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The Use of Structural Presumptions in Antitrust – Note by Peru

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1. Structural Presumptions and their role in merger control

1.1. Rules applicable to the evaluation of the effects of merger transactions

1. According to the Peruvian Antitrust Merger Review Act², in the merger review process, the competition authority (the Commission³) evaluates the effects of the merger transaction to identify whether it produces a significant restriction of competition in the markets involved. To complete this evaluation, the Commission shall take into consideration, among other factors⁴, the structure of those markets.
2. In that regard, the Regulations of the Act⁵ establish that notification for authorization of the merger transaction must include, among other information, the 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.
3. The Regulations of the Act specify that “*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.
4. In consideration of this legal framework, the Peruvian Merger Notice Template⁶ requires the filing parties to:
 1. Identify all the goods and services produced, traded or delivered in the country by each of the economic agents involved in the merger transaction, clustering them by commercial categories according to their common use in the industry or the company’s policies or criteria.
 2. Describe each of the markets (both product and geographic) involved in the merger transaction, specifying the motives that lead to the definition of those markets and

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² Act N° 31112, enacted by the Peruvian Congress of the Republic in January the sixth, 2021.

³ The Commission for the Defense of Free Competition.

⁴ The actual or potential competition of economic agents in the market; the evolution of supply and demand for the products and services in question; the sources of distribution and commercialization; statutory or other barriers (technological, specific investments, horizontal or vertical restrictions) to access the market; the economic and financial power of the companies involved; the creation or strengthening of a dominant position; and the generation of economic efficiencies.

⁵ Approved by Supreme Decree N° 039-2021-PCM.

⁶ Approved by the Commission in May 2021.

the reasons other possible alternatives have been excluded (indicating those alternatives).

3. Only if the merger transaction comprises a market defined as an “*identified involved market*” additional and more detailed information regarding those markets must be included in the filing.
5. Regarding information requirement (3), the Peruvian Merger Notice Template points out that “*identified involved markets*” are those markets in which: (i) two or more economic agents involved in the merger perform activities in the same market and the transaction generates a combined market share above 20%; (ii) at least one of the agents involved in the merger has activities in an upstream or a downstream market with respect to a market in which any other agent involved in the merger participates, and whose individual or combined market shares are above 30%, regardless of the existence of a client/supplier relationship between the agents involved in the merger; (iii) any of the agents involved in the merger has a market share above 30% and another agent involved in the merger is a potential competitor in that market⁷; or (iv) any of the agents involved in the merger has a market share above 30% and another agent involved in the merger is the holder of intellectual or industrial property rights that are of importance in the same market.
6. In that sense, only if the markets involved in the notified merger transaction comply with any of the abovementioned criteria will they qualify as an “*identified involved market*” and the notifying parties shall be obliged to present more in-depth information regarding those markets. This includes detailed information on the structure of supply and demand, differentiation of goods or services, competition intensity, barriers to entry and exit, among other market characteristics. Otherwise, the notifying agents must only submit information regarding their estimated market shares in the markets involved in the merger and a general description of these markets, in order to rule them out as “*identified involved markets*”.
7. The above-mentioned qualifies as a structural presumption that impacts on the notifying agents’ obligations to submit information for their filing to be admitted and on the authority’s analysis of potential effects of the merger transaction during the evaluation procedure⁸.

1.2. Guidelines on the definition and analysis of merger transactions

8. The Guidelines on the definition and analysis of merger transactions⁹ indicate that the market shares or participations of economic agents are an indicator of the market power they possess and that the Commission takes into consideration current and potential (or post-operation) market shares. These Guidelines also state that, for the calculation of current shares or participations, information that responds to the market structure of each specific case is used, that the information provided by the notifying company and other sources of information that provide details on the possible entry, exit or expansion of the most important players in the market involved is evaluated and that, for the calculation of potential shares or participations, the combined share of the economic agents involved after the merger transaction is considered.

⁷ An economic agent can be considered a potential competitor when it has plans to enter a market or has developed or put into practice those plans within the last three years.

⁸ Notwithstanding the authority’s power to require additional information during Phase 1 for the evaluation of the potential effects of the merger transaction, even if those thresholds aren’t reached.

⁹ Approved by the Commission in December 2022.

9. Additionally, according to the Guidelines, the level of market concentration is an indicator that measures the effects of a merger transaction on the market. The Commission mainly uses the HHI index to assess concentration in a market, which provides an initial signal of the competitive pressure in the market involved after the merger. It evaluates both the value of the HHI after the merger and the variation in the HHI itself as result of the merger. The latter value will reflect the change in the degree of concentration in the market.

10. In the case of horizontal mergers, the Guidelines indicate that it is presumed that the greater the participation of a merged economic agent, the more likely it is that competition risks will be generated. In that sense, horizontal concentration operations with values of $1500 < \text{HHI}$, $1500 < \text{HHI} < 2500$ and variation of $\text{HHI} < 200$, or $2500 < \text{HHI}$ and variation of $\text{HHI} < 100$, will have a lower probability of generating risks to competition, unless other circumstances are present, such as the following: (a) One of the agents involved in the concentration transaction is a potential competitor; (b) one or more of the economic agents involved are important innovators or maverick agents; (c) the economic agents involved are close competitors; (d) the economic agents involved have ownership (such as minority shareholdings) or contractual ties (such as collaboration agreements) that may reduce their independence or autonomy; (e) there are market factors that favor coordination or there have been indications of coordination in the past; (f) there are cases in Peru in which risks to competition have been identified; or (g) there is evidence or information that qualifies as indications of possible risks to competition.

11. The Guidelines point out that, if after the preliminary analysis the Commission cannot rule out the potential competition risks of the horizontal transaction based on the above-mentioned criteria, a more detailed analysis will be required.

12. In that sense, in consideration of its Guidelines, during phase 1 evaluation the Commission must assess whether the notified merger results in considerable structural change in the markets involved, in which case the merger will have a higher probability of generating risks to competition. In that scenario, if other risk factors are also identified by the Commission considering the specific characteristics of the assessed markets¹⁰, a more in-depth analysis during a phase 2 evaluation should be performed to confirm or discard those risks. On the contrary, if there is no considerable structural change in the markets involved and none of the previously mentioned circumstances are present, the Commission should clear up the transaction during the first phase evaluation.

13. This type of analysis has been reflected in the Commission's case law since the Peruvian Antitrust Merger Review Act entered into force.

1.3. Case law

1.3.1. Merger in the sugar market

14. In June 2024¹¹, the Commission evaluated a merger transaction that consisted of the acquisition of a sugar mill in the northern coast of Peru by an economic agent that already owned a series of sugar mills throughout the northern coast of the country. During the phase 1 evaluation, the Commission identified two markets in which potential horizontal risks to competition could arise in case the merger was authorized: (i) Domestic

¹⁰ For example, the Guidelines establish that in the case of differentiated products markets special attention must be directed into assessing whether the agents involved in the merger transaction offer close substitutes.

¹¹ Decision 148-2024/CLC-INDECOPI.

sugar commercialization to the wholesale channel nationwide; and (ii) sugar cane purchases from independent cane farmers in the northern regions of Peru.

15. In both markets, the combined market share of the merging parties was above the threshold indicated in the Merger Notice Template and the variation of the HHI as a consequence of the notified merger was above the threshold established in the Commission's Guidelines. Additionally, the Commission verified that the prices of some of the domestic sugar brands sold by the merging parties were close to each other, indicating that in the case of these brands they were close competitors. It was also found that the acquired party had duplicated its market share in the sugar cane purchases market during the three years prior to the transaction.

16. In attention to its findings, the Commission issued a decision to launch a second phase evaluation. During this second phase, the Commission collected additional data that enabled it to verify and confirm the structural change that would take place in both markets due to the merger transaction. Additionally, the Commission elaborated on its price analysis and confirmed that, in the case of the brands that were sold by the merging parties in the northern part of the country, these economic agents were close competitors, which was also verified based on a series of interviews with the merging parties' clients. The Commission also found that limited farmland access and restricted water supply constituted barriers that made the entry of a new sugar cane purchaser very unlikely.

17. Based on the structural change that would occur in the event the merger was authorized and on its additional findings, the Commission concluded that the merger transaction could generate risks to competition in both markets. Since the remedies offered by the notifying agent weren't sufficient to address these risks, it decided to block the transaction.

1.3.2. Merger in the construction materials market

18. In October 2024¹², The Commission also evaluated a merger transaction that consisted of the acquisition of a construction materials production and commercialization company by an agent that also participated in these markets. During the first phase of the procedure, potential horizontal risks to competition were identified in five different markets: (i) Chemical admixtures for concrete and mortar commercialization nationwide; (ii) resin-based grouts and bonding agents commercialization nationwide; (iii) impregnations and corrosion protection commercialization nationwide; (iv) ancillary products commercialization nationwide; and, (v) premix mortars for tiles commercialization nationwide.

19. In all of these markets, the combined market share of the merging parties was above the threshold indicated in the Merger Notice Template and the variation of the HHI as a consequence of the notified merger was above the threshold established in the Commission's Guidelines. Additionally, the main agents in these markets identified both the merging parties as their most important competitors and referred to their well-positioned brands as a barrier that limited their growth.

20. In attention to these findings, the Commission issued a decision to launch a second phase evaluation. It is important to note that other construction materials markets in which a structural change would also take place due to the merger were also involved in this transaction¹³. However, since this structural change was below the thresholds established

¹² Decision 206-2024/CLC-INDECOPI.

¹³ Such as the premix mortars for facades and the sealants and adhesives for construction markets.

in the Guidelines, the Commission discarded potential competition risks in these markets during its first phase evaluation.

21. During the second phase, the Commission collected additional information and split the chemical admixtures for concrete and mortar market into the chemical admixtures for concrete market and the chemical admixtures for mortar market. It also split the resin-based grouts and bonding agents market into the resin-based grouts market and the bonding agents market.

22. The Commission collected additional data that enabled it to verify that, even considering the above-mentioned split, a structural change would take place in all the seven markets analyzed due to the merger transaction.

23. However, it was also found that, in the chemical admixtures for concrete market, most of the sales of one of the merging parties consisted of direct sales to the construction sector, while the other party's sales corresponded to the traditional channel (the contrary happened in the admixtures for mortar market where the sales of both merging parties belonged to the same market segment). This was also the case in the resin-based grouts market. Since this indicated that the merging parties were not close competitors, potential risks were discarded in these markets. Regarding the impregnations and corrosion protection market, it was found that after the merger an agent with a market share of over 70% which exhibited the lowest prices would remain and that the parties' products price analysis showed that they weren't close competitors. Since these findings indicated that the merging entity would have low incentives to raise its prices post-merger, potential risks were also discarded in this market.

24. The Commission also found that, in addition to the considerable structural change that would take place in the chemical admixtures for mortar, the bonding agents, the ancillary products and the premix mortars for tiles markets, many of the products commercialized by the merging parties in those markets exhibited similar prices, which indicated they were close competitors¹⁴. Additionally, based on the merging parties' internal documents and on interviews with different agents, it verified that the acquiring party's brand was very well positioned in the Peruvian construction materials markets and that it constituted an important barrier for potential entry and for its competitors' growth.

25. Considering all these findings, the Commission decided to authorize the merger subject to a series of remedies.

2. The use of market shares in the determination of dominance

26. According to the Codified Version of the Law for the Repression of Anticompetitive Conducts (LRCA)¹⁵ the prohibited conducts are (i) the abuse of dominant position; (ii) horizontal collusive practices; and (iii) vertical collusive practices. According to the same law, in order to sanction abuses of dominance and vertical collusive practices, it is required to demonstrate that the economic agent under investigation has a dominant position in the relevant market¹⁶.

¹⁴ Guppi tests results which indicated the merging entity would have incentives to raise prices after the transaction were also performed.

¹⁵ Supreme Decree 111-2024-PCM.

¹⁶ Sections 10 and 12 of the Codified Version of the LRCA. Section 6 of the Codified Version contains the definition of 'relevant market'.

27. Section 7 of the LRCA states the following:

Section 7.- Market dominance

7.1. It is understood that an economic agent enjoys a dominant position in a relevant market when it has the possibility of substantially restricting, affecting or distorting the conditions of supply or demand in such market, without its competitors, suppliers or customers being able, at that moment or in the immediate future, to counteract such possibility, due to factors such as:

- a) A significant share in the relevant market.*
- b) The characteristics of supply and demand of goods or services.*
- c) The technological development or services involved.*
- d) The access of competitors to sources of financing and supply as well as to distribution networks.*
- e) The existence of legal, economic or strategic barriers to entry.*
- f) The existence of suppliers, customers or competitors and their bargaining power.*

7.2. The mere holding of a dominant position does not constitute unlawful conduct.

28. As can be seen from the content of section 7, 'a significant participation in the relevant market' is one of the factors that may grant a dominant position to an economic agent.

29. In the cases of abuse of dominance and vertical collusive practices in Peru, the use of market share analysis to determine the existence of dominance has had the following characteristics:

1. Neither case law nor the law itself has established a level of market share in the relevant market that implies a structural presumption of dominance.
2. The evaluation of market shares has usually been the first step for the analysis of the determination of the existence of a dominant position, but it has always been considered in addition to the analysis of other elements, mainly: the barriers to entry and the evaluation of the capacities of current competitors. As has been seen, section 7.1 contains a list of factors that may be considered to determine the existence of a dominant position. According to Peruvian jurisprudence, it would not be possible to reach a conclusion on the existence of a dominant position without evaluating these other factors.

30. Although there is a direct relationship between market share and market power, the determination of the existence of a dominant position cannot in any case be based solely on the market share of the investigated company. Necessarily, the competition authority in charge of the evaluation of the dominance of a certain company must evaluate the supply and demand conditions of the market where such company operates, through the joint evaluation of factors such as those indicated in section 7 of the Codified Version of the LRCA.

In particular, the prohibition of vertical collusive practices (section 12 of the Codified Version of the LRCA) refers to those agreements or concerted practices carried out by economic agents operating at different levels of the production, distribution or commercialization chain (e.g. an agreement between a producer and a wholesale distributor). It is a requirement established in the Law (section 12.3) for a vertical collusive practice to exist that at least one of the parties involved has a dominant position in the relevant market.

31. Thus, for example, in the case of a dominant firm with a competitive fringe, the Lerner Index, which approximates market power, depends not only on its market share, but also on other supply and demand factors. Landes and Posner derive the following expression considering a dominant firm and competitive fringe (of symmetric firms) model¹⁷:

$$L_i = \frac{P_i - Cmg_i}{P_i} = \frac{S_i}{\varepsilon_m^d + \varepsilon_j^s(1 - S_i)}$$

32. Where L_i is the Lerner Index for the company i ; P_i y Cmg_i are the price and marginal cost of the company i at the company's utility maximizing level of production. S_i is the market share of firm i ; ε_m^d the market elasticity of demand¹⁸ and ε_j^s the elasticity of supply of competing firms¹⁹.

33. As can be seen, market power, as measured by the Lerner Index, depends not only on the firm's market share but also on the elasticity of demand of the market and the elasticity of supply of competing firms²⁰. In the words of Hervert Hovenkamp:

*Market share is an incomplete Proxy for market power. The correlation between market share and market power can be rigorously expressed in a formula [in reference to the Lerner Index equation shown above]. However, the formula contains three variables: market share, market demand elasticity, and the elasticity of supply of competing and fringe firms. (...) Thus in order to estimate a firm's market power we must gather some information not only about a firm's market share, but also about the demand and supply conditions that it faces.*²¹

34. Indeed, a company with a high market share will lack dominance if any of the forces listed below represent a threat that disciplines its behavior:

- Current competition;
- Potential competition;
- Buyer power

35. Current competition is constituted by the segment of competitors of the alleged dominant. These companies could represent a disciplining force if they have idle installed capacity that could be used as a response to a price increase of the alleged dominant company. Potential competition is constituted by those companies operating in different markets that could adapt their production processes to participate in the relevant market, as well as by those new investors willing to enter the market in the event of a price increase.

¹⁷ Market Power in Antitrust Cases. William M. Landes and Richard A. Posner. Harvard Law Review, Vol. 94, No. 5 (Mar., 1981), 937-996.

¹⁸ Reaction of the quantity demanded to a change in the price of the good.

¹⁹ Reaction of the quantity offered by competing firms to an increase in the price of the alleged dominant firm.

²⁰ The demand elasticity of the market will be determined by the existence of good substitutes. The supply elasticity of the competitive segment will be determined by the ability of existing firms to expand their production and by the ability of new firms to enter the market.

²¹ Herbert Hovenkamp. Federal Antitrust Policy. The Law of Competition and its Practice. 81-82.

Finally, buyer power refers to the bargaining power of one or a group of large-scale buyers in the market.²²

36. Therefore, under Peruvian legislation and jurisprudence, it is clear that the market share analysis is combined with other factors to obtain a conclusion on the existence of a dominant position. Thus, for example, the considerations on the elasticity of supply of the competitive segment as a determinant of market power are included in the Peruvian legislation by including the competitors' capacities (access to sources of financing, supply and distribution networks) or the existing barriers to entry in the list of factors to be considered for the determination of dominance contained in section 7.1 of the Law.

37. For these reasons, Peruvian competition law does not have structural presumptions to establish dominance.

38. Accordingly, it can only be considered, in general, of a 'greater likelihood' of the existence of a dominant position in cases of companies that have persistently maintained high market shares (say, above 50%) with respect to those that have persistently maintained low market shares (say, below 30%) or have had fluctuating market shares over time.

39. In this sense, a low market share could at least indicate the existence of current competitors, which have been able to capture together a significant market share, representing an alternative for consumers and, therefore, eliminating the possibility of an exercise of market power by the investigated company.

40. In relation to Peruvian jurisprudence on this matter, we consider it pertinent to refer to two cases from recent years in which market share information and other factors were used to determine the dominant position.

41. First, in a case of abuse of dominance sanctioned by the Commission in December 2022 in the gray portland cement commercialization market (of certain standard types) in the Southern Region of Peru (departments of Arequipa, Cusco, Madre de Dios, Moquegua, Puno and Tacna), the dominant position of the investigated cement producer company (Yura S.A.) was determined by analyzing that it held more than 90% market share in the investigated period (2014 - 2019) and that there were structural barriers to entry (economies of scale and scope), a developed distribution system, vertically integrated operations, high levels of installed capacity, a strategic location of its production plant and legal barriers²³.

42. Second, in a case of abuse of dominance resolved by the Commission in May 2023 in the electricity distribution market in the regions of Huancavelica, Ayacucho and, mainly, Ica, the dominant position of the investigated energy distribution company (Electro Dunas S.A.A.) was determined by analyzing that it held 100% market share in the investigated

²² According to Massimo Motta:

(...) market share is only one of the variables that one must look at in order to determine market power. Other variables are the relative position of competitors, the existence of potential entrants, and the countervailing power of buyers.

Motta. Competition Policy: Theory and Practice (2004), 117.

²³ The Commission noted the following:

In summary, taking into account that during the investigated period Yura held high market shares that fluctuated between 96.12% and 99.99% and that the relevant market is characterized by economic, legal and strategic barriers to entry, it is possible to conclude that Yura has held a dominant position in the relevant market during the investigated period.

Decision 094-2022/CLC-INDECOPI, 82 – 83.

period (between January 2017 and December 2020) and that it had no competitors in the relevant market since it was the only concessionaire²⁴.

²⁴The Commission noted the following:

Considering the foregoing and taking into account that Electro Dunas has a 100% share of regulated users with a demand between 200 kW and 2 500 kW in its concession area, as well as not facing potential competition in this segment since it started operations in this area, this Commission concludes that Electro Dunas would have held a dominant position in the supply of electricity to regulated users with a demand between 200 kW and 2 500 kW in its concession area during the period analyzed in this proceeding (2017-2020).

Decision 055-2023/CLC-INDECOPI, 29 – 30.