

Supreme Decree that approves the Regulations of Act N° 31112, the Antitrust Merger Review Act

SUPREME DECREE

N° 039-2021-PCM

THE PRESIDENT OF THE REPUBLIC

WHEREAS:

By means of Act N° 31112, the Antitrust Merger Review Act, a regime that reviews merger transactions is established with the purpose of promoting effective competition and economic efficiency in the markets for the welfare of consumers;

The Twelfth Final Supplementary Provision of Act N° 31112, provides that such Act becomes effective fifteen (15) calendar days after the regulatory adequacy established in the ninth final supplementary provision;

The Sixth Final Supplementary Provision of Act N° 31112, provides that the Prime Minister prepares and publishes, at the proposal of the National Institute for the Defense of Competition and Protection of Intellectual Property, the regulations of the aforementioned Act;

The Presidency of the Board of Directors of the National Institute for the Defense of Competition and Protection of Intellectual Property has proposed to the Prime Minister the regulation of the aforementioned Act N° 31112;

Within the framework of the provisions of section 2 of Legislative Decree N° 1310, Legislative Decree that approves additional administrative simplification measures, by means of the Minutes of Virtual Session N° 207, dated on January 22, 2021, the Multisector Commission on Regulatory Quality gave its approval to the administrative procedures contained in the draft regulations;

Pursuant to section 118, paragraph 8 of the Political Constitution of Peru; Act N° 29158, Organic Act of the Executive Branch; and Act N° 31112, the Antitrust Merger Review Act;

HEREBY DECREES:

Section 1. Approval of the Regulations of Act N° 31112, the Antitrust Merger Review Act

To approve the Regulations of Act N° 31112, the Antitrust Merger Review Act, which consists of eight (8) chapters, thirty-three (33) sections, six (6) final supplementary provisions and three (3) transitory complementary provisions, included in this Supreme Decree.

Section 2. Effectiveness

This supreme decree becomes effective alongside the entry into force of Act N° 31112, the Antitrust Merger Review Act.

Section 3. Publication

This Supreme Decree and the Regulations approved in section 1 are published in the Single Digital Platform for Citizen Orientation (www.gob.pe), the Institutional Portal of the Prime Minister (www.gob.pe/pcm), the Institutional Portal of the Ministry of Economy and Finance (www.gob.pe/mef) and the Institutional Portal of the National Institute for the Defense of

Competition and Protection of Intellectual Property (www.gob.pe/indecopi), on the same date of its publication in the Official Gazette "El Peruano".

Section 4. Endorsement

This Supreme Decree is endorsed by the Prime Minister and the Minister of Economy and Finance.

Given at the Government Palace, in Lima, on the third day of march of the year two thousand and twenty-one.

FRANCISCO RAFAEL SAGASTI HOCHHAUSLER

President of the Republic

VIOLETA BERMÚDEZ VALDIVIA

Prime Minister

WALDO MENDOZA BELLIDO

Minister of Economy and Finance

REGULATIONS OF THE ANTITRUST MERGER REVIEW ACT

CHAPTER I

GENERAL PROVISIONS

Section 1. Purpose

The purpose of this norm is to regulate Act N° 31112, the Antitrust Merger Review Act

Section 2. Scope of application

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

- a) Merger transaction, included in section 5 of the Antitrust Merger Review Act, that produce effects in all or part of the national territory, including those merger transactions that are carried out abroad and directly or indirectly link economic agents that carry out economic activities in the country.
- b) 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. Acronyms and references

For the purposes of these Regulations, the following acronyms, references and definitions shall have the respective meanings indicated below:

- a) Productive operating assets: Tangible or intangible assets to which income, revenue, cash flows or turnover can be assigned, and that has the potential to develop or increase the market share of an economic agent in the market. An asset is considered to be operating if it has generated revenues, income, cash flows or turnover in the year prior to the notification of the merger transaction.
- b) AFP: Private Pension Fund Administrators.

c) Authorized economic agent: The economic agent, in accordance with the definition set forth in section 3.1 of the Antitrust Merger Review Act, whose notified merger transaction was authorized with or without conditions, in accordance with the provisions of section 7.4 of the aforementioned regulation.

d) Commission: Commission for the Defense of Free Competition.

e) Indecopi: National Institute for the Defense of Competition and Protection of Intellectual Property.

f) Act N° 31112: Antitrust Merger Review Act

g) Technical Secretariat: Technical Secretariat of the Commission for the Defense of Free Competition.

h) SBS: Superintendency of Banking, Insurance and Private Pension Funds Administrators.

i) SMV: Superintendency of Securities Market.

j) SUNARP: National Superintendency of Public Registries.

k) Tribunal of Indecopi: Tribunal for the Defense of Competition and Intellectual Property.

Section 4. Rules for the calculation of thresholds

4.1. In order to require the authorization of a merger transaction, the economic agents evaluate whether their transaction qualifies as a merger transaction in accordance with section 5 of the Antitrust Merger Review Act and whether it complies with any of the following parameters included in section 6.1 of the aforementioned Act:

a) The sales or gross income generated in Peru by the companies involved have reached, in the fiscal year prior to that in which the notification of the merger transaction is notified, the thresholds established in paragraphs a) and b) of section 6.1. of the Antitrust Merger Review Act.

b) The book value of the assets in Peru of the companies involved has reached, in the fiscal year prior to that in which the merger transaction is notified, the thresholds established in paragraphs a) and b) of section 6.1. of the Antitrust Merger Review Act.

4.2. The gross sales or revenues of the companies involved, as well as the value of their assets, is determined in accordance with the following rules:

a) When the transaction corresponds to the operations established in paragraphs a) and c) of section 5.1 of the Antitrust Merger Review Act, the annual gross sales or income or the book value of the assets of the economic agents participating in the transaction and their respective economic groups shall be taken into account.

b) When the transaction results in the acquisition by one or more economic agents, directly or indirectly, of the rights that allow it to exercise control over all or part of another economic agent, the annual gross sales or income or the book value of the assets of the acquiring agent and its economic group shall be taken into account; and the annual gross sales or income or the book value of the assets of the acquired agent and the agents over which the latter exercises control as well.

c) When the transaction corresponds to the operations set forth in paragraph d) of section 5.1 of the Antitrust Merger Review Act, the gross sales or income or the book value of the assets of the acquiring agent and its economic group, and those gross sales or income that have been generated by the acquired productive operating assets or the book value of such assets shall be taken into account.

4.3 For purposes of the calculation of the thresholds, only gross sales or income generated in Peru during the fiscal year prior to that in which the transaction is notified shall be taken into account.

4.4 For purposes of the calculation of the thresholds, only assets located in Peru during the fiscal year prior to that in which the transaction is notified shall be taken into account.

4.5. When paragraph b) of section 6.1 of the Antitrust Merger Review Act refers to at least two of the companies involved in the merger transaction, each one of them corresponds to the economic agent and its respective economic group participating in the referred transaction. For the calculation of the gross sales or income or the book value of the assets of each company involved, the rules set forth in the preceding paragraphs are applied.

Section 5. Calculation of the threshold in successive operations

5.1. In order to verify whether the operations described in section 5.3 of the Antitrust Merger Review Act reach the thresholds set forth in section 6.1. of the aforementioned Act, the gross sales or income or the book value of the assets in the country of the companies involved in such transactions, corresponding to the fiscal year prior to that in which the transaction is notified, shall be taken into account.

5.2. For the purposes of the case described in the preceding paragraph, the rules set forth in section 4 of these Regulations shall apply.

Section 6. Third Parties

6.1. In accordance with the rules set forth in the Antitrust Merger Review Act, the powers of third parties with a legitimate interest in the proceeding consist of the right to access the file in accordance with the conditions set forth in section 20.2 of the Antitrust Merger Review Act and the possibility of submitting to the Commission relevant information on the merger transaction.

6.2. The time limit to request the appearance to the merger review process is ten (10) working days following the day of publication indicated in section 21.7 of the Antitrust Merger Review Act.

6.3. The time limit to request the appearance to the ex officio merger review process is ten (10) working days following the publication of the decision starting the proceeding indicated in section 24.2 of these Regulations.

6.4. Private sector agents that have not requested to appear in the proceeding and public entities may only submit an opinion on the merger transaction when the competition authority requires it or when they wish to do it in virtue of the publication indicated in section 21.7 of the Antitrust Merger Review Act.

Section 7. Consultations for guidance

Prior to the merger review process proceedings and ex officio review of merger transactions, the economic agents may individually or jointly submit consultations for guidance to the

Technical Secretariat. The opinions of the Technical Secretariat shall not bind the Commission in its decision making.

Section 8. Respect for the merger review process principles

All officers, servants or collaborators of the public entities or agencies that participate in the merger review process proceedings, ex officio review of merger transactions, review of conditions proceedings or administrative sanctioning proceedings, must comply with the principles set forth in section 4 of the Antitrust Merger Review Act,

CHAPTER II

MERGER REVIEW PROCESS

Section 9. Requirements for the notification for authorization of a merger transaction

9.1. Prior authorization of the transaction shall be submitted to the Commission including the following requirements:

a) Notification for authorization of the merger transaction stating the following:

(i) Information in accordance with the provisions of section 124 of the Codified Version of Act N° 27444, the General Administrative Procedure Act, approved by Supreme Decree N° 004-2019-JUS. In the case of legal entities, the identification information of the legal representative shall be included.

(ii) Date and number of the payment receipt of the processing fee.

b) Notification form signed as an affidavit containing the following:

(i) Identification information of the notifying economic agent(s) involved in the transaction.

(ii) Identification information of the legal representative(s) of the notifying economic agent(s), as well as the number of the registration entry in which the power of attorney is registered. In the case of powers of attorney granted before a foreign authority that were not registered in SUNARP, they must have the consular legalization and the legalization of the Peruvian Ministry of Foreign Affairs or the Apostille granted by the competent foreign authority.

(iii) Description and purpose of the merger transaction. The following must be attached:

1. Copy of the final or most recent version of the agreement or contract subscribed on the merger transaction. If an agreement or contract on the transaction has not yet been signed, submit the documents that show the real and serious intention of the economic agents to carry out the transaction, such as memorandums of understanding or letters of intent.

2. Copy of the minutes of the meetings of the management and administrative bodies of the companies involved where the merger transaction, the reasons for its celebration and its effects, have been discussed.

3. Copy of the reports, studies, presentations and/or internal or external reports that have been prepared or commissioned with the purpose of evaluating or analyzing the merger transaction, the reasons for its execution and its effects.

(iv) Description of the ownership and control structure of each of the economic agents involved in the transaction and their respective economic groups.

(v) Identification of the kinship, ownership, and/or management links existing between each of the economic agents described in the previous point with respect to other companies operating in the country.

(vi) Identification and description of the markets involved in the merger transaction. A copy of studies, reports, analyses, surveys and any comparable document corresponding to the identification and definition of the markets involved, the structure of supply and demand, differentiation of goods or services and intensity of competition, barriers to entry and exit from the market and the existence of cooperative agreements, must be attached.

(vii) Where applicable, a detailed description of the efficiencies associated with the merger transaction, and how these are passed on to consumers, as well as the timing of the pass-through of such efficiencies.

(viii) Identification of the countries in which the merger transaction has been notified or is intended to be notified; and, if applicable, its processing status. Where applicable, the pronouncements of the competent authorities must be attached.

(ix) The financial statements for the fiscal year prior to that of the notification of the economic agents involved according to the rules set forth in section 4 of these Regulations.

9.2. For the purposes of item vi) of paragraph b) of section 9.1 above, the markets involved are understood as those markets in which the economic agents directly involved in the merger transaction and their respective economic groups participate; and whose delimitation is necessary to identify the horizontal, vertical or conglomerate relationships generated by the transaction and its possible risks to competition in the Peruvian territory.

9.3. For the purposes of item viii) of paragraph b) of section 9.1. above, the applicant shall inform the Commission in a timely manner on the jurisdictions notified after the filing of the notification.

9.4. The Commission, at the proposal of the Technical Secretariat, approves the ordinary notification form to be used by the economic agents to submit the information requested in paragraph b) of section 9.1. of these Regulations.

9.5. The proceeding to obtain the authorization of a merger transaction is of prior evaluation and is subject to positive administrative silence in case the Commission does not make a pronouncement within the period established by section 21 of the Antitrust Merger Review Act.

Section 10. Administrative proceeding for the simplified notification for authorization of the merger transaction

10.1 Economic agents may submit a simplified notification for authorization of the merger transaction when one of the following conditions is met:

a) When the economic agents involved in the merger transaction or their respective economic groups do not carry out economic activities in the same product market and in the same geographic market; or, do not participate in the same production or value chain.

b) When the merger transaction generates for an economic agent to acquire the exclusive control of another economic agent over which it already has joint control.

10.2 The proceeding for the simplified notification for authorization of the merger transaction is processed before the Commission observing the following requirements:

- a) Application indicating what is required in letter a) of section 9.1 of the Regulations.
- b) Form, signed as an affidavit, containing the requirements set forth paragraphs (i), (ii), (iv), (v), (viii) and (ix) of Section 9.1 (b) of the Regulations, and which, in turn, contains the following:
- (i) Description and purpose of the merger transaction. Only the following must be included:
- Copy of the final or most recent version of the agreement or contract subscribed on the merger transaction. If an agreement or contract on the transaction has not yet been signed, submit the documents that show the real and serious intention of the economic agents to carry out the transaction, such as memorandums of understanding, letters of intent or similar.
- (ii) List of the economic activities carried out by the companies involved. Any internal or external document that identifies the economic activities carried out by the companies involved, the goods, services and distinctive signs included in such activities, the characteristics of their supply and demand, and the existence of cooperative agreements, must be attached.
- 10.3 Within ten (10) working days from the date of submission of such notification, the Technical Secretariat informs the economic agents that the notification must be made through the ordinary form when the assumptions applicable to the simplified notification form are not met; or, when it determines that additional information is necessary for an adequate investigation of the possible risks to competition derived from the merger transaction.
- 10.4 In accordance with section 21.3 of the Antitrust Merger Review Act, the economic agents have a time limit of ten (10) working days to correct the respective deficiencies, under penalty of declaring the notification for authorization inadmissible.
- 10.5 The proceeding for the simplified notification for authorization of the merger transaction is of prior evaluation subject to positive administrative silence, with indeterminate validity. Once the notification is admitted for processing, the Commission evaluates the notification in accordance with the period established in sections 21.4 and 21.8 of the Antitrust Merger Review Act,, as applicable.
- 10.6 The Commission, at the proposal of the Technical Secretariat, approves the form referred to in section 10.2 (b) of this section.

Section 11. Submission of commitments during Phase 1

- 11.1. Applicants may submit commitments, as referred to in section 8 of the Antitrust Merger Review Act, within the first fifteen (15) working days, counted as of the day following the notification of the decision of admission to process the notification for authorization, in order to avoid or mitigate the eventual anticompetitive effects related to the merger transactions. Applicants may also submit commitments as part of their notification for authorization.
- 11.2. The proceeding is suspended for an initial period of fifteen (15) working days, counted from the day following the presentation of the commitments. This period may be extended for an additional fifteen (15) working days, at the request of a party and with the prior approval of the Commission. In the event that the applicant submits commitments as part of the notification for authorization, the suspension period shall be counted as from the day following the notification of the admission for processing.

11.3. Within the first ten (10) working days of the suspension period indicated in the previous paragraph, the applicants may make modifications or extensions. Once this period has elapsed, unilateral modifications to the commitment proposals will not be accepted.

11.4. Before and during the evaluation of the commitments, the Technical Secretariat provides guidance to the applicants on the presentation of the commitments and their viability.

Section 12. Evaluation of commitments during Phase 1

12.1. The Commission may consult private sector actors and public entities, whose opinion considers useful in the evaluation process of the commitments referred to in section 11 of this Regulation.

12.2. During the suspension period established in section 11.2 of these Regulations, the applicants may request the holding of a hearing. Only the applicants and the public entities that require it may participate in such hearings.

Section 13. Decision on commitments during Phase 1

13.1. At the end of the suspension period established in section 11.2 of these Regulations, the Commission shall decide whether the commitments submitted by the applicants are favorable.

13.2. If the Commission does not consider the commitments submitted to be favorable, it issues a decision rejecting them, which cannot be challenged and that is notified to the parties; without prejudice to continuing with the actions to decide over the notification for authorization of the merger transaction.

13.3. If the Commission considers that it has grounds to declare favorable the commitments submitted, it issues a provisional decision, which is notified to the parties. A non-confidential version of said decision is notified to the private sector agents and public entities that were consulted by the Commission during the proceeding and to others that it considers of interest for the decision of the proceeding, so that they may submit their comments within a maximum period of five (5) working days.

13.4. The Commission finally issues a decision on the commitments considered favorable, during the period established for Phase 1, for which it may adopt the following decisions:

a) If the Commission approves the commitments, it authorizes the merger transaction subject to such commitments and terminates Phase 1. When applicable, the decision includes a work schedule for the implementation and supervision of the accepted commitments, as well as the participation of a monitor, in charge of periodically monitoring its compliance, who may be appointed and removed by the Commission, at the request of the Technical Secretariat.

b) If the Commission rejects the commitments, it issues a decision that cannot be challenged and notifies the parties; without prejudice to continuing with the actions to decide over the notification for authorization of the merger transaction.

13.5. For assessing the commitments, it is considered that the competition concerns raised by the transaction are clearly defined by the Commission, so that the proposed commitments are effective and easy to implement to address such concerns.

Section 14. Submission of commitments during Phase 2

14.1 Applicants may submit commitments within forty (40) working days from the day following the notification of the decision initiating Phase 2.

14.2 The proceeding is suspended for an initial period of fifteen (15) working days, counted from the day following the presentation of the commitments. This period may be extended for an additional thirty (30) working days, at the request of a party and with the prior approval of the Commission.

14.3 Applicants may make modifications or extensions within ten (10) working days from the day following the date of submission of the commitments. After this period has elapsed, unilateral modifications to the proposals will not be accepted.

11.4. Before and during the evaluation of the commitments, the Technical Secretariat provides guidance to the applicants on the presentation of the commitments and their viability.

Section 15. Evaluation of commitments during Phase 2

15.1 The Commission may consult with private sector actors and public entities, whose opinion considers useful in the evaluation process on the commitments referred to in section 14 of these Regulations.

15.2 During the suspension period established in section 14.2 of these Regulations, the applicants may request the holding of a hearing. Only the applicants and the public entities that require it may participate in such hearings.

Section 16. Decision on commitments during Phase 2

16.1. Once the suspension period established in section 14.2 of these Regulations has elapsed, the Commission shall evaluate the commitments submitted by the applicants. In case it rejects them or considers them insufficient, when establishing possible conditions to the merger transaction these may be based on the commitments offered by the applicant.

16.2. If the Commission does not consider the commitments submitted to be favorable, it issues a decision rejecting them, which cannot be challenged and is notified to the parties; without prejudice to continuing with the actions to resolve the notification for authorization of the merger transaction.

16.3. If the Commission considers that it has grounds to declare favorable the commitments submitted, it issues a provisional decision, which is notified to the parties. A non-confidential version of the decision is notified to the private sector agents and public entities that were consulted by the Commission during the proceedings, and to others that it considers of interest for the decision of the proceeding, so that they may submit their comments within a maximum period of ten (10) working days.

16.4. The Commission finally issues a decision on the commitments considered favorable, during the period established for Phase 2, for which it may adopt the following decisions:

a) If the Commission approves the commitments, it authorizes the merger transaction subject to such commitments and terminates Phase 2. The decision may also contain conditions imposed by the Commission. When applicable, such decision includes a work schedule for the implementation and supervision of the accepted commitments, as well as the participation of a monitor in charge of periodically monitoring its compliance, who may be appointed and removed by the Commission, at the request of the Technical Secretariat.

b) If the Commission rejects the commitments, it issues a decision that cannot be challenged and notifies the parties; without prejudice to continuing with the actions to resolve the notification for authorization of the merger transaction.

16.5 For assessing the commitments, it is considered that the competition concerns raised by the transaction are clearly defined by the Commission, so that the proposed commitments are effective and easily implemented to address such concerns.

CHAPTER III

PROCESS FOR THE REVIEW OF CONDITIONS

Section 17. Process for the review of the conditions of conduct

17.1. After the period established for the review of conditions of conduct that has been imposed on the occasion of the authorization of a merger transaction, the Commission shall evaluate whether it is pertinent to maintain, modify or leave without effect the referred condition of conduct imposed to the economic agents, in accordance with section 9.1 of the Antitrust Merger Review Act.

17.2. If the Commission or the authorized economic agent considers that, during the period established for the review of the condition of conduct, a variation in the conditions of competition has occurred, they may request the review of such conditions, in accordance with sections 9.2 and 9.3 of the Antitrust Merger Review Act. In such cases, the Tribunal of Indecopi is the competent authority to determine, at the request of the Commission or the authorized economic agent, whether it is necessary to maintain, modify or revoke the condition of conduct imposed on the economic agents.

17.3. In case the condition of conduct is modified, it cannot be more burdensome for the authorized economic agent than the one in force at the beginning of the review process.

Section 18. Proceeding initiated by the expiration of the period established for the review of the condition of conduct

18.1. Before the expiration of the period established for the review of the condition of conduct, the Commission shall issue the decision ordering the initiation of the respective review proceeding.

18.2. Once notified the decision of initiation, the authorized economic agent has a period of twenty (20) working days to manifest its position.

18.3. At any stage of the proceeding, the authorized economic agent may request the Commission to hold a hearing.

18.4. During the proceedings, the Commission is empowered to request information from other public entities and private sector agents, who have a period of twenty (20) working days for its presentation, counted as of the day following the request.

18.5. The Commission may suspend the computation of the period for the issuance of its final decision, in accordance with the provisions of section 15.2 of the Antitrust Merger Review Act.

18.6. The Commission issues its final decision within ninety (90) working days, counted from the notification of the decision initiating the proceeding. This period may be extended by the

referred body for up to thirty (30) working days, and the reasons justifying the extension must be indicated.

18.7. In its final decision, the Commission determines whether to maintain, leave without effect or modify the condition of conduct in question, as appropriate. In case the authority decides to maintain or modify the respective conditions, it establishes a new period for its review. In case the condition of conduct is modified, it cannot be more burdensome for the authorized economic agent than the one in force at the beginning of the review proceeding.

18.8. The authorized economic agent may file an appeal against the final decision of the Commission. The period for its filing does not exceed fifteen (15) working days from the day following the notification of the final decision of the first instance.

18.9. The Tribunal of Indecopi processes the appeal in accordance with the rules set forth in sections 41 and 42 of the Codified Version of the Act on the Repression of Anticompetitive Conducts, approved by Supreme Decree N° 030-2019-PCM, as applicable. This body resolves the referred appeal within a maximum period of ninety (90) working days.

18.10. During the review process, the condition of conduct remains in force.

Section 19. Proceeding initiated during the period established for the review of the condition of conduct.

19.1 If the Commission or the authorized economic agent considers that there has been a change in the conditions of competition during the established period for the review of the condition of conduct, they may request to the Tribunal of Indecopi to leave without effect or modify the referred condition, in accordance with the following rules:

a) In case the proceeding is initiated at the request of the Commission, a report is submitted to the Tribunal of Indecopi specifying the reasons for such request.

b) In case the proceeding is initiated at the request of the authorized economic agent, the latter submits its request to the Tribunal of Indecopi stating the reasons for the change in the conditions of competition, attaching the elements of judgment or evidence that it considers justify its position. It also specifies whether the purpose of the request is to leave without effects or modify the condition of conduct, proposing in the latter case the new applicable condition.

19.2 The proceeding for review of the condition of conduct, initiated at the request of the authorized economic agent, is processed by the Tribunal of Indecopi, observing the following requirements:

a) Request for the review of the status of the conduct, including the information provided in section 124 of the Codified Version of Act N° 27444, the Act of General Administrative Procedure, approved by Supreme Decree N° 004-2019-JUS. In the case of legal entities, indicate the number of the registry entry in which the power of attorney is registered or a simple copy of the power of attorney in case it does not appear in the Public Registry. In the case of powers of attorney granted by a foreign authority that were not registered before SUNARP, they must have the consular legalization and the legalization of the Peruvian Ministry of Foreign Affairs or the Apostille granted by the competent foreign authority. Likewise, the condition(s) of conduct subject of the request and the arguments for which, in their consideration, there is a variation in the conditions of competition in the market, must be indicated.

b) Documents supporting the arguments presented in the request.

19.3 Once the request or report review has been submitted, the Tribunal of Indecopi has a period of ten (10) working days to issue the decision ordering the initiation of the review process of the imposed condition of conduct.

19.4 The Commission and the authorized economic agent, as appropriate, have a period of twenty (20) working days from the day following the notification of the decision of initiation, to express their position.

19.5 At any stage of the proceeding, the authorized economic agent may request the Tribunal of Indecopi to hold a hearing.

19.6 During the proceedings, the Tribunal of Indecopi is empowered to request information from public entities and private sector agents, who have a period of twenty (20) working days for its presentation, following the day of the request.

19.7 The Tribunal of Indecopi may suspend the computation of the period for the issuance of its final decision, in accordance with the provisions of section 15.2 of the Antitrust Merger Review Act.

19.8 The Tribunal of Indecopi issues its final decision within ninety (90) working days, counted from the day following the notification of the decision initiating the procedure. This period may be extended by the referred body for up to thirty (30) working days, and the reasons justifying the extension must be indicated.

19.9 In its final decision, the Tribunal of Indecopi determines whether it decides to leave without effect, maintain or modify the condition of conduct in question, as appropriate. In case the condition of conduct is modified, it cannot be more burdensome for the authorized economic agent than the one in force at the beginning of the review proceeding.

19.10 In the event that the Tribunal of Indecopi does not issue its final decision within the legally established period, the positive administrative silence is applicable, thus concluding the proceeding initiated at the request of a party.

CHAPTER IV

PROVISIONS REGARDING ECONOMIC AGENTS SUPERVISED BY THE SBS AND THE SMVS

Section 20. Prior authorization of transactions involving economic agents within the scope of regulation and supervision of the SBS that do not take deposits from the public or are not insurance companies.

20.1. In the case of transactions involving economic agents within the scope of regulation and supervision of the SBS that do not take deposits from the public or are not insurance companies, the referred economic agents submit a request for authorization to the SBS, provided that the authorization of this entity is required according to the applicable regulations, and a notification for authorization to Indecopi, as indicated in section 9.1 of these Regulations if the transaction is within the scope of application of the Antitrust Merger Review Act. The merger transaction proceeds if it has the authorization of Indecopi and the SBS, provided that the authorization of such entities is required according to the applicable regulations, each one within the scope of its competencies.

20.2. The filing of the notification for authorization of the merger transaction before the SBS and Indecopi may be made simultaneously.

Section 21. Prior authorization of transactions involving economic agents of the financial system that take deposits from the public or are insurance companies.

21.1. In the case of transactions involving economic agents of the financial system that take deposits from the public or are insurance companies, the referred economic agents submit the request for authorization to the SBS.

21.2. The SBS determines whether the transaction involves economic agents referred to in section 21.1, presents relevant and imminent risks, which compromise the solidity or stability of such economic agents or the systems of which they are part, as provided in section 16.4 of section 16 of the Antitrust Merger Review Act. In case the SBS determines so, it continues with the evaluation without the need to submit an additional notification for authorization to Indecopi. In this case, if the SBS authorizes the transaction, it sends a copy of the authorization decision to Indecopi.

21.3. In case the SBS determines that the transaction does not fall under the assumption indicated in section 21.2 above, it notifies the requesting economic agents so they may evaluate whether to submit the notification for authorization to Indecopi, in accordance with the provisions of section 4.1 of these Regulations. The communication from the SBS is made within a period no longer than twenty (20) working days as from the filing of the request for authorization to the SBS, with a copy to Indecopi. The merger transaction is allowed if it has both the authorization of the SBS and Indecopi, each within the scope of their competencies.

21.4. If after the communication from the SBS referred to in the previous numeral and during the Commission's evaluation, new facts arise that imply relevant and imminent risks that compromise the solidity or stability of the companies of the financial system that take deposits from the public or insurance companies that participate in the transaction or of the systems they integrate, the SBS communicates such situation to Indecopi; so the proceeding processed by Indecopi is terminated and filed.

Section 22. Prior authorization for transactions involving economic agents authorized by the SMV.

The economic agents to which the SMV has granted authorization, that participate in the merger transaction, request from the SMV the required authorizations according to the special rules on the matter that regulates them. Such request is submitted to the SMV prior to or simultaneously with the notification for authorization to the Commission, observing the provisions of section 9.1 of the Regulation. The merger transaction proceeds if it has the authorization of the aforementioned entity and Indecopi, each within the scope of its competence.

CHAPTER V

EX-OFFICIO ACTION

Section 23. Criteria and parameters for the ex officio action of the Technical Secretariat in the event of a merger transaction.

23.1 Within the framework of the provisions of section 6.4 of the Antitrust Merger Review Act, the Technical Secretariat may review ex officio those merger transactions included in section 5.1 of the Antitrust Merger Review Act, which do not reach the thresholds established in section 6.1 of the Antitrust Merger Review Act, if there are special circumstances in which it identifies

reasonable indications that these transactions may generate a dominant position or affect effective competition in the relevant market.

23.2 The following cases, among others, are considered special circumstances:

- (a) Horizontal merger transactions carried out in concentrated markets.
- b) Horizontal merger transactions involving the acquisition of an economic agent with a small market share, but with growth potential, or of an innovative economic agent that has recently entered the market.
- c) Horizontal merger transactions, in which the acquiring economic agent or its economic group has previously carried out merger transactions involving the acquisition of a competitor.
- d) Other merger transactions that have the potential to generate possible significant restrictive effects on competition.

23.3 The merger transactions subject to the ex officio review referred to in the preceding paragraphs must have an impact on the Peruvian market. It is understood that a transaction meets said requirement if the economic agents that have concentrated, or their respective economic groups have carried out economic activities in Peru or have generated income, sales or cash flows in the country, during the 12 (twelve) months prior to the formal closing of the transaction.

23.4 The Technical Secretariat may determine the initiation of the ex officio review proceeding of a merger transaction up to one (1) year after its formal closing.

23.5 Merger transactions previously approved by the SBS involving financial system companies that take deposits from the public or insurance companies and which, at the time, could have presented relevant and imminent risks that would compromise the solidity or stability of the economic agents involved or of the systems they comprise, are not subject to ex officio review by the Technical Secretariat. In order to determine whether a merger transaction is included in the aforementioned assumption, the Technical Secretariat resorts to the information submitted by the SBS within the framework of the provisions of section 21 of these Regulations.

Section 24. Proceeding for the ex officio review of merger transaction

24.1 The proceeding for the ex officio review of merger transactions is always initiated ex officio on the initiative of the Technical Secretariat.

24.2 The Technical Secretariat initiates the ex officio review proceeding of a merger transaction by means of a decision containing a succinct statement of the facts and grounds that prove compliance with the criteria and parameters established in section 23 of these Regulations. The decision is notified to the economic agents identified in section 18 of the Antitrust Merger Review Act within five (5) working days. In case the referred agents do not have a legal domicile in Peru, it is notified to any of the companies of their economic group that have a legal domicile in Peru. Within the same period, the Decision of Initiation is published in the institutional web portal of Indecopi.

24.3 Once notified of the Decision of Initiation, the Technical Secretariat opens an evidentiary stage in which it carries out the necessary actions for the review of the merger transaction for a maximum period of ninety (90) working days, which may be extended for up to fifteen (15) additional working days, and the reasons justifying the corresponding extension must be

indicated. At this stage, the Technical Secretariat may request the opinion of public entities and private sector agents, without qualifying them as third parties appearing in the proceeding. Likewise, the economic agents subject to review may present the allegations they deem pertinent, submit the documents that support their position on the possible effects of the merger transaction and, if applicable, on the existence of economic efficiencies that compensate its possible restrictive effects.

24.4 When the merger transaction involves companies of the financial system that take deposits from the public or insurance companies, the Technical Secretariat must request an opinion from the SBS to inform whether the possible measures imposed by the Commission referring to a divestiture of shares or assets related to the transaction could generate relevant and imminent risks that could compromise the solidity or stability of such agents or the systems they are part of. The opinion of the SBS must be issued within fifteen (15) working days of the Technical Secretariat's request. If the SBS does not issue its opinion within the established period, the Technical Secretariat continues with the evaluation of the operation.

24.5 Within thirty (30) working days from the conclusion of the evidentiary stage, the Technical Secretariat issues a report with its conclusions and recommendations on the possible effects of the transaction and the applicable corrective measures, if deemed necessary. The report is forwarded to the Commission and the economic agents subject to review within five (5) working days.

24.6 The economic agents subject to review have a period of fifteen (15) working days, counted from the notification of the Technical Secretariat's report, to formulate their observations and request a hearing to the Commission to express their arguments.

24.7 Within ten (10) working days of the presentation of the request for a hearing referred to in the preceding paragraph, the Commission communicates its acceptance or rejection. If accepted, the hearing shall be held within the following five (5) working days.

24.8 Once the observations of the agents subject to review to the Technical Secretariat's report have been received and, if applicable, the hearing referred to in the previous paragraph has been held, the Commission has a period of thirty (30) working days to issue its final decision, choosing one of the following alternatives:

- a) If it determines that the merger transaction could not generate possible significant restrictive effects on competition, the Commission closes the proceeding.
- b) If it determines that the merger transaction could generate possible significant restrictive effects on competition, it issues the orders or measures it deems pertinent to eliminate or mitigate them, which includes, if applicable, and if feasible, reasonable and proportional, the divestiture of the shares or assets acquired.

24.9 The economic agents subject to review may allege the existence of efficiencies arising from the transaction, in accordance with the criteria established in section 7 of the Antitrust Merger Review Act. In this case, if the Commission determines that the possible significant restrictive effects on competition that could be generated by the merger transaction are compensated by the efficiencies demonstrated by the agents, it terminates the proceeding.

24.10 Only the economic agents indicated in section 24.2 may file an appeal against the final decision of the Commission within fifteen (15) working days of its notification.

24.11 The appeal is filed before the Commission, which will submit it to the Tribunal of Indecopi for its processing within a period not exceeding one hundred and twenty (120) working days, and the rules set forth in sections 41 and 42 of the Codified Version of the Act on the Repression of Anticompetitive Conducts, approved by Supreme Decree N° 030-2019-PCM, shall be applicable, if appropriate.

24.12 In the ex officio review proceeding, the Technical Secretariat, the Commission and the Tribunal of Indecopi analyze the merger transaction in accordance with the criteria established in section 7 of the Antitrust Merger Review Act.

24.13 In the processing of the preliminary investigation and the subsequent ex officio review proceeding of the merger transaction, the Technical Secretariat has all the powers of investigation established in the Antitrust Merger Review Act, the Codified Version of the Act on the Repression of Anticompetitive Conducts and other supplementary applicable regulatory instruments.

Section 25. Early termination of the ex officio review proceeding of merger transactions

25.1 Within the first seventy-five (75) working days of the evidentiary stage referred to in section 24.3, the Technical Secretariat and the economic agents subject to review may jointly formulate an agreement proposal for the early termination of the proceeding that incorporates measures that eliminate or mitigate the possible restrictive effects on competition that could be generated by the merger transaction. To this end, the Technical Secretariat has all the negotiating powers necessary to define the terms of the proposal.

25.2 The Technical Secretariat sends the agreement proposal for the early termination of the proceeding to the Commission within five (5) working days of its formulation.

25.3 The Commission decides on the approval or rejection of the proposal within a maximum period of twenty (20) working days of its reception, its decision cannot be challenged due to its eminently discretionary nature.

25.4 If the Commission approves the proposal, it issues a decision concluding the ex officio review proceeding of the transaction. The decision includes a work schedule for the implementation and supervision of the agreed measures, as well as the participation of a monitor in charge of supervising its compliance, who may be appointed and removed by the Commission, at the request of the Technical Secretariat.

25.5 If the Commission rejects the proposal, it issues a decision and continues with the ex officio review proceeding of the merger transaction.

25.6 If an agreement proposal for the early termination of the proceeding is made pursuant to this section, the period established in section 24.3 of these Regulations is extended for a period of twenty (20) additional working days.

Section 26. Supplementary application

The provisions pertaining to the merger review process of merger transactions set forth in Chapters II and III shall be applied supplementarily to this Chapter, as applicable.

CHAPTER VI

VOLUNTARY NOTIFICATION

Section 27. Voluntary Notification

27.1. Within the framework of the provisions of section 6.4. of the Antitrust Merger Review Act, prior to the formal closing of a merger transaction, economic agents may voluntarily request its authorization if they do not meet the thresholds set forth in section 6.1. of the Antitrust Merger Review Act. The transaction cannot be executed until its authorization.

27.2. The filing of the notification for authorization, the processing of the respective administrative proceeding, and other matters, rights or obligations, are subject to the periods and rules established in Chapters III, IV and V of the Antitrust Merger Review Act and to the provisions of these Regulations corresponding to the merger review process regime, including the application of the positive administrative silence. The infractions and corrective measures applicable to the proceedings derived from a voluntary notification are in accordance with the provisions set forth in Chapters VI, VII and VIII of the Antitrust Merger Review Act as well as the provisions included in Chapter VII of these Regulations.

27.3. Economic agents may previously consult with the Technical Secretariat in order to determine whether it justifies the voluntary notification of a merger transaction.

CHAPTER VII

REGISTRY

Section 28. Registration of the measures approved by the Commission

The conditions, commitments, agreements and other measures approved by the Commission are registered in the registry implemented by Indecopi for such purposes. Such registration provides publicity to the Commission's decisions and security to third parties at the time of contracting with the applicants.

Section 29. Registration and Inscription of Mergers Transactions by Notaries and Public Registrars

29.1. For the registration and inscription of any merger transaction by notaries and public registrars, the parties must submit an affidavit informing that the transaction to be registered is not subject to the merger review process established in the Antitrust Merger Review Act or that they have obtained the respective express or implied authorization from the competent resolution bodies of Indecopi, as well as from the SBS and SMV, when applicable.

29.2. Notaries may not notarize instruments that are presented without the affidavit.

29.3. The public registrars must verify that the notaries incorporate the affidavit in the notarial report.

CHAPTER VIII

SANCTIONING ADMINISTRATIVE PROCEEDING

Section 30. Initiation of the sanctioning proceeding

30.1. The sanctioning proceeding is initiated ex officio by the Technical Secretariat, after becoming aware of the conduct that may constitute an infraction in any of the cases described in section 27 of the Antitrust Merger Review Act.

30.2. The Technical Secretariat may carry out preliminary investigation, inquiry and inspection actions in order to determine, on a preliminary basis, whether there are circumstances that justify the initiation of a sanctioning proceeding.

30.3. The decision to initiate the sanctioning proceeding issued by the Technical Secretariat contains the identification of the natural or legal person or persons to whom the alleged infringement is imputed, the facts that are imputed to them as a charge, the qualification of the infringements that such facts may constitute and the expression of the sanctions, if any, that may be imposed, as well as the rules that empower it to initiate the sanctioning proceeding as the competent authority. The initiation decision is notified to the accused economic agents. In case the referred agents do not have a legal domicile in Peru, any of the companies of their economic group that have a legal domicile in Peru are notified.

30.4. In case a sanction is imposed, it is applicable to the economic agents responsible for the imputed conduct, in accordance with the assumptions described in section 27 of the Antitrust Merger Review Act.

Section 31. Defense of the parties

The economic agents charged may present their defense within twenty-five (25) working days from the notification of the decision initiating the sanctioning proceeding.

Section 32. Evidentiary stage

32.1. Upon expiration of the period indicated in the previous section, the Technical Secretariat opens an evidentiary stage for a period of four (4) months to carry out the necessary actions for the examination of the facts, gathering the relevant data and information to determine the existence of the alleged infringement.

32.2. Within no more than twenty (20) working days of the completion of the evidentiary stage, the Technical Secretariat issues a final report recommending the Commission to declare the existence or non-existence of administrative liability, as well as the corresponding sanctions and corrective measures. This report is notified to the accused agents within five (5) working days.

32.3. The accused economic agents have a period of ten (10) working days to present their arguments to the Technical Secretariat's final report. Likewise, they have the right to request a hearing to express their allegations. If the request is accepted, the Commission's evaluation period is extended for a period of fifteen (15) working days.

Section 33. Final Determination and Appeal

33.1. Upon receipt of the final report and the discharges, within a period of twenty (20) working days, the Commission shall decide on the liability of the economic agents charged, the possible application of sanctions and corrective measures established in the Antitrust Merger Review Act. For this purpose, it takes into account the criteria for the estimation of sanctions established in sections 46 and 47 of the Codified Version of the Act on the Repression of Anticompetitive Conducts, approved by Supreme Decree N° 030-2019-PCM.

33.2. The decision referred to in the preceding paragraph is notified to the economic agents charged within five (5) working days and may be appealed within fifteen (15) working days from its notification.

33.3. The appeal shall be processed before the Tribunal of Indecopi within a period not to exceed ninety (90) working days.

33.4. The Tribunal of Indecopi shall process the appeal in accordance with the rules set forth in sections 41 and 42 of the Codified Version of the Act on the Repression of Anticompetitive Conducts, approved by Supreme Decree N° 030-2019-PCM, as applicable.

FINAL COMPLEMENTARY PROVISIONS

FIRST. Complementary Regulations

The Commission, at the proposal of the Technical Secretariat, issues guidelines for the best application and interpretation of the Antitrust Merger Review Act and these Regulations.

SECOND: Complementary regulations for the registration and inscription of authorized merger transactions.

The National Superintendency of Public Registries, in its capacity as the governing body of the National System of Public Registries, approves the pertinent provisions for the registration and inscription of authorized merger transactions subject to the merger review process provided for in the Antitrust Merger Review Act.

THIRD: Use of virtual means

The competent bodies involved in the merger review process favor the use of virtual means.

FOURTH. Application of the Eighth Final Complementary Provision of Act N° 31112

For the application of the suspension provided for in the Eighth Final Complementary Provision of the Antitrust Merger Review Act, Indecopi communicates to the Ministry of Transportation and Communications the name of the economic agents involved in the notifications for merger transactions filed by companies of the telecommunications sector, once they are admitted for processing; as well as the final pronouncement with respect to such procedures. Likewise, the Ministry of Transportation and Communications may apply the suspension of the administrative proceedings included in the Eighth Final Complementary Provision of the Antitrust Merger Review Act, in those cases in which it requests such information to Indecopi.

FIFTH. Financing

The provisions of these Regulations shall be financed from Indecopi's institutional budget, without requiring additional resources from the Public Treasury.

SIXTH. Indecopi's report on merger transaction within the framework of the processes of promotion of private investment for the development of public infrastructure projects and provision of public services under the Public-Private Partnership modality.

If during the Promotion Process in Public-Private Partnerships regulated by Legislative Decree N° 1362, the Private Investment Promotion Agency competent for the development of projects under the Public-Private Partnership modality, taking into account the information of the respective project, identifies that competition has a role in the regulatory contractual design, and if the project may generate risks on competition, it requests the Commission a report on the possible effects on competition that the merger transactions involved in the proceeding may generate.

The report is requested by the competent Private Investment Promotion Agency until the evaluation and selection stage and prior to the signing of the contract. The economic agents involved in the process are obliged to submit to the Commission the information requested for its respective analysis. The Commission issues the report within 30 working days from the date of delivery of the requested information to the agents involved. If the Commission does not issue a report within the established period, the competent Private Investment Promotion Agency validly assumes that there are no effects on competition.

The economic agents involved in the processes may previously consult with the Technical Secretariat in order to receive guidance on the possible effects on competition evaluated by the Commission.

COMPLEMENTARY TRANSITORY PROVISIONS

FIRST. Ex officio review of merger transactions concluded before the entry in force of Act N° 31112.

The Technical Secretariat may not review ex officio those merger transactions that, prior to the entry in force of this Act, have concluded with the closing acts necessary to make effective the transfer or change of control referred to in section 5.1 of the Antitrust Merger Review Act.

SECOND. Proceedings for the review of conditions in process

The proceedings for review of conditions imposed under Act N° 26876, whose request was filed prior to the entry in force of the Antitrust Merger Review Act and are in process, continue to be processed under the rules in force at the time the respective request for review was filed.

THIRD. Proceedings in process for the promotion of private investment for the development of public infrastructure projects and the provision of public services under the Public Private Partnership modality.

Act 31112 and the present regulation are not applicable to those public infrastructure projects and provision of public services under the Public Private Partnership modality, by state initiative, which, at the date of entry into force of Act 31112, are in the structuring or transaction stage and are awarded before December 31st, 2021; and, to those investment projects under the same modality, by private initiative, which are in a stage subsequent to the opinion of relevance of the sector.

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