THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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July 2023

Chapter 20

PERU

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I INTRODUCTION

In June 2021, Peru joined most Latin American countries in adopting a general merger control law (Law 31112). The new regime replaced a sector-specific law, which only regulated mergers in the electricity sector.[2] The updated legislation introduces a mandatory notification process that applies to mergers and acquisitions meeting specific criteria, based on the value of the parties' revenues or assets, individually and combined.

Albeit late to the game relative to most of its international peers, the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (Indecopi) has made notable progress since the implementation of Law 31112. For instance, the authority has published two important set of guidelines, each of which underwent a public consultation: the first, published in September 2021, covers notification threshold calculations;[3] and the second, published in January 2023, informs on the broad economic criteria that the authority will follow in its analyses.[4] Although there is room for improvement, these documents have provided a welcome element of predictability for market participants, many of whom were sceptical and nervous about how this new regime would affect the merger and acquisition (M&A) ecosystem in Peru.

In addition (and perhaps more importantly), Indecopi has resolved a total of 25 cases since Law 31112 entered into force: two cases in 2021, 18 in 2022 and five so far in 2023 (at the time of writing in May).[5] This experience is expected to have a lasting effect on the criteria used by Indecopi in the future. We examine the main highlights from the past year, which are likely to shape the regulatory approach of the authority moving forward.[6]

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2 Antitrust Law for the Electricity Sector (Law 26876).

3 National Institute for the Defence of Free Competition and the Protection of Intellectual Property (Indecopi), *Notification Thresholds Calculation Guidelines* (May 2021).

4 Indecopi, *Guidelines for the qualification and analysis of business concentration operations* (2023).

5 See https://servicio.indecopi.gob.pe/buscadorResoluciones/competencia.seam (accessed 1 June 2023), from where users can search for resolutions. The data stated above was provided by Indecopi on 2 May 2023.

6 APOYO Consultoría has advised clients in several of the cases mentioned in this chapter. The opinions expressed are those of the authors and do not reflect the opinions or views of APOYO Consultoría in any particular case.

II YEAR IN REVIEW

The novelty of merger control in Peru means that every case has been a step upwards on a steep learning curve for Indecopi. Most notably, 2022 saw the first Phase II case being cleared by the authority in the acquisition of Hersil by Medifarma, two pharmaceutical laboratories dedicated to the production and commercialisation of drugs.[7] Indecopi's final verdict (approval with conditions) reflected its assessment of the potential effects of the merger on the market: the authority identified a risk of potential price increases in certain markets where the merger caused a material increase in concentration.

Although the aftermath has focused on the remedies, this case is also useful for understanding how Indecopi is assessing competition risks. For instance, the authority defined the product markets using the fourth level of the World Health Organization's anatomical therapeutic chemical (ATC) classification system in its decision, a narrower market definition than other cases in the pharmaceutical sector, where the third level of the ATC system is often used.[8] This example is a clear indication of Indecopi's approach to competition analyses, which is characterised by caution.

This case is also notable as it is the first in which Indecopi imposed conditions regarding the licensing of three Hersil brands that belong to those markets where the authority detected potential risks to competition if the merger was carried out. The remedies imposed are still being implemented: time will tell whether they are ultimately successful in mitigating the risks foreseen by Indecopi in its resolution and whether the licensing obligations imposed on Hersil can serve as a model for future remedies to be imposed by the authority.

Another case worth highlighting is the acquisition of Derco by Inchcape, approved without conditions in late 2022.[9] This was a complex multi-jurisdictional case, as it required the approval of the competition authorities in Chile (National Economic Prosecutor's Office (FNE)) and Colombia (Superintendence of Industry and Commerce (SIC)). There was also a conflux of horizontal and vertical elements to analyse, since both parties operated in upstream (wholesale of cars) and downstream markets (retail sale of cars) as previously integrated firms.

One of the technical aspects of the *Hersil/Medifarma* case is the way Indecopi approached its analysis of the closeness of competition between the parties. As shown in the authority's ruling, it did not only analyse the competitive pressure exerted by agents within the same relevant market but also considered more conservative scenarios with narrower market subsets. In particular, Indecopi segmented Chinese car brands from the rest of the brands in each market, taking into account the possibility that these brands are not considered as substitutes by consumers or retailers (but without conclusively indicating that they are part of different markets). For every subset, the authority therefore evaluated prices and market shares at the brand level, price dispersion and the year of market entry.

7 Resolution 076-2022/CLC-Indecopi.

8 For example, see M.6705: *Procter & Gamble/Teva Pharmaceuticals OTC II* and M.3751: *Novartis/Hexal* for topical anti-rheumatics and analgesics; and M.7276: *GlaxoSmithKline/Novartis Vaccines (excluding influenza)/Novartis Consumer Healthcare* for medicines to treat mild to moderate pain with non-narcotic analgesics.

9 Resolution 098-2022/CLC-INDECOPI.

The multi-jurisdictional aspect of this case enables us to compare Indecopi's competition analysis to that of other authorities, such as the FNE in Chile.[10] One aspect the two authorities have in common is their classification of relevant markets according to the use and weight of cars (in line with international precedents). Further, both authorities concluded that the parties are not close competitors and, therefore, ruled out significant risks to competition. However, there are also differences between the conclusions reached by Indecopi and the FNE. For example, whereas the FNE does not split the wholesale and retail activities of the automotive industry agents into separate relevant markets, Indecopi does make this distinction, following international precedents prior to the operation.

When looking at the sectoral cross-section of the cases resolved since the enactment of Law 31112, several of the transactions assessed by Indecopi took place in the electricity sector. This sector was already well known by Indecopi, as the current merger control law replaces a previous one that solely targeted the electricity sector (Law 26876); however, the stricter notification thresholds mandated by Law 31112 have led to several operations in the electricity sector being notified that would have previously not required the authority's approval.[11]

Overall, the treatment these operations have had from the authority follow a similar line to the previous law. For instance, as regards market definition, Indecopi has followed what it established for mergers that were notified under the previous law. Such was the case in the analysis of the acquisition of Samay I, a generation company, in 2022, for which three relevant markets were defined: the spot market, the market for free clients and the market of contracts for the regulated market.[12] The same relevant markets have been defined for various mergers that were notified under the previous law; most recently, for the analysis of the acquisition of Luz del Sur (a distribution company) by CYPI in 2020 (owner of two generation companies).[13]

Furthermore, when considering the theories of harm derived from these transactions, Indecopi has remained mainly focused on those analysed under the previous law. For horizontal mergers, this has involved analysing the possibility of the acquirer increasing its prices after the merger, as a result of a significant reduction of competition in the market for unregulated clients. Indecopi's focus in respect of vertical mergers has been on those that involve an integration between distribution and generation companies. For these mergers, the potential effects on regulated clients have been analysed, especially those that would arise from distribution companies favouring generation companies that belong to the same economic group in the acquisition of energy for the regulated market.

The complexity of the cases highlighted above shows that Indecopi needed to hit the ground running with the implementation of the new merger control regime, not least considering the higher volume of transactions requiring review than had been envisaged. As

10 Resolution FNE F326-2022.

11 For example, operations such as the acquisition of Orazul Energy by Z Power Peru (Resolution 062-2022/CLC-INDECOPI), and the acquisition of Samay I by Chambers Capital Holding (Resolution 011-2023/CLC-INDECOPI) would not have had to be notified under Law 26876. Under this Law, cases in which the parties had a market share of less than 15 per cent for horizontal mergers or less than 5 per cent for vertical integrations did not have to be notified to Indecopi.

12 Resolution 011-2023/CLC-INDECOPI.

13 Resolution 007-2020/CLC-INDECOPI.

stated above, Indecopi approved 18 cases in 2022 and has approved five so far in 2023. Of these 23 cases, six have been in respect of energy markets, two in respect of mining, two the health sector, one in respect of digital markets and the rest in other sectors.[14]

Interestingly, the relatively high number of cases coincides with a period of slow private investment in Peru, which has fallen from an average growth of 2.9 per cent between 2016 and 2019 to -0.4 per cent in 2022.[15] The downturn in private investment is to be expected, given the external and internal pressures faced in the past few years. The pandemic and its aftermath posed significant challenges for Peru, which were aggravated by political instability that has existed since 2018. Furthermore, inflationary pressures and a higher cost of capital have added strain to companies already facing a stretched financial situation.

In such a challenging economic context and business environment, we may expect to see some mergers of which the main objective is to salvage firms facing financial difficulties, resulting in antitrust filings based on an exception known as the failing firm defence.

So far, failing firm defences are untested waters for Indecopi, though it is contemplated as a possible justification in Law 31112.[16] However, extrapolating from Indecopi's already cautious approach to regular cases, it is likely that the (already high) burden of proof generally expected for failing firm defences will be particularly elevated in Peru. As is well known, this type of defence requires the parties to prove that (1) the exit of the failing firm is imminent owing to its severe financial distress, (2) there are no other potential buyers that would involve smaller competition risks and (3) from a competition perspective, the transaction is not more detrimental to competition than the exit of the failing firm.

In a jurisdiction like Peru, one important concern is how the authority will calibrate the second criterion. The capital markets in Peru (let alone the M&A market) are relatively illiquid, meaning that finding reasonable potential buyers for distressed firms can be extremely challenging. In more liquid markets, a distressed firm may have multiple interested parties with similar willingness to pay. In contrast, most distressed firms in Peru will likely not have this luxury, so the authority will need to ask itself to what extent it will require the failing firm to adjust its target price downwards to allow for several potential buyers to be interested. Failing to consider this issue adequately will result in potentially distorted decisions as to whether or not this criterion has been met.

III THE MERGER CONTROL REGIME

The implementation of Peru's new merger control regime has been broadly positive. Indecopi has coped well with the case load, averaging 26 business days from the admission of the filing until the Phase I resolution (four days fewer than the legal limit); however, companies should be aware that this time frame is only a fraction of the complete legal process. For instance, admission of a filing can occur up to 25 business days after the notification form is formally

14 See footnote 5.

15 Source: Peruvian Central Bank (Banco Central de Reserva del Perú (BCRP)) (https://estadisticas.bcrp.gob.pe/estadisticas/series/anuales/resultados/PM04919AA/html (accessed 3 July 2023)).

16 See Indecopi, *Guidelines for the qualification and analysis of business concentration operations* (2023), Section 2.3.4.3 (Failing firm exception).

submitted for review. This is because, from the day a filing is submitted, the authority has 10 business days to revert with comments, after which the parties have 10 days to resolve any observations, which then are reviewed by the authority for a further five days.

There have been limited signs from Indecopi to suggest that parties could accelerate this procedure in the event of special circumstances, such as hostile transactions, or transactions taking place through tender offers. The only way to use a 'simplified' review process, in fact, is for the operation not to take place between undertakings performing in the same value chain. For instance, this could be the case if there is a 'first landing' by a foreign investor in Peru.

The thoroughness and complexity of Indecopi's notification form makes it challenging to have a filing admitted without observations. This is particularly true when transactions involve multi-market business conglomerates, as they involve complex economic relationships that the authority must disentangle.

Further, the difficulty in successfully completing a notification form depends on correctly defining the relevant markets, as the data requirements depend strongly on the combined market shares of the parties. On that matter, detailed economic information is required when the transaction involves horizontal overlaps with a combined market share of 20 per cent or more, or vertical relationships with market shares (upstream or downstream) of 30 per cent or more.[17] This implies that the parties must decide the level of information that is submitted based on their own understanding of the relevant market, which may not correspond with that of the authority. This potential mismatch could result in the authority not admitting the notification form, in which case the parties would have a short amount of time to produce large volumes of additional information.

Still, although market shares play a part in the amount of information required to notify, they are not relevant as to whether the transaction must be notified or not. This is an important difference from other jurisdictions, which makes the Peruvian merger control law more predictable in terms of its applicability to certain transactions.

Continuing on the subject of predictability, one aspect of Indecopi's engagement with firms is the extent of guidance it is providing ahead of formal filings. This is consistent with regional experience: pre-notification has been highlighted in the region as a valuable tool to start building trust between the authority and the notifying parties, as this modality allows the latter to gain greater visibility of the case-specific requirements to be expected during the notification process.[18]

Furthermore, legal teams can now be more confident when advising their clients regarding the confidentiality of the information provided to the authority. So far, to our knowledge, Indecopi has managed the confidentiality of the cases it has reviewed adequately, disclosing to the public only what the law mandates; for instance, in the only case that has moved to Phase II, a press release was published, allowing third parties to challenge the merger, with only the strictly necessary information being shared.

17 In these cases, it is mandatory to complete question 14 of the notification form, which requires a lot of detailed information relating (but not limited) to market capacity, competitors, production factors, vertical integration, barriers to entry, pricing and distribution systems, among other things.

18 Centro Competencia, 'Lanzamiento de Themis: Una mirada al Derecho de Competencia en la región' (31 March 2021) (https://centrocompetencia.com/lanzamiento-themis-mirada-derecho competencia-region/ (in Spanish) (accessed 1 June 2023)).

Law 31112 has a specific provision that allows parties to consult on whether a particular transaction falls under the remit of the law and what information will be required; however, this legal provision has come to involve much more than this. Private practitioners are now referring to this public consultation as a pre-filing process, and it is now common practice in the application of the law.

The pre-filing has several potential advantages, such as:

a reducing the likelihood of formal observations to the notification form;

b receiving queries and questions from the authority ahead of the filing;

c providing the parties with enough time to resolve any observations made by the authority without the time pressure of the formal filing process; and

d allowing the parties to ask questions regarding the adequacy of the information provided as well as potential exemptions to the information requirements.[19]

In addition, from the perspective of Indecopi, pre-filings allow the authority to organise itself such that, at the time of filing, there is already a team in place. Giving the authority this advance warning may be crucial in large-scale or complex cases, where the decision to move on to Phase II hinges on whether the authority is able to complete its analysis within the 30 business days provided for Phase I.

Parties should be wary of these perceived advantages, however. First, the opinions from the authority in the pre-filing process are not binding, so there is no guarantee that a favourable view of the completeness of a filing form in the pre-filing will be followed by a seamless admission of the notification form in the actual filing. Second, given that the pre-filing process is not formally set out in Law 31112, the extent of feedback received from the authority varies from case to case. Finally, the good disposition of the authority to provide guidance in pre-filings, as has been the case so far, may gradually decrease as its caseload increases and the merger control team become increasingly busy over time.

Nevertheless, it is now clear to practitioners that Indecopi can establish effective communication channels for the purpose of merger control. This could not have been taken for granted ahead of the implementation of Law 31112, given that the merger control team at Indecopi was created from within the broader competition team, which mainly dealt with abuse of dominance and cartel cases, both of which involved much less openness with undertakings during a proceeding. This gives rise to a few key strategic considerations for the authority and merging parties, as discussed next.

IV OTHER STRATEGIC CONSIDERATIONS

Although Indecopi has coped with the initial hurdles of implementing Law 31112, there are a few issues that should be addressed as it settles into its new role, and which, in the meantime, will require certain strategic considerations from market participants.

In the first place, the merger control team has been partly built from public officers previously engaged in investigating anticompetitive practices. Indeed, Indecopi's technical team (part of the Directorate of Free Competition), which has a director and senior economic advisers of its own, is a single unit that must manage resources to cover a series of

19 On that matter, the notification form indicates that exemptions can be awarded for two reasons: if the information is not reasonably available to the notifying parties; or if the information is not necessary or relevant for analysis of the transaction.

responsibilities, including market studies, antitrust investigations and merger control. This means that, at the senior level, the same individuals who pursue cases against alleged abusive or collusive firms must analyse and give recommendations to Indecopi's commission on merger cases.

This creates two main challenges. First, the authority needs to switch focus constantly when analysing mergers and investigating anticompetitive conducts. In practice, this may be difficult to apply consistently and permanently, and could add unwarranted scepticism from the officials when analysing relatively benign transactions. Second, the concerns (theories of harm) that the authority may raise in merger cases could be weighted towards the types of conduct that it is investigating in cartel or abuse of dominance cases.

For instance, in the electricity sector, the analysis of the acquisition of Luz del Sur in 2020[20] included an evaluation of the capacity of the merged entity to exonerate regulated clients that met the criteria to become unregulated from a one-year notice period.[21] In 2018, Indecopi received complaints about two distribution companies allegedly engaging in abuse of dominance practices by cancelling the one-year notice period for clients that agreed not to switch their energy provider and to remain clients of the distribution company.[22] Later, in 2020, Indecopi launched a formal investigation on these distribution companies.[23] Evidently, the theories of harm analysed for the acquisition of Luz del Sur matched the conduct being investigated in the abuse of dominance investigations.

This means that market participants that are active in M&As, or plan to grow inorganically, would do well to implement compliance practices as a way to establish goodwill with Indecopi and limit any initial scepticism regarding the intentions behind the transaction.

20 Resolution 007-2020/CLC-INDECOPI.

21 Peruvian regulation allows energy consumers that have a consumption level of between 0.2MW and 2.5MW to choose whether to acquire energy as regulated clients or become unregulated clients. Those that choose to become unregulated clients must notify their provider (a distribution company) of their decision one year in advance. However, distribution companies are allowed to exempt clients from this one-year notice period. See Osinergmin, Regulation for free users (DS No. 022-2009-EM) (https://www.osinergmin.gob.pe/seccion/centro_documental/ PlantillaMarcoLegalBusqueda/ Decreto%20Supremo%20N°%20022-2009-EM%20-%20Reglamento%20de%20Usuarios%20Libres%20de%20Electricidad.pdf (accessed 1June 2023)).

22 In 2018, Atria (a generation company) filed complaints against Seal and Ensa (two distribution companies) for allegedly exempting clients from the one-year notice period in exchange for them not changing their energy provider. See Gestión, 'Indecopi confirma sanción a eléctrica Seal por trato discriminatorio a clientes' (11 August 2022) (in Spanish) (https://gestion.pe/economia/empresas/indecopi-confirma-sancion-a-electrica-seal-por-trato-discriminatorio-a-clientes-rmmn-noticia/ (accessed 1 June 2023).

23 In 2020, Indecopi launched formal investigations for abuse of dominance against Seal and Ensa. These investigations resulted in the sanctioning of both distribution companies. See Gestión, 'Indecopi confirma sanción a eléctrica Seal por trato discriminatorio a clientes' (op. cit. note 22); El Comercio, 'Indecopi multó con S/ 2,34 millones a ENSA por abusar de su posición de dominio' (13 April 2022) (in Spanish) (https://elcomercio.pe/economia/indecopi-multo-con-s-234-millones-a-ensa-por-abusar-de-su-posicion-de-dominio-rmmn-noticia/ (accessed 1 June 2023)).

In a similar vein, internalising the types of practices that Indecopi or other competition authorities have previously investigated in the respective industry may be useful to provide clarity as to why the transaction under review should (or should not) raise concerns.[24]

Second, while apt, the Indecopi merger control team is still in the early stages of implementation of Law 31122 and there is a natural need for further knowledge and experience. Although this is not necessarily evident from the resolutions to date, which are generally very technical, it can be perceived in the smaller things, such as the granting of exemptions to non-material economic information during the filing process.

This issue can be overly costly to notifying parties in the context of evidently simple transactions or when the acquiring party operates as a conglomerate in unrelated markets. In both cases, Indecopi tends to be very conservative and cautious, making it difficult for parties to obtain exemptions to the information required in the notification form. As a result, parties should broadly operate under the assumption that exemptions will seldom be granted. The expectation for the future is that Indecopi will calibrate a level of pragmatism to its conservative approach.

The third aspect is also related to Indecopi's conservative approach during filings. When faced with a range of uncertain scenarios, for instance in the context of defining the relevant market, the authority tends to assume the most conservative scenario. Given that, as stated above, the threshold for providing more detailed information about a given market is expressed in terms of the parties' shares in these markets, a more conservative approach to market definition will tend to lead to increased information requirements. Furthermore, such a conservative philosophy may also ultimately affect Indecopi's decision, for instance as illustrated by the adoption of a narrower market definition in the *Hersil/Medifarma* case (as discussed in Section II).

That being said, in recent cases we have observed a willingness by Indecopi to relax its conservative approach in cases where the eventual risks or theories of harm were considered highly remote and unlikely. As such, the application of the aforementioned criteria, which are objective by nature, ultimately depends on the underlying economic risks perceived by the authority. This tendency is welcome and wholly consistent with the spirit of the law, which should seek to give greater priority (and, consequently, require more information) to the aspects of a merger that are the most liable to potential antitrust risks.

Finally, Indecopi's challenges in the organisation of its technical team have been magnified by the recent resignation of Jesus Espinoza, long-standing director of Indecopi's Directorate of Free Competition.[25] The forthcoming recomposition of the senior team with a new director, as well as Indecopi's approach to resolving future cases, will be key in determining whether the authority continues on the largely positive track record it has built since the enactment of Law 31112, and whether it is able to overcome the challenges described in this section.

24 Taking note of the developments in other jurisdictions is also important because Indecopi tends to communicate with fellow competition authorities in the region. Indeed, for multi-jurisdicional transactions, awareness of how other authorities are analysing a particular market can help with legal strategy.

25 See Semana Económica, 'Cambios en Indecopi: Jesús Espinoza renunció a la Dirección Nacional de Libre Competencia' (9 May 2023) (in Spanish) (https://semanaeconomica.com/legal-politica/sector-publico/indecopi-direccion-de-la-libre-competencia-entra-en-proceso-de-cambios (accessed 1 June 2023)).

V OUTLOOK AND CONCLUSIONS

After several years of debate among academics, politicians and other stakeholders, Peru's merger control law entered into effect in June 2021, in the middle of the covid-19 pandemic and during a relatively volatile political environment. Those who had previously expressed concerns regarding Indecopi's ability to manage such a law in a technical, transparent and independent manner were undoubtedly reassured as the first cases were resolved by the authority. Further concerns about whether the authority would have sufficient economic resources and human capital to manage the forthcoming caseload also proved unfounded, possibly in part thanks to the adverse economic and political context, which probably resulted in less M&A activity and, consequently, fewer merger filings to be reviewed by Indecopi than would otherwise have been the case.

Now that private investment confidence is gradually improving on the back of a somewhat more stable political context, Indecopi's caseload is expected to increase. This, combined with the director's recent departure, will clearly present challenges as Indecopi continues to learn to prioritise. Based on the authority's track record during the past couple of years, we remain optimistic that it is up to the challenge.