



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

NICARAGUA

Overview





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NOTE

This peer review of competition law and policy has been carried out by UNCTAD under the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (United Nations Set of Principles and Rules on Competition) adopted by the General Assembly in 1980. One of the purposes of this set of principles is to help developing countries to enact and enforce laws and policies for the defence of competition that are appropriate to their development needs and economic situation.

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NICARAGUA

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This document contains a summary of the full report on the Voluntary Peer Review of Nicaragua. The report was prepared for UNCTAD by Ms. Pamela Sittenfeld, competition law attorney and former executive director of the Costa Rican Commission for the Promotion of Competition, and Mr. Gustavo Valbuena, LL.M. in Public Law and former head of Colombia's Superintendency of Industry and Commerce.

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The opinions expressed in this report are the exclusive responsibility of the authors and may not coincide with those of the United Nations.

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PREFACE

This report is part of the Voluntary Peer Review of Competition Law and Policy in the Republic of Nicaragua. The purpose of the exercise is to evaluate the country's competition law framework and enforcement experience, identify the lessons to be learnt and make recommendations that may improve the system in line with international best practice.

This summary examines the current state of competition law and policy in Nicaragua on the basis of an extensive review of relevant documents and a study visit to the country to gather the experience of PROCOMPETENCIA and representatives of the three branches of government. The review of documents covered, among others, the Constitution, Law 601 of 28 September 2006 (the Law for the Promotion of Competition) and Decree 79-2006 of 21 December 2006, containing the Regulations to the Law (Competition Regulation), different sector rules and provisions of civil and procedural law, decisions by PROCOMPETENCIA and other public bodies, and diverse market studies.¹

The study visit to Nicaragua took place from 8 to 12 October 2012. During the visit, some interviews were conducted with various authorities and private sector representatives with an interest in the defence and promotion of competition.

¹ *The full report of the voluntary peer review on Nicaragua contains all information on the sources used and an account of the interviews conducted during the study visit to the country.*

1. NICARAGUA'S ECONOMIC, POLITICAL AND HISTORICAL CONTEXT

1.1. Economic situation

Nicaragua is a Central American State which borders on Honduras to the north and Costa Rica to the south and has an ethnically diverse population of 5.87 million. Spanish is its official language, and the Nicaraguan córdoba is its currency.

Different political, economic and even environmental factors have contributed to Nicaragua ranking as the second poorest economy in the American continent after Haiti, according to the World Bank.²

In recent years there has been a relative improvement in the main macroeconomic indicators, with medium-term growth estimates of over 3 per cent, driven by heavy public investment, higher consumption stimulated by family remittances and greater availability of private credit.

Nicaragua ranks 115th of 139 on the Global Competitiveness Index, and obtained a score of 119 points in the Doing Business Index (1 being the best and 185 the worst).

1.2. Reference to the Constitution

Through several articles (the Preamble and articles 2, 5, 98–105, 138 and 150, among others), the 1987 Constitution describes the economic model the country seeks to develop and the role of the State and individuals in promoting and attaining it. The Constitution therefore safeguards the principle of free enterprise as an engine of development, albeit within certain limits that, in the public interest, the State may set on the exercise of that freedom. The Constitution thus provides the basis for Law 601.

1.3. International economic relations

Nicaragua is a member of the United Nations and currently has permanent relations with different international organizations such as the World Bank and the International Monetary Fund. The country also maintains active multilateral and regional relations, especially in the area of trade. For example, it is a signatory to the free trade agreements between the Central American countries and the United States, the European Union and Canada and is a member of the Bolivarian Alliance for the People of Our America (ALBA).

² *Nicaragua: Panorama General at the World Bank's official website (in Spanish), <http://www.bancomundial.org/es/country/nicaragua/overview> (consulted 3 October 2012).*

For several years Nicaragua has shown a deficit in its balance of trade, largely as a result of the high costs of oil imports and increased purchases of industrial goods, transportation equipment and construction materials. Nicaragua's main trading partner is the United States, followed by the Central American countries, Venezuela and more recently China.

The Central American and Dominican Republic Free Trade Agreement (CAFTA-DR) took effect in Nicaragua in 2006. This agreement opens attractive opportunities for the Nicaraguan economy, as it grants preferential access to a market of more than 360 million consumers, which generate more than 25 per cent of the world gross domestic product.

The CAFTA-DR agreements and commitments have in some areas required changes in the States parties' internal legislation to bring them in line with the terms of the Agreement. Law 601 is an example of that.

2. LAW 601: SUBSTANTIVE ASPECTS

2.1. Background

In the 1990s, Nicaragua began a process of institutional and legal modernization, with the aim of introducing the country to the market economy. These efforts intensified in 2001, in the context of the CAFTA-DR talks, since, although the Agreement does not contain a chapter on competition, it does discuss the issue in its programme provisions and its complementary agenda includes the obligation to enact a competition law.

Accordingly, Law 601 was passed in December 2006. The structure and content of Law 601 are similar to most of the world's competition laws. It bans anticompetitive practices, establishes a regime for controlling mergers and acquisitions and bans unfair competition between economic agents.

The Law created PROCOMPETENCIA, which officially started work in 2009, and empowered it to look into anticompetitive practices and mergers, carry out ex ante assessments for some mergers, take on important tasks of competition advocacy and deal with complaints of unfair competition.

2.2. Scope of application and exceptions

Law 601 applies to the acts of economic agents in any sector of the economy, to the extent that those acts may produce anticompetitive effects in the national market (art. 2). It does not apply to actions promoted by the State for the purpose of ensuring the

health and the nutritional and food security of the Nicaraguan people (art. 4).

2.3. Banned practices

Law 601 bans anticompetitive practices between competing economic agents and between non-competitors.

Article 18 of Law 601 bans anticompetitive practices between competing economic agents and price-fixing agreements, market allocation, limiting the supply of goods or services, collusive bidding and agreements to limit market entry by other agents.

Law 601 does not expressly stipulate the application of the *per se* rule³ in these cases. Nevertheless, since the Law does not establish any additional requirement to be shown in these cases beyond the conduct itself, PROCOMPETENCIA has concluded that the practice should be deemed to be prohibited in itself, once it has been proved to exist.

Article 19 of Law 601 defines anticompetitive “vertical” practices, i.e., between non-competitors, which include unilateral abuse of market power. Banned practices include exclusive distribution, imposition of prices or other resale conditions, tying sales, making purchases or sales conditional on not using or acquiring goods or services offered by third parties, unjustified refusal to deal, application of dissimilar conditions for equivalent provisions and sale of goods or services at prices below marginal costs.

To determine the illegality of vertical conduct, article 20 of Law 601 provides as additional factors the alleged offender’s dominant position in the relevant market, that the behaviours are engaged in for the respective goods or services or those related to the relevant market, that the practices block or limit market entry or drive out competitors and, in any case, that they cause harm to consumer interests. In addition, article 23 of the Competition Regulation describes the potential efficiency gains to be considered by the authority and offset against the anticompetitive effects of the practices, so as to assess the net impact: this is considered to some extent to approximate to an evaluation of the practices under the rule of reason.

Law 601 has provided for “leniency” in the Nicaraguan system (art. 48), whereby any economic agent who reports to the competent authority any anticompetitive practice they are involved in or have been involved in may be exempt from the applicable penalties. This mechanism has not yet been used and its application is expected to run into practical difficulties arising from the business climate, the fear of trade

³ The “*per se* rule” is a rule whereby a practice is banned under any circumstances, without any need to prove its effects. The “rule of reason”, on the other hand, requires an analysis of the particular circumstances surrounding the practice and of its effects.

reprisals by other economic agents and any lack of confidence there may be in the system. In addition, it seems that the leniency programme is also applicable to vertical practices, which is not appropriate.

Article 273 of the Criminal Code defines the crime of “anticompetitive practices,” i.e., imposing resale prices, limiting production, sharing markets and excluding competitors from the market, where this restricts competition and puts the country’s economic stability at risk or affects basic goods. To date no such case has been tried in the criminal courts. In such cases it would be important for PROCOMPETENCIA to provide concrete assistance and technical support.

2.4. Mergers

Article 24 of Law 601 states that a merger occurs when there is a change of control of the companies involved, regardless of how this happens, and grants PROCOMPETENCIA the power to review and authorize mergers. The criterion on which a merger should be authorized or not is whether it creates or reinforces a dominant position that may impede or limit competition.

There is an obligation to notify merger operations when the following thresholds are reached (art. 25): a market share of 25 per cent or more of the relevant market or gross combined revenue of more than 642,857 minimum wages (around US\$ 87 million). The relevant market criterion is not direct and the threshold of 642,857 minimum wages seems high for a relatively small economy such as Nicaragua’s.

The procedure begins with a request to PROCOMPETENCIA before the merger, accompanied by a fee. The request should be dealt with within the time frame established in the Law and may result in denial of authorization for the merger, full authorization or partial or conditional authorization i.e., subject to fulfilment of certain conditions.

2.5. Unfair competition

Unfair competition practices generally involve private disputes between economic agents and only in very exceptional cases affect the competition process itself. Law 601 recognizes that unfair competition conduct can sometimes affect the collective interest and thus has given powers to PROCOMPETENCIA to investigate it. Article 23 prohibits acts of deceit, denigration, comparison, harmful plot, confusion, fraud, inducement and imitation.

2.6. Consumer protection

In Nicaragua consumer protection and competition defence are handled by different

authorities. The Nicaraguan Consumer Protection Law, Law 182, was passed in 1994 and designates the Consumer Defence Office, which is a department of Ministry of Development, Industry and Trade, as the body responsible for applying the Law.

3. INSTITUTIONAL ASPECTS: PROCOMPETENCIA

PROCOMPETENCIA is a technical institution of public law with legal status, its own assets, and administrative and budgetary autonomy. It is responsible for both investigation and resolution of cases.

3.1. PROCOMPETENCIA bodies

The highest body in the institution is the Board of Directors, which is charged with “dictating policy for the prevention, promotion, protection and guarantee of free competition, and overseeing its enforcement”. The Board consists of the President, three members and their respective alternates, appointed by the President of the Republic and ratified by the National Assembly, for a five-year term.

The President is in charge of “enforcing policies for the promotion, protection and guarantee of free competition pursuant to the law”, is responsible for the institution’s administrative and technical management, and concentrates most of the decision-making functions.

PROCOMPETENCIA’s organizational structure was originally intended to be more extensive, but due to the severe budget restrictions it has faced from the outset, it has been forced to cut down and, apart from the Board of Directors and the Presidency, it has only an Administrative and Finance Unit, a Legal Directorate, the Prosecutor’s Office, and an Economic Directorate.

3.2. Human and financial resources

PROCOMPETENCIA’s assets consist chiefly of allocations in the national budget, fees for services and funding from international cooperation. Yet the budget approved for the institution has been very limited from the beginning (although it has grown, in 2012 the budget approved was only USD 374,000), which explains why the institution finds it so difficult to fulfil its mandate or even to pay its staff.

The budget constraints are such that the salaries of a number of its 13 staff members (including the four Board members) are funded from international cooperation. Indeed, it was largely thanks to international cooperation – notably the COMPAL programme on strengthening institutions and capacities in the area of competition and consumer protection policies in Latin America, financed by the Government of

Switzerland and administered by UNCTAD, that PROCOMPETENCIA was able to start operations.

3.3. Independence, transparency and accountability

In principle PROCOMPETENCIA'S institutional design fosters its independence, but in practice its power to act, and therefore its de facto independence, is limited by the shortage of funds.

In the interests of transparency and accountability, PROCOMPETENCIA is obliged to report on its work to the National Assembly and to the general public (art. 14 of Law 601), which it has been doing since its creation.

Also, PROCOMPETENCIA's website offers relevant information on its activities.

PROCOMPETENCIA's decisions are subject to judicial review, although there is still not enough technical mastery of competition issues by those required to exercise this supervision; this highlights the importance of advocacy functions with the judiciary.

3.4. Strategic planning

In the case of PROCOMPETENCIA, budget limitations and uncertainty regarding funding beyond the very short term make it extremely difficult to conduct any planning exercise. PROCOMPETENCIA did nevertheless establish priorities, specifically a list of key sectors for case analysis, and a competition advocacy plan, but lately the budget constraints have stopped it doing everything it wanted. In fact PROCOMPETENCIA has not launched any investigation ex officio: all have been initiated at the request of a party.

3.5. Knowledge management

In the interests of adequate knowledge management and preservation of institutional memory PROCOMPETENCIA needs to improve its databases to include, for example, records of its competition advocacy activities and follow-up.

4. PROCEDURAL ASPECTS

Law 601 sets out a series of special procedures for competition cases, and these are supplemented with general procedural rules of Nicaraguan law.

4.1. Procedure in respect of banned practices

Article 48 of the Competition Regulation establishes that the President may initiate

proceedings ex officio or at the request of a party, while article 31 of Law 601 states complaints can be lodged only by agents with a legitimate interest or by any type of legally constituted organizations. This seems to exclude private complaints of practices affecting free competition purely in the interests of objective respect for the law. Fortunately, PROCOMPETENCIA would be entitled under Law 601 to initiate proceedings ex officio following an anonymous report or information received from a private citizen.

Once a complaint has been submitted — and it would be important to review the content of reports as required under the Law and the Regulation, which are not completely consistent — the President of PROCOMPETENCIA has sole responsibility for determining whether it has sufficient merit to warrant an investigation and, if so, to order an investigation (Regulation, art. 51).

Where an investigation is opened ex officio, the burden of proof is on PROCOMPETENCIA, while for complaints it is on the complainant. In the latter case the evidence is limited to that provided by the complainant and the alleged offender. However, the Regulation provides that PROCOMPETENCIA may order the production of further evidence if it believes it is necessary, within three days of the submission of evidence by the parties.

This proviso is particularly important in view of the onerous procedural requirements that complicate the submission of complaints, even for consumer associations, and the limited options open to PROCOMPETENCIA to launch cases ex officio.

Interim measures may be dictated by the Board of Directors in the course of the proceedings, at a party's request only.

The President of PROCOMPETENCIA issues a final ruling on the case, stating whether or not restrictive practices have been found. The rights and obligations arising from practices or agreements declared illegal must be construed as null and void (art. 36 of Law 601).

The ruling may order cessation of the practices or full or partial de-concentration of economic agents, impose obligations or conditions to restore the situation to the way it was prior to the illegal action, or impose sanctions in accordance with the gravity of the offence, all without prejudice to the right of civil action against the offenders.

PROCOMPETENCIA's experience with regard to these penalties is still limited, but the fines imposed to date are close to the lower limits established by Law 601. In any case it would be premature to evaluate whether sanctions of this kind will have the desired dissuasive effect.

Once the decision is final it becomes legitimate and enforceable. The President then

enforces it by his own means or, if necessary, with the help of the police.

4.2. Appeals against PROCOMPETENCIA decisions

A request for review of a decision by PROCOMPETENCIA may be submitted to the President of PROCOMPETENCIA, but only regarding procedural violations. An appeal may subsequently be lodged with the Board of Directors against the President's decision on the review. PROCOMPETENCIA has determined that such an appeal may cover substantive issues so that the parties are not deprived of the right to a defence.

In addition, PROCOMPETENCIA's decisions are subject to judicial oversight through both *amparo* appeals and actions against administrative decisions. *Amparo* is a special remedy for protection of constitutional guarantees against acts by an authority. The purpose of the ruling on *amparo* is to restore the aggrieved party's rights and re-establish the situation as it was before the violation.

In an action against an administrative decision the plaintiff may request the declaration of nullity of acts, omissions, general provisions and ultra vires acts. Moreover, the plaintiff can ask for recognition of an individualized legal situation and the adoption of any necessary measures for full restoration, including declaration of the right to claim material and moral damages.

4.3. Damages actions

Claims for damages against offenders are heard in the civil courts. Article 38 of Law 601 establishes a statute of limitations of one year, shorter than the general statute of limitations provided for in the Civil Code.

5. SPECIAL REGULATORY REGIMES

5.1. Enforcement of competition law by sector regulators

It is peculiar to Nicaragua that it has a special authority, PROCOMPETENCIA, that lacks jurisdiction over regulated sectors. This is because article 15 of Law 601 opens an inconvenient gap to exclude several extremely important sectors of the economy with a direct impact on consumers' well-being from PROCOMPETENCIA's control.

Article 15 states as follows: "When the investigations into practices covered by this law are conducted in economic sectors and markets subject to regulation, PROCOMPETENCIA will issue an opinion prior to resolution by the sector regulators." The Supreme Court therefore found that Law 601 defines sectors where the sectoral

authority is competent to enforce the free competition laws.

The Law and the Regulation are inconsistent insofar as the Regulation recognizes PROCOMPETENCIA's jurisdiction over regulated sectors. Rather than resolving that inconsistency by amending the Regulation, however, what is really needed is for the Law to recognize PROCOMPETENCIA's jurisdiction in enforcing Law 601 in all sectors of the economy, including regulated sectors.

5.2. Some regulated sectors of the Nicaraguan economy

5.2.1. Finance

The Superintendency of Banks and Other Financial Institutions (SIBOIF) was created by means of Law 316 of 1999 as the regulator of the financial sector. Its primary objective is to watch over the interests of depositors and to preserve the security and public confidence in these institutions.

The objective of the sector regulator is thus defined in terms of stability and solvency, and the promotion of competition does not appear to be a priority. Its actions in that regard have been confined to eliminating requirements for market entry (minimum capital and conditions for the participation of foreign institutions).

Nicaragua's financial sector is a particularly concentrated one, and of great importance and sensitivity because of its direct impact on the Nicaraguan people, and one might hope that the State might act to promote competition in this sector. As will be seen below, PROCOMPETENCIA attempted, unsuccessfully, to take action in an alleged case of price-fixing between financial institutions.

5.2.2. Energy

Electricity generation in Nicaragua is open to competition, while transmission and distribution are subject to State regulation. The law sets restrictions on vertical integration of agents in the market.

The Nicaraguan Energy Institute (INE) is an autonomous State entity charged with planning, policy formulation and regulation in this sector. The INE's primary objective is to promote competition in order to foster lower costs and better service quality for consumers in the medium term, ensuring at the same time financial sufficiency for providers in the market.

There has been no intervention by the regulator or by PROCOMPETENCIA in cases relating to anticompetitive practices in this sector.

5.2.3. Telecommunications

Telecommunications in Nicaragua are considered as public utilities provided under

a regime of free competition but subject to the public interest and the surveillance of the State.

Law 200 of 1995 promotes and stimulates free competition in service provision. With regard to vertical practices, article 25 prohibits telecommunications operators from using their advantageous situation to introduce practices that hinder free competition or give rise to acts of unfair competition.

The Nicaraguan Institute of Telecommunications and Postal Services (TELCOR) is the regulator of telecommunications and postal services. Its situation as a regulator of anticompetitive practices is particularly complex. Article 26 of Law 200, which specifically granted TELCOR its authority in that regard, was revoked by Law 601, yet article 3 of Law 200, together with the Supreme Court interpretation of article 15 of Law 601, would appear to support TELCOR's jurisdiction over restrictive competitive practices in this sector.

6. ANALYSIS OF PROCOMPETENCIA'S ENFORCEMENT PRACTICE

PROCOMPETENCIA has completed 17 anticompetitive practices cases and 3 merger analyses since it commenced operations. The most important are described below.

6.1. Banned practices

6.1.1. Credit cards⁴

This case was initiated by a complaint filed by the National Consumer Defence Network against seven private banks and the Association of Private Banks of Nicaragua for fixing interest rates in the internal credit card market. In its analysis of the case PROCOMPETENCIA applied the *per se* rule, whereby establishing the existence of the practice enabled it to declare it unlawful.

PROCOMPETENCIA imposed fines of 300 minimum wages (around US\$ 40,000) on one of the banks and 100 minimum wages (around US\$ 14,000) on the Association of Private Banks. The bank was ordered to stop engaging in those practices and the Association of Private Banks was ordered to abstain from making recommendations to its members that would result in a violation of the competition law.

Following *amparo* appeals, however, the Constitutional Chamber of the Supreme Court of Justice annulled PROCOMPETENCIA's decisions, finding that the President

⁴ PROCOMPETENCIA. Cases: 002-2010, 003-2010, 004-2010, 005-2010, 006-2010, 007-2010, 008-2010, 009-2010 and 010-2010.

did not have the power to receive, investigate or rule on a complaint in this regulated sector.⁵

6.1.2. Liquid petroleum gas⁶

This case began with a complaint lodged against two liquid gas distributors who had allegedly engaged in price-fixing, limiting entry to the market and exclusive distribution, among other things. PROCOMPETENCIA determined that irrefutable evidence had not been presented to establish several of the reported infringements but Tropigás de Nicaragua was fined 153 minimum wages (around US\$ 22,000) for refusal to deal.

PROCOMPETENCIA took account of several documents showing that the company had indeed refused to sell liquid petroleum gas to the complainant without any objective justification for that behaviour.

The company's appeals were rejected.

6.1.3. LIDO and BIMBO case⁷

A complaint was brought against the Compañía Industrial Lido Pozuelo, S.A. (LIDO) and Bimbo de Nicaragua, S.A. (BIMBO) for price-fixing with a view to driving other companies out of the market and limiting production, as well as refusal to deal, and sale conditions and price discrimination.

With regard to the alleged price-fixing, PROCOMPETENCIA determined that the complainant had not presented sufficient evidence, and with regard to refusal to deal, it was found that the company had stopped supplying the complainant and providing it with advertising support, but that the exception under article 19 (e) of Law 601 applied as the complainant had fallen behind in its payments. For the same reason the alleged discrimination charges were also rejected and the complaint was dismissed.

PROCOMPETENCIA nevertheless ordered the company to resume sales and advertising support to the complainant, and to supply all its products to any economic agent meeting the requirements established by law and good business practices. The complainant appealed the decision, but the Authority upheld all the arguments.

6.2. Mergers

6.2.1. Poultry market⁸

⁵ *Supreme Court Constitutional Chamber, judgement 864 of 31 May 2012, Case 911-11, and judgement 760 of 20 July 2011, cases 1049, 832, 925, 924-2010 and 628-2011.*

⁶ *PROCOMPETENCIA. Case: 0002-2011.*

⁷ *PROCOMPETENCIA. Case: 010-2010.*

⁸ *PROCOMPETENCIA. Case: 001-2010.*

In November 2010, Sun Valley Foods of Central America Ltda. and Rica Foods Inc., both active in the poultry industry and the latter with operations in Costa Rica and Nicaragua, sought authorization for a merger from PROCOMPETENCIA.

PROCOMPETENCIA identified as potential anticompetitive effects of the transaction increased market power and greater possibility of market cartelization, but it also recognized efficiencies which could be transferred to consumers. In the end it ruled that, in the short term, the transaction would not irrationally diminish free competition in the Nicaraguan poultry market and authorized the merger with conditions.

The analysis of the merger was reasonable with respect to the pro- and anticompetitive effects of the merger. The same cannot be said, however, of some of the conditions imposed, which are of questionable reasonableness and pertinence.

6.2.2. Hydrocarbons market⁹

In June 2011, Inversiones en Combustibles y Lubricantes de Nicaragua S.A. and ECCLESTON Co. Ltd. sought authorization for a merger through the former's acquisition of the latter's operations in Nicaragua. The two groups were engaged in the wholesale distribution of hydrocarbons.

In this case, after analysing the merger, PROCOMPETENCIA found that, given that there would be no significant overall change in market concentration, it could be approved. It nevertheless subjected approval to several conditions, some of which coincided with what the regulator, INE, had recommended.

As in the previous case, the relationship between the effects of the concentration and the conditions imposed by PROCOMPETENCIA is not clear.

7. COMPETITION ADVOCACY

7.1. Legal framework

Law 601 (chap. III) sets forth the advocacy functions of PROCOMPETENCIA. Under article 16, PROCOMPETENCIA's responsibilities include proposing the removal of legal barriers to market entry; preparing, presenting and disseminating proposals to liberalize and deregulate markets and economic sectors; advising public administrations so that they do not establish bureaucratic barriers or red tape to economic freedom and competition; proposing initiatives for simplifying administrative procedures and carrying out pro-competition activities; and providing economic and commercial advice to State bodies and entities, economic agents, academic organizations and professional associations.

⁹ PROCOMPETENCIA. Case: 003-2011.

In sum, the law grants PROCOMPETENCIA functions in the two typical areas of competition advocacy — promotion of a competition culture and of pro-competition regulatory decisions — but Law 601 and its Regulation also include functions that are more common to bodies specially charged with procedures simplification and improved regulation, which are in principle not appropriate for a competition authority.

7.2. PROCOMPETENCIA advocacy actions

From the start, and to a large extent with the help of international cooperation, especially from the COMPAL programme, PROCOMPETENCIA has made significant efforts to promote a culture of competition in Nicaragua and coordinate actions with other public entities.

It has, for example, carried out training activities and market studies, produced guides to competition for economic agents, set up programmes with universities and issued opinions on laws and decrees.

According to the annual report presented to the National Assembly in 2012,¹⁰ PROCOMPETENCIA has trained more than 500 people including judges, regulators, business people, legal practitioners, consumer associations, etc., in the benefits of competition and the scope of Law 601. Among the main events organized, special mention should be given to the First National Competition Forum in Managua, the workshops held in the cities of Estelí, León and Granada, the First Regional Competition Forum and the First Local Meeting of Consumer Organizations.

One of the studies carried out by PROCOMPETENCIA was the first to be done on Nicaragua's general competition conditions. The study covered 14 sectors, mainly public service and agricultural markets.¹¹

Several guides have also been published in order to improve understanding of competition legislation and PROCOMPETENCIA's functions and procedures, notably a competition guide for business associations, a layperson's guide to competition, a guide for filing complaints, a basic guide for the promotion of competition, and a competition guide for the prevention and detection of anticompetitive practices in public procurement.

PROCOMPETENCIA has also worked very closely with universities. In March 2012 the first Competition Diploma programme opened in the Institute for Public Policy Administration of the University of Engineering. In addition, various undergraduate and postgraduate competition courses were included in the Master's Programme in

¹⁰ PROCOMPETENCIA. *Informe a la Asamblea Nacional. Managua, Nicaragua. May 2012.*

¹¹ PROCOMPETENCIA, *La Competencia en el Mercado Nicaragüense. Condiciones Generales, Managua, Imprenta Comercial La Prensa.*

Business at the Central American University. Furthermore, agreements have been signed with the American University of Nicaragua (UAM), the Polytechnic University (UPOLI) and the University of Commercial Science (UCC).

PROCOMPETENCIA has also issued opinions in response to enquiries from the private sector. In 2012 it issued opinions on medicine distribution and supermarket pricing policies. It has also issued opinions on decrees, laws and international conventions, such as the Tax Pact Bill and the Consumer Protection Reform Bill. However, PROCOMPETENCIA is not keeping statistics on these opinions and has not followed them up.

Despite PROCOMPETENCIA's strenuous efforts, there is still little awareness in the country regarding the scope of competition legislation. This is probably due to the fact that Law 601 is relatively new and to the scant resources available to the Authority to carry out its work.

8. INTERNATIONAL RELATIONS

8.1. International cooperation

Small and relatively open economies such as Nicaragua's are inevitably affected by anticompetitive practices and concentrations that have cross-border effects. For this reason an appropriate level of international cooperation is desirable, as this makes it possible to take action against such practices and helps reduce inconsistencies between the various remedies applied by the different authorities. Better understanding between the countries in the application of competition rules also helps reduce companies' compliance costs.

To that end, the Protocol to the General Treaty on Central American Economic Integration (Guatemala Protocol) and the Framework Agreement for the Establishment of the Central American Customs Union promote harmonization of competition laws in the countries of the region. There is also a working group on Competition Policy of the Central American Integration, which is working on a project supported by the Inter-American Development Bank to design an institutional and regulatory model for a regional competition policy.

International cooperation on competition issues is also a common theme in the free trade agreements signed by Nicaragua. Thus the treaties signed between Canada and Central America 4 (CA4), Nicaragua and Taiwan Province of China, between the Dominican Republic, Central America and the United States, and between Central America and Panama, include various provisions on the subject, as does the European Union-Central America Association Agreement.

Bilaterally, PROCOMPETENCIA has entered into cooperation agreements with various Central American competition authorities: the Salvadoran Competition Superintendency, the Costa Rican Commission for the Promotion of Competition and the Panamanian Authority for Consumer Protection and Competition Defence.

PROCOMPETENCIA has also joined various competition networks that provide best practices standards, promote informal cooperation and hold workshops and seminars on different topics. These include the International Competition Network (ICN) and the Inter-American Competition Alliance.

8.2. Technical assistance

PROCOMPETENCIA receives technical assistance from various international bodies. Special mention has to be made of the COMPAL Programme, which has been supporting Nicaragua in the area of competition defence for nearly 10 years.

The contribution of international cooperation to PROCOMPETENCIA's operation is definitely appreciable. It is noteworthy that it is a cooperation programme, COMPAL, that guarantees the salaries of a significant proportion of PROCOMPETENCIA's own staff, a situation that ought to change in the near future.

9. CONCLUSIONS AND POSSIBLE POLICY OPTIONS

Based on the findings summarized in the Peer Review of Competition Law and Policy in the Republic of Nicaragua and PROCOMPETENCIA's experience in enforcing the legislative framework for the past four years, it is clear that there is a need to make certain adjustments to the way the Authority works, notably through a revision of Law 601 and its Regulation.

- **Scope of application of the law:**

- The exceptions listed in article 4 of the Law do not constitute true exceptions to its application;
- Extend the Law to cover actions carried out abroad that produce effects in the national market.

- **Structure of PROCOMPETENCIA:**

- Review the appropriateness of members of the Board of Directors being nominated by the sectors concerned, which may create conflicts of interest;
 - Separate the investigation and decision-making functions, possibly reserving final decisions for the President;
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- Review the President’s functions, as too many have been accumulated in that office;
 - Set up a knowledge and institutional memory management system.
- **Coordination of PROCOMPETENCIA with other public entities on the enforcement of Law 601:**
 - Make a proposal for a single competition authority with competence for enforcing Law 601 in all sectors of the economy, without prejudice to ongoing cooperation with sector regulators;
 - Confirm PROCOMPETENCIA’s right to ask for the technical opinion and collaboration of specialized entities in all areas of its work and not only in respect of merger control.
- **Competition advocacy:**
 - Review the role of PROCOMPETENCIA with regard to simplification of procedures and best administrative practices;
 - Continue advocacy efforts among certain key public institutions and the private sector;
 - Continue to bolster advocacy work with the judiciary and the National Assembly;
 - Make efforts to train and coordinate with sector regulators;
 - Make more use of the guides already published;
 - Replicate in other forums the advocacy work done with universities and consumer associations.
- **Anticompetitive practices:**
 - Make explicit reference to the per se rule in relevant cases (mainly cartels);
 - Eliminate the reference to the legitimacy of agreements between domestic producers and foreign purchasers which give domestic producers favourable conditions;
 - Revise the wording of article 20 of the Competition Regulation, which confuses the criteria for assessing practices with indicators of anticompetitive practices;
 - Clarify article 21 of the Regulation, which refer not so much to “criteria for
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assessment,” as, in some cases, to the provisions for sanctions and, in others, to anticompetitive effects. In addition, it is inconsistent with the Law inasmuch as it refers to “total average costs” and “variable average costs” as measures for determining the existence of predatory practices;

- Clarify article 22 of the Competition Regulation in order to establish whether harm to consumer interests is a necessary requirement for declaring a violation, or just a criterion to consider when grading the sanction;
- Clarify article 24 of the Regulation since, rather than establishing criteria for assessing market power, what it actually establishes are examples of entry barriers.

- **Unfair competition:**

- Structure the criteria for assessing unfair competition in article 26 of the Regulation.

- **Merger control:**

- Consider a fast-track consultation procedure;
- Do away with the market-share threshold for notification;
- Lower the threshold for notification of a merger;
- Clarify article 32 of the Competition Regulation so as to make it clearer at what point the term for notification begins;
- Establish that the reason for taking a case to the second phase is that there are queries over the market impact of the merger;
- Unify the rules governing the procedures for investigating non-notified mergers with the general procedures for investigations into anticompetitive practices;
- Reduce merger fees, which are extremely high and disproportionate for an economy the size of Nicaragua’s.

- **Procedures:**

- Conduct a comprehensive review of the principles underlying the procedures and develop one set of principles to be applied to free competition;
 - Amend article 48 of the Competition Regulation, which contradicts article 31 of the Law in respect of unfair competitive practices;
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- Revise the role of the complainant in the procedure and reinforce the Authority’s power to take the initiative and investigate;
 - Reduce the number of requirements that a complaint must meet under article 49 of the Competition Regulation. The minimum requirements should be those established in the Law;
 - Establish that PROCOMPETENCIA can decree interim measures ex officio;
 - Regulate who is responsible for hearing the parties’ arguments and deciding on the suspension of interim measures;
 - Amend article 43 (b) of Law 601, which establishes as the criterion for imposing interim measures “that no possibility exists of causing irreparable harm to the interested parties,” when the purpose of such a measure is exactly the opposite;
 - Bring article 64 of the Regulation into line with article 36 of the Law and with the powers of the President with respect to PROCOMPETENCIA’S decision on a case;
 - Include in article 47 of Law 601 a section on the seriousness of the conduct as a criterion to be taken into account when setting sanctions;
 - Publish in future manuals or interpretive guides to the Law that include indications as to the seriousness of conduct of various kinds;
 - Ensure more complex analysis of cases, notably their economic aspects.
- **Leniency programme:**
 - Specify the procedural rules and specific conditions for granting leniency and clarify that leniency only applies to anticompetitive practices between competitors;
 - Consider the possibility, in the case of practices between non-competitors, of early conclusion of the procedures through commitments or settlements with the Authority;
 - Expand the Authority’s powers of investigation, in addition to the obligation to collaborate under article 53 of the Law.
- **Damages actions:**
 - Interested parties’ right to seek reparation of harm caused by anticompetitive practices should be clear;
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– The statute of limitations in respect of such action should be the one generally applied to civil liability.

- **Obligation to collaborate; cooperation agreements:**

- Consolidate regional and bilateral mechanisms in order to make it possible to prohibit practices and mergers with cross-border effects;

- PROCOMPETENCIA's current dependence on international cooperation resources undermines its autonomy and makes it extremely vulnerable to circumstances beyond its control.
