

# THE MERGER CONTROL REGIME IN PERU

STATE OF PLAY AFTER TWO YEARS IN FORCE

2

GARRIGUES

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STATE OF PLAY AFTER TWO YEARS IN FORCE

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# 1. INTRODUCTION

## REASONS, CONTRIBUTION AND OBJECTIVES

Roughly two 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 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 and any other soft law documents that the Antitrust Commission may issue later to provide better guidance to users

The Spanish Chamber of Commerce in Peru (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. State of Play Coming Up To Eighteen Months In Force ("El Régimen de Control previo de concentraciones empresariales en el Perú. Balance a casi un año y medio de vigencia"), which includes a preliminary analysis of the implementation of that legislation in our country.

Now that we have come to the end of the second year of the merger control regime, the Spanish Chamber of Commerce in Peru 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 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 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 business players generally.	 Indecopi
Mergers and acquisitions involving business players falling under the regulatory and supervisory powers of the SBS.	  SUPERINTENDENCIA DE BANCA, SEGUROS Y AFP

Mergers and acquisitions involving business players authorized by the SMV.



Mergers and acquisitions involving deposit-taking institutions in the financial system, or 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 meets 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 business 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 business 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 voting rights.</li></ul>

Only transactions considered to be mergers or acquisitions 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):

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

Type	Calculation Method	Approximate Value in US\$
Combined Threshold	Total sum of 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*.	158 million.
Individual Threshold	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, for each one, equal to or above 18,000 UIT	24 million.

\* The value of the UIT in 2023 is S/ 4950.

NB: The interbank exchange rate for August 2023 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 depending on 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 business 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 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 calculation of thresholds
Business relationships between companies in the same business group	Sales between companies in a same business group are not included in the calculation of 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 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 legally determined period, it will be considered that the transaction has been approved under the “approval by administrative silence” principle.

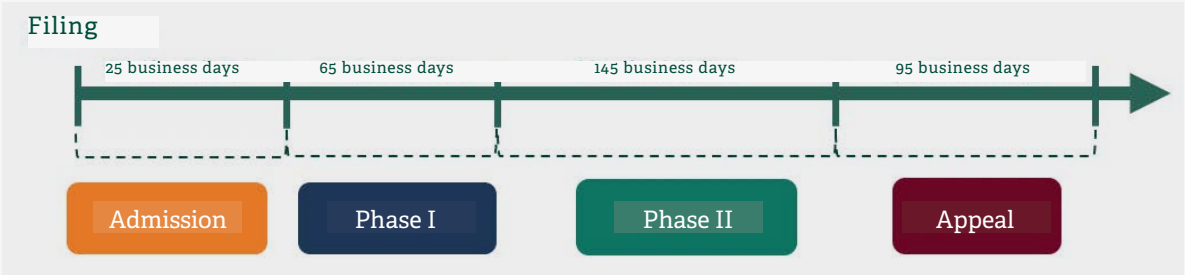
At any point in both phases, companies may file commitments to prevent or reduce the potential anticompetitive effects linked to the transaction.



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, consisting of a first-instance (Phase I and Phase II) and a second instance procedure could take up to 340 business days (See Chart 3).

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



\* These periods include any additional steps on top of 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** sets out 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 of competitio	Give clearance to the transaction without conditions

Phase II The merger could generate a significant restriction of competition	1) Give clearance to the transaction without conditions Applicants have to evidence the existence of economic efficiencies that outweigh the effects of the potential significant restriction of competition.
	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 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 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 business capability or potential entrants.	Identify whether other companies already established in the market or 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: Technological Strategic barriers: Players' conduct Regulatory barriers	Identify whether market entry 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 In-decopi 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” 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 proportionate) the 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. NEW ADDITIONS TO 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 and acquisitions in 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 business player 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 business players, 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 or De facto	De iure: The powers to exert control arise from legal acts.
		De Facto: The powers to exert control arise from circumstantial factors.

Similarly, the guidelines 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 players, 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 generate effects on the market. The factors that the Commission explains may be taken into account to confirm this 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 (HHI) index and the HHI variation (HHI  $\Delta$ ), 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 generating risks to competition, as shown in **Table 8**.

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

Method	Scenario 1	Scenario 2	Scenario 3
HHI	Below 1500	Between 1500 and 2500	Over 2500
HHI $\Delta$	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 generate 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 represent a scenario with major 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.



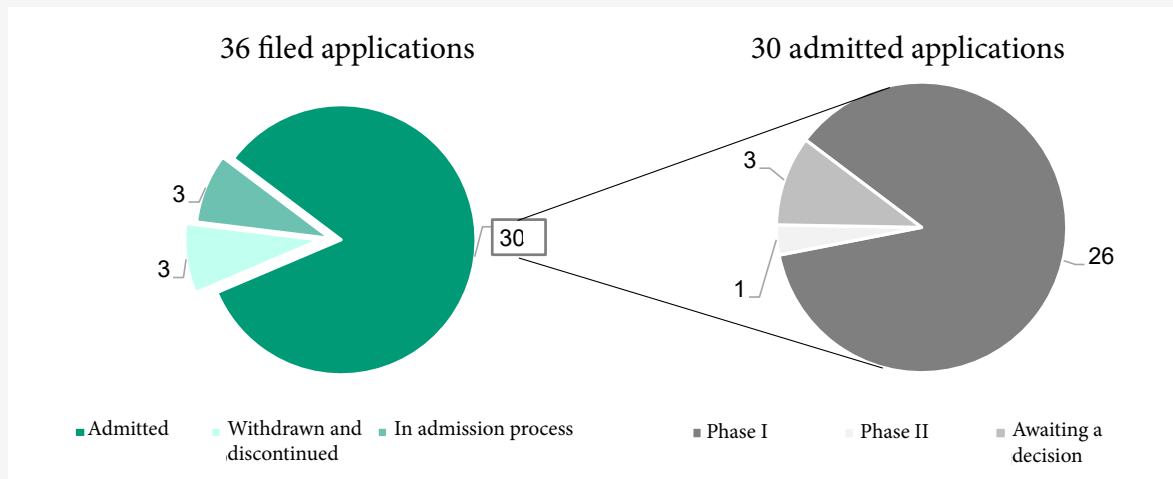
# 4. STATE OF PLAY AFTER THE LAW'S FIRST TWO YEARS

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 2023, Indecopi had received 36 applications for clearance of mergers and acquisitions, of which 30 were admitted, 3 were going through the admission process, and 3 were withdrawn or discontinued. Of the 30 admitted applications, 26 transactions were approved in Phase I, in other words they did not pose any risks to competition, whereas 1 was approved in Phase II, but with conditions. In total there are currently 3 procedures in progress and awaiting a decision, of which one has been taken to Phase II by the authorities.

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



Preparation: Own.

Source: Indecopi.

In this respect, of the 30 admitted applications, on the date of preparation of this report, Indecopi reported 25 public decisions, of which 24 were transactions approved in Phase I, and 1, in Phase II. The analysis provided in the following points is based on the information contained in the publicly available versions of those decisions, which are listed in Schedule 1.

With regard to the decisions adopted in Phase I, the Commission delivered decisions on the applications within average periods of 44.3 business days, or 66.3 calendar days (See Diagram 2). 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, so the determined periods include the admission phase.

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



Preparation: Own.

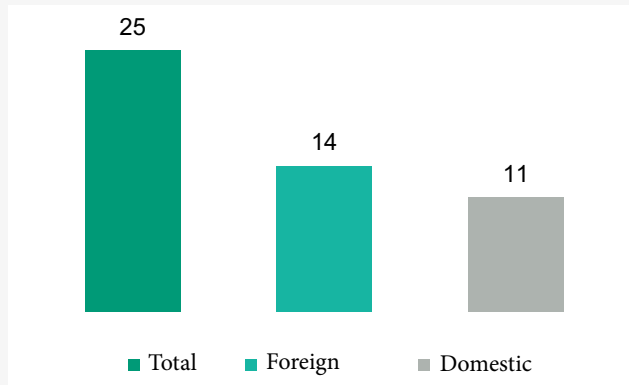
Source: Commission decisions (public version)

## UP TO DATE ECONOMIC STATISTICS

As of August 2023, of the 25 applications that already have a public decision by the Commission (non discontinued applications), 14 relate to transactions originated in other countries with an impact on the Peruvian market, whereas the other 11 originated in Peru (See Diagram 3).

According to information made public by Indecopi, the value of the 25 transactions that already have a decision amounts to approximately US\$ 28,464 million, of which 79.7% relates to the 14 transactions that were originated in other countries with an impact on the Peruvian market.

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



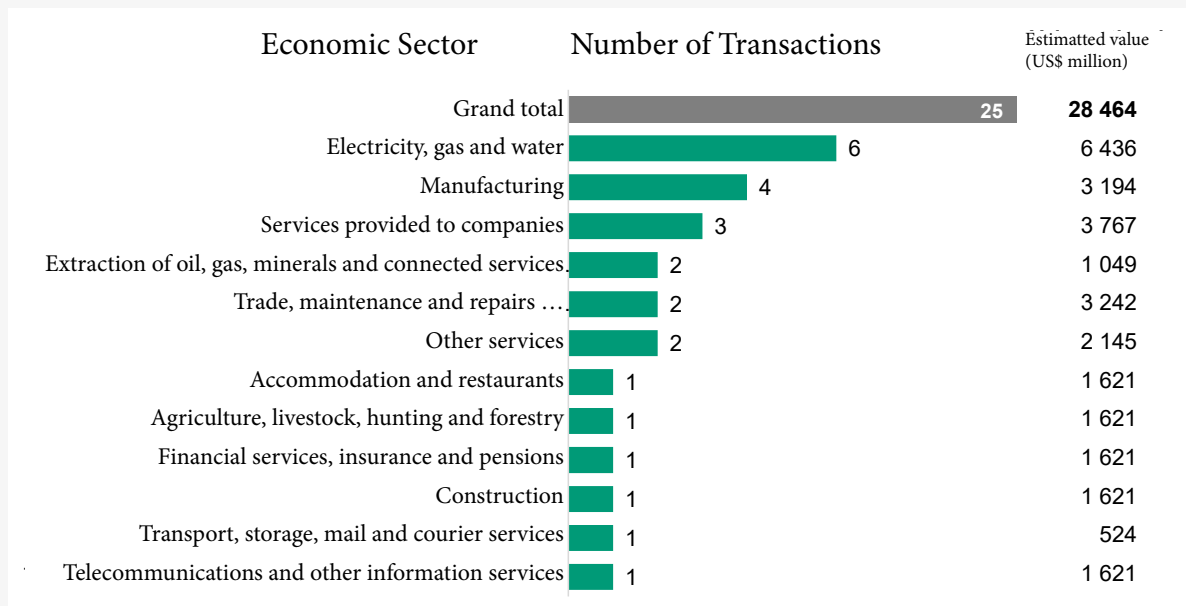
Preparation: Own.

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 electricity, gas and water sector, with 6 transactions which reportedly had a total average value of US\$ 6,436 million; accounting for 22.6% 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 August 2022**



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.

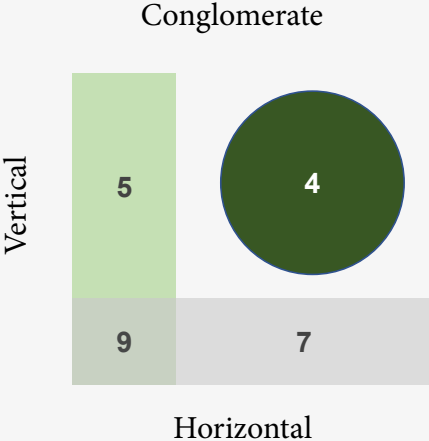
Transactions with horizontal overlaps, where the acquirer and target company compete directly in the market. These types of transactions are the ones most likely to generate impacts on competition.

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 major 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 25 transactions that already have a public decision by the Commission. Of this total, 4 transactions may be classed as conglomerate mergers or acquisitions, 5 transactions were found only to have vertical overlaps and 7 transactions were found to be horizontal mergers or acquisitions. Interestingly, for the other 9 transactions, both horizontal and vertical overlaps were identified.

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



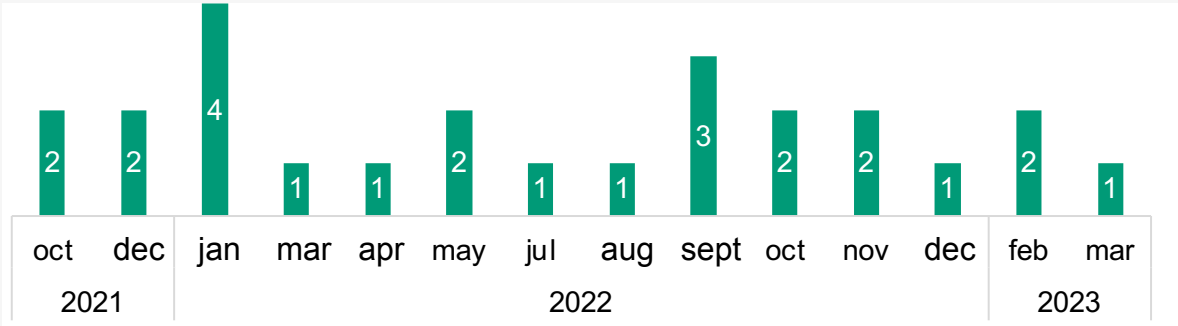
Preparation: Own.

Source: Indecopi (information taken from public decisions)

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

With regard to the filed applications, the information as of August 2023 contains public decisions on mergers and acquisition filed until March 2023. **Diagram 5** shows that up to 4 applications have been filed a month.

**Diagram 5 | Merger and acquisition applications received**



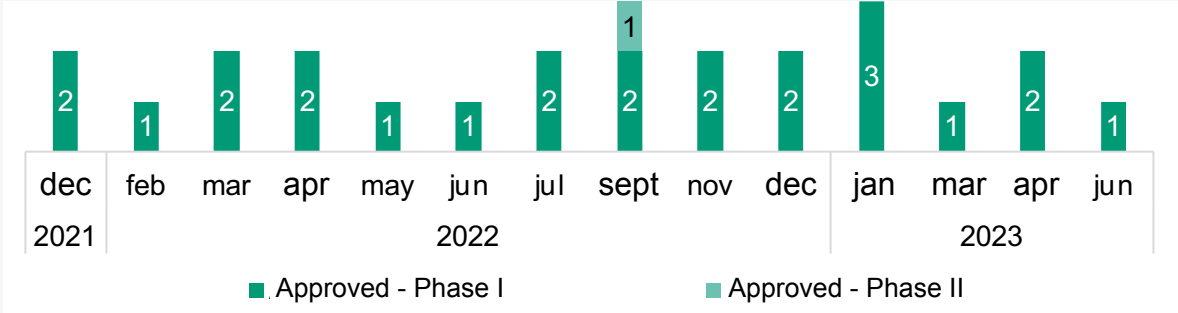
NB: The diagram does not include months in which no merger or acquisition applications were filed.

Preparation: Own.

Source: Indecopi (information taken from public decisions)

In line with the number of applications filed, up to 3 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 (information taken from public decisions)

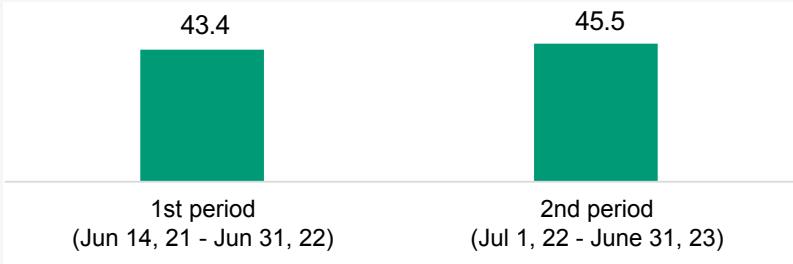
# COMPARISON BETWEEN THE FIRST TWO YEARS OF APPLICATION OF THE LAW

Despite having information until August 2023, the information from the public decisions shows that these decisions were filed / completed up until June 2023 (see **Diagram 5 and Diagram 6**).

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

The time periods for applications decided in Phase I with a public decision were on average 2.1 days longer in the second period than in the first (**Diagram 7**).

**Diagram 7 | Average decision time period in number of business days for decisions in Phase I, by filing period**

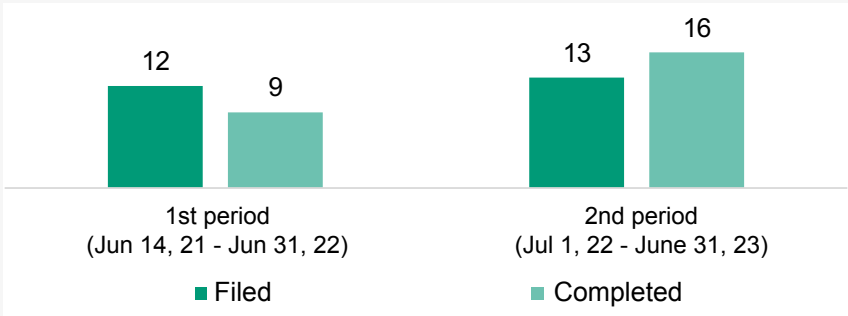


Preparation: Own.

Source: Indecopi (information taken from public decisions)

The number of filled transactions rose from 12 to 13 between the first and second period analyzed, which was roughly an 8% increase. Interestingly, the number of notified transactions in a year stayed within the range expected when the Law first came into force. Additionally, the number of completed merger and acquisitions rose from 9 in the first period to 16 in the second period (see **Diagram 8**).

**Diagram 8 |** Filed and completed merger and acquisition applications

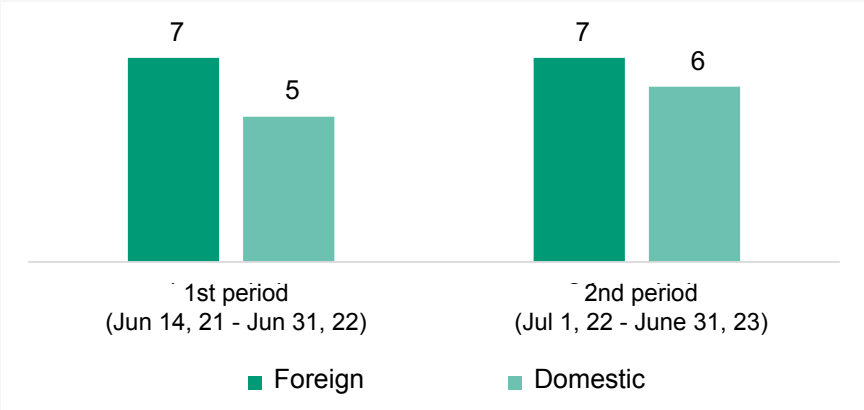


Preparation: Own.

Source: Indecopi (information taken from public decisions)

By origin, the number of transactions originated abroad with an impact in Peru stayed at 7 in the two periods of application of the legislation. The number of transactions originated in Peru rose from 5 to 6. This means that a certain balance has been maintained in the taste for investing to bring about mergers between local investors and foreign investors.

**Diagram 9 |** Merger and acquisition applications, by transaction origin and filing period



Preparation: Own.

Source: Indecopi (information taken from public decisions)

# 5. METHODS IN THE ASSESSMENT OF MERGERS AND ACQUISITIONS

In this section we describe a few methods explained by the Commission in the decisions adopted by that body. This provides a way of identifying how the authority has been assessing mergers and acquisitions and of tracking the predictability of its decision, especially with regard to its economic analysis.

## PRELIMINARY ECONOMIC ANALYSIS METHODS

The 26 decisions made public by the Commission showed important methods which were part of the economic analysis geared towards building theories as to how a transaction could affect competition and disregarding assumptions of a significant effect on competition.

**Table 9** provides a brief summary of the main methods of which details have been made public by the Commission, in the decisions reviewed to date.

**Table 9 | Economic Analysis: A few methods used by the Commission**

Element of Analysis	Method
Market definition	<p>The Commission has stuck to a conservative method for defining markets, and has even defined markets at the level of a specific product.</p> <p>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.</p>
Barriers to entry	<p>The authority observably pays particular attention to paperwork barriers, especially in relation to permit and license procedure times.</p> <p>Among other elements, the authority considers that brand reputation may be an important barrier.</p>
Characteristics of demand	<p>The costs of change, in other words the ease with which consumers or clients may change supplier, may be an important element to be considered in the economic analysis.</p>



Presence of rivals	<p>The authority has taken the view that the presence of rivals with similar or higher market shares than those of the companies involved may mitigate risks to competition.</p> <p>It is not clear, however, whether only one rival with those characteristics has to exist or whether more than one rival needs to be identified.</p>
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Source: Commission's public decisions.

## CONDITIONS AND REMEDIES

As mentioned above, only one transaction was approved in Phase II over these first two years (although a second transaction moved to Phase II in 2023 and is 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. It may be said that the Commission, under the former merger control legislation that only concerned the electricity industry, only applied behavioral conditions, and therefore for the time being structural conditions have not been assessed, such as divestitures or the sale of rights.

In particular, the Commission has designed as a remedial measure 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 whose trademarks are ordered to be licensed, until the first mandatory license takes place.

## NON-COMPETITION CLAUSES

In the Commission's decision in Phase II, a few methods are inferable relating to non-competition clauses adopted as part of the agreements concluded in the merger or acquisition. The mentioned 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 greater scopes than the standard.

In **Table 10** we provide a brief summary of the elements considered by the authority, which are relevant for any negotiations conducted between the various players 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 players bound in the transaction.	-
	Material	Should be confined to operations which are strictly necessary to ensure the validity of the transaction.	-
	Spatial	Should be confined to the geographic area in which the transaction has effects.	-
	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 time period, reasons will have to be given for the length of the period.</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>

# CONCLUSIONS AND THOUGHTS

In the roughly two 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 remained 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 in particular, with technical support from the Directorate. Although the time periods for clearance of a transaction increased on average by around two days in the second period with respect to the first, they stayed comfortably within the maximum statutory period, which gives the right signal to stakeholders.

Thirdly, the methods adopted in practice by the authorities continue to be based on international standards, affording predictability regarding the elements that could generate cause for concern over competition such as, for example, the clauses or agreements forming part of a merger or acquisition transaction.

In coming years new challenges will obviously have to be faced in the application of this instrument of public policy. So, as long as we see a continuing of the issuance of clear methods and rules, of the ongoing work of capable technical teams, and close dialog between the authorities and business players, 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

	Transaction	Companies involved	Origin
1	Decision no 087-2021/CLC-INDECOPI	Acquirer: Patagonia Holdco LLC	Domiciled in: USA
		Target no 1: Level 3 GC Limited	Domiciled in: Bermuda
		Target no 2: Global Crossing Americas Solutions, LLC	Domiciled in: USA
		Target 3: CenturyLink Latin America Solutions, LLC	Domiciled in: USA
2	Decision no 098-2021/CLC-INDECOPI	Acquirer: Grupo Vinci S.A.	Domiciled in: France
		Target: Cobra Servicios, Comunicaciones y Energía, S.L.U.	Domiciled in: Spain
3	Decision no 003-2022/CLCI-INDECOPI	Acquirer: APMH INVEST XXVIIIAB	Formed in: Sweden
		Target: Unilabs Holding AB	Formed in: Switzerland
4	Decision no 005-2022/CLC-INDECOPI	Acquirer: Nugil S.A.A (Nugil)	Formed in: Colombia
		Target: Nutresa S.A.	Formed in: Colombia
5	Decision no 007-2022/CLC-INDECOPI	Acquirer: FLS Germany Holding gmbh (FLS)	Formed in: Germany
		Target: TK Mining	Formed in: Germany
6	Decision no 017-2022/CLC-INDECOPI	Acquirer: Norcobre S.A.C	Domiciled in: Peru
		Target: Contonga Minería S.A.C	Formed in: Peru
7	Decision 021-2022/CLC-INDECOPI	Acquirer: Intercorp Financial Services Inc. (IFS)	Formed in: Panama
		Target: Procesos de Medios de Pago S.A.C. (PMP)	Formed in: Peru
8	Decision no 025-2022/CLC-INDECOPI	Acquirer: Centro Logístico y de Fabricación S.A.C.	Belonging to the Intercorp Group (Peru)
		Target: Ferreycorp S.A.A	Transactions in Peru
9	Decision no 037-2022/CLC-INDECOPI	Acquirer: Crystal Realty 2 S.A.C.	Domiciled in: Peru
		Target: Building (asset)	Located in Lima, Peru
10	Decision no 043-2022/CLC-INDECOPI	Acquirer: AL Makani -Luxembourg S.A.R.L.	Domiciled in: Luxembourg
		Target: Holding Hotelera GHL S.A.S.	Transactions in Peru
11	Decision no 045-2022/CLC-INDECOPI	Acquirer: Técnica Avícola S.A. (Tecavi)	Formed in: Peru
		Target: Oregon	Formed in: Peru
12	Decision no 076-2022/CLC-INDECOPI3	Acquirer: Pharmaceutica Euroandina S.A.C.	Domiciled in: Peru
		Target: Hersil S.A.	Domiciled in: Peru
13	Decision no 062-2022/CLC-INDECOPI	Acquirer: Z Power Perú S.A.C.	Formed in: Peru
		Target: Orazul Energy Perú S.A	Formed in: Peru

	Transaction	Companies involved	Origin
14	Decision no 079—2022/CLC-INDECOPI	Acquirer: <i>Cretaceous Bidco Limited</i>	Formed in: UK
		Target: <i>Contourglobal PLC</i>	Formed in: UK
15	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
16	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
17	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
18	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
19	Decision no 008-2023/CLC-INDECOPI	Acquirer no 1: <i>Ultratug ApS</i>	Formed in: Denmark (part of the Ultronav group)
		Acquirer no 2: <i>Remolcadores Ultratug Ltda.</i>	Formed in: Chile (part of the Ultronav group)
		Target: <i>Holding Transoceánica S.A.</i>	Formed in: Peru
20	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>SAMAYI S.A.</i>	Domiciled in: Peru
21	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
22	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
23	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
24	Decision no 049-2023/CLC-INDECOPI	Acquirer: <i>Canada Inc.</i>	Formed in: Canada
		Target: <i>Hortifrut</i>	Formed in: Chile
25	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: <i>Does not have a name</i>	Domiciled in: Peru

Source: Commission decisions (public version)

Preparation: Own

# GARRIGUES

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