

NEW PRE-MERGER CONTROL REGIME ENTERS INTO FORCE IN PERU

On January 7, 2021, a new merger control act (*Ley que Establece el Control Previo de Operaciones de Concentración Empresarial – Ley No. 31112*) was published in the official gazette approving a new pre-merger control regime for all business transactions that: (i) involve a change of control; (ii) exceed certain thresholds; and (iii) have effects in all or a part of the Peruvian territory. Complementary regulations and guidelines were published on March 4, 2021 and June 1, 2021, respectively. The merger control enforcement will be conducted by the Peruvian Antitrust Agency ("INDECOPI") and will enter into force on June 15, 2021. Before implementation of the new regime, Peru was only reviewing transactions in the electricity sector.

We are providing a Q&A that covers the main aspects of the new regime below:

1. What transactions are caught by the regime?

Any act or transaction that involves a permanent transfer or change of control in a company or part of a company. Among others, the following will be considered as transactions:

- (i) Mergers;
- (ii) Acquisition of shares;
- (iii) The formation of a joint venture or any other similar arrangement involving the acquisition of joint control over one or more economic agents; or
- (iv) The acquisition of assets that involve the transfer of control.

In addition, INDECOPI will consider as a single transaction, a set of acts or operations carried out between the same economic agents within a period of two years. The concentration must be notified before the last transaction or act that exceeds the thresholds established.

2. Are there any excluded transactions?

Among others, the following transactions do not fall under the scope of the new merger control regime:

- (i) Business growth within the same economic group;
- (ii) The acquisition of political and/or economic rights by an economic agent that has not previously participated in the relevant market or in any related market; and
- (iii) Transactions that have no effects in the Peruvian territory.

3. What transactions are subject to prior control?

Transactions that meet the following characteristics are subject to the new merger control regime:

- (i) A permanent transfer or change of control in a company or part of it, including the acquisition of productive assets;
- (ii) A transaction executed in Peru or abroad, but that has effects in all or a part of the Peruvian territory; and
- (iii) Exceeds the jurisdictional merger control thresholds established by the new law.

4. What is the definition of "control"?

The possibility of exercising decisive and continuous influence over an economic agent through:

- (i) Rights of ownership or use of all or part of a company's assets; or
- (ii) Rights or agreements that allow a decisive and continuous influence over the composition, deliberations, and/or decisions taken by a company's decision bodies, directly or indirectly, determining the company's competitive strategy.

5. What are the jurisdictional thresholds?

Transactions will be subject to the new merger control regime when the following thresholds are jointly met before their execution:

- (i) The total annual gross sales or income or value of the assets, in Peru, reported by the companies involved in the transaction, during the past tax year, has reached an amount equal or greater than PEN 519.2M (approx. USD 133M¹ or EUR 109.5M²); and
- (ii) The annual gross sales or income or value of the assets, in Peru, reported by at least two of the companies involved in the transaction,

¹ 1 USD = 3.9027 PEN. Exchange rate: *Mercado Profesional, Promedio Ponderado* published by the *Peruvian Superintendencia de Banca, Seguros y AFP* (sbs.gob.pe) on June 14, 2021.

² 1 EUR = 4.74 PEN. Exchange rate: average between the exchange rate for purchase and the exchange rate for sale published by the *Peruvian Superintendencia de Banca, Seguros y AFP* (sbs.gob.pe) on June 14, 2021.

during the past tax year, has reached an amount equal or greater than PEN 79.2M (approx. USD 20.3M³ or EUR 16.7M⁴) for each company.

6. Which entities shall be considered for purpose of calculating the thresholds?

- (i) In the event of an acquisition of shares or other rights involving a change of control, the acquiring entity and its economic group and the acquired entity and the entities controlled by the acquired entity.
- (ii) In the event of a merger, formation of a joint venture or any other similar arrangement involving the acquisition of joint control over one or more economic agents, the participant entities and their economic groups.
- (iii) In the event of an acquisition of assets, the acquiring entity, its economic group and the acquired assets.

7. What is the definition of "economic group"?

Group of economic agents, national or foreign, formed by at least two members, when any of them has control over the other(s), or when the control over the economic agents correspond to one or many individuals acting as a decision unit.

8. Are there any specifics for purpose of calculating the thresholds?

- (i) A same factor shall be applied for the calculation, that is, gross sales and income may be jointly applied as a factor, but gross sales and income may not be jointly applied with assets as a same factor for purpose of calculating the thresholds.
- (ii) Gross sales and income shall include all sales and income related to the ordinary course of business (it should not include returns, offers or discounts; taxes obtained as withholding or collecting agent; and sales or services between entities of the same economic group).
- (iii) The value of the assets shall be the book value and shall include tangible and intangible assets in Peru.

9. Can IDENCOPI review any transaction other than the ones mentioned in question 3 above?

INDEOPI may review ex post (within one year after closing) by its own initiative, transactions that do not reach the jurisdictional thresholds if any of the following special circumstances are identified:

- (i) Horizontal concentration transactions in concentrated markets;
- (ii) Horizontal concentration transactions involving an economic agent with low market share but growing potential or innovative economic agent that has recently entered the market;

³ 1 USD = 3.9027 PEN. Exchange rate: *Mercado Profesional, Promedio Ponderado* published by the Peruvian *Superintendencia de Banca, Seguros y AFP* (sbs.gob.pe) on June 14, 2021.

⁴ 1 EUR = 4.74 PEN. Exchange rate: average between the exchange rate for purchase and the exchange rate for sale published by the Peruvian *Superintendencia de Banca, Seguros y AFP* (sbs.gob.pe) June 14, 2021.

- (iii) Horizontal concentration transactions where the acquiring entity or its economic group has recently acquired a competitor; or
- (iv) Other concentration transactions that could potentially have material restrictive effects to market competition.

10. Who has the responsibility to report the transaction to INDECOPI?

In the event of a merger or acquisition of joint control, all economic agents involved in the transaction must submit a joint authorization application before INDECOPI. In all other cases, the authorization application must be submitted by the economic agent that is acquiring control over all or a part of one or more economic agents.

11. What are the consequences for failing to notify or gun jumping?

Fines may reach an amount of up to twelve percent (12%) of the infringing company's or its economic group's sales or gross income during the tax year immediately preceding the issuance of INDECOPI's resolution. Additionally, INDECOPI may establish corrective measures aimed at, when possible, reversing any unlawful transactions.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Santiago Roca
Special Legal
Consultant

T +1 202 912 5183
E santiago.rocaarribas
@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore
@cliffordchance.com

**Maria Fernanda Gadea
Rivera**
Foreign Law Clerk

T +1 212 880 5614
E maria.gadea
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2021

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.