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Summary

Introduction

As of June 2021, three years ago, Peru aligned the scope of its antitrust policy with the majority of Latin American nations by implementing a comprehensive merger control law (Law 31112). This legislation superseded a previous sector-specific framework that governed mergers solely within the electricity sector. The current law establishes a compulsory notification procedure for mergers and acquisitions that meet designated thresholds concerning the revenues or assets of the involved parties, both individually and collectively.

In this period, the National Institute for the Defence of Competition and the Protection of Intellectual Property (Indecopi) has resolved a total of 47 cases since the law entered into force: two cases in 2021, 18 in 2022, 13 in 2023, and 14 so far in 2024 (as of May).[2]

Notably, the authority has now brought five notifications to Phase II of the review process, and approved two of them with remedies (the other three are still under review). These experiences have shed more light onto how the authority is calibrating risks, which will be explored in this article.[3]

Year in review

While still well within the initial stage of its learning curve, Indecopi is now more clearly settled in its new role reviewing mergers, with most of its current technical personnel having been part of the team since the time the law first came into force. A notable exception is the Director of the Competition Directorate, Javier Documet, who replaced Jesús Espinoza, longstanding Director, in 2023.

In terms of notable cases reviewed, in 2023 Indecopi brought two cases into Phase II of the review process, with two further cases being brough into Phase II in the first quarter of 2024. These are, in chronological order, the acquisition of Enel Distribución by CSGI, the acquisition of Sucroalcolera del Chira, Agrícola del Chira y Bioenergía del Chira, jointly known as 'Caña Brava' by Grupo Gloria, the formation of a joint venture (JV) between KKR, Telefónica and Entel (Pangeaco), and the acquisition of several companies from the Chema Group by Sika. This resulted in the authority handling four Phase II cases simultaneously during the first months of 2024.

The first of the four transactions involved the acquisition of Enel Distribución by CSGI. Enel Distribución is the distribution company responsible for providing energy to all regulated users in the north of Lima, Peru's capital city. CSGI is a Chinese company, supervised by SASAC. The authority analysed this case considering that CSGI and all SASAC-supervised companies operating in Peru form part of a same economic group and thus, analysed the potential horizontal and vertical relationships between Enel Distribución and all companies supervised by SASAC that have operations in Peru.[4]

This transaction was cleared in 2024 with the condition that all energy purchases made by Enel Distribución (a distribution company) for regulated users be made through a tender process.[5]

Indecopi stipulated that these tenders must comply with three main aspects: (1) Indecopi must be notified before the tender takes place; (2) all offers by interested suppliers should be presented simultaneously; and (3) the winner should be selected only based on price.

This condition seeks to address a potential self-preferencing (vertical restraint), by which Enel Distribución would favour its related generation companies in its energy procurement. This was of particular importance given that Enel Distribución is one of the largest purchasers of energy in Peru.

The condition imposed in this case is analogous to that imposed by Indecopi in two previous cases involving the purchase of a distribution company by another company that owned assets in the generation sector: the acquisition of Enersis by Endesa in 1999[6] and the acquisition of Luz del Sur by CYPI in 2019.[7] In both cases, the authority cleared the transactions on the condition that the distribution companies tender their purchase of energy for regulated users. In addition, the main parts of Indecopi's risk analysis for the acquisition of Enel Distribución resemble the authority's analysis of these two previous cases.

This case shows that Indecopi has followed a similar approach to the one taken in earlier cases in the electricity sector, a sector in which it has been analysing mergers since the nineties. The same trend has also been observed for other merger transactions analysed in the electricity sector for which Indecopi has maintained a consistent approach with regard to certain elements of its analysis, such as the definition of relevant markets. Furthermore, taking into account the considerable media and political attention generated by this case, the authority has confined its analysis to antitrust concerns, and there is no evidence or indication of political interference in Indecopi's decisions.

In the case of Grupo Gloria's acquisition of Caña Brava, the authority identified potential risks to competition in two relevant markets in which it considered the merging firms to have a horizontal relationship: the market for the purchase of sugar cane in three regions of Peru, and the wholesale market of sugar in Peru. This case marks the first time that Indecopi is analysing a buyers' market in Phase II.[8]

For both markets, Indecopi has analysed the effects of the transaction on market concentration, as estimated with the Herfindahl–Hirschman index (HHI), and has applied the criteria established in its guidelines for the analysis of mergers.[9]

According to these guidelines, a transaction that generates a change in the HHI of 200 points or more in a moderately concentrated market is indicative of potential lessening of competition. In the case of the market for the purchase of sugar cane, the authority estimated an average change in the HHI exceeding 600 points between 2020 and 2022, approximately three times the threshold of 200 points established in the guidelines.[10]

Conversely, in the wholesale sugar market, the authority estimated an average change in the HHI under 300 points in the same period, with the change even resulting in being inferior to the 200 threshold in one of these years.[11]

The third case that went into Phase II of the Indecopi process is the 'Pangeaco' JV between KKR (54 per cent), Telefónica (36 per cent) and Entel (10 per cent), which is formed to jointly operate Telefónica's and Entel's current optical fibre access networks, as well as future joint deployments.

This business model, which results in the creation of a neutral operator as a result of the entry of an investor (in this case, KKR), has already been implemented by the Telefónica Group in several countries in the region, such as Brazil, Colombia and Chile. In these cases, competition authorities have taken into account the pro-competitive effects of this type of operation, as it creates a neutral operator with incentives to open and share its networks with operators in the retail market.

In Peru, Indecopi moved this case to Phase II based on two main concerns. First, the potential generation of unilateral effects in the wholesale optical fibre access market in one province (Lima), as a result of the consolidation of Telefónica's and Entel's optical fibre access networks. Second, the possibility of customer foreclosure in the wholesale access market, as Telefónica's and Entel's retail businesses (fixed internet) would cease to be potential clients to other wholesale operators.

Finally, in the case of the acquisition of various companies from the Chema Group by Sika, Indecopi received the notification of the deal in November 2023 and decided to initiate Phase II in February 2024.[12]

This case had significant complexities because of the large number of highly specific products where the parties overlapped. Indeed, Indecopi identified five relevant markets where the extent of the horizontal overlap raised serious concerns. These markets included the sale of chemical additives for concrete and mortar, resin-based grouts and union agents, impregnations and other protections against corrosion, products and accessories for concrete, and pre-mixed mortars for tiles. All product markets were defined at the national level.

Overall, the considerable increase in the number of Phase II cases over the past 18 months can be attributed to several factors. Admittedly, all the Phase II cases were relatively complex, either as a result of the extent of the horizontal overlaps, or the vertical relationships between the parties. In all cases, the decisions to initiate the Phase II can be traced to a technical approach by the authority, with no apparent political motivation or interference.

Having said that, market participants perceive that the burden of proof to move cases to Phase II is lower than it was in previous years. Whereas in 2021/2022 the authority would start with a structural assessment of the effects on competition and prominently consider additional elements during Phase I (e.g., the strength of competitors, barriers to entry, buyer power, etc.), the latest resolutions to move cases to Phase II lean more heavily on structural analysis.

To illustrate this point, two years ago, a change in HHI that surpassed the levels set out in Indecopi's guidelines did not appear to be enough to move cases to Phase II, as clearly seen in Inchcape's acquisition of Derco. In contrast, in the recent Pangeaco case, changes in market structure marginally above those same thresholds were enough to push the case into Phase II, although the analysis that is presented in the resolution might not reflect the full assessment carried out by the authority.

This trend has led to market participants becoming more warry of the merger control procedure. The additional concerns do not necessarily relate to the risk of an operation being prohibited, but of (1) the time required to obtain clearance and (2) the apparent need to negotiate remedies in the event of a Phase II, given that, so far, there have not been any Phase II cases cleared without remedies.

However, one potential cause for the authority increasingly limiting its analysis to structural effects, as discussed above, is the constrains it faces in terms of staffing combined with the heavier workload it faced in the past 18 months. This, as well as other considerations worth highlighting regarding the merger control regime are developed below.

The merger control regime

During 2023, the implementation of Peru's new merger control regime has remained broadly positive, albeit with certain headwinds starting to show, especially related to the ability from the Directorate to cope with the workload. Although the legal time frames are being met, and there have not been any operations approved by constructive consent, the overall time frame that companies must take into account when thinking of a filing has increased, especially with complex cases that require more guidance by the authority.

A review of the Directorate's publicly available headcount shows that the number of staff has remained broadly constant since June 2021: as of late 2023, there were 33 staff in the Directorate, which is only one fewer than when the merger control law came into force in 2021. This means that as the number of cases increased significantly in late 2023 and early 2024, Directorate members were forced to split their time between more cases. According to some market participants, this was also reflected in the average seniority of case teams, with junior members of the Directorate increasingly taking more prominent roles and responsibility.

Despite the broadly constant headcount, the composition in the Directorate has changed over the years as a result of the departure of a few senior and experienced members. In June 2021, the Directorate had eight senior members, including the Director and the Head of the mergers division. The former had been Director for 10 years, while the latter had been Head of the mergers division since the merger control law came into force and had prior experience in the Directorate overseeing mergers in the electricity sector. The new Director, Javier Documet, is an experienced public officer, but does not have a background in competition law. In the case of the head of the mergers division, her exit in mid-2023 was not offset with a new hire, and from what can be observed, the position remains vacant.

Related to this, in March 2024, several news outlets reported that many seats in decision-taking Commissions in Indecopi (including, but not limited to, the Competition Commission) remained vacant and that, consequently, cases were delayed and internal processes taking longer periods. Due to the public pressure generated by this issue, Indecopi's president, who is responsible for appointing Directors and Commissioners in these highly important positions, resigned in late March 2024.

All of the above suggests that companies intending to undertake the merger control process should pay attention to the nuances that take place in Indecopi, as they can have an impact on the timing and the fluidity of the process.

On the surface, there have not been any changes to the law since 2021, which means that Indecopi still has 30 business days to resolve a case in Phase I. However, companies should be advised that this time frame is only a fraction of the complete legal process. For instance, a filing's admission can occur up to 25 business days after the notification form is formally 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.

Furthermore, based on the various Phase II cases now either concluded or under review, companies should be aware that the process is likely to take longer than the 90 business days legal time frame for a Phase II. The reason is that the law allows for several suspensions and postponements to this legal term, both at the parties' and Indecopi's request. For instance, Indecopi can extend the term by 30 business days if it requires more time to conclude with its analysis. Similarly, if an opinion from a sectoral regulator is required, this allows for further suspensions of the proceeding. Furthermore, the Phase II time frame is also suspended when commitments are presented. All taken into account, parties that contemplate a possible extension of the process into Phase II should factor in at least six additional months to the term corresponding to a regular Phase I case.

In terms of the preparation for the filing, the thoroughness and complexity of Indecopi's notification form result in a low likelihood of a filing being 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 to determine the documentation requirements for admission.

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. In particular, 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.[13]

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 coincide 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 time window to gather and present large volumes of additional information.

Importantly, even though market shares have an impact on the quantity of information that is required to notify, they do not act as a notification threshold to determine whether the transaction must be notified or not. This is an important difference with other jurisdictions, which makes the Peruvian merger control law more predictable in terms of its applicability to any specific transaction.

Another aspect that also relates to the predictability of the notification process is the extent to which the authority engages with firms and provides guidance prior to the formal filings. Until the first half of 2023, notifying parties regularly used an informal pre-notification process whereby they presented draft notification forms and economic data. This was framed under 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.

This practice, which was highlighted in the region as a valuable tool to start building trust between the authority and the notifying parties, has become less common in the second half of 2023 and 2024, as a result of two main factors. Firstly, the time taken by the authority to review pre-notification documents increased considerably. Given that most parties have provisions in their sales and purchase agreements regarding the maximum

time between signing and closing, this additional time became too costly to incur. This is partly because of the increased case load, combined with the changes in the composition of the Directorate staff, as commented above.

Secondly, an important advantage of the pre-filing, as initially perceived by market participants, was to reduce the odds of formal observations: by receiving queries from the authority ahead of the formal filing, the parties had enough time to address any observations without the time pressure of the formal process. As part of a pre-filing, the parties also had the opportunity to ask questions regarding the sufficiency of the information provided as well as possible exemptions to the information requirements.[14]

This advantage, however, was largely derived from an approach and initiative by the authority to assist, even perhaps educate, market participants on the criteria for it would apply in formal filings, which was something highly valued by market participants in the first few years of the law. Now, after three years and over 40 merger filings, experienced market participants have gained a better understanding of the criteria applied by the authority in practice, and hence do not perceive the same value in a pre-filing. In addition, any opinion expressed by the authority in the pre-filing process is not binding, and 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. Further, given that the pre-filing process is not formally set out in the law, the extent of feedback received from the authority varies from case to case.

In light of the above, pre-filings have lost prominence, and experienced legal counsel can now rely on precedents and their previous interactions with the authority to advise their clients and successfully complete filings. In that sense, the pre-filing has gradually been reduced to what it was always intended to be: a mechanism provided by the law for parties to ask specific and narrow questions to the authority to obtain orientation.

The experience gained by the authority and market participants, especially as a result of the significant increase in Phase II procedures, gives rise to a few key strategic considerations for the authority and merging parties, as discussed next.

Other strategic considerations

The competition authority has now received over 40 notifications since the inception of the new merger control law in June 2021. This means that the industry now has a much more clear idea of what to expect, although a few issues that require strategic considerations from market participants have emerged with the recent increase in the number of Phase II cases.

First, the implementation and monitoring of the remedies imposed by Indecopi in Medifarma's acquisition of Hersil, which involved the licensing of certain products to a third party for a five-year period, seems to have been more resource-intensive than expected, based on comments from members of the Directorate.

This has resulted in the authority expressing a preference for structural remedies when dealing with horizontal effects. Therefore, market participants acquiring or merging with a competitor should be aware of the combined market share they will obtain in their respective markets, considering conservative market definition scenarios, especially given

the weight put on structural aspects in recent cases moved to Phase II, as commented on above. With that input, they can then assess the feasibility of different divestment alternatives that could be proposed as remedies if required by the authority as a condition for clearance.

Second, the exits from the former director and head of the merger control division have resulted in the economic team taking a more prominent role, especially in the meetings and negotiations during Phase II. Both of these senior members of the Directorate were lawyers, so the balance between legal officers and economists has shifted significantly towards the latter. While apt and each year more experienced, Indecopi's merger control team is still at an early stage of implementation of the law and there is a natural need for further knowledge and experience. This is particularly the case in Phase II cases, where the dynamic between the authority and the parties should be increasingly less technical and more oriented towards a negotiation, especially when remedies are considered.

Another consequence of the prominence of economists at the senior level of Indecopi's mergers division is that information requirements tend to be overly detailed, even for deals that, at face value, should not pose significant risks to competition. Indeed, the authority 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. There has not been evidence in the past year that Indecopi is more prone to granting exemptions; on the contrary, it is becoming the norm that, especially for Phase II cases, the (already detailed) information provided in the notification form (at the start of Phase I) is just the starting point of the information that will be required by parties throughout the process.

Furthermore, 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' market shares in each corresponding relevant market, a more conservative approach to market definition will tend to lead to increased information requirements. Importantly, this tendency to consider the most conservative scenarios can also affect case outcomes, although time will tell whether the authority moves towards a more moderate approach as it reaches its final decision in the more complex cases.

Finally, the authority also regularly gathers information from market participants, like competitors and clients of the merging parties, especially during Phase II of the merger control process. In general, this can be a good practice, as the information gathered by Indecopi informs its views of the potential risks to competition posed by the operation while saving the time and resources that would otherwise be needed to gather information from other sources or further investigate the market. However, opinions from third parties, especially competitors and clients, have a natural bias based on their incentives and the impact of the transaction on their own businesses. Therefore, the correct balance between these opinions and hard data needs to be struck to reach correct and unbiased conclusions regarding the real risks of an operation on market competition.

Outlook and conclusions

The nearly three-year implementation of Peru's merger control law has ushered in a new era of regulatory oversight that has significantly impacted how mergers and acquisitions are navigated in the country. Concluded cases, like the acquisition of Enel Distribución by CSGI, or Medifarma's acquisition of Hersil, show that the merger control law is not to be disregarded as a mere transaction cost. The conditions imposed in these cases, such as the mandatory tender process for CSGI, or the licensing obligation imposed on Medifarma, reflect the stringent measures Indecopi is willing to enforce to mitigate anticompetitive effects.

For businesses, the evolving dynamics of Indecopi's criteria and engagement with companies underscore the importance of preparing for a rigorous review process. The increase in Phase II cases highlights a trend towards more detailed scrutiny of mergers and acquisitions, particularly those where structural effects (i.e., changes in market concentration) are present. Companies should anticipate the need for comprehensive and well-substantiated submissions to meet the regulatory requirements set forth by Indecopi. This preparation includes a thorough analysis of how a proposed merger could affect market competition and detailed justifications for the transaction, including, when appropriate, pro-competitive benefits.

Given the operational strains observed at Indecopi, because of an uptick in complex cases against a backdrop of significant rigidity in Indecopi's ability to hire, companies must also be prepared for potential delays in the review process. Engaging proactively with Indecopi, understanding the nuances of the required documentation, and being ready to respond promptly to any requests for additional information are crucial. These strategies will not only facilitate a smoother review process but also minimise the risk of unforeseen complications arising from regulatory reviews. As Indecopi continues to gain experience, businesses must similarly adjust their strategies to navigate this regulatory environment effectively.

Endnotes

1. Vincent Poirier-Garneau is a managing partner and Andrés Caro is a project director at APOYO Consultoría. The authors would like to acknowledge the contributions of Silvana Manrique and Grace Hixson to this chapter. Back to section

2. Source: Indecopi, https://servicio.indecopi.gob.pe/buscadorResoluciones/competencia.seam. Back to section

3. Disclaimer: APOYO Consultoría has advised clients in several of the cases mentioned herein. The opinions expressed in this article are that of its authors and may not reflect the opinions or views of APOYO Consultoría in any particular case. Back to section

4. Source: Indecopi Press Release, 5 February 2024 (https://www.gob.pe/institucion/indecopi/noticias/902252-el-indecopi-autoriza-con-condiciones-la-operacion-de-adquisicion-de-enel-distribucion-por-parte-de-china-southern-power-grid-international). Back to section

5 Resolution 014-2024/CLC-INDECOPI. Back to section

6 Resolution 012-99-INDECOPI/CLC. Back to section

7 Resolution 007-2020/CLC-INDECOPI. Back to section

8 Resolution 119-2023/CLC-INDECOPI. Back to section

9 Indecopi, 'Guidelines for qualification and analysis of concentration operations', 2023.- Back to section

10 Resolution 119-2023/CLC-INDECOPI. Back to section

11 Resolution 119-2023/CLC-INDECOPI. Back to section

12 Resolution 026-2024/CLC-INDECOPI. Back to section

13 In these cases, it is required to complete question 14 of the notification form, which comprises much detailed information related (but not limited) to market capacity, competitors, production factors, vertical integration, barriers to entry, pricing and distribution systems, among others. Back to section

14 On that matter, the notification form indicates that exemptions can be awarded for two reasons: (1) if the information is not reasonably available to the notifying parties, or (2) if the information is not necessary or relevant for the analysis of the transaction. Back to section

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