOPI	Acquirer: <i>China Southern Power Grid International CO.</i>	Domiciled in: China
	Phase II: 014-2024/CLC- Indecopi	Target no 1: <i>Enel Distribución S.A.A.</i>	Formed in: Peru
		Target no 2: <i>Enel X Perú S.A.C.</i>	Formed in: Peru
34	Decision no 050-2024/CLC- INDECOPI	Acquirer: <i>Niagara Energy S.A.C.</i>	Formed in: Peru
		Target no 1: <i>Enel Generación Perú S.A.A.</i>	Formed in: Peru
		Target no 2: <i>Compañía Energética Veracruz S.A.C.</i>	Formed in: Peru
		Target no 3: <i>Chinango S.A.C.</i>	Formed in: Peru
		Target no 4: <i>SL Energy S.A.C.</i>	Formed in: Peru
		Target no 5: <i>Energética Monzón S.A.C.</i>	Formed in: Peru
35	Decision no 069-2024/CLC- INDECOPI	Acquirer: <i>Fibra Prime (Fideicomiso de Titulización para Inversiones en Renta de Bienes y Raíces)</i>	Registered in: Peru
		Targets: <i>6 bienes inmuebles (edificios)</i>	Location: Peru
36	Decision no 071-2024/CLC- INDECOPI	Acquirer: <i>Engie Energía Perú S.A.</i>	Formed in: Peru
		Target no 1: <i>GR Paino S.A.C.</i>	Domiciled in: Peru
		Target no 2: <i>GR Taruca S.A.C.</i>	Domiciled in: Peru
		Target no 3: <i>GR Andino S.A.C.</i>	Domiciled in: Peru
		Target no 4: <i>GR Aparic S.A.C.</i>	Domiciled in: Peru
		Target no 5: <i>GR Huambos S.A.C.</i>	Domiciled in: Peru

No	Transaction	Companies involved	Origin
37	Decision no 089-2024/CLC-INDECOPI	Acquirer: <i>Luz del Sur S.A.A.</i>	Formed in: Peru
		Target no 1: <i>Parque Eólico Tres Hermanas S.A.C.</i>	Domiciled in: Peru
		Target no 2: <i>Parque Eólico Marcona S.A.C.</i>	Domiciled in: Peru
38	Decision no 103-2024/CLC-INDECOPI	Acquirer: <i>AB Acquisition Corporation</i>	Domiciled in: USA
		Target: <i>Boart Longyear Group Ltd.</i>	Domiciled in: Australia
39	Decision N° 148-2024/CLC-INDECOPI	Acquirer: <i>Agroaurora S.A.C.</i>	Domiciled in: Peru
		Target: <i>Agrícola del Chira S.A.C.</i>	Domiciled in: Peru

Source: Commission decisions (public version)

Preparation: Own



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