

# Notification Thresholds Calculation Guidelines





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## **NOTIFICATION THRESHOLDS CALCULATION GUIDELINES**

### **INTRODUCTION**

On January 7th of 2021, Act N.º 31112 (hereinafter, the “Act”) was published in the Official Journal “El Peruano”. This Act establishes a merger review process regime intending to promote effective competition and economic efficiency in the market for consumers’ welfare.

On March 4th of 2021, Supreme Decree N.º 039-2021-PCM which approves the Act’s Regulation was published on the Official Journal “El Peruano” (hereinafter, the “Regulation”).

According to the Act’s dispositions, Indecopi must assess and authorize those acts that: (i) qualify as transactions; and (ii) exceed the notification thresholds.

Regarding the notification thresholds, the Act establishes quantifiable and objective criteria that allow filtering those transactions that, due to the involved agent’s dimension, can possibly pose competition risks; and therefore, justify an evaluation. If such thresholds are met, the economic agents will have to present an authorization request to the Commission for the Defense of Free Competition (hereinafter, the “Commission”) to carry on with the transaction.

Although the Regulation elaborates on the notification thresholds application, it is fundamental to make a few clarifications regarding the way they should be calculated, in order to guide the market agents and provide clarity.

This, as stated by clause c) section 12.2 of the Act and article 9 of Legislative Decree 807, that stipulates the faculties, rules, and organization of Indecopi that allow the Commission to pass Guidelines that lead the economic agents regarding the correct interpretation of the Act and its Regulation.

It is in that context, that these “Notification Thresholds Calculation Guidelines” (hereinafter, the “Guidelines”) are issued; in order to explain the elements that should be considered to conduct the notification thresholds calculation, using examples and graphics that intend to provide the economic agents with clarity and legal certainty. The Guidelines will be reviewed and, if needed, updated periodically by the Commission.

## 1. THE NOTIFICATION THRESHOLDS

According to section 6.1 of the Act, a transaction must be notified to the Commission if the following requirements occur – at the same time<sup>1</sup>:

- a. The total sum of the gross income or sales or the value of the assets in the country of the involved companies has reached a worth that equals or exceeds 118 000 UIT during the previous fiscal year, and;
- b. The total sum of the gross income or sales or the value of the assets in the country of at least two of the involved companies<sup>2</sup> has reached a worth that equals or exceeds 18 000 UIT during the previous fiscal year for each company.

As can be noted, the Act establishes two types of thresholds to determine the obligation to notify a transaction: (i) a joint threshold that equals 118 000 UIT; and (ii) an individual threshold that equals 18 000 UIT. In turn, the Act clarifies that the calculation of these thresholds must be done considering two factors: (i) the gross income or sales generated in the country by the companies involved in the transaction; or (ii) the value of the assets in the country of the companies involved in the transaction.

According to section 4.1 of the Regulation, the factors for the thresholds' calculation must be employed alternatively. This way, the agents must notify the transaction if: (i) their gross income or sales reach the joint and individual thresholds; or (ii) if the value of their assets reaches such thresholds.

For example, let us consider the hypothetical case of a company acquisition. In this scenario, company **A** is dedicated to the production of paint, chemical products and derivatives, and decides to acquire its competitor, company **B**. The year prior to the notification, company **A** generated income in Peru that equated 100 000 UIT and, according to its financial statements, its assets in the country were book valued in 110 000 UIT.

For its part, company **B** generated income in Peru that equated 10 000 UIT and, according to its financial statements, its assets in the country were book valued in 19 000 UIT.

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<sup>1</sup> If the transaction does not reach the established thresholds, the Act allows the economic agents to notify it voluntarily. Likewise, according to the Act and Regulation, the Technical Secretariat of the Commission is entitled to review transactions that do not reach the thresholds but can create a dominant position or affect the competition in the relevant market significantly.

<sup>2</sup> It must be noted that, regarding the individual threshold, when the Act mentions that the annual gross income and asset value in the country of "at least two of the companies involved in the transaction", refers to each "counterpart" of the transaction. In Section 2 of this document, it will be specified what should be understood as "counterpart" in each type of transaction covered by the Act.

In order to determine if both companies comply with the notification thresholds, their income or sales and assets must be calculated, according to the following rules<sup>3</sup>.

- **Income**

- Joint Threshold (118 000 UIT): To determine if the companies meet this threshold, the incomes of **A** (100 000 UIT) and **B** (10 000 UIT) must be added up. As can be noted, the sum of such income does not reach the joint threshold<sup>4</sup>.
- Individual Threshold (18 000 UIT): To determine if the companies meet this threshold, the incomes of **A** (100 000 UIT) and **B** (10 000 UIT) must be considered separately. As can be noted, company **B** does not reach the individual threshold.

- **Assets**

- Joint Threshold (118 000 UIT): To determine if the companies meet this threshold, the assets' value of **A** (110 000 UIT) and **B** (19 000 UIT) must be added up. As can be noted, this sum reaches the joint threshold.

Individual Threshold (18 000 UIT): To determine if the companies meet this threshold, the assets' value of **A** (110 000 UIT) and **B** (19 000 UIT) must be considered separately. As can be noted, both companies meet the individual threshold.

Given that the assets of **A** and **B** do not reach the thresholds regarding the sales parameter, they do reach them regarding their asset value, therefore, the transaction must be notified to the Commission.

It should be pointed out that, according to the rules established by the Regulation, in order to determine the fulfillment of the joint threshold it is not possible to add up the income of company **A** and the assets of company **B**, or vice versa. Likewise, to determine the fulfillment of the individual threshold it is not possible to consider, on one hand, the income of **A**; and on the other, the assets of **B**, or vice versa.

Finally, it is also not possible to consider the sales or income while calculating the joint threshold (for example, **A**'s and **B**'s sales) and, at the same time, to use the asset value while calculating the individual thresholds (**A**'s and **B**'s assets in the described example). The same factor should be applied for both thresholds' calculation.

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<sup>3</sup> For the purposes of this example, the companies that comprise **A**'s and **B**'s economic groups do not operate in the country.

<sup>4</sup> Relating to the income or sales factor, even if the transaction does not exceed the joint thresholds, for didactic purposes of this example, we will proceed to calculate the individual threshold.

## 2. INVOLVED ENTITIES IDENTIFICATION

For its part, section 4 of the Regulation clarifies which companies must be considered to calculate the thresholds of a transaction. To these effects, the following calculation rules must be considered:

- a) When the transaction corresponds to the acts established on clauses a) and c) of section 5.1 of the Act<sup>5</sup>, the income or sales and the asset values of the economic agents participating in the transactions and their economic groups should be considered<sup>6</sup>.
- b) When the transaction results in the acquisition by one or more economic agents, directly or indirectly, of the rights that allow them to exercise control over part or all of other economic agent, the income or sales and the asset value that should be considered correspond to those of the acquiring agent, its economic group, the acquired agent, and the agents over whom the acquired agent exercises control<sup>7</sup>.
- c) When the transaction corresponds to the act established on clause d) of section 5.1 of the Act<sup>8</sup>, the income or sales and the asset value that should be considered correspond to those of the of the acquirer and its economic group; and those sales

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<sup>5</sup> **Act N.º 31112**

**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.

(...)

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.

<sup>6</sup> In these cases, in order to calculate the individual threshold, the counterparties of the transaction are:

(i) In the case of a merger of two or more economic agents, the counterparties will be the economic agents that were previously independent and that, as a result of the transaction, are merging. Each counterparty includes the economic group of such economic agents.

(ii) In the case of the creation of a common enterprise, joint venture, or similar figure, the counterparties will be the independent economic agents that acquire joint control, including their respective economic groups.

<sup>7</sup> In this case, to calculate the individual threshold, the counterparties of the transaction are, on one side, the acquiring party, and its economic group and on the other, the acquired agent and the agents it controls.

<sup>8</sup> **Act N.º 31112**

**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:

(...)

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.

or gross income that is generated by the acquired productive assets or the book value of those assets<sup>9</sup>.

As can be noted, for the calculation of the notification thresholds, depending on the type of acts, the Regulation considers the companies that directly intend to concentrate, and the companies that comprise their economic groups or control units.

It is worth recalling that section 3 of the Act defines economic group as *“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.”*

Furthermore, the term 'control' is defined as 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”<sup>10</sup>.*

This way, when the Regulation refers to the economic group or the control of enterprises, we should consider the mentioned definitions and, in a complementary manner, the case law that the Commission and Tribunal have issued about this matter<sup>11</sup>.

Examples will be used to clarify how the calculation rules work for each scenario<sup>12</sup>:

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<sup>9</sup> In this case, to calculate the individual threshold, the counterparties of the transaction are the acquired party and its economic group on one side; and the operative productive assets that will be acquired on the other.

<sup>10</sup> In that line, in previous opportunities, the Commission has clarified that an economic agent can hold different forms of control over other agents, such as joint and exclusive control, as set forth:

- Exclusive control implies that a single person can individually exercise a decisive influence in the competitive performance of the company, without requiring additional wills or factors to do so. What is characteristic about this type of control is the capacity of a shareholder to unilaterally determine the will or competitive behavior of a company, without other power that can oppose to its decisions or other agent needed to take such decisions.
- Joint control in competition matters is verified when two or more persons have the possibility of exercising a decisive influence in the strategic behavior of a company. In these cases, the adoption of decisions regarding the competitive behavior of the company will require a consensus between controlling companies.

<sup>11</sup> See Decisions 002-1998-INDECOPI-CLC, 015-1998-INDECOPI-CLC, 012-1999-INDECOPI-CLC, 034-2014/CLC, 019-2019/CLC and 1351-2011/SDC.

<sup>12</sup> It must be noted that the sales, income, or assets considered for the threshold's calculation correspond to the year before the transaction's notification.

**2.1. Calculation Rule N.º 1 applicable to mergers, creation of new joint enterprises, joint ventures, and similar contractual modalities<sup>13</sup>**

**What does the Regulation say about this rule?**

*“When the transaction corresponds to the acts established in clauses a) and c) of section 5.1 of the Act 31112, the 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.”*

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<sup>13</sup> It is relevant to point out that for the creation of a new enterprise, joint venture, or similar contractual modality to qualify as a transaction, it will be necessary that it operates as an economically autonomous entity, according to clause c) section 5.1. of article 5 of the Act.

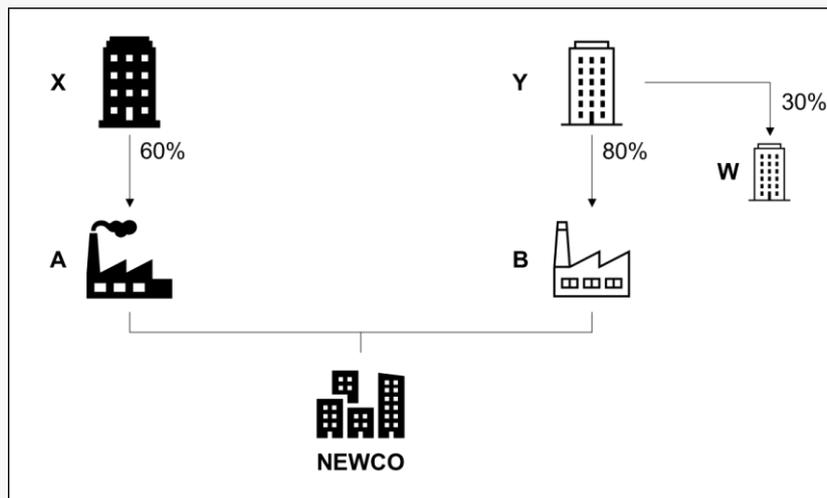
### Hypothetical case: Creation of a new enterprise

**A** is a company that produces office supplies in Peru. **X** who also participates in the Peruvian market, is **A**'s main shareholder<sup>14</sup>.

For its part, **B** is a company that offers consultancy services to sustainable development and recycling projects in Peru. **B**'s main shareholder is **Y**, who also participates in the Peruvian market<sup>15</sup>. In turn, **Y** has a percentage of participation in **W**, but does not control it.

With the goal of making office supplies with recycled inputs, **A** and **B** decide to form a common enterprise that will function in an autonomous and lasting manner.

This transaction would look as follows:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- Company **A** (which participates in the transaction) and company **X** (that is part of **A**'s economic group).
- Company **B** (which participates in the transaction) and company **Y** (that is part of **B**'s economic group).

In this case, company **W** should not be considered, as it is not controlled by **Y**; and therefore, is not part of its economic group.

<sup>14</sup> X has 60% of A's shares, that in this example, grant A of exclusive control over the company.

<sup>15</sup> Y has 80% of B's shares, that in this example, grant B of exclusive control over the company.

**2.2. Calculation Rule N.º 2 applicable to acquisitions or the rights that allow them to exercise control over part or all of another economic agent.**

**What does the Regulation say about this rule?**

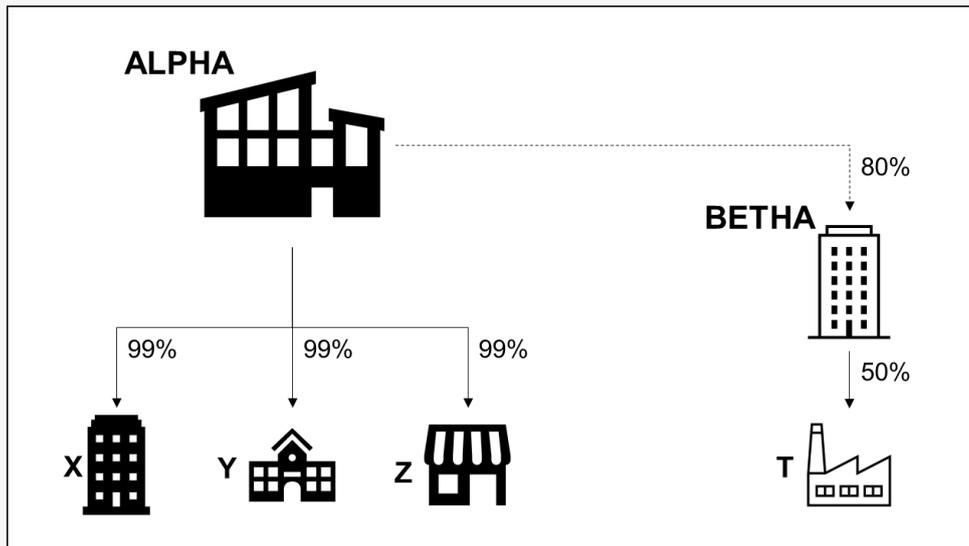
*“When the transaction results in the acquisition by one or more economic agents, directly or indirectly, of the rights that allow it to exercise control over all or part of another economic agent, the annual gross sales or income or the book value of the assets of the acquiring agent and its economic 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.”*

**Hypothetical case: Control Acquisition**

**ALPHA** is a Peruvian enterprise dedicated to the merchandising of liquid and gas fuels in the country. It also participates in the pharmaceutical market (through company “**X**”), in the education services (through company “**Y**”) and the retail market (through company “**Z**”).

**ALPHA** is interested in acquiring 80% of voting securities from company **BETHA**, who participates in the liquid fuel market in La Libertad, Lambayeque, Piura, and Tumbes. Likewise, **BETHA** holds – with another company – control of company T, which participates in the liquid fuel market in Cajamarca.

This transaction would look as follows:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- Company **ALPHA** (the acquirer) and company **X**, **Y** and **Z** (that are part of the acquirer’s economic group).
- Company **BETHA** (the acquired company) and company **T** (that is controlled by the acquired company).

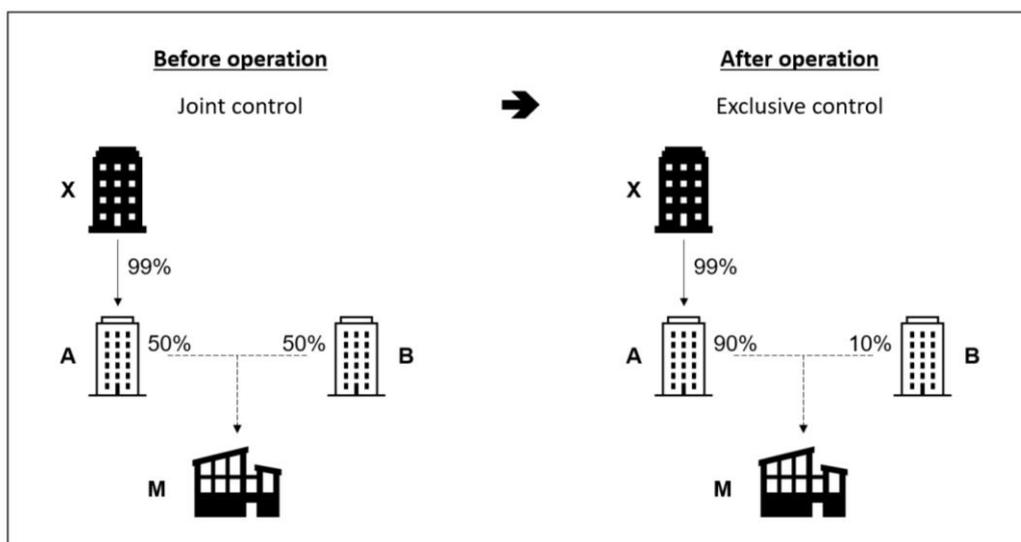
For the calculation of sales, income, or assets, if a company controls the other company (joint or exclusive control), the total value of the sales, income, or assets of the controlled company must be considered, regardless of the shareholding that the controlling economic group specifically holds in that company<sup>16</sup>.

### Hypothetical case: From joint to exclusive control

**A** is a Peruvian company that provides construction services. **A**'s main shareholder is **X**, a company that also participates in the Peruvian market. **A** has 50% of the shareholding of **M**, holding control of said company together with **B** (who holds the other 50% of shares). **M** is a Peruvian company that provides consulting services on engineering and infrastructure issue.

**A** want to acquire 40% of **M**'s shares from **B**, in order to obtain exclusive control of the company.

This transaction would look as follows:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- (i) Company **A** (the acquirer) and company **X** (that are part of the acquirer's economic group)
- (ii) Company **M** (the acquired company).

<sup>16</sup> A similar rule is applicable in Chile. For further details, see the information included in the "Practical Guide for the application of notification thresholds in concentration operations in Chile", available at: [https://www.fne.gob.cl/wp-content/uploads/2019/08/Guia\\_Umbrales-08.2019.pdf](https://www.fne.gob.cl/wp-content/uploads/2019/08/Guia_Umbrales-08.2019.pdf)

For threshold calculation effects, when a company holds joint control of other company and decides to acquire its exclusive control, the acquiring company and its economic group must be considered on the one hand; and the acquired company (and if applicable, the companies it controls) on the other. This rule allows to avoid double counting the income of the acquired company<sup>17</sup>.

### 2.3. Calculation Rule N. ° 3: Productive Assets Acquisition

#### What does the Regulation say about this rule?

*“When the transaction corresponds to the operations set forth in paragraph d) of section 5.1 of the Act 31112, 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.”*

#### Hypothetical case: Productive Assets Acquisition

**A** is a Peruvian company dedicated to the production of safety suits for industrial plants. **A** is jointly controlled by **R**, a Chilean company that carries out economic activities in Peru and **S**, a Peruvian company that also operates in Peru. At the same time, **A**, controls **Q** with a participation of 80%. **Q** is a company that makes safety suits for works in mining units.

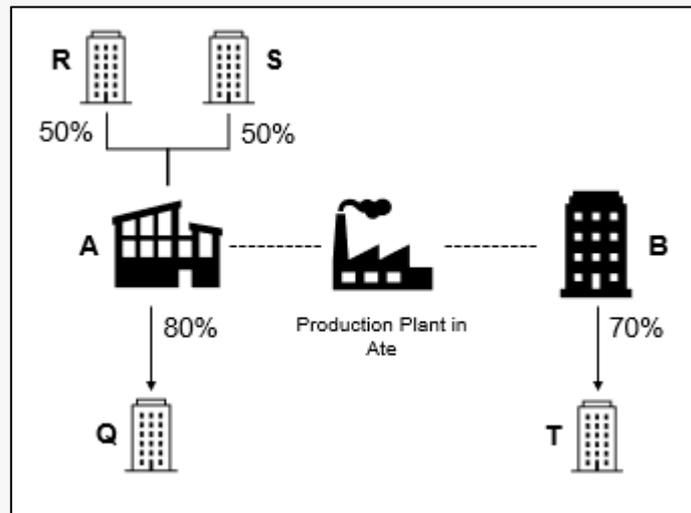
For its part, **B** is a company that tailors fasteners and belts. **B** has two production plants, one located in Callao and other in Ate. **B** also has a participation of 70% in **T**, a Peruvian company that makes shoes<sup>18</sup>.

**A** is interested in acquiring a production plant owned by **B**.

<sup>17</sup> A similar rule is applicable to the European Union. For further details, see the information included in the “Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings”, available in: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52008XC0416%2808%29>

<sup>18</sup> B owns 70% of T’s shares, which, for the purposes of this example, gives him exclusive control of the company.

This transaction would look as follows:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- (i) Company A (the acquirer) and companies Q, R and S (that comprise A's economic group).
- (ii) The plant that will be acquired.

As can be noted, for B, the only sales or income that will be considered is the sum that the acquired plant generates or, its book value. Sales, income, or assets that correspond to B or its economic group (T) will not be counted.

## 2.4. Subsequent Transactions

Lastly, the Act considers the obligation to notify the group of acts or transactions carried out between the same economic agents in the term of two (2) years as a single transaction<sup>19</sup>. Such situation includes transactions carried out directly between the same companies or between the companies of their respective economic groups.

Regarding this point, it is necessary to point out that the concept of transaction cannot be always understood as an individual and isolated in time event. Indeed, various transactions can happen through stages or sections, separately in time, but respond to a same transaction which is gradually structured.

It is also possible that certain transactions are divided with the goal of evading the obligation to notify, isolating acts that in practice answer to the same transaction, but that individually cannot be considered as subject to a notification.

<sup>19</sup> The Act establishes in section 5.3 that "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".

In order to evaluate transactions that are structured in various stages and prevent the possibility that economic agents avoid the obligation to notify a transaction that is subject to merger control, different jurisdictions have provided in their laws, rules that allow to evaluate as a single transaction, the set of transactions carried out in a particular period by the same parties (considering the agents that directly intervene in the transaction and the companies of their respective economic groups, for such effects)<sup>20</sup>.

It is for this reasons, in accordance with the best international practices, Act 31112 decided to include a rule that allows the competition authority to evaluate subsequent transactions carried out in a term of two years<sup>21</sup>.

Regarding the rules for the thresholds' calculation in these type of transactions, the Regulation establishes that they will be the same that have been developed in this point for independent transactions.

This way, given that subsequent transactions are considered as a single transaction, the factors for the thresholds' calculation must be used alternatively, such as what happens with independent transactions. In this sense, the companies must notify the transaction if: (i) the income or sales of the economic agents in all the subsequent transactions reach the joint and individual thresholds; o, (ii) the asset value of the economic agents in all the subsequent transactions reach the joint and individual thresholds. It will not be possible to use a calculation factor for one transaction, and other calculation factor for the next.

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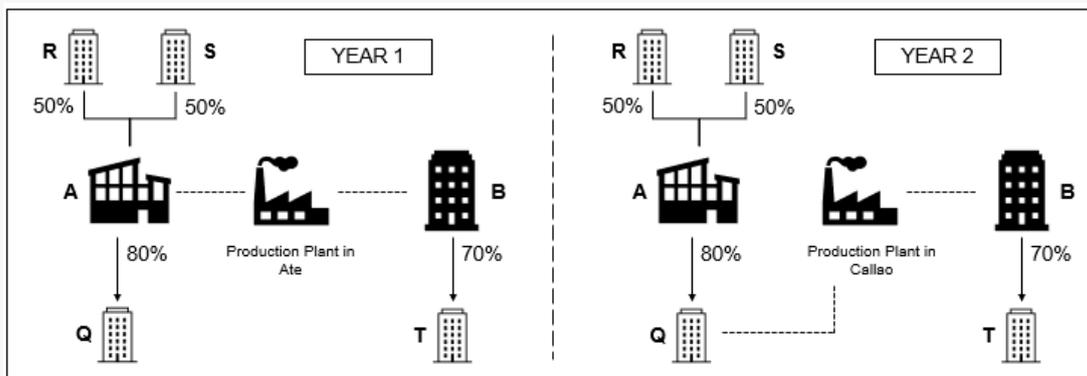
<sup>20</sup> A similar treatment is followed by the United States, the United Kingdom, the European Union, Chile, between others.

<sup>21</sup> The argument exposed in this section was contained in the Explanatory Memorandum of Legislative Decree 1510, precedent to the Act.

### Hypothetical case:

Retaking the previous example, let us imagine that **A** acquires one of **B**'s plants, but the income generated by that plant, or its value, do not reach the thresholds. Then, the next year, **Q** decides to acquire **B**'s second plant. This second transaction, by itself, does not reach the thresholds either. However, given that it is a transaction by the same economic agents in the term of two years, the Regulation establishes that both transactions should be considered as one and, thus, counted jointly to determine if they exceed the notification thresholds.

This transaction would look as follows:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- (i) Company **A** and **Q** (the acquirers), and companies **R** and **S** (that comprise **A**'s and **Q**'s economic group). According to the Act, the sales, income, or assets that should be considered correspond to the fiscal year before the notification.
- (ii) The two plants that are the object of the transaction. According to the Act, the sales or income generated by the two plants the previous fiscal year, or their book value in that period, should be considered.

### 3. THRESHOLD CALCULATION CRITERIA

As mentioned in section I of these Guidelines, in Peru, notification thresholds calculation must be based on two factors: (a) the gross income or sales generated in the country by the companies involved in the transaction; or (b) the value of the assets in the country of the companies involved in the transaction. In this regard, it is necessary to specify the characteristics that the aforementioned factors must meet in order to be considered in the thresholds' calculation.

### 3.1 Income and/or sales

#### 3.1.1 What concepts should I consider?

The Act indicates that one of the factors to be considered for the calculation of the thresholds is the value of the “sales or gross income” of the involved companies. It is important to point out that the Act does not link such concept to any specific definitions included in other laws, in a way that these Guidelines can establish their own definitions based on the particular purpose of the notification thresholds within the framework of the Act: identify in the most certain and real way, the economic power of the companies involved in the notified transactions and, with that, the dimension of such transactions.

In that sense, it should be established as a general rule that the concept of “income or gross sales” includes all the income or sales related to the usual line of business.

As for the notion of “usual line of business”, it must be understood as all those activities that the economic agent carries out ordinarily to generate income. This way, the exceptional or extraordinary income that does not come from the usual line of business is excluded<sup>22</sup>. To determine the activities that qualify as ordinary, one may reference to the social purpose and/or the activities included in the CIU<sup>23</sup> of the corresponding economic agent.

Likewise, it must be clarified that certain income and/or sales that will be excluded from the calculation, such as: (i) those returns, offers, or discounts carried out by the companies in the sale of their products or the provision of their services; (ii) those taxes that, by legal provision,

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<sup>22</sup> From the reviewed information it was possible to identify that in the laws and/or guidelines that develop merger control regulation in jurisdictions such as Chile, Spain, the European Union, Finland, Switzerland, and Philippines, it is expressly specified that the income or sales that should be considered to calculate thresholds, must come from the usual line of business or the ordinary activities of the companies that are involved in the transaction. In that sense, the income that comes from activities that escape the usual line of business of the economic agents that participate in the transaction is not included within the calculation.

For example, let us imagine a company that sells electronic equipment and also provides repairing and maintenance services for their products in their sales premises. In this cases, both activities are part of their usual line of business and, so, must be counted.

<sup>23</sup> The term CIU refers to the code that identifies the economic activity of the business of an economic agent and comprises one item of the data on the RUC record.

have been obtained by the companies in their quality of retainer or collector agents<sup>24</sup>; (iii) those amounts that are generated by sales or services within the same economic group<sup>2526</sup>.

**Hypothetical case:**

**Query 1:**

**A** is a successful Peruvian company that sells groceries in the country. Given the current crisis, in 2020 it decided to focus its sales online and, therefore, rent its stores located in Lima. Likewise, as part of its expansion plan, **A** is evaluating the absorption of company **B**, dedicated to the production of fruits and vegetables in the Peruvian coast. **A** consults Indecopi whether the amounts obtained from the rental of its premises should be included as income for purposes of calculating thresholds.

**Answer:** Although these amounts are part of **A**'s annual income, they are not related to its normal line of business. Therefore, for these purposes, they **should not** be included in the calculation.

**Query 2:**

Additionally, **A** decided to take the opportunity to invest in a series of bonds in 2020. These bonds give **A** a fixed quarterly return in the form of coupons. In this regard, **A** asks Indecopi whether this income should be considered for the purpose of calculating thresholds.

**Answer:** As the income related to the rental of the stores, the income from this financial investment is not related to **A**'s usual line of business, which is the commercialization of groceries. Therefore, they **should not** be included in the calculation.

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<sup>24</sup> It includes specifically the General Sales Tax (IGV) and the Selective Consumption Tax (ISC). Other concepts or sums that are collected by the companies by legal provision and where they act as simple retainers or collectors can be excluded. For those cases, the exclusion analysis will be decided case by case, with the economic agents having the possibility to formulate, through prior consultation to the Authority, their enquiries regarding the application of this scenario. This way, the application of this exclusion to other concepts than the mentioned ones, will be initially conditional to an eventual and previous evaluation from the Technical Secretariat.

<sup>25</sup> The definition of "income and/or sales" and the applicable exclusions for the threshold's calculation are based on an accounting and structural concept whose purpose, it must be reiterated, is identifying as accurately as possible the economic power of the involved companies and, with that, the dimension of their transactions. This is conceptually and substantially different from the legal-economic approach (with a deterrent purpose) used by the Authority to calculate the expected illicit profits caused by the anticompetitive practices, in the imposition of sanctions within the framework of Anticompetitive Conducts Repression Law.

<sup>26</sup> The notification thresholds aim to identify the volume of the economic resources compromised in the transaction (**OECD 2016, Local Nexus and Jurisdictional Thresholds in Merger Control**). In that sense, the income and/or sales for the thresholds' calculation will be those that represent the economic resources of the economic agents and should not consider the amounts that generate double counting of such economic resources (for example, sales within the same economic group). Similar exemptions are applicable in jurisdictions such as Chile, Spain, Canada, the European Union, between others.

### 3.1.2 Geographical nexus

The Act and its Regulation mention that the sales and income to be considered in the calculation of the thresholds are those achieved or generated in the country. The reference to the country implies that the rule applies exclusively to those acts that have a geographical nexus with Peru.

In this context, it is necessary to specify which sales and income will be considered as executed or obtained in Peru. Only these amounts should be included in the calculation.

As a general rule, revenues from sales of a company's products or provision of services should be allocated to the location where competition with other potential suppliers has occurred. In the sale of goods or products, this place will generally correspond to the place where the customer is located for the delivery of the good or product. In the contracting of services, this place will generally correspond to the place where the service is rendered<sup>27</sup>.

Therefore, if the good or product is delivered to a customer located in Peru, the income resulting from the sale of such good or product will be included in the calculation of the thresholds. As for services, if the services are rendered in Peru, such revenues must be accounted for.

**Hypothetical case:**

**Query:**

Companies **A** and **B** are merging. Both operates in the Peruvian market. A has clients located in the country and foreign clients (to whom it exports its products). A consult – if for the purposes of calculating thresholds – if it should include all of the incomes from the sales of the products or only those that come from customers located in the country.

**Answer:** Only incomes from clients located in the country should be considered.

In addition, there are particular cases worth mentioning, where the location of the sales or income of the agents is not so clear or justifies the establishment of special rules. For these cases, the following location rules should be followed<sup>28</sup>:

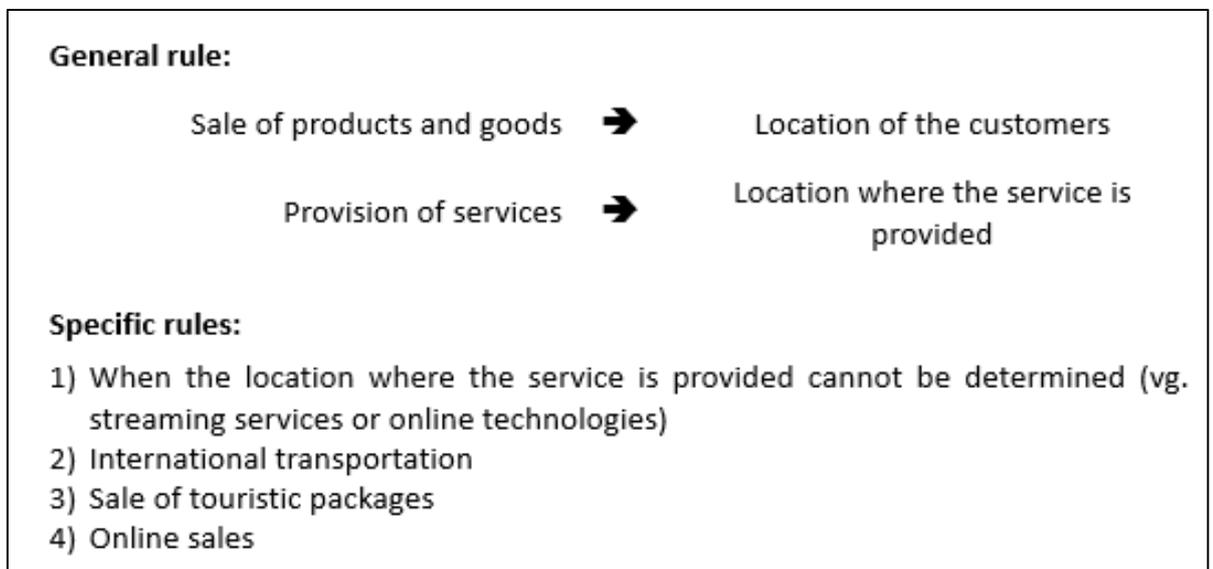
- a. Provision of services: As a general rule, for purposes of locating income or sales, the place where the service is provided should be considered, regardless of the place where the service has been contracted. In those cases where it is not possible to determine with certainty where the service is provided, the place of location or billing of the customer will be considered, such is the case, for example, of the contracting of streaming services or technology packages.

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<sup>27</sup> Similar rules are applied in jurisdictions such as Chile, the European Union, Spain, and the United Kingdom, between others. In Chile and the European Union, special rules are established in those scenarios where the geographic allocation of income is not so clear.

<sup>28</sup> Similar treatment is applied in the European Union and Chile.

- b. International transportation: In this case, both cargo and passenger transportation services that have Peru as origin or final destination must be considered as 'performed in Peru'.
- c. Sales of tourism packages: In the case of the sale of tourism packages in Peru to be provided abroad, the service begins with the sale of the package through a travel agency in the customer's location and the competition among travel agencies takes place in a certain location; even though the service may be provided in different locations, other than Peru. In this scenario, the customer's location or billing location will be considered. It should be noted that, in case of travel agencies, being companies that act as intermediaries in the sale of tourism packages, only the commissions obtained from the sales of such packages should be counted as income.
- d. Online sales: In cases of sales of goods over the Internet where the location of the customer is different from the place of delivery, the latter shall prevail.



### 3.2 Assets value

#### 3.2.1 What assets should be considered?

Section 6.1 of the Act establishes an alternative parameter to sales or income for the calculation of thresholds, related to the value of assets of the economic agents involved in the transaction.

The Act and the Regulation do not make any distinction in the type of assets considered for the calculation of thresholds, specifying only that their book value must be considered and that they

must be located in the country. Therefore, both tangible<sup>29</sup> and intangible assets must be considered.<sup>30</sup>

### 3.2.2 How to determine the assets value?

Section 4.1 of the Regulation establishes that, for purposes of calculating the thresholds, the book value of the assets corresponding to the fiscal year prior to the notification of the transaction must be considered. This information will be generally included in the balance sheet that comprises the financial statements of the involved companies<sup>31</sup>. For the particular case of the intangible assets, their book value is usually located on the “Financial Statements Notes” part of the financial statements.

In case the financial statements do not specify certain assets in the country of the involved companies (for example, the intangible assets), any other additional document that states their value and has been elaborated under the International Accounting Rules will be considered. If any doubts arise regarding the valuation of such assets, the economic agents can go the Prior Consultation with the Technical Secretariat of the Commission (hereinafter, the “Technical Secretariat”).

### 3.2.3 Geographical nexus

The Act establishes that the assets to be considered for the calculation of thresholds are the assets “*in the country*”. The intention of the legislator in these cases is to include only those assets that have a geographic nexus with the country and, therefore, can generate effects in the Peruvian market.

In this regard, assets recorded in the financial statements of an economic agent constituted in Peru will be considered as assets located in the country<sup>32</sup>, with the exception of those assets

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<sup>29</sup> Tangible assets are defined as a company’s physical or material goods, such as production plants, inventories, factories, machinery, vehicles, equipment, among others.

<sup>30</sup> Intangible assets are defined as a company’s intangible resources that represent some value for the company, such as intellectual or industrial property rights, accounts receivable, financial assets, intellectual or industrial property rights, among others.

<sup>31</sup> The economic agents that are involved in the transaction are obliged to present their financial statements corresponding to the prior fiscal year when notifying a transaction, according to clause ix) section 9.1. of article 9 of the Regulation.

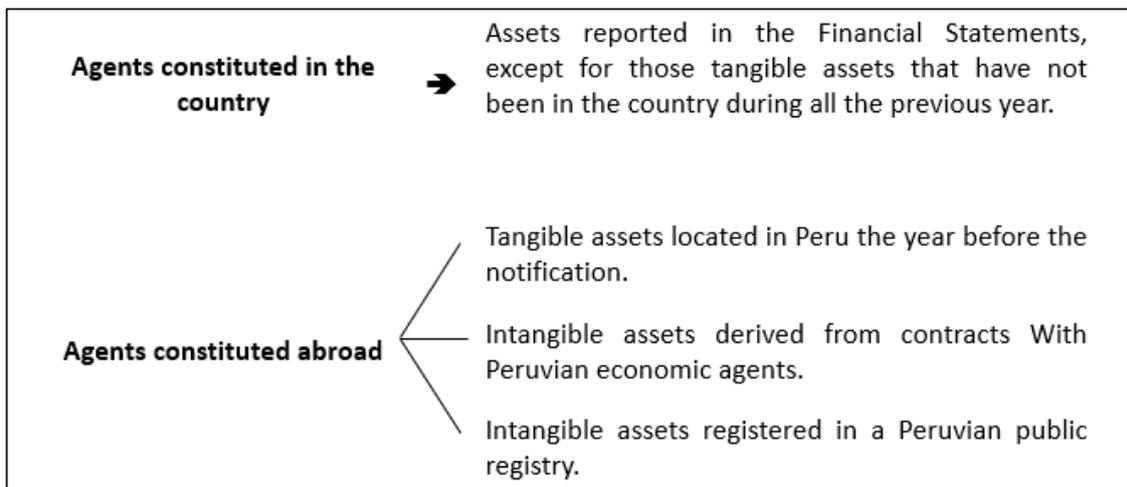
<sup>32</sup> In jurisdictions such as Canada, Colombia, Mexico and Costa Rica, the general rule is that the assets located in the country are all the included in the financial statements of the national companies involved.

It must be noted again that in case the financial statements do not include the value of certain assets in the country, any other additional document that indicates their value and has been elaborated under the International Accounting Rules will be considered. If any doubts arise regarding the valuation of such asset, economic agents can go to the Technical Secretariat’s Prior Consultation.

that, during the fiscal year prior to the notification of the transaction, have not been located in Peruvian territory.

In the case of economic agents that are not constituted in Peru, the following will be accounted<sup>33</sup>:

- Those tangible assets located in Peru in the fiscal year prior to the notification of the transaction.
- Those intangible assets derived from contracts signed with economic agents constituted in Peru.
- Those intangible assets registered in any public registry in Peru<sup>34</sup>.



These are the general rules for determining the location of assets for purposes of calculating thresholds. There is an exception for the case of assets located in Peru that have obtained, in the fiscal year prior to the notification, more than 50% of their income through sales outside the country.<sup>35</sup> In this case, such assets will be excluded from the calculation, regardless of their tangible or intangible nature, and whether or not they correspond to an agent incorporated in the country.

As an example, the exception would apply to a case like the following:

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<sup>33</sup> Similar reasoning is applied in jurisdictions such as Canada and the Philippines.

<sup>34</sup> It also includes the registration of distinctive signs of Indecopi.

<sup>35</sup> Consistent with the applicable treatment to the calculation of sales or income, only those assets that generate income in Peru should be considered.

**Hypothetical case:**

The German company **A** is dedicated to the production and commercialization of shoes and has decided to merge with Peruvian company **B**, which carries out the same activity. Company **A** has clients in the country and clients abroad. **A** consults if – for thresholds calculation effects – they should include the value of a production plant located in Callao, which sales are aimed both for the internal and external markets.

**Answer:** In this particular case, company **A** must identify if, in the fiscal period prior to the transaction's notification, more than 50% of the sales that correspond to the goods produced in that plant have been sold to clients located abroad, in which case, the exception applies, and such asset is not considered for the thresholds' calculation.

#### **4. SPECIAL PROVISIONS<sup>36</sup>**

##### **4.1. Financial Entities**

For the purposes of the rule, "financial entities" shall be considered as economic agents included in the scope of regulation and supervision of the Superintendency of Banking, Insurance and Private Pension Fund Administrators<sup>37</sup>, with the exception for insurance and reinsurance companies and Pension Fund Administrators (hereinafter "AFP"), which will be discussed in the following section.

If a transaction involving a financial institution is planned, with respect to such agent, the income that results from interests and financial services must be considered for the income or sales calculation.

Alternatively, for the calculation of the value of the assets of a financial entity, the rules set forth in the previous chapter of these Guidelines shall apply.

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<sup>36</sup> Without detracting from the provisions set forth in this section, the rules set forth in chapters 3.1. and 3.2. of this document may also be applied, as applicable.

<sup>37</sup> The following shall be considered as financial entities: those referred to in paragraphs a), b) and c) of Section 16 and in the Twenty-Fourth Final Complementary Provision of the General Law of the Financial System and the Insurance System and Organic Law of the Superintendence of Banking and Insurance (Law N. ° 26702). In other words, the following will be considered: banking companies, finance companies, municipal savings and credit cooperatives, municipal popular credit cooperatives, small and micro enterprise development entities (EDPYME), savings and credit cooperatives authorized to capture resources from the public, rural savings and credit cooperatives, real estate capitalization companies, leasing companies, factoring companies, surety and guarantee companies, trust service companies, mortgage administration companies, investment banks and savings and credit cooperatives not authorized to capture resources from the public.

## 4.2. Insurance, Reinsurance and Pension Fund Administrators

Regarding companies that are considered insurance and reinsurance companies according to the rules of the matter<sup>38</sup> for the calculation of sales or income consider the value of net premiums<sup>39</sup> in the fiscal year prior to the notification, investment income and other financial income will be considered<sup>40</sup>.

In the case of the AFP, the sales and income to be considered should come from the collection of commissions for the contributions managed, including income from legal reserve requirements<sup>41</sup>.

Finally, for the calculation of the assets of an insurance company or an AFP, the rules established in the previous chapter of these Guidelines will be applied.

## 4.3. Investment Funds

According to the Act, investment funds constitute economic agents that can carry out concentration acts, for which, the general rules established in such law and its Regulation are applicable.

Between the activities that investment funds can carry out, the acquisition of shares, rights and assets from other companies is included, subject to their respective Participation Regulation. These transactions can enable an investment fund to acquire control of more than one company that participates in the Peruvian market.

However, investment funds normally require another economic agent who acts in their name and representation, even assuming different responsibilities. That being because the fund does not have its own legal personality (as in the case of national investment funds)<sup>42</sup> or because its own structure requires it (as many foreign investment funds).

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<sup>38</sup> Insurance and reinsurance companies are contemplated and regulated in paragraph d) of Section 16 of the General Law of the Financial System and the Insurance System and Organic Law of the Superintendence of Banking and Insurance (Law N. ° 26702).

<sup>39</sup> They comprise issued insurance premiums and accepted reinsurance premiums. It must be specified that the insurance and reinsurance premiums that are considered in the thresholds' calculation also include those that arise from previous contracts that are still current.

<sup>40</sup> These items are generally reflected in the statements of income that comprise the financial statements of such companies.

<sup>41</sup> These items are generally reflected in the statements of income that comprise the financial statements of such companies.

<sup>42</sup> The Unique Ordered Text of the Investment Funds and Management Companies Law, Legislative Decree N. ° 862, regulates investment funds as autonomous capitals comprised by natural and legal persons contributions for further investment, under the management of a company created for that end.

In case of national investment funds, there are two types of funds which are classified according to how they place their participation certificates in the market: whether its by public or private offer. Public offer investment funds compulsorily require to be administrated by an investment fund management company or a mutual fund management company authorized by the Superintendence of Securities Market (hereinafter, “SMV”), with the consequent application of Legislative Decree N. 862 and its Regulation.

By contrast, private offer investment funds do not have to be managed by an agent who is supervised by the SMV and can be managed by any economic agent (for example, a financial entity). The same happens with the foreign investment funds<sup>43</sup> who are usually managed by a general partner whose functions are similar to a fund management company.

Regardless of the type of investment fund, the fund management companies generally have the necessary faculties to take investment decisions for these funds, at the expense and risk of its participants. In this context, as a general and guiding rule for the thresholds’ calculation, when an investment fund carries out a transaction, the fund management entity (SAFI, SAF, general partner or de economic agent, as it corresponds) must be considered as part of its organizational structure due to its dominant role on the fund’s investment decisions<sup>44</sup>.

However, the Commission is aware that, given each investment fund’s particularities and depending on the conditions that determined its creation and management, its organizational structure can vary generating several control scenarios within such funds<sup>45</sup>. In that sense, in case of a transaction where an investment fund participates, the economic agents are advised to resort to the Technical Secretariat in order to identify the companies involved in the transaction in each particular case.

As an example, we are placing a hypothetical case of a rights acquisition by an investment fund, applying general rules for thresholds’ calculation:

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<sup>43</sup> This happens, for example, with hedge funds or private equity funds.

<sup>44</sup> Even in those cases where the Investment Committee – independent body in charge of the investment decisions – is not directly appointed by a management company but by a third-party (external operator or investment advisor), the management company controls this body even in this case, because this third-party is hired by the management company.

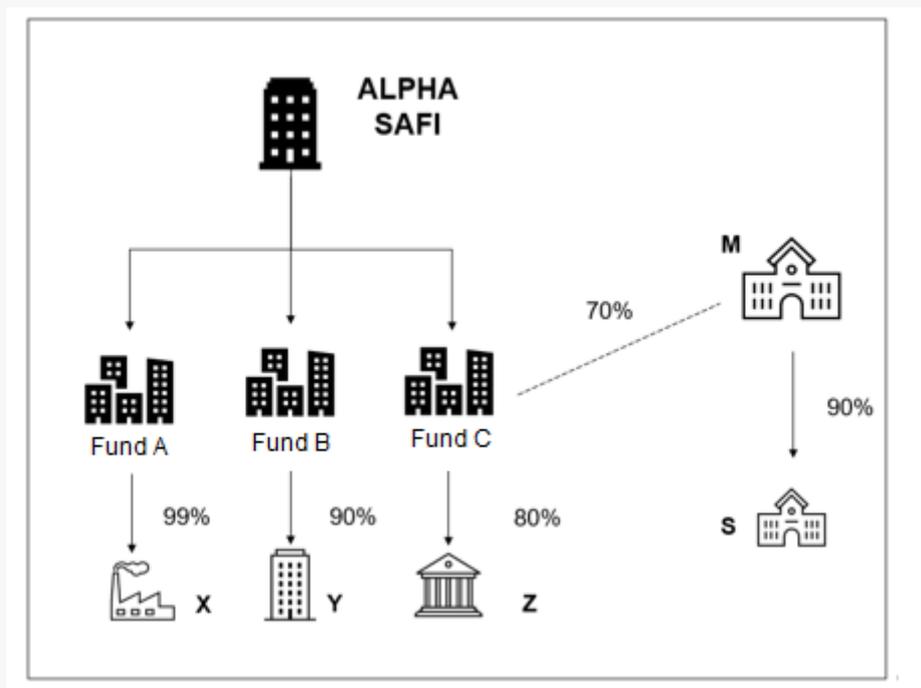
<sup>45</sup> By this way, for example, even if the investors participations in an investment fund generally tend to be atomized or disperse, it could occur that in a specific fund – given the particularities of its creation and management – an investor has a significant participation that allows it to control the fund.

**Hypothetical case:**

**Alpha SAFI** is funds management company and manages three investment funds (**A**, **B** and **C**), created by the contribution of several investors. Such funds in turn exclusively control Peruvian companies **X**, **Y** and **Z**, respectively. **Alpha SAFI** has all the necessary faculties in order to decide on the investments and management of each of the funds that it administers.

Investment fund **C** is interested in getting control of company **M**, acquiring 70% of its shares. **M** participates in the management of health provision centers (clinics) in Lima; and, at the same time, controls company **S**, dedicated to the management of health provision centers (clinics) in the Puno Region.

The transaction would be illustrated in the following way:



Following the rules established by the Regulation, for this case, the following sales, income, or assets should be considered:

- (i) The management company **Alpha SAFI** and companies **X**, **Y**, **Z** (that are ultimately controlled by **Alpha SAFI** through their different investment funds).
- (ii) Company **M** (the acquired company) and company **S** (controlled by the acquired company).

#### 4.4. State-owned Enterprises

In the case of transactions involving state-owned enterprises, certain clarifications are required. In order to calculate the sales, income or asset value of state-owned companies involved in a concentration, it will be necessary to consider all the companies that belong to the same independent decision-making unit. Also, the calculation rules developed in this document should be applied as appropriate.

In the Peruvian case, public enterprises are controlled by The National Fund for the Financing of the Public Sector Companies ("FONAFE"), a public corporation in charge of regulating and directing the State's business activity, approving the budget of public enterprises, and administering the income produced by them<sup>46</sup>. In this regard, all Peruvian state-owned enterprises controlled by FONAFE are under the same decision-making unit<sup>47</sup>.

### 5. DATA SOURCES

Section 6.1 of the Act provides that the sales, income, or asset value to be included in the calculation must be those obtained in the fiscal year immediately preceding the notification of the transaction. These amounts must be extracted from the financial statements corresponding to that period, which must be submitted by the economic agents when notifying the transaction.

The financial statements presented by the economic agents must comply with the accounting rules that are approved in Peru. In the case of companies that are not constituted in the country, the financial statements must comply with the standards and rules established by the International Accounting Rules.

Additionally, in the case of companies that are obliged to keep audited financial statements according to Peruvian or other countries' laws, they must submit such documents. This, except in the cases where the notification is done when audited financial statements are not available (for example, within the first or second month of the year).

Besides that, in case the transaction implies the thresholds' calculation of several agents of the same economic group, consolidated financial statements may be submitted.

Finally, if certain income or assets are not individualized on the financial statements, the economic agents may submit other accounting or financial instruments that reflect their value. The accuracy of such document will be assumed based on the Sworn Statement the economic agents should submit according to the Notification Forms.

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<sup>46</sup> Municipal Enterprises or Enterprises and Production and Service Centers of Public Universities are not considered among the scope of FONAFE.

<sup>47</sup> The purpose and functions of FONAFE are set forth in Law N.º 27170, Law of the National Fund for the Financing of the State's Entrepreneurial Activity. Its provisions establish as one of FONAFE's functions to "*exercise the ownership of the shares representing the capital stock of all companies, created or to be created, in which the State participates and to manage the resources derived from such ownership*".

## **6. UIT**

The Act establishes that the notification thresholds are determined in terms of Tax Units ("UIT"). It is understood that this refers to the UIT prevailing on the last day of the fiscal exercise prior to the transaction's notification, that is, on December 31<sup>st</sup> of the previous year.

## **7. EXCHANGE RATIO**

As a general rule, the amounts in local currency (S/) recorded in the financial statements of the companies involved in the transaction will be used.

In case there are amounts consigned in a different currency than the Peruvian sol, the applicable exchange rate must be the average sale exchange rate of the last twelve (12) months prior to the notification, as established by the Central Reserve Bank.