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# The Legal 500 Country Comparative Guides

## Peru

# MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Peru.

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# PERU

## MERGER CONTROL



### 1. Overview

In Peru, the Defense of Free Competition has as its main normative base the Legislative Decree 1034 - Law of Repression of Anticompetitive Behaviors (hereinafter, LRAB), which establishes an ex post control of anticompetitive conducts, such as the abuse of dominant position, horizontal and vertical collusive practices, in order to promote economic efficiency in markets for consumers welfare. The National Institute for the Defense of Competition and Protection of Intellectual Property (hereinafter, INDECOPI) applies the LRAB in all sectors of the economy, except in the public telecommunications services sector where the Supervisory Organism of Private Investment in Telecommunications - OSIPTEL is the entity competent to apply the LRAB.

Peru used to have an ex ante (prior) and exclusive control of business concentration operations between firms of the electricity sector. It was regulated by Law N°26876 - Electricity Sector Anti-monopoly and Anti-Oligopolistic Law (hereinafter, Law N°26876) - and by its bylaws (Supreme Decrees 017-98-ITINCI and 087-2002-EF). Then, in March 2021, Peru enforced a mandatory merger control regime applicable to all fields of economic activities, through approved [Urgency Decree No 13-2019](#) (hereinafter, DU 13-2019). On the aforementioned date, DU 13-2019 derogated and replaced Law 26876.

However, since June 14th of 2021, a new business concentration regime came into force. The Law N° 31112 (hereinafter, Law 31112) - Law that establishes an ex ante control of corporate concentrations - and its bylaw (Supreme Decree 039-2021-PCM), altogether with the Guidelines for Notification Thresholds Calculations. As the previous regime from the DU 13-2019, the new regimen is intended to be applied in every economic sector, as long as the thresholds are exceeded.

From now on, we will analyze Law 31112 and its respective bylaw.

### 2. Is notification compulsory or voluntary?

The notification is always compulsory, only if the firms have exceeded the thresholds.

### 3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Yes, if all the conditions established by Law for previous control are met, the firms are forbidden to complete the transaction without the authority's clearance. Otherwise, the transaction is not only deemed null, but is also considered as an infringement and punished by INDECOPI.

### 4. What types of transaction are notifiable or reviewable and what is the test for control?

The Law 31112 has the following definitions of notifiable transactions:

- The merger between two or more previously independent firms.
- The acquisition, direct or indirectly, by one or more firms of rights that grant them control over the whole or part of one or more firms.
- The creation of a joint venture or any similar contract that grants joint control over one or more economic agents.
- The acquisition of control, direct or indirectly, of the productive assets of one or more different economic agents.

The Law 31112 defines "control" as the possibility to exert a decisive and continuous influence over an economic agent. The Law indicates the forms of control as it follows:

- Property rights or the use of the totality of the firm's assets.

- Rights or contracts which grant decisive and continuous influence over the composition, deliberations and decisions of the bodies of a corporation, determining direct or indirectly its competitive strategy.

### **5. In which circumstances is an acquisition of a minority interest notifiable or reviewable**

Only if the acquisitions confer direct or indirect control over the target company, in terms of the Law 31112.

### **6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?**

Under the Law 31112, an authorization from INDECOPI is required prior to the acquisition of direct or indirect control of a firm, only if the following thresholds are concurrently met:

- The sum of the value of the annual gross sales or income or the assets' value, during the year before the notification, in the country of the companies involved (combined threshold) has a value equal to or greater than 118 000 tax units (approximately, USD 138 million).
- The value of the annual gross sales or income or the assets' value, during the year before the notification, in the country of at least two of the companies involved (individual threshold) is equal to or greater than 18 000 tax units each (approximately, USD 21 million).

These thresholds are applied to any concentration transaction.

In addition, INDECOPI can propose updates to the thresholds. The modification must be approved by Law.

### **7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

The Law 31112 only takes into account the firm's annual gross sales, income or its assets' value in the country during the year before the notification date. In order to verify if the firms exceed the thresholds, both incomes/gross sales and assets need to be valued. If any of these exceed both the combined and individual thresholds, then the notification and clearance are

mandatory.

Notwithstanding, the proposed regulation of the Law 31112 states that the term "involved firm" refers to the economic agent that participates in the operation and its economic group. It proposes the following rules to determine the relevant gross sales for the threshold calculation:

- Merger of two independent firms to create a new firm: annual gross sales, income or assets' value of the participant firms and its economic groups, if applicable.
- Absorption of one firm by other: annual gross sales, income or assets' value of the absorbing company and its economic group, and the annual gross sales or income of the acquired company and other economic agents that the acquired company controls.
- Acquisition by one or more firms of the rights that grant them control over the whole or part of one or more firms: annual gross sales, income or assets' value of the acquiring firm and its economic group, and annual gross sales or income or assets' value of the acquired firm and the economic agents that are controlled by the acquired.
- Creation of a Joint venture or any similar figure that grants joint control over one or more economic agents: annual gross sales, income or assets' value of the participant firms and its economic group.
- Acquisition of the direct or indirect control of the productive assets of one or more different economic agents: annual gross sales or income of the acquiring firm and its economic group and the annual gross sales or income generated by the productive asset or its book value.

### **8. Is there a particular exchange rate required to be used to convert turnover and asset values?**

Law 31112 does not establish anything in this regard.

### **9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?**

As long as the joint venture qualifies as a concentration operation that grants direct or indirect control of a company and the thresholds are exceeded, it will be

necessary to notify it to INDECOPI.

**10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?**

Yes. INDECOPI will evaluate as a single concentration operation those acts that are executed within two years if the thresholds are exceeded. The transaction must be notified before the last act is executed.

Conversely, it is possible to split a control operation if it lasts more than two years.

**11. How do the thresholds apply to “foreign-to-foreign” mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?**

No. According to Law 31112, the thresholds are the same for all kinds and forms of mergers and acquisitions. However, foreign concentrations must be notified if anticompetitive effects are produced or might be produced in Peru.

**12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Law 31112 establishes a voluntary filing regime if the firms involved in the transaction do not exceed the thresholds. If the voluntary filing is done, the operation cannot be performed, unless it has INDECOPI's authorization.

**13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?**

The substantive test under Law 31112 is whether a proposed merger may have a significant effect of diminishing, damaging or impeding competition in the markets involved.

To this end, INDECOPI must evaluate the following aspects:

1. The market structure.

2. The real or potential competition in the market.
3. The evolution of the products or services' supply and demand.
4. The sources of distribution.
5. The legal, technological, economic and strategical entry barriers.
6. The economic and financial power of the involved firms.
7. The creation or strengthening of a dominant position.
8. The efficiencies produced by the concentration.

These economic efficiencies must meet the following requirements:

1. They must be proven.
2. They must be inherent to the concentration.
3. They must be aimed to compensating for the restrictive effects identified and improving the welfare of consumers.
4. They must be able to be transferred to the consumer.
5. They must be verifiable by the authority.

The authority will have to prove the possible anti-competitive impacts of the operation, while the parties must prove that the efficiencies, they claim meet the stated requirements.

**14. Are factors unrelated to competition relevant?**

No.

**15. Are ancillary restraints covered by the authority's clearance decision?**

Ancillary restraints are covered by the INDECOPI's evaluation and decision. These restraints are evaluated in concert with the entry barriers.

**16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

According to Law 31112, the involved undertakings must request regulatory clearance before any corporate and/or commercial transaction is carried out. Without this clearance, the referred process will have no legal effect and liabilities are triggered.

### 17. What is the earliest time or stage in the transaction at which a notification can be made?

Law 31112 established that the notification must be made before it is executed, without indicating an earliest time or stage in the transaction. However, the transaction will not take effect if it has not been notified and approved.

### 18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Formal pre-notification conversations can be held with INDECOPI. Law 31112 establishes that before the start of the procedure, the parties can conduct consultations of an indicative nature to the authority in order to check whether they are within the scope of the Law. The opinion issued by the support organ of the authority in such consultations is not binding for the Commission for the Defense of Free Competition (hereinafter, the Commission).

### 19. What is the basic timetable for the authority's review?

According to Law 31112, the Technical Secretariat has 10 business days to review the notification. If there is no need to amend it, the First Phase begins. The authority has 30 working days to determine if the transaction is under the law's application and raises serious competitive concerns. If not, the concentration is approved. On the other hand, the First Phase ends and the authority begins with the Second Phase of 90 business days, extendable for 30 more.

This process is subject to positive administrative silence if the Commission does not decide on the authorization or rejection in the established timetable.

### 20. Under what circumstances may the basic timetable be extended, reset or frozen?

The term to resolve may be suspended for 15 business days, extendable for 15 more, when the undertakings present a commitment during the First Phase, to prevent or mitigate the anti-competitive effects of the concentration. If the commitment is presented during the Second Phase, the procedure is frozen for 15 working days, extendable for 30 more. The suspensory effect is conditional to the authority's approval.

### 21. Are there any circumstances in which the review timetable can be shortened?

No.

### 22. Which party is responsible for submitting the filing?

Under Law 31112, for mergers or collective control acquisitions, the notification must be made by both parties. In the remaining cases, the notification must be made by the agent that totally or partially acquires the control of other agents.

### 23. What information is required in the filing form?

INDECOPI requires the following information from the undertakings, under Law 31112:

- Identification of the persons or companies that make the notification and of others that also intervene in the operation.
- Identification of the notifying economic agent legal representatives.
- Description and objective of the business concentration operation and identification of the economic agents involved in it. When applicable, the notifying economic agent must prove the serious situation in crisis of any of the companies involved and the need to carry out the concentration operation.
- Description of the ownership and control structure of each of the economic agents involved in the operation and their respective economic groups.
- Description of the relationship, property, and / or management ties existing between each of the economic agents described in the previous point with respect to other companies operating in the country.
- Description of the markets involved in the business concentration operation.
- Detailed description of the efficiencies linked to the business concentration operation.
- Identification of the countries in which the business concentration operation has been or will be notified.
- The financial statements for the fiscal year prior to that of the notification of the economic agents involved.

The bylaw describes the requirement for the simplified notification form.

#### **24. Which supporting documents, if any, must be filed with the authority?**

INDECOPI requires a copy of the documents related to the closing of the operation, as well as a copy of the analysis or studies about the conditions of competition, the competitors and the market situation.

Notwithstanding this, all the information presented by the parties constitutes a declaration under oath.

#### **25. Is there a filing fee?**

Yes, the filling fee is PEN 91 629.40 (approx. USD 23 340).

#### **26. Is there a public announcement that a notification has been filed?**

According to the Law 31112, INDECOPI publicizes a summary of the notified operation in media if it must be assessed in the Second Phase.

#### **27. Does the authority seek or invite the views of third parties?**

Third parties with legitimate interest can present relevant information about the concentration to the decision-making body.

#### **28. What information may be published by the authority or made available to third parties?**

As we previously mentioned, INDECOPI publicizes a summary of the notified operation in media if it must be assessed in the Second Phase, in order to allow third parties to present the information they find appropriate or relevant. Third parties who appeared in the process can access to the administrative record.

#### **29. Does the authority cooperate with antitrust authorities in other jurisdictions?**

It is possible that the authority can cooperate with antitrust authorities in other jurisdictions.

#### **30. What kind of remedies are acceptable to the authority?**

Law 31112 does not state what specific remedies or kind

of remedies are acceptable to authorize the merger or acquisition. However, the authority has enough powers to impose both behavioral and structural remedies.

#### **31. What procedure applies in the event that remedies are required in order to secure clearance?**

The remedies or commitments are proposed by the undertakings in order to reduce the anti-competitive effects from the operation. When the suspensory effect (explained in the Question # 20) ends, the authority evaluates them and decides according to the following:

- If the decision-making body approves the remedies proposed, the transaction is authorized and the Second Phase ends.
- If the decision-making body rejects the remedies, this decision is unimpugnable and must be notified to the undertakings involved and the clearance procedure continues.

Law 31112 also states that if the authorization is subject to conditions, they must be reviewed within a certain period in order to determine whether it is necessary to maintain, eliminate or modify them. This review may also occur due to a variation in the conditions of competition or at the request of the parties.

#### **32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

According to the Law 31112, failure to submit an application for authorization qualifies as a minor offense and is penalized with a fine of up to 500 UIT (approx. USD 585 000), up to a maximum of 8% of the gross income received by the offender or its economic group the year prior to the issuance of the resolution that decides to impose the fine

Executing the concentration operation before submitting it to the control procedure or issuing the corresponding resolution is considered a serious infraction and is sanctioned with a fine of up to 1 000 UIT (approx. USD 1.17 million), up to a maximum of the 10% of the gross income received by the offender or its economic group the year prior to the issuance of the resolution that decides to impose the fine.

#### **33. What are the penalties for incomplete or misleading information in the**

### notification or in response to the authority's questions?

According to the Law 31112, failure to provide the required information or the presentation of incomplete, incorrect, adulterated, misleading or false information are considered very serious infractions, and may be penalized with fines greater than 1 000 UIT (approx. USD 1.17 million), up to a maximum of 12% of gross income received by the offender or its economic group the year prior to the issuance of the resolution that decides to impose the fine.

### 34. Can the authority's decision be appealed to a court?

The decision is taken in the first instance by the Commission for the Defense of Free Competition of INDECOPI, which can authorize the operation, condition its authorization to the adoption of certain remedies or deny it. This can be appealed before the Special Court for the Defense of Competition of the INDECOPI Tribunal, this is part of the administrative procedure.

The decision issued by the Court, when it is final, may be challenged before the judiciary, following a contentious administrative process. This institution may correct or annul the ruling in administrative headquarters by INDECOPI.

### 35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

Since the Law came into force in June 2021, 12 transactions have been notified. Hereafter, we present the most remarkable characteristics of such transactions:

- So far, 8 operations have been authorized, during the Phase 1 of the proceeding (which means that the authority has not observed significant anticompetitive concerns regarding the operations), without further conditions.
- Indecopi has applied the following criteria to determine whether a transaction does not raise significant anticompetitive risks: (i) if the undertakings do not participate on the same market; (ii) if the market share of the resulting

undertaking does not exceed 30%; (iii) if the impact on competition is significant, the transaction is held on a market characterized by a strong competitive pressure.

- The markets in which the operations were being held are: telecommunications, retail, laboratories, maritime transport, mining, meat, among others.
- 7 out of the 12 transactions were international, reaching an average value of USD 3 400 million.

In May 31st, Indecopi published the Project of Guidelines for qualification and analysis of corporate concentration operations. The document expands: (i) the different types of control; (ii) the cases in which the Law 31112 shall be applied (explained above in Question 4); (iii) how the factors named in Question 13 should be addressed by the authority; (iv) the effects a concentration could have; (v) efficiencies; and (vi) entry barriers. The Project also provides hypothetical situations and examples.

Moreover, one of the most controversial topics regarding the Law 31112 and its bylaw is the possibility of reviewing concentrations which were already performed and did not exceed the thresholds. This ex officio review is done in some special circumstances, such as:

- The concentration was performed in a concentrated market.
- The concentration involves a small economic agent with a significant growth potential or a new competitor acquisition.
- When the economic group of an undertaking has previously performed an acquisition.
- Other acquisitions with the potential to produce restrictive effects on competition.

The ex officio control is questionable, under a legal examination and comparison between the competencies attributed by the law and the text of the bylaw. This competency has motivated judicial actions from some citizens.

### 36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

Currently, there are no future developments or reforms regarding the merger control regime in Peru.

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