

New Peruvian Merger Control Complementary Regulations

The Peruvian Government has issued a preliminary version of the Executive Regulation ("Regulation") for the Peruvian Merger Control Legislation ("MCL") which will come into force next year (March 1, 2021).¹

The Regulations have been published for review and public comments for thirty calendar days from the date of its issuance (July 24, 2020).

Summary Breakdown

Threshold determination: The MCL has two concurrent financial thresholds: (i) the parties to the transaction must have a combined Peruvian turnover (gross revenue) of at least 118,000 Referential Tax Units (approximately USD 150.2 million) in the last fiscal year and (ii) two of the parties to the transaction must each have a Peruvian turnover of at least 18,000 Referential Tax Units (approximately USD 22.9 million) in the last fiscal year.²

The Regulation details the rules that will be used to determine the turnover that shall be considered in each type of economic concentration:

- For mergers between two or more previously independent economic agents into any form of company or entity, the Peruvian Competition Authority ("INDECOPI") will consider the Peruvian turnover (gross revenue) of the economic agents involved in the operation and their economic groups.
- For 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, INDECOPI will consider the Peruvian turnover (gross revenue) of the acquiring agent, the economic group of the latter, the acquired agent and the companies in which the latter exercises control.
- For incorporations between two or more independent economic agents of a joint company, a joint venture or any other type of association agreement in which the former shares control over a new autonomous entity that performs a permanent economic activity, INDECOPI will consider the Peruvian turnover (gross revenue) of the economic agents involved in the operation and their economic groups.
- For acquisitions by an economic agent, by any means, through direct or indirect control over productive operating assets of another economic agent, INDECOPI will consider the Peruvian turnover (gross revenue) of the acquiring agent and the economic group of the latter and the Peruvian turnover (gross revenue) generated from the productive operation assets acquired.

Consecutive operations. Minority acquisitions do not require notification unless they confer control (i.e., the power to exercise a decisive and lasting influence over the competitive strategy of an undertaking). Under this scenario, the INDECOPI will consider all operations performed by the same economics agents in the period of two years as an individual operation. The turnover to be considered in this case will be those earned in the last fiscal year prior to the operation that triggered the notification.

Simplified requirements. The Regulation details the documentation that must be included in the notification to INDECOPI (including financial statements, report of merger notifications in other locations and their status, etc.).

However, the documentation required with the notification will be reduced if: (i) the agents involved in the economic concentration (or their economic groups) do not develop the same economic activities in the same product or geographical market or in the same production/value chain (vertical market); or, (ii) the economic concentration allows the acquirer to have exclusive control over a company where the former had joint control.

¹For more information about the Peruvian Merger Control Legislation and its modifications, please access the following Client Alerts:

<https://prcp.com.pe/wp-content/uploads/2019/11/Client-Alert-EN-New-Peruvian-Merger-Control-Legislation-cian.pdf>

<https://prcp.com.pe/wp-content/uploads/2020/07/Payet-Rey-Cauvi-Pérez-Abogados-Changes-to-the-Peruvian-Merger-Control-Legislation.pdf>

²A Referential Tax Unit has a value of PEN 4,200.00 for the year 2020 and increases every year. Exchange rate used: 3.30.

Voluntary Commitments. Parties may offer commitments to remedy competitive concerns that arise during the evaluation within fifteen business days from the date the application is deemed completed (first phase) and thirty business days after the second phase has begun. The decision issued by INDECOPI regarding the commitments offered shall be deemed final and not subject to appeal.

Conditions: Conditions imposed are subject to a specific period of time and may be reviewed, overturned, modified or ratified if competitive conditions have varied sufficiently to justify it or the period of time of such condition is close to its expiration.

Penalties for Noncompliance. The MCL detailed that parties who close reportable deals without prior approval from INDECOPI, engage in gun-jumping during the suspensory period or 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 break up the unauthorized concentration. The Regulation details that the infringing agent will be considered duly notified of the charges, even if such documentation is delivered to any of the companies of their economic group with a legal address in Peru.

Registrations of Concentrations in the Public Registry: In order to be registered in the Peruvian Public Registry, any concentration act will require a sworn statement issued by the involved agents declaring that such operation either: (i) does not require an authorization from INDECOPI; or, (ii) has been approved by INDECOPI, in which case a copy of the decision issued must be presented.

Guidelines: INDECOPI is entitled to issue guidelines regarding the application and interpretation of the MCL and the Regulation.



Band 1 for Corporate/M&A
Chambers Latin America 2020



Band 1 for Corporate/M&A
Legal 500 (2019)



Band 1 for Competition/Antitrust
Chambers Latin America 2020



Band 1 for Competition/Antitrust
Legal 500 (2019)

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