Payet Rey Cauvi Pérez

New Peruvian Merger Control Legislation

The Peruvian Government has enacted a new mandatory and suspensory clearance regime, which will come into force next year.

Previously, Peruvian legislation only imposed mandatory pre-notification and clearance requirements for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution. [1]

Summary Breakdown

Scope. The new merger control regime will apply to concentrations occurring in all fields of economic activities, except for concentrations involving failing banks and insurance companies that endanger the stability of the financial system, which will only require clearance from the Superintendence of Banking and Insurance.

Reviewing Agency. INDECOPI, Peru's multipurpose market overseer, consolidates all merger review responsibilities. The Competition Commission at INDECOPI, which already investigates and sanctions anticompetitive practices, will be charged with the initial phases of review and issuing clearance decisions. The Technical Secretariat to the Competition Commission will provide administrative support, issue guidelines and conduct noncompliance investigations. The Tribunal for the Defence of Competition at INDECOPI will act as an appellate body.

Suspensory Regime. Reportable concentration acts must be notified to the Competition Commission and cannot be implemented unless and until INDECOPI grants clearance.

Relevant Concentration Acts. The statute defines "economic concentrations" subject to clearance as transactions that involve a permanent transfer or change of control over a company or part of it, including:

- The merger of two or more previously independent economic agents into any form of company or entity.
- The acquisition of rights by one or more economic agents that, directly or indirectly, allow the holder to, individually or in association, exercise control over another economic agent.
- The incorporation by two or more independent economic agents of a joint company, a joint venture or any other form of association agreement in which the former share control over a new autonomous entity that performs a permanent economic activity.
- The acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

In turn, the statute defines "control" as the power to exercise lasting and decisive influence over the composition, deliberations or decisions of an undertaking's decision-making bodies, allowing it to determine the latter's competitive strategy.

Minority Interests. Minority acquisitions do not require notification unless they confer control (*i.e.*, the power to exercise a decisive and lasting influence over an undertaking's competitive strategy).

"Newcomer Exemption". Concentrations resulting in the acquisition of control by an economic agent who prior to such concentration does not partake in the relevant market, would not be required to be notified. Supplemental regulations are expected to be issued clarifying the precise scope of this exemption.

Thresholds. The new regime has two concurrent financial thresholds: (i) the parties to the transaction must have a combined turnover (gross revenue) of at least PEN 495,6 million (approximately USD 150.2 million) in Peru and (ii) two of the parties to the transaction must each have a turnover of at least PEN 75.6 million (approximately USD 22.9 million).

Timing of Notification. Parties must notify their deal before the transaction has been consummated.

[1] Law No. 26876, the Antitrust and Anti-oligopoly Law for the Electricity Sector, in force since 1997.

Notification Form. A standard notification form is expected to be issued by INDECOPI in the coming months.

Review Period (up to 175 business days). The first phase review period is thirty (30) business days. Said period commences only after a notification is deemed complete. The Competition Commission has up to twenty-five (25) business days to determine the completeness of the notification.

If the Competition Commission concludes that the transaction may potentially raise "*serious concerns*" of generating restrictive effects upon competition, it can initiate a second phase review that may last a maximum of one hundred twenty (120) business days.

If a decision has not been issued upon the expiration of the review periods, the transaction will be deemed to have obtained clearance.

Decisions issued by the Competition Commission are appealable to the Tribunal for the Defence of Competition. The Tribunal must issue its determination within ninety (90) business days.

Ability to Carve Out and Gun-Jumping. The statute does not contain explicit provisions on carve outs, setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI. It does however explicitly sanction the implementation of the proposed transaction prior to clearance as a breach of the suspension obligation (*i.e.*, gun-jumping).

Clearance and Voluntary Commitments. INDECOPI may only deny clearance if it determines in a second phase review that the transaction will generate "*significant restrictive effects upon competition in the market*".

Parties may offer commitments to remedy competitive concerns that arise during the evaluation. If these are accepted, the Competition Commission may issue a conditional clearance decision.

Conditions imposed are subject to periodic review by the authority and may be overturned or modified if competitive conditions have varied sufficiently to justify it.

Confidentiality. Upon the initiation of a phase two review, the Competition Commission shall publish a summary of its decision to do so, allowing third-parties with legitimate interest to partake in the procedures providing information. Third-parties, however, are not formally deemed party to the procedures and will only be allowed limited access to the information on record.

Commercially sensitive and reserved information provided by the notifying parties may be deemed and treated as confidential. Confidential information may not be accessed by third-parties.

Penalties for Noncompliance. Parties that close reportable deals without prior approval from INDECOPI, that engage in gun-jumping during the suspensory period or that violate conditions imposed upon clearance are subject to fines of up to 12% of gross revenue of the offender or its economic group. INDECOPI may also seek to void and breakup the unauthorized concentration.

Vacatio legis. The statute will come into force nine (9) months from the day after its publication (i.e. August 20, 2020). Concentrations occurring prior to said date will not be subject to administrative authorizations, except for vertical or horizontal concentrations occurring in the electricity market, which will continue under their current regime until the new regulation comes into force. The statute will be in force for a period of five (5) years, unless it's made permanent by the Peruvian Congress.

Contacts:

Carlos A. Patrón
cap@prcp.com.pe

David Kuroiwa
dkh@prcp.com.pe

Julia Loret de Mola
jld@prcp.com.pe

Giancarlo Baella
gbp@prcp.com.pe