

## ACT Nº 31112

THE PRESIDENT

OF THE CONGRESS OF THE REPUBLIC

WHEREAS: THE CONGRESS OF THE REPUBLIC

Has enacted the following Act:

### ANTITRUST MERGER REVIEW ACT

#### CHAPTER I

#### GENERAL PROVISIONS

##### **Section 1. Object of the Act**

The purpose of this Act is to establish a merger review process regime with the objective of promoting effective competition and economic efficiency in the markets for the welfare of consumers.

##### **Section 2. Scope of application**

The following are included within the scope of application of this Act:

1. Merger transactions that produce effects in all or part of the national territory, in accordance with the thresholds provided in this Act, including merger transactions that are carried out abroad and directly or indirectly link economic agents that carry out economic activities in the country.
2. Economic agents that offer or demand goods or services in the market and carry out merger transactions that produce or may produce anticompetitive effects in all or part of the national territory.

##### **Section 3. Definitions**

For the purposes of the application of this Act, the following definitions are taken into account:

1. Economic Agent: Is the natural or legal person, domestic or foreign, of private or public law, who offers or demands goods or services and that is the holder of rights or beneficiary of contracts or who, without being the holder of such rights or beneficiary of such contracts, may exercise their inherent rights. This includes investment funds, domestic or foreign.
2. Control: The possibility of exercising decisive and continuous influence over an economic agent through (i) rights of ownership or use of all or part of the assets of a company, or (ii) rights or contracts that allow decisive and continuous influence over the composition, deliberations, or decisions of the organs of a company, directly or indirectly determining the competitive strategy.
3. Economic group: A group of economic agents, domestic or foreign, comprising at least two members, when one of them exercises control over the other or others, or when the control over the economic agents belongs to one or several natural persons acting as a decision-making unit.

4. Geographic nexus: This is the nexus that allows to identify whether the merger transaction produces effects in the national territory, in which the competent bodies have jurisdiction to assess such operation.

5. Dominant position: This is defined in section 7 of Legislative Decree 1034, Legislative Decree that approved the Act on the Repression of Anticompetitive Conducts.

6. Threshold: It is the quantifiable, selective and objective parameter expressed in tax units (UIT), from which a merger transaction must be compulsorily subject to the merger review process.

#### **Section 4. Principles of the merger review process**

In the merger review process, the authority takes into account, in addition to the principles established in section IV of the Codified Version of Act 27444, General Administrative Procedure Act, the following principles:

1. Principle of proportionality: The decisions of the competent bodies, when establishing conditions, obligations to do or not to do, classifying infringements, imposing sanctions or any other measure restricting a related right to the merger transaction, shall comply with the limits of the power conferred by statute, maintaining due proportion between the means to be used and the public purposes to be protected, so that they respond to what is strictly necessary.

2. Principle of transparency and independence: The competent bodies act in the development of the merger review process in a transparent manner and with absolute political, economic or any other kind of impartiality, demonstrating independence with respect to their personal opinions, or influences from economic or political interests. The entities or authorities, officials or public servants or third parties are prohibited from opposing, interfering or hindering the exercise of the functions and powers conferred by the present Act to the competent bodies.

3. Principle of confidentiality: The competent bodies maintain confidentiality regarding the information to which they have access in the merger review process, granting, where appropriate, the confidential character, avoiding jeopardizing the legitimate interest of the companies or natural persons involved. It is forbidden to disclose the business, commercial or industrial secrets of the economic agents or to make improper use of such information, under liability.

## **CHAPTER II**

### **MERGER TRANSACTIONS AND NOTIFICATION THRESHOLD FOR MERGER CONTROL**

#### **Section 5. Merger transactions**

5.1 It is every operation or transaction involving a transfer or change in control of a company or part thereof. Such transactions may occur as a result of the following operations:

a. A merger of two or more economic agents, which were independent before the operation, regardless of the form of corporate organization of the merging entities or of the entity resulting from the merger.

b. The acquisition by one or more economic agents, directly or indirectly, of rights that allow them, individually or jointly, to exercise control over all or part of one or more economic agents.

c. The constitution by two or more independent economic agents of a common company, joint venture or any other analogous contractual modality that implies the acquisition of joint control over one or more economic agents, in such a way that said economic agent performs the functions of an autonomous economic entity.

d. The acquisition by an economic agent of direct or indirect control, by any means, of productive operating assets of one or more other economic agents.

5.2 The following are not acts or transactions subject to this Act:

a. The corporate growth of an economic agent as a result of operations carried out exclusively within the same economic group.

b. The internal corporate growth of an economic agent, regardless of whether it is produced through its own investment or with resources from third parties that do not participate directly or indirectly in the markets in which the economic agent operates.

c. The corporate growth of an economic agent that does not produce effects on the markets within the national territory, in part or in whole.

d. Temporary control acquired over an economic agent as a result of a temporary mandate conferred by legislation relating to the expiration or termination of a concession, equity restructuring, insolvency, agreement of creditors or other similar procedure.

e. When credit institutions or other financial or insurance or capital market institutions whose normal activity is the negotiation and transaction of securities, for their own account or for the account of third parties, temporarily hold shares or participations they have acquired in a company for the purpose of reselling them, provided that they do not exercise the voting rights inherent to such shares or participations in order to determine the competitive behavior of such company.

5.3 For the purposes of the application of section 5.1, the authority considers as a single merger transaction the set of acts or operations carried out between the same economic agents within a period of two (2) years. In that case, the merger transaction must be notified prior to the execution of the last transaction or operation that would allow the thresholds established in section 6.1 to be exceeded.

## **Section 6. Notification threshold for merger control**

6.1 A merger transaction is subject to the merger review process when the following are met concurrently:

a. The total sum of the value of sales or annual gross income or value of assets in the country of the companies involved in the merger transaction that they have reached, during the fiscal year prior to that in which the transaction is notified, is equal to or more than one hundred and eighteen thousand (118,000) tax units (UIT).

b. The value of sales or annual gross income or value of assets in the country of at least two of the companies involved in the merger transaction that they have reached, during the fiscal year prior to that in which the transaction is notified, is equal to or more than eighteen thousand (18,000) tax units (UIT) each.

6.2 If, prior to its execution, the merger transaction falls within the foreseen threshold, the economic agents submit a notification for authorization before the Commission, which is understood to be the Commission for the Defense of Free Competition of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). This notification is processed under the merger review process established in the present Act.

6.3 INDECOPI may propose the updating of the value of the threshold provided that the need for such updating is justified, in accordance with the purpose of this Act. The modification of the value of the threshold shall be made through a statute.

6.4 The Technical Secretariat of the Commission for the Defense of Free Competition of INDECOPI may act ex officio in cases where there is reasonable evidence to consider that the merger transaction may generate a dominant position or affect effective competition in the relevant market.

The notification of the merger transaction will be voluntary for the parties when the companies involved do not reach the thresholds established in section 6.1.

The application of this paragraph shall be regulated through the Regulations of the Act.

### **CHAPTER III**

#### **AUTHORIZED MERGER TRANSACTIONS**

##### **Section 7. Analysis of the merger transaction**

7.1 In the merger review process, the competent body evaluates the effects of merger transaction, in order to identify whether it produces a significant restriction of competition in the markets involved.

7.2 In the merger review process, the competent organ takes into consideration, among others, the following factors:

- a. The structure of the market involved.
- b. The actual or potential competition of economic agents in the market.
- c. The evolution of supply and demand for the products and services in question.
- d. The sources of distribution and commercialization.
- e. Statutory or other barriers (technological, specific investments, horizontal or vertical restrictions) to access the market.
- f. The economic and financial power of the companies involved.
- g. The creation or strengthening of a dominant position.
- h. The generation of economic efficiencies.

7.3 If within the merger review process, it is determined that the merger transaction does not produce a significant restriction of competition, the competent body authorizes the transaction.

7.4 If within the merger review process, it is determined that the merger transaction could generate a significant restriction of competition, the Commission may carry out the following actions:

a. Authorize the transaction, provided that the notifying economic agents demonstrate the existence of economic efficiencies that compensate the effects of the possible significant restriction of competition.

b. Authorize the transaction under conditions aimed at avoiding or mitigating the possible effects that may arise from the merger transaction. Such conditions may be based on the commitments offered by the economic agents, in accordance with the provisions of section 8.

c. Deny the transaction when the notifying economic agents do not demonstrate the existence of economic efficiencies that compensate the effects of the possible significant restriction of competition, and it is not possible to establish conditions aimed at avoiding or mitigating the possible effects that could derive from the transaction.

7.5 When analyzing the ability of the merger transaction to produce economic efficiencies; productive, allocative or innovative efficiencies may be considered. Economic efficiencies shall meet the following requirements:

a. To be demonstrated by the notifying economic agents.

b. To have an inherent character to the transaction.

c. To be aimed at compensating the identified restrictive effects on competition and improve consumer welfare.

d. To be susceptible of being transferred to the consumer.

e. To be verifiable by the authority.

7.6 The burden of proof regarding the anticompetitive impact of the merger transaction lies with the competent authority. The burden of proving the nature, magnitude and probability of the economic efficiencies lies with the economic agents involved in the transaction.

7.7 The sole creation or strengthening of the dominant position does not imply a prohibition of the merger transaction. It is necessary to evaluate the restrictive effects on competition in the markets in which the economic agent participates, as a buyer or as a supplier of goods and services, without prejudice to the provisions of paragraph 7.6 of this section.

## **Section 8. Commitments proposed by the economic agents during the merger review process**

8.1 During the course of the preliminary merger review process, economic agents may submit to the competent body a proposal for commitments aimed at avoiding or mitigating the possible effects that could arise from the merger transaction under analysis.

8.2 The commitments proposed by the economic agents may be communicated by the competent body to third parties, to the extent necessary for their evaluation, in accordance with the purpose of this Act.

8.3 If the competent body determines that the proposed commitments avoid or mitigate the possible effects that could derive from merger transaction under analysis, it authorizes the transaction subject to such commitments and concludes the merger review process.

8.4 The merger review process is suspended until the authority decides on the proposal submitted by the economic agents, for up to fifteen (15) working days in the respective phase. By mutual agreement, the competent authority and the economic agents may additionally suspend the merger review process for a period of fifteen (15) and thirty (30) working days in the first and second phase respectively.

8.5 The opportunity and requirements for submitting and modifying the commitment proposal, the complementary rules for its processing and the time limit for the suspension of the proceeding are established in the regulations of this Act.

### **Section 9. Review of conditions**

9.1 When the authorization of a merger transaction is subject to the fulfillment of a condition of conduct, the authority establishes a term for its review. After such period, the authority determines whether it is appropriate to maintain it, leave it without effect or modify it. If it decides to maintain or modify it, it establishes a new term for its review.

9.2 Likewise, during said period, in the event that a variation in the competition condition is detected, the authority may review ex officio the condition imposed on the economic agents in order to determine whether it is necessary to maintain such condition or to modify it, verifying that no harm is caused to third parties.

9.3 At any time, economic agents may request the authority to cancel or modify the condition of conduct established when the merger transaction was authorized. For this purpose, they can submit elements of judgment that demonstrate that there has been a variation in the competition condition that justify their request. The requirements to submit this request and its processing are subject to the regulations of this Act.

9.4 The modification of a condition of conduct made by the authority, ex officio or at the request of the economic agents involved, is made in accordance with the provisions set forth in the regulations of this Act.

### **Section 10. Effects of merger transactions subject to notification for authorization**

10.1 A merger transaction that must be submitted to the merger review process pursuant to the provisions of paragraph 6.1 of section 6 shall not have any legal effect prior to the application of the positive administrative silence or until the authority has expressly authorized it. When conditions are established for the authorization of the merger transactions, these are integrated to the contractual terms corresponding to such transaction.

10.2 The ineffectiveness of a merger transaction that fails to comply with the provisions of section 10.1 does not require the issuance of an administrative act by the competent body, without prejudice to the issuance of the corresponding measures and the imposition of the corresponding sanctions, in accordance with the provisions of this Act and its regulations.

10.3 The authorization of the merger transaction shall be null ex officio when fraud or falsehood of the declaration is proven, information or documentation submitted by the economic agent, without prejudice to the legal consequences that may apply, in accordance with the provisions of this Act, its regulations and other rules on the matter.

10.4 Failure to comply with the conditions imposed on the merger transaction will result in the authority to proceed the issuance of the corresponding measures and impose sanctions, in accordance with the provisions of this Act and its regulations.

## CHAPTER IV

### COMPETENT AUTHORITY

#### **Section 11. Competent authority for the merger review process**

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) is in charge of the merger review process, whose competent bodies exercise their powers in accordance with the provisions of this Act and Legislative Decree 1033, Legislative Decree that approves the Act on the Organization and Functions of the INDECOPI. Likewise, the provisions of Legislative Decree 1034, Legislative Decree that approves the Act on the Repression of Anticompetitive Conducts are also supplementarily observed.

#### **Section 12. Commission for the Defense of Free Competition**

12.1 The Commission is the resolute body with exclusive competence to evaluate and rule in the first administrative instance at the national level in the merger review process, exercising the powers set forth in Legislative Decree 1033, Legislative Decree approving the Act on the Organization and Functions of the INDECOPI and Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts, without prejudice to the powers set forth in this Act. For the exercise of its powers, the Commission has the technical and administrative support of the Technical Secretariat.

12.2 For the purposes of this Act, the Commission has the following powers:

- a. To authorize, to establish conditions or to deny acts of merger transactions.
- b. To issue orders or mandates with respect to the merger transactions.
- c. To issue guidelines to orient market agents on the correct interpretation on the rules of this Act.
- d. In the case of merger transactions involving companies operating in markets under the jurisdiction of the regulatory agencies, to request from the latter a non-binding report on the level of concentration in their respective market, including a technical opinion on the possible effects that could derive from the transaction under evaluation.
- e. Any other duties assigned to it by the legal provisions in force.

#### **Section 13. Technical Secretariat of the Commission for the Defense of Free Competition**

13.1 The Technical Secretariat of the Commission for the Defense of Free Competition is the technical body with powers to carry out the management, instruction and investigation actions on merger transactions subject to the merger review process or, when applicable, on the preliminary investigation actions that may give rise to the initiation of an administrative sanctioning proceeding, in accordance with the provisions of this Act and in conformity with the powers set forth in Legislative Decree 1033, Legislative Decree approving the Act on the Organization and Functions of the INDECOPI, and Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts.

13.2 The duties of the Technical Secretariat are the following:

- a. To carry out preliminary inquiries and investigations.

- b. To instruct the proceeding, to conduct investigations and to collect evidence, exercising for such purpose the powers of investigation provided for in Legislative Decree 1033, Legislative Decree that approves the Act on the Organization and Functions of the INDECOPI and its Regulations of Organization and Functions, approved by Supreme Decree 009-2009-PCM; Legislative Decree 807, Powers, Rules and Organization of INDECOPI; and Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts. To initiate ex officio or, at the request of the interested party, the proceeding for investigation and sanction of violations of this Act.
- d. To conduct studies and publish reports.
- e. To prepare proposals for guidelines.
- f. To conduct training and dissemination activities for the application of this Act.
- g. Others assigned by the legal provisions in force.

#### **Section 14. Tribunal of Indecopi**

The competent specialized chamber of the Tribunal of INDECOPI is the functional body that rules in second and final administrative instance the appeals filed against the administrative acts issued by the Commission for the Defense of Free Competition in merger review process, as well as in the sanctioning procedures regulated by the present Act.

#### **Section 15. Inter-institutional collaboration in the merger review process**

15.1 The competent bodies in the merger review process are empowered to request information from other entities of the public administration, with no other limitation than that established by the Political Constitution of Peru and the Act, for which purpose the corresponding measures are issued and the corresponding means are implemented for effective inter-institutional collaboration within the framework of compliance with the purpose indicated in this Act.

15.2 If required, the time limit for decision may be suspended when an entity must provide information to the competent bodies, as long as such information is essential for the resolution of the merger review process and may not exceed ten (10) working days from the date of the request to the corresponding entity, which may be extended for up to five (5) additional working days, due to the complexity of processing or making the information available.

#### **Section 16. Reports provided in the merger review process**

16.1 For the merger review process, the regulatory bodies prepare a non-binding report on the level of concentration of the market within their competence, including the corresponding technical opinion on the possible effects on the market that could derive from the merger transaction that is the object of the evaluation.

16.2 The merger review process of economic agents within the scope of regulation and supervision of the Superintendency of Banking, Insurance and Private Pension Fund Administrators is carried out by INDECOPI, without prejudice to the prior prudential control and financial stability nature that corresponds to said Superintendency by virtue of the provisions of Act number 26702, General Act on the Financial System and the Insurance System and Organic Act on the Superintendency of Banking and Insurance, and amendments.

The merger transaction may proceed if it has the authorization of both INDECOPI and the Superintendency of Banking, Insurance and Private Pension Fund Management Companies, each within the scope of their competencies.

16.3 The merger transaction of economic agents authorized by the Superintendency of Securities Market is carried out by INDECOPI, without prejudice to the prior control of a prudential nature carried out by the Superintendency of Securities Market, pursuant to the provisions of Legislative Decree 861, Securities Market Act, and Executive Order 26126, which approves the Codified Version of the Organic Act on the Superintendency of Securities Market.

The merger transaction is allowed if it has the authorization of both INDECOPI and the Superintendency of Securities Market, each within the scope of its competencies.

16.4 In the case of merger transactions involving companies of the financial system that take deposits from the public or insurance companies, which imply relevant and imminent risks that compromise the solidity or stability of the referred companies or the systems they comprise, only the prior control of the Superintendency of Banking, Insurance and Private Pension Fund Administrators is required in its area of competence, given the nature and reserved nature of such situation, which must be determined by the Superintendency.

16.5 The Commission requires the report referred to in section 16.1, as well as any information it may need from the Superintendency of Banking, Insurance and Private Pension Fund Administrators and the Superintendency of the Securities Market, at any time during the merger review process requested, applying the term established in section 15.2 of this Act.

## CHAPTER V

### MERGER REVIEW PROCESS

#### **Section 17. Prior consultation to the submission of the notification**

Prior to the initiation of the merger review process, the economic agents participating in the merger transaction may make consultations of an indicative nature individually or jointly to the Technical Secretariat, in order to be able to specify whether the transaction is within the scope of application of this Act or what information is required for the merger review process, among other aspects. The opinions of the Technical Secretariat do not bind the Commission when making its decisions.

#### **Section 18. Economic agents submitting the notification**

In the case of a merger transaction constituting a merger or acquisition of joint control, the notification for authorization is submitted jointly by the economic agents involved in such transaction. In other cases, the notification is submitted by the economic agent acquiring control of all or part of one or more economic agents.

#### **Section 19. Processing fee**

The merger review process, which begins with the notification for authorization of the merger transaction, is subject to payment of the processing fee, which is established in accordance with the methodology in force, by means of a supreme decree, with the endorsement of the Prime Minister, and is set forth in the Single Text of Administrative Procedures (TUPA) of INDECOPI.

## **Section 20. Confidential Information and access to the file**

20.1 For the purpose of declaring the confidentiality of information, within the framework of proceedings on the merger review process, the proceeding provided for in section 32 of Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts is followed.

20.2 At any time during the proceeding and until it is concluded at the administrative level, only the parties involved in the transaction and third parties with a legitimate interest who have appeared in the proceeding in a timely manner have the right to know the status of the file, access to it and obtain a copy, provided that the Commission has not approved its confidentiality as it constitutes confidential information. As from the working day following the notification of the final decision of the Commission to the interested parties, the non-confidential version of this decision is public, and the lack of exhaustion of the administrative instance, must be reported, when applicable.

20.3 Officials and servants of the competent bodies who have access to the file, during and after the conclusion of the merger review process, regardless of the employment or contracting regime, are prohibited from sharing, disclosing or making improper use of such information, under civil, administrative or criminal liability.

## **Section 21. Procedure applicable to the merger review process**

21.1 The notification for authorization of the merger transaction shall be accompanied by the necessary background information to identify the transaction in question and the economic agents participating in it, as well as the economic group to which each of them belongs. Likewise, the applicants submit the elements that allow a preliminary evaluation of the possible effects of the transaction on competition in the markets involved, and the other requirements detailed in the regulations of this Act.

21.2 The Technical Secretariat reviews the notification for authorization of the merger transaction, notifying the intervening parties of compliance or non-compliance with the requirements within ten (10) working days from the date of submission of the notification.

21.3 If the notification for authorization of a merger transaction does not comply with providing the necessary information to continue the merger review process, the Technical Secretariat grants a term of ten (10) working days for the respective correction, under penalty of being considered as not submitted. The Technical Secretariat analyzes the corrected application and, if applicable, admits the notification for processing within a maximum period of five (5) working days.

21.4 Within thirty (30) working days from the date the notification is admitted for processing, the Commission shall determine whether the merger transaction falls within the scope of application of the Act and whether it generates serious concerns as to cause significant restrictive effects on competition in the market.

21.5 If the Commission concludes that the merger transaction whose authorization is requested does not fall within the scope of application of the Act or does not generate serious concerns as to cause significant restrictive effects on competition in the market, it declares it, by decision, closing the proceeding or authorizing the operation, as applicable.

21.6 If the Commission finds that the merger transaction whose authorization is requested raises serious concerns regarding the generation of restrictive effects on competition in the market, it declares this by means of a decision, informing the

interested parties of the risks the authority has identified, as well as the end of the first phase of evaluation and the beginning of the second phase, supporting the reasons for its decision.

21.7 Once the second phase has begun, the Commission publishes a brief summary of the decision that supports the initiation of the second stage, so that third parties with a legitimate interest may submit relevant information to the authority, without being considered as intervening parties in the proceeding.

21.8 The second phase of evaluation of the merger transaction does not exceed ninety (90) working days and may be extended for a maximum of thirty (30) additional working days. The reasons justifying the corresponding extension must be stated.

21.9 The Commission analyzes the merger transaction in accordance with the criteria established in section 7 and concludes the proceeding authorizing it, authorizing it with conditions or denying it, as applicable.

21.10 The Commission does not consider aspects that are distinct to the object of the Act in the substantive evaluation of the operation, under liability.

The regulations of this Act may simplify the notification requirements for those types of merger transactions that are less likely to produce restrictive effects on competition.

### **Section 23. Non-execution of merger transactions subject to merger control**

23.1 The execution of merger transactions included in section 6.1 is suspended until the competent authority at the administrative level makes a decision or definitively concludes the merger review process.

23.2 The execution of a merger transaction included in section 6.1, without having filed the corresponding notification for authorization or without having waited until the competent authority at the administrative level makes a decision or definitively concludes the merger review process, entails the nullity of the acts derived from such execution, which shall have no legal effect, without prejudice to the legal consequences that may apply, as provided for in this Act and its regulations.

23.3 In the case of a merger transactions included in section 6.1 that is carried out through a public tender offer in the stock market, a prior pronouncement by the competent entity is a prerequisite for the economic agents to be able to initiate the respective procedure before the Superintendency of the Securities Market. Likewise, the prior pronouncement of the competent authority is a prerequisite to carry out the merger transaction that originates the obligation to formulate a subsequent takeover bid.

### **Section 24. Proceedings at the request of the economic agents**

At any stage of the proceeding, those who have filed the notification for authorization may request the holding of hearings. In these cases, the evaluation period may be extended by the Commission for up to fifteen (15) working days.

### **Section 25. Authorization decision**

25.1 The Commission issues a duly reasoned decision at the end of the merger review process, attaching the corresponding reports, expressing its decision, authorizing the transaction, authorizing it with conditions or denying the authorization of the transaction.

25.2 The Commission may authorize the merger transaction subject to the compliance under conditions and obligations aimed at guaranteeing that the companies involved comply with the commitments made before the Commission, or that they compensate the restrictive effects on competition in the market.

25.3 If the Commission finds that a notified transaction does no longer raises serious doubts as to the creation of restrictive effects on competition in the market, it may authorize the transaction.

25.4 If the companies decide not to proceed with the transaction, the competent body issues a decision terminating the proceeding.

25.5 In the event that the competent body does not issue an express pronouncement within the legally established term, positive administrative silence shall apply, thus concluding the merger review process.

### **Section 26. Appeal**

26.1 In the event that the notification for authorization is denied or authorized under conditions, the requesting economic agents may file an appeal. The time limit for filing the appeal shall not exceed fifteen (15) working days from the day following the notification of the resolution that ends the first instance.

26.2 In the event that the Commission has ordered a preventive measure, the execution of the challenged decision is not suspended, unless the Tribunal decides otherwise by means of a duly motivated decision.

26.3 The Tribunal shall issue its decision within a maximum period of ninety (90) working days.

26.4 The decision issued by the Tribunal puts an end to the administrative instance.

## **CHAPTER VI**

### **INFRINGEMENTS AND SANCTIONS**

#### **Section 27. Administrative infringements**

The administrative infringements, sanctioned by INDECOPI, within the scope of application of the present Act, are distinguished between minor, serious and very serious, and are configured in the following cases:

##### **1. Minor**

- a. Failure to submit the notification for authorization through the merger review process, in accordance with the provisions of this Act.
- b. Failure to provide the competent body with the information required by the latter within the stipulated period.

##### **2. Serious**

- a. Executing a merger transaction before it has been submitted to the merger review process.
- b. Executing a merger transaction before the decision of the competent body is issued.
- c. Executing a merger transaction before the positive administrative silence.

### 3. Very serious

- a. Failure to comply with or contravene a condition, agreement or commitment established in a decision issued in application of this Act.
- b. Executing a merger transaction having been denied the authorization.
- c. Obstructing, by any means, the investigation work carried out by the competent body with respect to a merger transaction.
- d. Unjustifiably refusing to provide the required information or providing incomplete, incorrect, adulterated, misleading or false information.

#### **Section 28. Sanctions**

Administrative infringements are sanctioned through the imposition of fines based on the tax unit (UIT), in accordance with the criteria and limits established in Legislative Decree 1034, Legislative Decree that approves the Act on the Repression of Anticompetitive Conducts, or the statute that replaces it.

#### **Section 29. Seriousness of the infringement and estimation of the sanction**

For the purpose of determining the seriousness of the infringement and the estimation of the sanction, the criteria established in section 44 of Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts, as applicable, as well as in the regulations of this Act, shall be applied.

#### **Section 30. Limitation period of the administrative infringement.**

Infringements of this Act shall be subject to the limitation period of four (4) years after the last operation of execution of the infringing conduct. The limitation period is interrupted by any act of the Technical Secretariat related to the investigation of the infringement that is made known to the investigated party and allows him/her to know the object of the investigation. The computation of the limitation period is resumed if the proceeding remains paralyzed for more than ninety (90) working days due to causes not attributable to the investigated party.

#### **Section 31. Liabilities**

The information submitted by the parties in the notification for authorization of the merger transaction has the character of an affidavit and may give rise to the corresponding civil or criminal liabilities, if false or adulterated information is submitted.

## CHAPTER VII

### CORRECTIVE MEASURES

#### **Section 32. Corrective Measures**

32.1 The Commission, in addition to applying the corresponding sanctions in accordance with this Act, may order as a corrective measure that the economic agents involved dissolve the transaction by dissolving the merger or disposing of all the shares or assets acquired, until the situation prior to the execution of the transaction is restored, when it finds that said transaction has been executed without its authorization or in breach of any of the conditions established for its authorization.

32.2 If it is not possible to restore the situation prior to the implementation of the transaction, the Commission may order other measures aimed at avoiding or mitigating the possible effects that may arise from the transaction.

## CHAPTER VIII

### COERCIVE FINES

#### **Section 33. Coercive fines for non-compliance with corrective measures**

33.1 If an economic agent fails to comply with the obligations related to a corrective measure ordered, the Commission shall impose a coercive fine equivalent to one hundred and twenty-five (125) tax units (UIT), which shall be paid within five (5) working days, otherwise coercive collection shall be ordered.

33.2 If non-compliance persists, the Commission may impose a new coercive fine, successively doubling the amount of the last coercive fine imposed until the corrective measure ordered is complied with and up to the limit of sixteen (16) times the amount of the coercive fine originally imposed.

### FINAL SUPPLEMENTARY PROVISIONS

#### **FIRST. Prohibition of interference in the exercise of functions.**

The decisions of the officials in charge of the decision of the merger review process are only challenged through the appeal before the Tribunal of INDECOPI or through judicial review proceedings, as appropriate, not being appropriate for this purpose the filing of civil lawsuits or criminal complaints.

#### **SECOND: Supplementary application of the Codified Version of Act number 27444, General Administrative Procedure Act.**

It is hereby specified that the special procedures processed within the framework of Legislative Decree 1034, Legislative Decree approving the Act on the Repression of Anticompetitive Conducts, as amended by Legislative Decrees 1205 and 1396, as well as within the framework of the present Act, are governed by the Codified Version of Act number 27444, General Administrative Procedure Act, in accordance with the provisions of section II of the Preliminary Title of the aforementioned Codified Version.

#### **THIRD. Judicial review proceedings**

Judicial review proceedings over decisions issued by INDECOPI regarding the repression of anticompetitive conducts and merger review process are filed in the first instance before the Contentious-Administrative Chamber of the respective Superior Court. In this case, the Civil Chamber of the Supreme Court decides on the appeal and the Constitutional and Social Chamber on cassation, if applicable, according to the provisions of Act number 27709, Act that amends section 9 of Act number 27584, Act that regulates the judicial review proceedings.

#### **FOURTH. Market Observatory**

INDECOPI develops, implements and manages a market observatory for the purpose of compiling updated information on competition conditions in formal markets.

To this effect, it publishes reports for each sector or economic activity that may be of interest to comply with the purpose of this Act and to verify the existing levels of competition in the market.

#### **FIFTH. Prohibition of the registration and inscription of unauthorized merger transaction**

It is prohibited for notaries and public registrars to register and enroll merger transaction included in section 6.1 that have not been expressly authorized by the Commission or that have not obtained the authorization through the application of positive administrative silence.

The contravention of this prohibition is considered a serious infringement for registrars and notaries, and the rules governing their actions must be adapted to the content of this provision, as regards infringements and sanctions.

#### **SIXTH. Regulations**

The Prime Minister prepares and publishes, at the proposal of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPi), the regulations of the present Act within fifteen (15) days as from the publication of the norm.

#### **SEVENTH. Financing**

The application of the present Act is financed from the institutional budget of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPi), without requiring additional resources from the Public Treasury.

#### **EIGHTH. Radio frequency spectrum or radioelectric spectrum**

In cases of the merger review process in the telecommunications sector, linked to the processing of administrative proceedings related to the transfer of enabling titles, radio frequency spectrum assignments or radio electric spectrum, the Ministry of Transport and Communications may suspend the processing of these pending INDECOPi's pronouncement. In such proceedings, those aspects that are part of the exclusive competence of INDECOPi by virtue of the present Act are excluded from the sectorial evaluation.

#### **NINTH. Adequacy**

Within a term that does not exceed fifteen (15) days from the publication of the regulations of the present Act, the amendments to the Regulations of the Act on the Organization and Functions of the INDECOPi and other management instruments of the entity shall be issued in order to adapt them to the provisions of the present Act.

#### **TENTH. Estimation, methodology and factors for the determination of the fines imposed by the resolute bodies of INDECOPi with respect to the infringements punishable within the scope of its competence.**

Within thirty (30) days as from the publication of the present Act, a supreme decree countersigned by the Prime Minister approves the estimation, methodology and factors for the determination of the fines imposed by the ruling bodies of INDECOPi concerning infringements punishable within the scope of its competence.

#### **ELEVENTH. Inter-institutional Cooperation**

For the purposes of the proper application of this Act, cooperation between INDECOPI and other national or foreign entities, may be governed by memorandums of understanding or other inter-institutional agreements signed for this purpose.

#### **TWELFTH. Effectiveness**

The present Act becomes effective fifteen (15) calendar days after the regulatory adjustment established in the ninth final complementary provision.

### **TRANSITIONAL SUPPLEMENTARY PROVISIONS**

#### **FIRST. Pending proceedings**

Merger transactions subject to Act number 26876, Anti-monopoly and Anti-oligopoly Act of the Electricity Sector, which have been initiated prior to the enactment of this Act and are in process, continue to be processed under the rules of Act 26876, until their completion.

#### **SECOND. Merger transactions concluded prior to the enactment of the Act**

Merger transactions that prior to the effective date of this Act, have been concluded with the closing acts necessary to make effective the transfer or change of control referred to in section 5.1 of section 5 of this Act, are not subject to notification.

### **COMPLEMENTARY AMENDING PROVISIONS**

#### **FIRST. Amendment of section 2, 24 and 52 of Legislative Decree 1033, Legislative Decree that approves the Act on the Organization and Functions of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI).**

Let literal b) of numeral 2.1 of section 2, section 24 and section 52 of Legislative Decree 1033, Legislative Decree that approves the Act on the Organization and Functions of the INDECOPI, be amended as follows:

##### **"Section 2. Functions of INDECOPI**

2.1 INDECOPI is the autonomous entity in charge of:

[...]

b) Defending free and fair competition, sanctioning anticompetitive and unfair conducts, preventing the anticompetitive effects of merger transactions and ensuring that there is effective competition in the markets;

[...]

##### **Section 24. The Commission for the Defense of Free Competition**

The Commission for the Defense of Free Competition is responsible for ensuring compliance with Legislative Decree 1034, Legislative Decree that approves the Act on the Repression of Anticompetitive Conducts and the Antitrust Merger Review Act, as well as those provisions that complement or replace the foregoing in whole or in part.

##### **Section 52. Sources of INDECOPI's financing**

INDECOPI is financed from the following sources:

- a) Fees for the services it provides and for the processing fees of administrative proceedings within the competence of its different organizational units;
- b) Amounts collected by fines;
- c) The antidumping and countervailing duties that are established, provisionally or definitively, in the proceedings on the matter;
- d) Resources received from the rendering of services:
- e) The resources from international technical cooperation;
- f) The legacies and donations it receives; and,
- g) Resources transferred to it.

The administrative proceedings processed before INDECOPI in the different matters of its competence, initiated at the request or by complaint of a party, are subject to the payment of processing fees. The amounts of the processing fees are determined in accordance with the methodology and regulations in force".

#### **SECOND: Addition of numeral 18.4 to section 18 of Legislative Decree 1034, Act on the Repression of Anticompetitive Conducts**

Incorporate numeral 18.4 to section 18 of Legislative Decree 1034, the Repression of Anticompetitive Conducts Act, in the following terms:

##### **"Section 18.- Forms of initiation of the proceedings**

[...]

18.4 By means of a duly motivated decision, the Technical Secretariat may not, in exercise of a discretionary power, initiate nor instruct an administrative sanctioning proceeding when it determines, based on the criteria set forth in section 44 of this Act, that a conduct subject to the relative prohibition is not capable of having a significant effect on competition. In this case, the Technical Secretariat may impose, ex officio or at the request of the investigated party, the implementation of actions to restore or promote competition and ensure compliance with the Act. The Commission approves the guidelines for the exercise of this discretionary power, at the proposal of the Technical Secretariat".

#### **THIRD. Modification of numeral 58.3 of section 58 of Legislative Decree 1044, Legislative Decree Approving the Act for Repression of Unfair Competition.**

Amend paragraph 58.3 of section 58 of Legislative Decree 1044, Legislative Decree Approving the Act on the Repression of Anticompetitive Conducts, in the following terms:

##### **"Section 58.- Action for damages**

[...]

58.3 In the case mentioned in section 58.1, the Commission, after a favorable report from the Technical Secretariat, forwards the administrative proceeding to the Legal Department so that it may initiate, in defense of the diffuse interests and collective interests of consumers, a judicial process for an action for damages derived from the conducts prohibited by the present regulation, in accordance with the provisions of section 82 of the Code of Civil Procedure, for which purpose it verifies the existence of

the corresponding procedural assumptions. Notwithstanding the foregoing, the terms, rules, conditions or particular restrictions necessary for the exercise of this action are approved by means of guidelines of the Commission, at the proposal of the Technical Secretariat".

### **COMPLEMENTARY DEROGATORY PROVISIONS**

#### **FIRST: Repeal of Act number 26876, Anti-monopoly and Anti-oligopoly Act of the Electric Sector.**

Act number 26876, Anti-monopoly and Anti-oligopoly Act of the Electric Sector is hereby repealed with the entry into force of this Act, with the exception of section 13, which amends section 122 of Decree Law 25844, Act of Electric Concessions.

#### **SECOND: Repeal of Emergency Decree 013-2019, which establishes the prior control of merger transactions, and Legislative Decree 1510, which amends Emergency Decree 013-2019.**

As of the entry into force of this Act, Emergency Decree 013-2019 and Legislative Decree 1510 are hereby repealed.

WHEREFORE:

The Act having been reconsidered by the Congress of the Republic, insisting on the text approved in the session of the Plenary held on October 23, two thousand twenty, in accordance with the provisions of section 108 of the Political Constitution of Peru, I hereby order it to be published and enforced.

In Lima, on the sixth day of January, two thousand twenty-one.

MIRTHA ESTHER VÁSQUEZ CHUQUILIN

President of the Congress of the Republic

LUIS ANDRÉS ROEL ALVA

Second Vice President of the

Congress of the Republic

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