

The International Comparative Legal Guide to: Merger Control 2010

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Free Competition Commission of the National Institute for the Defence of Competition and the Protection of Intellectual Property (“INDECOPI”, for its acronym in Spanish), together with its technical secretariat, and the Chamber for the Defence of Competition of the Tribunal for the Defence of Competition and Intellectual Property are the authorities in charge of applying and enforcing merger regulations in the electricity sector, the only kind of pre-merger control which is in force in Peru. Mergers affecting other industries are not subject to merger control.

INDECOPI is a governmental agency with technical, administrative, economic and budgetary autonomy, which is in charge of enforcing the laws and regulations that promote competition and protect intellectual property.

The Free Competition Commission (“the Commission”), composed of four members, decides both merger and antitrust cases. Its technical secretariat, which acts as its executive body, handles the proceedings, carries out investigations, gathers evidence and issues a final report in aid of the Commission’s decision.

Decisions delivered by the Commission are subject to appeal before the Chamber for the Defense of Competition of the Tribunal (“the Chamber”), which is the highest administrative body in the agency and works as a court of appeals. The Chamber, composed of five members, makes a final administrative decision on merger cases. It also functions with the administrative support of a technical secretariat, although its secretariat only handles the proceedings.

In addition, OSINERGMIN, the sector regulator, participates in the merger control process by calculating market shares of the participating companies. OSINERGMIN’s calculations are only for purposes of determining which mergers shall be notified and are not binding for the Commission, which can arrive to a different result in its evaluation. At the Commission’s or the Chamber’s request, OSINERGMIN, the Ministry of Energy and Mines and other public agencies may participate in the proceedings issuing recommendations or reports regarding proposed mergers.

Finally, the Peruvian Agency for Promotion of Investments (PROINVERSION) and its Special Committees also play a role in the case of merger transactions arising out of privatisations, deciding at which point in the privatization process is it pertinent to initiate the pre-merger authorisation proceedings. Both bodies may also participate in the proceedings issuing reports (recommendations) regarding the merger at issue at the Commission’s request.

1.2 What is the merger legislation?

- Law 26876, Antitrust and Antioligopoly Law of the Electricity Sector.
- Legislative Decree No.1033, Law of Organisation and Powers of the National Institute for the Defense of Competition and the Protection of Intellectual Property.
- Legislative Decree 1035, Law which Suppresses Anticompetitive Behaviour (Antitrust Act).
- Supreme Decree 077-2005-PCM, Regulations for the Organisation and Powers of the National Institute for the Defense of Competition and the Protection of Intellectual Property.
- Supreme Decree 017-98-ITINCI, Regulations to Law 26876 complementing pre-merger notification procedures.
- Supreme Decree 087-2002-EF, Regulations complementing Law 26876 with respect to merger transactions in the electricity sector arising out from privatisations.
- Guidelines prepared by the Commission.

1.3 Is there any other relevant legislation for foreign mergers?

There are no particular regulations for foreign mergers. Please refer to the answer to question 1.4 for additional information on specific sectors and to the answer to question 2.6 on foreign to foreign transactions.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Only merger transactions affecting the electricity market are subject to pre-merger control by INDECOPI based on potentially adverse competitive effects.

As a general rule, mergers affecting other industries are not subject to merger control based on a competition analysis. However, there have been cases of the application of a sort of merger control in regulated industries (e.g. telecommunications) where, as part of the proceedings for granting concessions, the authorities study the impact and effects of granting the concession on the competition in the relevant market. In some cases, reports or recommendations have been requested to the sector regulator.

It is relevant to note that recently, a proposal emerged for introducing pre-merger control to the fishing industry. However, this proposal did not succeed.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

Pre-merger control applies to transactions which create horizontal or vertical integration in the electricity market and that affect either the markets of generation, transmission or distribution of electricity. Only horizontal or vertical mergers which have the effect of lessening, harming or obstructing competition in the electricity industry are prohibited.

Concentration can occur through acts such as mergers, the direct or indirect acquisition of controlling interests (in terms of stocks, shares, equity, management or decision-making power and including use or usufruct of shares of stock or equity), the establishment of partnership agreements, joint ventures or trusts, incorporation of a common company, the acquisition of productive assets, and any other transactions or agreements which affects market concentration in the power/energy sector by granting direct or indirect control of a company to one of the parties in the transaction. The definition includes those transactions arising out from privatisations.

The Commission has asserted through case law that a merger will not be deemed to have taken place if the decisions made or the agreements entered into do not modify the structure of control, granting control over a company operating in the electricity market to another company operating in the market. A transaction which does not involve a change of control in a company operating in the market will not be considered a concentration.

In this sense, a company's internal growth, financed by its own resources or with third-party financing is not characterised as a concentration even if it increases its market share as a result of this growth.

Merger regulations do not provide a definition of control. General regulations on securities will apply for referential purposes. In these regulations, control is defined as the "preponderant and continuous influence in a company's decision making structure". Control can be either direct (majority voting power in shareholders' meetings) or indirect (e.g. through agreements, usufructs, trusts, etc.).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, the acquisition of minority shareholdings can amount to a merger when the acquisition grants the acquiring company direct or indirect control. As a general rule, the acquisition of minority shareholdings is exempt from pre-merger control (see the answer to question 3.2 below). However, this exemption will not apply if the merger grants the acquiring company direct or indirect control over a company.

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control if the transaction grants to the participating parties direct or indirect control over another company participating in the electricity market.

2.4 What are the jurisdictional thresholds for application of merger control?

Pre-merger clearance is mandatory in the following cases:

- Horizontal mergers of companies participating directly or indirectly in the markets of generation, transmission or distribution of electricity in Peru and which together or separate, before or after the merger in question, concentrate 15% or more of the relevant market(s).
- Vertical mergers of companies participating directly or indirectly in the markets of generation, transmission or distribution of electricity in Peru and which together or separate, before or after the merger in question, concentrate 5% of any of the markets involved in the transaction.

These market shares are calculated taking into consideration the share of the merging entities engaged directly in the markets of generation, transmission or distribution of electricity and of any of their subsidiaries and affiliates also engaged in these markets. Calculations are based in the company's total income for the calendar year prior to the date of the pre-merger notice.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. Merger control applies even in absence of a substantive overlap. Significantly, this is the case of vertical mergers when the merging companies are engaged in different activities of the electricity production chain (e.g. a transmission company merging with a distribution or generation company).

2.6 In what circumstances is it likely that transactions between parties outside Peru ("foreign to foreign" transactions) would be caught by your merger control legislation?

Foreign transactions that have a direct or indirect effect on control of companies engaged in the generation, transmission or distribution of electricity within Peruvian territory will be subject to the pre-merger control described above. In such cases, its affiliate domiciling in Peru shall be obligated to comply with Peruvian merger regulations and subject to the sanctions it contemplates.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Other than the exceptions described in the answer to question 3.2, there are no provisions by which the jurisdictional thresholds may be overridden.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Peruvian regulations do cover mergers taking place in stages. As noted in the answer to question 3.2, concentrations under certain thresholds (acquisitions of productive assets equivalent to less than 5% of the total value of the productive assets of the acquiring company or of less than 10% of the total of voting stock or shares of the other company) are not subject to merger control even if they take place in one or more stages. Concentrations over these thresholds, taking place in either one or more stages, will be subject to merger control.

Other than the above, there are no further standards or specific rules for assessing mergers taking place in stages.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes, notification is compulsory unless the merger meets the exceptions described in question 3.2. There is no specific deadline although the regulations do state that the filing must be prior to the execution of any of the transactions that result in the merger.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Even when the jurisdictional thresholds are met, pre-merger clearance is not required in the following cases:

- If the integration, taking place in one or various stages, involves the direct or indirect acquisition of productive assets equivalent to less than 5% of the total value of the productive assets of the acquiring company.
- If as a consequence of the merger, taking place in one or various stages, the acquiring company acquires less than 10% of the total of voting stock or shares of the other company. However, the latter shall be subject to pre-merger control when the merger grants the acquiring company direct or indirect control of a company engaged in the generation, transmission or distribution of electricity.
- When control is acquired on a temporary basis by mandate of the legislation regarding the lapsing or denouncing of concessions, bankruptcy and restructuring or any other similar procedure.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

If clearance is not obtained where a merger technically requires notification pre-merger, the transaction will be deemed legally ineffective and sanctions for breach of the merger regulations may apply.

The Commission has the power to initiate *ex-officio* investigations and proceedings to analyse potentially illegal mergers that have not been notified by the merging parties. As a consequence of these proceedings, it can order total or partial divestiture of illegal mergers. It also has the power to decide to initiate proceedings before the judiciary to nullify the transaction or suspend control or management over the illegally acquired company, when pertinent.

In addition, the Commission can impose fines to the acquiring or acquired companies amounting up to 10% of their sales or gross income for the year prior to the decision of the Commission. The Commission may apply such fines when companies carry out the merger which technically requires notification (i) without requesting prior clearance or without awaiting the decision of the Commission authorising the transaction, (ii) even when the merger has already been declared incompatible with the merger legislation, or (iii) when the conditions ordered by the Commission are not complied with. The Commission can also impose fines of up to 500 Taxable Units (approximately, US\$560,000.00) where companies fail to file a pre-merger authorisation, provide fraudulent information in their filing or answer or when they do not provide the requested information or not provide it in the terms requested.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

As noted in the answer to question 2.6, foreign transactions which have a direct or indirect effect on control of companies engaged in the generation, transmission or distribution of electricity within Peruvian territory will be subject to Peruvian pre-merger control described above. Thus, carving out local completion to avoid delaying global completion carries the risks of not filing described in the answer to question 3.3.

In such cases, the affiliate domiciling in Peru shall be obligated to comply with Peruvian merger regulations and subject to the sanctions it contemplates.

3.5 At what stage in the transaction timetable can the notification be filed?

The filing of the pre-merger request must be prior to the execution of any of the transactions that result in the merger. In the case of mergers arising out of privatisation processes, the Special Committee of the privatisation agency decides at what point of this process the pre-merger authorisation shall be initiated.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Merger regulations establish tight timeframes for investigation stages and the issuing of merger decisions, which are outlined below. If the Commission fails to issue a decision in its term, the pre-merger authorisation will be deemed denied (please see the answers to questions 5.1 and 5.8 below for further information).

The regulatory process has a preliminary investigation stage where, once the pre-merger notice is filed, the technical secretariat of the Commission has five business days counted from the filing of the notice to evaluate if the information provided is complete or if additional information is required. If the technical secretariat determines that it is missing relevant information to review the merger authorisation, it will give notice to the filing parties granting them five additional days to provide the requested information. Upon expiration of this term or after the submission of the required information, the Commission and its technical secretariat have ten business days to request further additional information and can grant the filing parties up to ten business days to submit it.

The Commission must issue its final decision within thirty business days counted from the date when the information requirements are fulfilled or the deadlines fixed for this purpose expired. This term can be extended for thirty additional days. In parallel, the Technical Secretariat of the Commission has up to twenty days to issue a report stating its opinion concerning the proposed merger and its effects, and recommending the decision to be issued by the Commission.

During the period of evaluation of the merger by the Commission, a hearing can be granted to the parties. The Commission can also make suggestions or recommendations to the parties with the purpose of eliminating potential objections to the transaction.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Yes, companies engaged in mergers requiring clearance are

prohibited to complete the transaction before the authorisation is granted. Risks are explained in the answer to question 3.3. It is relevant to note that mergers completed without awaiting the decision of the Commission authorising the transaction can be subject to similar penalties to those in which the merging parties fail to file a notice (the merger may be deemed legally ineffective, divestiture can be ordered and fines can sum up to 10% of the companies' sales or gross income for the year prior to the decision of the Commission).

3.8 Where notification is required, is there a prescribed format?

To accelerate proceedings, the Commission has approved guidelines which can be found at <http://www.indecopi.gob.pe/ArchivosPortal/estatico/jurisprudencia/clc/lineamientos/LineamientosFormOperacLeyN26876.pdf>. These guidelines outline a five-item format which contains the following mandatory basic information:

1. Details of the persons or companies that file the pre-merger notice as well as other merging persons or companies.
2. Description of the control and ownership structure of each of the persons or companies that participate in the merger and of their affiliates.
3. Description of the personal, ownership and/or management relationships existing between the persons or companies participating in the filing and in the merger transaction and other companies operating in the relevant market or other related markets.
4. Detailed description of the transaction and of the markets it affects.
5. Relevant information for market definition of the affected markets (e.g. product market, geographic market, concentration and competition, identification of participating firms, entry alternatives, etc.).
6. Detailed description of the effects of the merger in the market and of the efficiencies it will generate.

3.9 Is there a short form or accelerated procedure for any types of mergers?

No, there is not.

3.10 Who is responsible for making the notification and are there any filing fees?

Pre-merger filings shall be made jointly by the merging companies or, where appropriate, by the persons or companies that directly or indirectly acquire, in whole or in part, one or more companies engaged in activities in the electricity market. In the case of foreign to foreign transactions (see the answer to question 2.6 above), its affiliate domiciling in Peru shall be obligated to comply with Peruvian merger regulations and subject to the sanctions it contemplates.

Pre-merger filings are subject to an administrative fee payable to INDECOPI by the filing party or parties, which will be equal to 0.1% of the total value of the transaction or to 50 Taxable Units (approximately, US\$60,000.00), whichever is lowest.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

To assess if the merger has or may have the effect of lessening, harming or impeding competition within the relevant markets, the Commission will analyse the relevant market and its structure, the position of the merging companies in such market, product and supply substitution, entry alternatives and the existence of barriers of entry to the relevant markets, the development of market supply and demand, technical or economic development in the market, potential integration with other markets and the short and long term effects of the transaction in other relevant markets.

In addition, the Commission will analyse if the merger in question has the potential effect to generate efficiencies in the market (including but not limited to the improvement of methods for production and commercialisation, technical or economic developments or benefit consumers) and if such potential effect offsets the adverse competitive effects; if market concentration is materially increased significantly lessening competition (the Herfindahl-Hirschman Index - HHI - is used to assess market concentration); if the merger facilitates anticompetitive behaviour such as cartels or the imposition of artificial barriers of entry; if the merger has or may have anticompetitive purposes (such as artificially inducing other companies to exit the market or limiting market entry).

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Both the Commission and the Chamber can request technical reports to sector regulators, such as OSINERGMIN and the Ministry of Energy and Mines, as well as to other public agencies. Other than that, third party intervention in merger proceedings is regulated by INDECOPI's general rules on third party intervention. Any person that can prove standing can be admitted to the proceedings. A person is considered to have standing if (i) the decision rendered or to be rendered violates, injures or does not recognise its legal rights, or (ii) the decision rendered or to be rendered affects a direct, personal, actual and proven legitimate interest.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Both merger regulations and the regulations on organisation and powers of INDECOPI provide the Commission and the Chamber, together with their technical secretariats, with broad powers to investigate and gather information, and in general any kind of evidence considered to be relevant for their decision. This includes but is not limited to documents, testimonies, cross examinations, inspections and expert reports. As noted above, merger regulations specifically grant the Commission and the Chamber power to request technical reports to sector regulators and other public agencies.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

INDECOPI's regulations have provisions guaranteeing the right of the private agents to request the confidentiality, in whole or in part,

of documents submitted to it as part of the administrative proceedings.

In addition, merger regulations declare that all the information submitted during the pre-merger process shall be treated as confidential and that employees and officials shall be liable for its disclosure. However, this is not the case of merger proceedings arising out from privatisations which the regulations declare of public access. In this case, INDECOPI's general regulations for confidentiality will apply (confidentiality of documents will have to be requested by the filing parties).

The decisions of the Commission and the Chamber, and the reports of the Commission's Technical Secretariat are of public access.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process before INDECOPI ends with the decision of the Commission or of the Chamber, in case of appeal, or at the expiration of the term that the authority has to deliver its decision.

As part of its decision, the Commission may (i) deny admission of the filing, if the merger is not within the jurisdictional thresholds, (ii) authorise the merger, (iii) approve the merger or condition its approval to compliance of certain requirements, or (iv) deny the merger.

The Commission can also declare the existence of a breach of the merger regulations and impose sanctions, order total or partial divestiture of illegal mergers, and decide to initiate proceedings before the judiciary to nullify the transaction or suspend control or management over the illegally acquired company.

If the Commission fails to issue a decision in its term, the pre-merger authorisation will be deemed denied without admitting further evidence. A breach of the regulations or the imposition of sanctions will not be inferred. This result can be challenged before the Chamber (in appeal) or before the judiciary (please see the answer to question 5.8 below for further information).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes, as noted above, during the proceedings the Commission can issue recommendations or suggestions to the merging parties in order to clear the transaction. Although it is not formally covered by the regulations, it is understood that during this period, the merging parties can negotiate with the agency and agree to remedies or conditions.

5.3 At what stage in the process can the negotiation of remedies be commenced?

Although this possibility is not specifically covered by the regulations, the merging parties can negotiate and agree to remedies at any stage of the process prior to a final decision of the Chamber.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There are no specific rules or a standard approach for conditions to be applied to divestitures. As of this date, no divestitures have been ordered by the Commission or the Chamber and, although the

regulations grant them the power to do so, there is some discussion as to the extent of these powers and the effects of these kinds of decisions.

5.5 Can the parties complete the merger before the remedies have been complied with?

No. Please see the answers to questions 3.3 and 5.6.

5.6 How are any negotiated remedies enforced?

If the parties agree to the proposals or suggestions made by the Commission or the Chamber, a final decision shall be issued clearing the merger. In this decision the Commission or the Chamber can include the conditions that they deem necessary to enforce the remedies. In addition, as stated in the answer to question 3.3, the Commission may apply a fine of up to 10% of the merging parties' sales or gross income for the year prior to the decision of the Commission when the conditions ordered by the Commission are not complied with.

5.7 Will a clearance decision cover ancillary restrictions?

Please see the answer to question 4.1 for the substantive test on mergers. Although there is no specific rule stating that a clearance decision will cover ancillary restrictions, restrictions on the market which are an inevitable consequence of the merger transaction should be assessed together with the merger.

5.8 Can a decision on merger clearance be appealed?

Decisions issued by the Chamber may be subject to appeal before the judiciary on very limited circumstances. Parties can challenge the administrative process and request the judiciary to declare the nullity or inefficacy of the administrative act. They can also request judicial review based on a violation to their constitutional rights during the proceedings. It is relevant to note that the judiciary has the power to review the case on the merits.

5.9 Is there a time limit for enforcement of merger control legislation?

Merger regulations have a five-year statute of limitations. Once expired, enforcement against the merging parties is not possible. The five-year count starts from the date of the last action taken by such parties in connection with the merger.

6 Miscellaneous

6.1 To what extent does the merger authority in Peru liaise with those in other jurisdictions?

INDECOPI has occasionally liaised with authorities in other jurisdictions for consultation purposes. However, it usually works with other agencies in cases different than mergers such as cartels or cases of abuse of dominant position.

6.2 Please identify the date as at which your answers are up to date.

November 6, 2009.

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