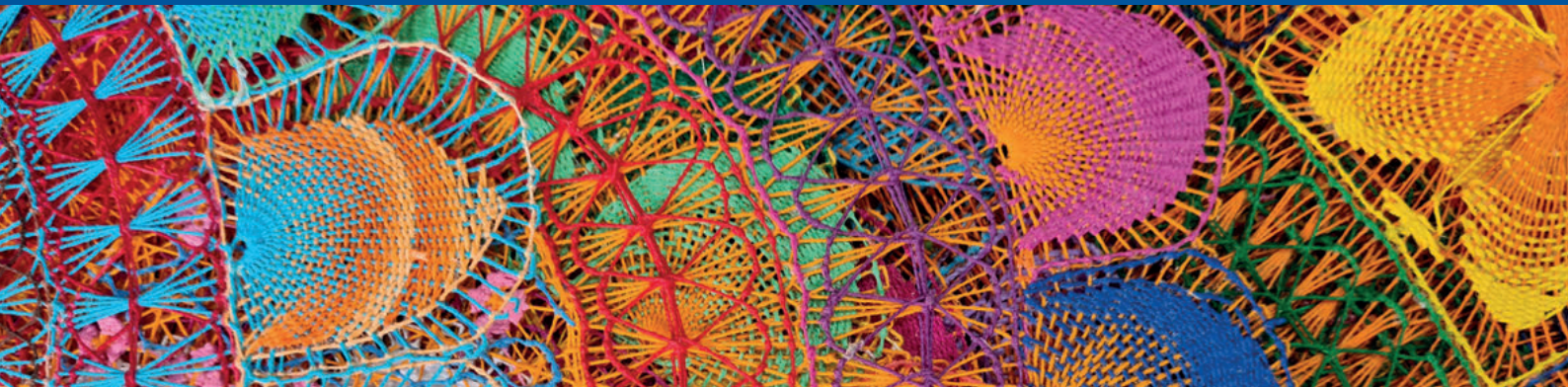


VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY

PARAGUAY



United
Nations



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The views expressed in this document are the sole responsibility of the author and may not coincide with those of the United Nations.

ABBREVIATIONS

ANDE	National Electricity Administration
IDB	Inter-American Development Bank
CADE	Administrative Council for Economic Defence
CONACOM	National Competition Commission
DNCP	National Directorate of Public Procurement
EFTA	European Free Trade Association
FEPRINCO	Federation of Production, Industry and Commerce
FNE	Office of the National Prosecutor for Economic Offences
ICN	International Competition Network
MERCOSUR	Southern Common Market
OECD	Organisation for Economic Co-operation and Development
PETROPAR	Petróleos Paraguayos
SEDECO	Ministry for Consumer and User Protection
SELA	Latin American Economic System
TVDC	Basque Competition Court
EU	European Union
UIP	Paraguayan Industrial Union
UNCTAD	United Nations Conference on Trade and Development
ZHAW	Zurich University of Applied Sciences

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FOREWORD

This report is part of the voluntary peer review on competition law and policy of the Republic of Paraguay. The purpose of the review is to assess the legal and institutional framework for the country's competition system and how competition law has been applied in practice until now.

The report contains an analysis of the current situation of competition law and policy in Paraguay on the basis of extensive documentary research and opinions expressed by a select group of experts, composed of officials, politicians, businesspeople, academics and liberal professionals, during a visit to Asunción by an UNCTAD delegation from 17 to 21 October 2022.

The documentary research involved reviewing the Constitution, competition law and regulations and other sectoral norms, as well as the decisions adopted by the National Competition Commission since its establishment. The views and testimonials of the interviewees have been very useful in providing, through this report, a holistic view of the system for the defence and promotion of competition in the country.

1. SOCIAL, ECONOMIC AND POLITICAL CONTEXT

1.1. Physical structure and historical summary

1. The Republic of Paraguay is located in South America and covers an area of 406,752 km². It is a landlocked country bordered by Argentina, the Plurinational State of Bolivia and Brazil. The Paraguay River physically divides the country into two regions, the Chaco (or Western Region) and the Eastern Region, each of which has distinct physical, climatic, ecological, administrative and demographic characteristics. The Eastern Region is the core of the nation, as 97 per cent of the population (7,232,889 inhabitants) is concentrated there, it is home to the most important cities and has almost all the road infrastructure and facilities. In contrast, the Western Region, with the remaining 3 per cent of the population (220,805 inhabitants), is an underprivileged area with few services.¹
2. Colonization began with the founding of Asunción, the capital of the country, in 1537. Settlements slowly expanded to the surrounding area and towards the Paraguay River. The borders were established at the end of the War of the Triple Alliance (1864-1870). The sale of State lands in 1880 and 1883 made it possible for foreign companies to control large swathes of the territory, mainly on the eastern border, in the northern part of the Eastern Region and in the Chaco, with no State presence.
3. In 1950, the population was concentrated in Asunción, in the border port cities of Encarnación and Concepción and around the railroad. The main connection with the world was the Paraguay-Paraná waterway to the south, through Argentina. In the 1950s, thanks to financial support from Brazil, the State rolled out roadwork projects aimed at integrating the different areas of the Eastern Region. The structure of the Eastern Region was profoundly altered owing to closer ties with Brazil through the development of roads, the Ciudad del Este-Foz do Iguazú bridge and the Itaipú hydroelectric

power plant, Brazilian immigration at the eastern border, as well as a transformation of production through the expansion of agricultural areas and the introduction of wheat and soybean crops. Cities emerged around the main routes to the detriment of port cities. The East axis became the most dynamic, while the South axis weakened. The Chaco, however, saw a different pattern of settlement and functioning, with the set-up of the tannin extraction industry (quebracho tree extract, which is used for the manufacture of all types of leather) on the banks of the river in Alto Paraguay, the development of Mennonite colonies in the central Chaco and the establishment of cattle ranches in the lower Chaco and on the banks of the Pilcomayo River.²

4. The region's integration initiatives, namely, the Southern Common Market (MERCOSUR), the Central-West South American Integration Zone and the Initiative for the Integration of Regional Infrastructure in South America, each have differentiated strategies and specific areas of action. However, MERCOSUR is the initiative with the greatest impact on the country's economy, especially soybean and livestock producing areas, whose functioning underpin the economic structure.³
5. With a current population of 7,453,694 people,⁴ Paraguay ranks 105th out of 196 countries in the population table in the 2022 World Population Prospects,⁵ compiled by the United Nations, and continues to have a very low population density of 18 inhabitants per km². The capital is Asunción and the national currency is the guaraní.

¹ National Institute of Statistics, <https://www.ine.gov.py/publicacion/2/poblacion>.

² In 1925, the entry of the Mennonite colonies in the Paraguayan Chaco was negotiated, and they were allocated lands, which were sold to them over time. Today, they have one million hectares and have become a centre for dairy production, livestock, crop farming and the oil and meat processing industries.

³ <https://dialnet.unirioja.es/servlet/articulo?codigo=5654262>.

⁴ National Institute of Statistics, 2022.

⁵ <https://population.un.org/wpp/>.

6. According to the Human Development Index,⁶ which is calculated by the United Nations to track the progress of a country and, ultimately, the standard of living of its inhabitants, Paraguay ranks 105th.⁷ The Corruption Perceptions Index, published by Transparency International, ranks Paraguay 137th out of 180 countries; in other words, its inhabitants believe that corruption is rampant in the public sector.⁸

1.2. Economic structure and context

7. The economy and gross domestic product of Paraguay are heavily reliant on the two largest sectors, that is, the agricultural and the trade and finance sectors. Trade and finance activities are concentrated in Asunción, Ciudad del Este, Encarnación and Pedro Juan Caballero. Gross domestic product (GDP) in 2022 was 215,401,047 (in millions of constant guaraníes),⁹ with a year-on-year variation of 0.2 and of -9.2 in the primary sector. The agricultural sector accounts for around 26 per cent of GDP and almost all of the country's exports. A breakdown by subsector reveals that crops account for 17 per cent and livestock for 7 per cent of GDP. Soy makes up 93 per cent of crop production, with cotton and tobacco accounting for the remainder. Soybeans and meat are the main export products and occupy the largest amount of physical space – 2.2 million hectares for soybeans and nearly 10 million hectares for livestock.¹⁰
8. Some 70 per cent of soy is exported in bean form, while 26 per cent gets processed; 60 per cent of soybeans are destined for the United States, 28 per cent for Argentina and 1.07 per

cent for Brazil. Soybean oil is exported to the Andean Community. Most of exports, 95 per cent, are transported by river along the Rio de la Plata and 2 per cent are transported by road for the Brazilian domestic market.

9. Livestock is another of the pillars of the Paraguayan economy that has been growing year after year, boosting the country's development. In 2010, Paraguay became the world's eighth largest exporter of beef, achieving a level of quality recognized worldwide. In the past 10 years, Paraguayan beef exports have increased from US\$ 50 million to US\$ 1.7 billion, the country's cattle stock has grown by 49 per cent, slaughter numbers have risen and there has been a three-fold increase in the number of slaughterhouses. In the last ten years, it has become the sixth largest exporter of beef cattle in the world, surpassing reference countries in the region such as Argentina and Uruguay, although not the giant Brazil, which remains first in the ranking. The country already exports to the European Union, Egypt, Colombia, the Russian Federation, Taiwan and Brazil and is looking for new markets such as Cuba and Dubai.¹¹ Cattle ranchers are organized in the Asociación Rural del Paraguay, a trade association with strong influence in national politics and which is divided into department-level branches throughout the country.
10. Another important sector worth highlighting is the electric energy sector, which consumes only 16 per cent of the energy it produces. The rest is exported to countries such as Argentina and Brazil, with whom Paraguay shares the Yacyretá (Argentina-Paraguay) and Itaipú (Brazil-Paraguay) hydroelectric plants. It is also worth mentioning that, as there are international treaties in place, this energy is being sold below market price.¹²

⁶ The Human Development Index is a summary measure used to assess long-term progress in three key dimensions of human development – a long and healthy life, being knowledgeable and having a decent standard of living. The indicator used to measure a long and healthy life is life expectancy. Access to knowledge is measured by the adult literacy rate and gross primary, secondary and tertiary enrolment rates. A decent standard of living is measured by gross domestic product (GDP) per capita.

⁷ <https://hdr.undp.org/data-center/specific-country-data/#/countries/PRY>.

⁸ <https://www.transparency.org/en/cpi/2022>.

⁹ The World Bank recorded a GDP of 42 billion constant United States dollars in 2021: <https://datos.bancomundial.org/pais/paraguay>.

¹⁰ https://economia.gov.py/application/files/2716/7414/0750/COMPILADO_BOLETIN_INV-2022.pdf.

¹¹ <https://cifca.agr.una.py/novedades/paraguay-ganaderia-y-su-crecimiento/>.

¹² In 2022, following the disconnection of its last remaining thermal power plant, Paraguay became the only country in the world in which clean, renewable energy sources account for 100 per cent of electricity generation. However, according to the Latin America and Caribbean Climate Change Vulnerability and Adaptation Index prepared by the Andean Development Corporation, Paraguay is the South American country most vulnerable to climate change, ranking among the 10 countries at extreme risk due to its low development indicators and its economic dependence on

11. As for the current economic situation, Paraguay had a GDP of almost US\$ 41 billion and recorded growth of 4.1 per cent in 2021. Its public debt that year was \$14.642 billion, or 37.72 per cent of GDP, and its per capita debt is US\$ 1,991.¹³
 12. The latest annual variation rate of the Consumer Price Index in Paraguay, published in January 2023, was 7.8 per cent. GDP per capita is an indicator of the standard of living and, in the case of Paraguay, it was US\$ 6,264 in 2021, which constitutes a very low standard of living.¹⁴
 13. Sound macroeconomic policies have benefited the Paraguayan economy over the past two decades. From 2004 to 2019, its economy grew faster and the country recorded smaller fiscal deficits and took on less debt than its peers. Much of this growth was a reflection of favourable terms of trade that supported agricultural and hydropower exports, but institutional reforms, such as the inflation targeting mechanism and fiscal responsibility legislation, helped ensure stability and sustain growth.
 14. Poverty (US\$ 6.85 per day per capita, at the 2017 purchasing power parity) dropped from 40.2 per cent to 19.7 per cent, while inequality slid from 54 to 46 Gini points¹⁵ over the same period from 2001 to 2019.
 15. More recently, multiple external shocks have slowed growth and poverty reduction. The economy contracted in 2019 due to droughts and poor performance of trading partners and subsequently, in 2020, due to mobility restrictions associated with the coronavirus disease (COVID-19) pandemic. The latter led to poverty rising to 22.3 per cent in 2020 despite additional social transfers. In 2022, drought-induced recession and inflation are expected to cause poverty to remain above pre-pandemic
16. Inflation is expected to slow as commodity prices moderate, interest rate hikes take effect and household utility bills decline following reductions in energy rates. In 2023–2024, inflation is expected to return to the upper limit of the target range.
 17. The current account balance is expected to deteriorate due to lower soybean exports and higher fuel imports. It is projected to continue running a small deficit in 2023–2024 as import growth accelerates in line with fixed investment growth.
 18. Public finances are expected to continue towards consolidation. Reforms have been proposed to improve the efficiency of public procurement, civil service salaries and pensions but have yet to be submitted to Congress. With no new revenue reforms planned, further consolidation of personnel and capital spending is expected as the Government strives to reach the deficit target of 1.5 per cent of GDP by 2024.
 19. With recession and high inflation depressing real disposable incomes, poverty is projected to stand at 21.5 per cent in 2022. The effects of the war in Ukraine on regional growth and the slow recovery of labour markets may increase poverty. Better targeted social protection programmes would help cushion the impact of future crises.¹⁷

1.3. Political context

20. Paraguay is a presidential republic in which the Head of State and Government is the President of the Republic. The current Constitution, enacted on 20 June 1992, was inspired by the constitutions of Western nations and enshrines the fundamental principles of representative,

the agricultural sector. As Paraguay struggles with droughts, floods, increasingly extreme events, water insecurity and displacement of people, the future of energy is not looking bright. The Office of the Deputy Minister for Mining and Energy has indicated that, as of 2030, the country's energy production will be insufficient to meet local demand.

¹³ <https://www.bancomundial.org/es/country/paraguay/overview>.

¹⁴ https://www.bcp.gov.py/userfiles/files/Anexo_Estad%C3%ADstico_del_Informe_Econ%C3%B3mico_16_02_2023.xlsx.

¹⁵ The Gini coefficient is an economic measure used to calculate income inequality among the inhabitants of a given territory, usually a country.

¹⁶ <https://www.bcp.gov.py/userfiles/getFile.php?file=userfiles/files/Perspectivas%202023.pdf>.

¹⁷ <https://www.bancomundial.org/es/country/paraguay/overview>.

pluralist republican democracy in a social welfare State governed by the rule of law.¹⁸

21. The President and Vice-President are elected by universal, direct and secret suffrage for a non-renewable term of five years. Re-election is prohibited under the Constitution. The President, who is Head of both State and Government, chooses his ministers.
22. The Congress is composed of two chambers: the Senate, with 45 members elected from national lists for a five-year term; and the Chamber of Deputies, with 80 members and a departmental base elected for the same five-year term. The Congress, especially the Senate, enjoys broad powers and holds a control function over the Executive similar to that in parliamentary regimes.
23. The judicial branch is led by a nine-member Supreme Court, elected by the Senate on the proposal of the High Council of the Judiciary. There is also a Constitutional Chamber within the Supreme Court and a High Court of Electoral Justice, whose members can be removed only by impeachment or upon reaching the age of 75.
24. The Republic of Paraguay does not correspond exactly to the classic Latin American model of presidential republic in which the President holds all powers, as the legislative branch plays a significant role in political life. Indeed, it has the most power, including the ability to block political initiatives by the executive. The territory is divided into 17 departments and a capital city, and the representatives are elected by popular vote, as are the municipal representatives.

¹⁸ The legal system is based on Roman law and the Napoleonic Code. The Constitution promulgated in 1992 is the supreme law of the land and the basis for the tripartite division of powers between the executive, the legislature and the judiciary.

2. BACKGROUND INFORMATION ON COMPETITION LAW

25. Article 107 of the Constitution of Paraguay, concerning freedom of competition, establishes that “all persons have the right to engage in the lawful economic activity of their choice, within a system of equal opportunities. Competition in the market is guaranteed. The creation of monopolies and artificial increases or decreases in price that restrict free competition shall not be permitted. Usury and the unauthorized trade of harmful items shall be punished under criminal law.”
26. Other laws addressing issues of competition include Act No. 1143/97, by which the Protocol on the Defence of Competition of MERCOSUR was adopted. The purpose of the Protocol, which was incorporated into national law on 2 October 1997, is to protect competition within the framework of MERCOSUR.
27. Another important law is Act No. 3026/06, by which the agreement on the Regulations implementing the Protocol on the Defence of Competition of MERCOSUR was adopted. The Regulations implementing the Protocol were incorporated into Paraguayan law on 7 September 2006.
28. The adoption of the Act on the Protection of Competition was complex. It took 10 years, from the date on which the first draft of the bill was brought before the chambers of Congress, for the law to be enacted in 2013. The legislative information system maintained by the Paraguayan parliament indicates that three drafts were presented to Congress, in 2003, 2008 and 2010.¹⁹
29. The first bill was submitted to the Senate by the executive branch, through the Ministry of Industry and Trade, in 2003.
30. The second was presented by two deputies in 2007. It should be noted that the Senate rejected the bill following a debate in which some of the members expressed doubt as to the need to adopt a competition law for a country that, in their opinion, was not ready for it and distrusted the future implementing authority, whose members were to be appointed by the executive branch.²⁰ This distrust was due to the authority’s lack of independence stemming from the fact that its members would be appointed by the Ministry of Industry and Trade. This caused discontent in the business sector and led to the bill being shelved.²¹
31. The third and final draft of the bill was the fruit of a consensus forged between the executive branch, through the Ministry of Industry and Trade, and the business sector, represented by the Paraguayan Industrial Union and the Federation of Production, Industry and Commerce (FEPRINCO), a grouping of business associations.
32. In 2008, under the mandate of President Fernando Lugo, the Government adopted a Strategic Economic and Social Plan for the period 2008–2013 aimed at promoting sustainable and inclusive economic growth. The Plan promoted a fair tax policy, encouraged fiscal responsibility, increased physical and human capital investment and strengthened State institutions in order to realize the constitutional ideals of a democratic and social State governed by the rule of law. In addition, the Plan was intended to remove obstacles to the development of institutions, including patronage, corruption, limited effectiveness, poor efficiency and discretionary powers in public administration.

¹⁹ <http://silpy.congreso.gov.py>.

²⁰ The following statement made by Senator Luis Alfredo Jaeggli, Chair of the Senate Committee on Economy and Finance, during the debate on the 2003 bill illustrates this well: “When I was given the Chair of the Finance Committee in 2003, they brought me this bill and said to me, this is important for you who are liberal. I began to read it and, in the first pages, I found: ‘The Executive will appoint three people who will decide who is engaging in competition and who has formed a monopoly.’ I simply closed it, threw it in the trash with a stone and my portrait on top and there it stayed.” See the Senate Journal No. 13 of 25 September 2008, p. 31 et seq.

²¹ <https://www.ultimahora.com/mic-impulsa-nuevo-proyecto-ley-defensa-la-competencia-n216814.html>.

33. One of the specific objectives of the Strategic Economic and Social Plan was to boost competitiveness and strengthen business and investment, for which the enactment of a competition law was expressly foreseen. The drafting of the bill was entrusted to the Ministry of Industry and Trade, which requested technical assistance from the United Nations Conference on Trade and Development (UNCTAD) to initiate the process of drafting a new bill with the prior consensus of the country's political and economic actors.
34. The process began in 2009 with a high-level technical mission to Asunción, carried out by a delegation composed of officials from UNCTAD, the Basque Competition Court of Spain, the Administrative Council for Economic Defence of Brazil and the Office of the National Prosecutor for Economic Offences of Chile, whose task was to examine the country's general situation and survey the various public and private sector stakeholders about the adoption of a national competition law. The outcome of the mission was positive because, although there was some reluctance towards the adoption of legislation hitherto unknown in Paraguay, the representatives of the business sector took a proactive stance on the formulation of a bill that met the country's needs and was in line with international standards.
35. The work carried out over three years by a group of experts made up of UNCTAD staff, advisors and private sector representatives (Federation of Production, Industry and Commerce) resulted in a bill tailored to the country's circumstances and challenges. One of the most important matters was the appointment process for the members of the implementing authority, namely, three members of the board of directors and one director of investigations, a responsibility that was eventually conferred on the Evaluation Board, composed in equal parts by public and private sector representatives.
36. The bill, based on a draft prepared and coordinated by the Ministry of Industry and Trade, was submitted to the legislature and was approved by the Senate on 21 March 2013.²² The Act on the Protection of Competition No. 4956/2013 ("the Act") was adopted by the Congress on 21 June 2013. Subsequently, in accordance with article 69 of the Act, which provides that the executive must adopt implementing regulations within 120 days, Decree No. 1490 regulating the Act ("the Regulations") was adopted on 14 April 2014.

²² Senate Journal No. 235 of 21 March 2013, p. 24 et seq.

3. LEGAL FRAMEWORK ON COMPETITION

37. The following section examines the main provisions of Act No. 4956 and its Regulations (Decree No. 1490). Like any competition law, the Act regulates the most important matters related to competition policy, such as scope of application, prohibitions, institutions and their powers, procedures, actions, statutes of limitation, judicial review, sanctions and remedies.
38. The Act is divided into six titles, each containing a number of chapters. Title I contains general provisions on free competition, for instance principles and scope of application, in addition to establishing prohibited conducts and the concentration control system. Title II, on the implementing authority, establishes its organic and functional structure, powers and management principles. Title III establishes the sanctioning procedure, addressing general and specific issues, such as the initiation of the procedure, the investigative stage and the disciplinary process. Title IV deals with the interaction between the implementing authority and government entities and regulatory bodies, establishing rules on collaboration and information. Title V contains provisions on sanctions, nullities and liabilities. Finally, title VI deals with the regulation and entry into force of the Act.
39. For clarity and ease of reference, the following section of this document is divided into four subsections covering: (i) substantive provisions; (ii) institutional aspects; (iii) procedures; and (iv) other matters.

3.1. Substantive provisions

3.1.1 Principles, scope of application and definition of relevant market

40. Before delving into these topics, it is worth highlighting certain rules that guide the analysis and assessment of conduct. Articles 2, 3, 4, 5 and 6 of the Act govern a series of matters of general application, such as foundational principles, scope of application, the concept of

free competition and the definition of relevant market.

41. Concerning the foundational principles, the Act recognizes that there may be economic sectors or activities to which its provisions are not applicable for reasons of general interest but does not identify who determines that this interest is involved. Article 2 (3) establishes the rule of reason for assessing and analysing anticompetitive conduct, including cartels, stating that the implementing authority must take into consideration the economic efficiency gains that the practices, conduct or recommendations may generate. This could be problematic given that very rarely does a cartel produce efficiency gains.
42. With regard to scope of application, the Act, as a general rule, is applicable to all actions, practices and agreements that have effects on freedom of competition in Paraguay even if they are implemented outside the country. Such actions, practices and agreements may be implemented by any subject of law, that is, by any individual or any public or private legal entity domiciled in Paraguay or abroad. What is important is that they conduct economic activities with effects in the Paraguayan territory.
43. It is also noteworthy that lawmakers made a point of including, in article 4, an explanation of what free competition entails, which can guide decision-making by the economic agents to which the Act applies, without prejudice to the determinations that the implementing authority may make on a case-by-case basis.
44. Lastly, article 6 provides a general definition of the term “relevant market”, from both the product and the geographical points of view, without prejudice to any additional criteria that may be established by the implementing authority when ruling on a specific case.

3.1.2 Prohibited agreements

In this report, the term substantive provisions of the Act refers to the provisions prohibiting conduct that may infringe free competition and those related to the

control of concentration operations. This section is divided into two parts: the first deals with prohibited agreements and the second with unilateral acts.

45. Prohibited agreements are governed by article 8 (title I (II)) of the Act and by title I (I) of the Regulations. Several aspects of article 8 should be highlighted.
46. The article is open-textured, as the first paragraph covers any agreement, decision or concerted or knowingly parallel practice that has the object or effect of restricting free competition, then includes a non-exhaustive list of such conduct.
47. The Act does not differentiate between concerted practice and knowingly parallel practice, which should be amended. Concerted practices undoubtedly constitute anticompetitive conduct in that the uncertainty inherent in a competitive market is in some respects eliminated. This category of conduct includes, among others, hub-and-spoke practices, where there is no direct agreement between competitors, but the result is the same because they have a common supplier or distributor, that is, a vertical relationship. Conscious parallel action or conscious parallelism, on the other hand, refers to practices that might reasonably be adopted by economic agents in an oligopolistic market in which their decisions are interdependent; in other words, decisions are made taking into account the expected behaviour or the likely reaction of competitors. For this reason, they are not sanctioned in the same manner, even though they produce results similar to those of collusion.
48. The final paragraph of article 8 establishes the implementing authority's duty to assess the efficiency gains potentially deriving from the conduct subject to analysis, which duty is reiterated in article 5 of the Regulations. As already noted, this form of analysis should not be carried out in the case of hard-core cartels, which should instead be analysed under the per se rule, in other words, be sanctioned independently of the effects they produce in the market. In any case, with respect to the other types of horizontal agreement, it is for the parties and not the implementing authority to prove efficiency gains.
49. Regarding the situations established in subparagraphs a, b, c, f and g of article 8, it

should be noted that the classic forms of hard-core cartel, such as price-fixing agreements, production limits, zone or market share allocation, as well as cartels that seek to affect the results of tendering processes, are included. The remaining situations (subparagraphs d, e, h and i) refer to collective situations with other marketing conditions, such as relationships of economic dependence or acts of collective boycott, which should be analysed under the rule of reason or at least under the quick look rule, whereby it must be proven that the conduct has the effect of preventing, restricting or distorting competition. As noted in the preceding paragraph, in respect of the latter conduct, the parties are those who should prove efficiency gains.

50. It is of note that collusive tendering is dealt with in greater detail in the Regulations, which reflects the importance of prosecuting this type of practice in the context of public procurement.

3.1.3 Abusive conduct

51. The rules concerning abuse of dominant position are set forth in articles 9 to 11 (title I (III)) of the Act and title I (II) of the Regulations. The Act innovates with respect to the rule that is ordinarily applied to this type of conduct in that it contains additional special provisions on predatory pricing practices and on abusive counterparties, as explained below.
52. Concerning the general concept of the ban on abuse of dominance under article 9 of the Act, it should be noted, first, that collective abuse of dominance is also prohibited. Secondly, it is striking that the Act establishes a sort of presumption of dominance, which occurs when a product or service is not exposed to effective or substantial competition, as well as another presumption regarding situations where there is no such type of competition. Thirdly, the final paragraph might lend itself to confusion, as it could imply an additional evidentiary burden for the prosecuting body to prove not only dominance and conduct, but also whether the purpose of the conduct was to obtain undue advantage and cause harm to others.
53. With regard to the situations enumerated in article 9, it is not clear whether it is an exhaustive or merely enunciative list. Given the multiple

- forms that unilateral abuse can take, it would be advisable to clarify the provision by adding “among others” to show that there are other types of conduct in which dominant companies might engage.
54. As for the types of abusive conduct, the Act provides for price-related conduct (allowing for cases to be brought for excessive prices), discrimination, production limits, refusal to issue a contract and abuse of economic dependence. In this regard, two considerations should be borne in mind. First, it is incorrect to consider a dominant company limiting its production to be a unilateral abusive act. Second, conduct such as tied sales, the imposition of artificial barriers to entry and abusive recourse to judicial or administrative actions is absent from the Act. This could be resolved by, as mentioned above, clarifying that the list is not exhaustive.
55. The Act has the particularity of explaining what background information should be considered in determining dominant position in a market, limiting it to the substitution of products or services, legal barriers and market power. No mention is made of artificial or natural barriers, nor of market share, elements that are necessary to assess dominance. To the extent that this provision is merely a guide for the implementing authority, which is free to take into account other factors in determining dominance, it is not necessary to modify the provision. Nevertheless, it would be advisable to do so.
56. As expected, an article of the Act is devoted to predatory pricing. According to information obtained during the visit to Paraguay, this provision reflects particular concerns within the private sector about the high levels of contraband trade in the country. The provision establishes criteria for determining when an abuse of dominant position is committed through this practice, namely, the effective costs, the non-occasional nature of the sale, exclusionary intent and a reference to profit margin. It also contains guidelines on what is meant by effective purchase price, related discounts, the composition of acquisition prices or the effective production cost, and profit margin. Finally, the provision establishes certain exceptions, such as the sale of goods nearing expiry and liquidations.
57. Lastly, the Act introduces a provision on abusive counterparties that prohibits any act by which the conclusion of contracts is made subject to the acceptance of onerous terms and conditions.
58. Thus, the Act addresses the most common anticompetitive practices, such as cartels and unilateral abuses. However, at the comparative level, a degree of consensus has recently emerged about the need to also scrutinize administrative acts that could infringe freedom of competition, as might be the case when procurement terms and conditions contain anticompetitive clauses. Advocacy by the competition authority is often not enough, so it would be advisable to ensure that administrative acts below the rank of law can be investigated and even to enable the implementing authority to challenge them before the Court of Auditors.

3.1.4 Concentrations

59. Economic concentrations are regulated in articles 12 to 14 (title I (IV)) of the Act and are addressed extensively in title I (III) of the Regulations. This part of the report contains an analysis of only the substantive provisions that regulate this conduct. The notification procedure will be discussed below, under the review of the procedural part of the Act.
60. First, article 12 of the Act distinguishes between operations that constitute concentrations and those that do not. Regarding the former category, provision is made for acts that: (i) entail the end of the independence of the merging companies; (ii) involve control by an economic agent (indicating when control is acquired); (iii) enable the establishment of a joint legal person; (iv) have crucial influence over the activities of an economic agent (the article includes examples).
61. In addition, article 12 (5) of the Act clarifies that the usual operations of credit, financial and insurance entities in the area of securities trading and transactions do not amount to a concentration. Controls of companies or legal persons that are acquired under legislation governing liquidation, bankruptcy, insolvency, default, arrangements with creditors and other similar procedures do not constitute concentrations either.
62. As in the case of abusive conduct, there are criteria for determining whether concentrations

are compatible with the Act, including the criterion of the creation of a significant obstacle to effective competition. To determine whether this is the case, the Act provides that the structure of the market, the market position of competitors and their economic and financial strength and the possibilities for choice of suppliers and users, among other factors, should be taken into account. However, it is noteworthy that the prohibition seeks to prevent the creation or strengthening of a dominant position in the market, which would indicate that the risk assessment focuses on unilateral effects rather than coordinated effects. In this regard, it would be more prudent to keep only the criterion – significant obstacle to effective competition – and leave it to the implementing authority's discretion to determine when such a situation occurs. The mere creation or strengthening of a dominant position may, in many cases, be insufficient to reject a concentration.

63. Without prejudice to the legally established criteria and the detailed description of the procedure set forth in the Regulations, it would be useful if the implementing authority issued a guide or guidelines explaining its methodology for analysing concentration operations to provide economic agents with certainty.²³ The foregoing would entail the exercise of the power set forth in article 69 of the Regulations.

3.2. Institutional aspects

3.2.1 National Competition Commission

64. Enforcing competition law is the responsibility of the National Competition Commission (CONACOM), a centralized collegiate authority with two main bodies: the three-member Board of Directors, which is the highest authority, and the Directorate for Investigations, which is headed by a public official. The Commission's remit is to promote and protect free competition in the markets. The Act confers on CONACOM the typical powers of a competition authority,

²³ The National Competition Commission has adopted instructions for giving notification of a concentration operation. The guide or guidelines being suggested here would set forth the criteria to be used by the Commission to analyse a concentration operation.

namely, investigative and decision-making powers.

65. The Regulations establish the principles that should guide CONACOM in its activities, including, specifically, the principle that there should be no restrictions on incentives for businesses to compete, the bases for their decisions, the predictability of their actions, and the optimal and efficient use of their resources. Additionally, in accordance with the organizational structure established in article 60 et seq. of the Regulations, the Directorate for Investigations consists of the Concentrations Control Department and the Restrictive Practices Department.
66. CONACOM had a budget of G5,715,620,777 (US\$ 776,157) in 2022, which increased to G6,361,524,768 (US\$ 863,868) in 2023.
67. The main provisions relating to the powers of the Board of Directors and the Directorate for Investigations and to the independence, appointment and removal of their members are described below.

3.2.2 Board of Directors of CONACOM

68. As its name indicates, the Board of Directors manages CONACOM in keeping with the wide range of powers contained in article 29 of the Act. Its legal representative is the president, whose serves for a two-year term. Board members remain in office for a period of six years, renewable once. To ensure that Board members can serve independently and autonomously and that they have the necessary technical expertise to perform their functions, the Act seeks to balance the appointment and removal process, eligibility criteria, incompatibility for office, resources, term length, remuneration and oversight of the Board's activities.

(a) *Independence, autonomy and technical expertise*

69. As regards the independence, autonomy and technical expertise of Board members, the Act contains a set of provisions intended to ensure that these core guiding principles of the competition policy are respected.
70. Article 15 (2) of the Act refers explicitly to independence and autonomy, stating that

CONACOM, “in carrying out its activities and fulfilling its purpose, shall enjoy organizational and functional autonomy, as well as full independence, and shall have its own assets.” However, this autonomy should be weighed against the fact that CONACOM, as a decentralized public entity with its own legal personality and assets, must also report to the executive branch through the Ministry of Industry and Trade.

71. Still with regard to independence and autonomy, it is worth explaining the appointment process for the Board members, who must have a degree in law, economics, accounting or business administration. Although the three Board members are appointed by the executive branch from three shortlists provided by the Ministry of Industry and Trade, these shortlists are drawn up following a merit-based competitive selection process carried out by the Evaluation Board, and the process serves to guarantee the independence and professional expertise of the candidates. Under the Act, it is not necessary, in principle, that all three members represent different professions; it is possible for the Board of Directors to be composed of three individuals from the same discipline. However, article 101 of the Regulations has been interpreted more restrictively, to the effect that every member must come from a different profession unless a minimum number of applicants is not reached, in which case the process may be opened to other professions. In practice, the Evaluation Board usually elects one member from each discipline. This interpretive discrepancy should be resolved so that the letter of the Act prevails and no limits are placed on the appointment of Board members.
72. In addition, the Act stipulates that the Evaluation Board should appoint an alternate in the person of the shortlisted candidate with the best assessment. The alternate would replace a regular member in the event of his or her absence, incapacity, resignation, removal or death or should the regular member be under investigation or disqualified. Despite the need for a body such as CONACOM to have an alternate director, the Act does not provide for the necessary resources to make this possible. Moreover, it is not clear whether the restrictions on the conduct of CONACOM officials contained in article 66 of the Regulations apply to the Board members. It would be problematic if they do because this would reduce the scope of the Board members’ work even though they do not have permanent, paid employment at the Commission.
73. As confirmed through the interviews conducted in preparation of this report, the private sector plays a significant role in the Evaluation Board. Indeed, four of its eight members must come from the production, industry, retail and services sectors, while the other four must represent the public sector. Ideally, the members of the Evaluation Board should not have any pending cases or investigations before CONACOM. The Evaluation Board must assess the background of the candidates and whether they meet the requirements in article 18 of the Act, in particular, whether they are suitable and have the capacity for and have experience in antitrust matters.
74. The articles on the autonomy, independence and technical expertise of members of the Board of Directors are complemented by articles regulating incompatibility for office (art. 19), remuneration (art. 23) and, very importantly, the grounds for removal.
75. Regarding incompatibilities for office, Board members must dedicate themselves exclusively to the work of the CONACOM and are not permitted to serve as directors, managers or employees of entities within the Act’s scope. Furthermore, under article 66 of the Regulations, members of the Board of Directors and the Director of Investigations may not publicly or privately defend cases before CONACOM for one year after leaving office. This provision should be revised to establish that members of the Board of Directors and the Director of Investigations should receive the equivalent of their remuneration for the duration of the one-year disqualification, provided that they do not have paid employment.
76. The remuneration to which they are entitled – a per diem equivalent to that of the ministers in the executive branch – seems reasonable. Concerning the grounds for termination of the director’s position, it is worth considering article 21 (c) of the Act, which provides for the

possibility of dismissal by executive decree for poor performance (the various scenarios are envisaged in article 52 of the Regulations), a process that begins with an administrative investigation by the Legal Counsel of the Office of the President. This provision could undermine the independence of the members of the Board of Directors due to pressure from the executive branch. It would be appropriate, therefore, for another body, such as the Supreme Court, to lead the investigation.

77. Notwithstanding the above, and however independent and autonomous a competition authority may be, it is not exempt from accountability. In this regard, article 28 of the Act provides for a system of oversight by the executive and legislative branches and the private sector. CONACOM is required to publish its annual report and to send copies to the Ministry of Industry and Trade, the Ministry of Finance and the manufacturing, industry, trade and services unions, in other words the entities that make up the Evaluation Board. It must also present its report at a public hearing. In addition, the President of the Board of Directors must appear before the Congressional Economy and Finance Committees at least once a year to account for his or her performance.

(b) Powers

78. The Commission's powers and duties, particularly those of its Board of Directors, are set forth in article 29 of the Act. Based on what can be gleaned from this article, CONACOM has been accorded the broadest possible powers to enforce the law in its two areas of action, namely, the protection of competition and competition advocacy. Furthermore, article 48 of the Regulations sets forth the body's administrative functions.

79. In terms of the defence of competition, the authority has the following powers and attributions:

- To resolve and rule on matters within the scope of the Act. This most basic power involves issuing definitive resolutions or undertakings to cease in cases against economic agents who have engaged in anticompetitive practices (illicit agreements

and abuses of dominant position) and authorizing, conditionally authorizing or rejecting concentrations submitted to it for approval.

- To conduct the relevant investigations requested by the Directorate for Investigations. This power derives from the previous one.
- To assess and approve, reject or conditionally approve concentrations.
- To follow up on its decisions and resolutions to ensure that they are effectively implemented.
- To issue precautionary measures and sanction non-compliance with the Act and Regulations.
- To carry out sector-specific studies.
- To prohibit and sanction conduct that is incompatible with the obligations of Paraguay under the international treaties, conventions and agreements that it has acceded to or ratified. This special power is established in article 29 (b).

80. Regarding competition promotion and advocacy, the Board of Directors is accorded a series of powers and duties to facilitate efforts to raise awareness of the principles of free competition at all levels, namely, among public authorities, the media, consumers and entrepreneurs. This is not surprising since CONACOM is a new competition authority. Among those powers, the following are particularly noteworthy:

- Propose competition guidelines within the framework of the Government's economic policy (art. 29 (c)).
- Inform and advise the executive and legislative branches on competition matters. This is the most important dimension of competition advocacy because of the impact that incorporating the principles underpinning free competition can have on the bills and other lower-ranking provisions affecting economic activities. This power relates directly to those established in article 29 (n) and (ñ), whereby CONACOM can, in a broad and unrestricted manner, prepare reports, make

recommendations and develop draft antitrust legislation, particularly draft regulations.

- Reply to queries. These queries are not intended to obtain a binding pronouncement from CONACOM on whether a fact, act or agreement complies with the Act and Regulations but, rather, they are specific queries that are usually made by research professionals concerning the way in which the Commission interprets the Act and Regulations. According to the information provided by CONACOM, this type of query has been made mainly in the area of concentrations; for example, it has been asked: (i) whether, under article 12 of the Act, internal restructurings of companies should be treated as concentrations; (ii) when the concentration notification period begins (art. 14 of the Act); (iii) whether it is possible to effect a concentration before obtaining authorization from CONACOM (art. 14 of the Act); and (iv) whether it is necessary or mandatory to notify the implementing authority of a concentration when the companies do not have information on market share or when there are doubts as to what the relevant market is. Under article 71 of the Regulations, queries must be reasoned and CONACOM must reply within 15 days of their receipt. According to the Board of Directors, the concept of “reasoned” should be refined and better explained in the Regulations, as the provision has been interpreted quite flexibly to date, leading to all queries being processed.
- Coordinate with sector regulators. This basically involves making recommendations to regulators to promote competition in the relevant economic sector.

3.2.3 Directorate for Investigations

81. In the defence of competition, the authority or authorities have two fundamental functions: to investigate breaches of or conduct that restricts this legal right and to impose sanctions or take appropriate action. Furthermore, defending competition also includes controlling concentrations that pose a risk to free competition. The term “conduct” is used in the broad sense to include unlawful agreements,

unlawful unilateral acts and breaches stemming from economic concentrations, such as the failure to notify the implementing authority of a concentration that exceeds the thresholds, concentrations that contravene the authority’s pronouncements and non-compliance with the conditions or remedies imposed.

82. From this perspective, and considering that competition policy is chiefly enforced by imposing sanctions in the event of breaches, it is essential to separate the investigative and decision-making functions in order to guarantee due process for those under investigation. This separation of functions can be done: (i) institutionally, by creating two independent authorities, as is the case of the systems in South Africa, Chile and Canada, or (ii) functionally, by grouping both tasks within the same body but with a clear division of powers and duties between the two departments or divisions. In the latter case, measures must be taken to ensure that the entity responsible for adopting final decisions does not interfere in any way in the matters taken up by the investigation division.
83. Paraguay has opted for the latter model. As mentioned above, along with the Board of Directors, article 30 of the Act establishes the Directorate for Investigations, headed by a director. Although administratively the Directorate comes under the CONACOM Board of Directors, legislators were mindful to safeguard the Directorate’s independence, autonomy and technical expertise by making the Evaluation Board, not the Board of Directors, responsible for the appointment and replacement of the Directorate’s members.
84. Regarding the Directorate’s functions, article 30 (a) of the Act provides that, in order to conduct an investigation, the Director must request authorization from the Commission. This could undermine the autonomy of the person investigating anticompetitive conduct; therefore, it is advisable that the Directorate notify the Board of Directors only when an investigation has been opened.
85. A more detailed description of the powers of the Directorate for Investigations is contained in article 54 of the Act and article 57 of the Regulations. These powers include to:

- a. Dismiss complaints that do not satisfy the requisite formalities or that are manifestly inadmissible.
- b. Require the Board of Directors to initiate an investigation ex officio or upon complaint by an interested party.
- c. Propose to the Board of Directors the adoption of precautionary measures.
- d. Conduct investigations.
- e. Following the investigation, recommend to the Board of Directors the dismissal of the complaint, the charging of the accused and, where applicable, the imposition of sanctions.
- f. Consider and rule on undertakings to cease acts that under investigation.
- g. Prepare and present market studies to the Board of Directors.
- h. Conduct investigations as part of the concentration notification procedure, by carrying out enquiries and requesting information from the interested parties or third parties.

3.3. Investigative procedures and powers

86. The Act contains extensive provisions regulating the procedure for the application of sanctions (title III) but only one article regulating the procedure for giving notification of concentration operations (art. 14). The latter procedure is, however, covered in detail in the Regulations. Both are discussed below.

3.3.1 Procedure for the application of sanctions

87. Title III, chapter 1, establishes certain rules that are common to the procedure, such as the principle of extensive application, the supplementary application of the Code of Civil Procedure, time limits, incompatibilities, access to the file, auxiliary investigators, notifications, duty of secrecy and treatment of confidential information.
88. It is worth going into further detail about the duty of secrecy and confidentiality due to their importance for competition policy. Competition

authorities must assess sensitive corporate information on a daily basis; therefore, it is essential that there be rules to ensure that officials safeguard the confidentiality of the information they handle in the exercise of their functions and to establish the right of the businesses under investigation to request that documents containing strategic information are kept confidential.

89. Both of these concerns are adequately addressed in the Act. Officials of CONACOM are bound by an obligation of confidentiality, and documents can be declared partially or totally confidential, ex officio or at a party's request, when disclosing their contents could significantly impair their owner's competitive development. The Act enumerates the criteria for determining when information is confidential. Requests for documents to be declared confidential must be precise, limited and accompanied by a non-confidential summary.
90. Chapter 2 establishes the rules on the initiation of the procedure. The procedure can be initiated ex officio or on receipt of a complaint from interested parties, who may choose to remain anonymous. As explained above, the Directorate for Investigations receives complaints, but it is the Board of Directors that authorizes investigations, including ex officio.
91. There are two stages in the sanctioning procedure: the investigation stage and the disciplinary process.
- (a) *Investigation stage*
92. The Act sets a period of 90 days for the investigation stage, which the Board of Directors can extend once for a further 90 days. While investigations should certainly be conducted efficiently and expeditiously, occasionally, the complexity of the conduct under investigation or the market that it affects warrants a longer time limit.²⁴
93. Investigations may be initiated ex officio or by complaint, which must comply with the requirements set forth in article 83 of the

²⁴ In Spain, for example, the investigation may last up to a year from the date of the initiation agreement. The maximum permitted period is a year and a half from the agreement to initiate a sanctioning procedure (art. 28 (4) of the Regulations implementing the Act on the Protection of Competition).

- Regulations. The Act provides for the possibility for investigated parties to intervene in the investigation and empowers the implementing authority to terminate an investigation by agreement or by an undertaking to cease the conduct. Regarding termination by agreement, the rule could cause confusion, as it requires the unlawful act to be under way and cannot be applied when the conduct has ended. As for undertakings to cease, changes in conduct by those under investigation are validated by the Board of Directors and do not imply an acknowledgement that their conduct was unlawful. Three requirements must be met for an investigation to be terminated through an undertaking to cease: (i) an end to the conduct; (ii) the establishment of a daily fine in the event of non-compliance with the undertaking; and (iii) periodic reporting to the implementing authority. Finally, article 88 of the Regulations should be clarified because it is contradictory to require termination agreements to include an undertaking to cease given that such undertakings do not entail recognition that the conduct was unlawful.
94. The powers of the Directorate for Investigations during this stage are provided for in article 54 of the Act. Apart from the classic functions that a competition authority must have – to issue summonses and request information from public institutions and individuals – the Act includes a special provision enabling the implementing authority to outsource some of its tasks, such as the identification of the economic and legal aspects of an investigation, to specialized consulting firms. This special power is understood to apply in the context of the authority's current budgetary and human resources restrictions.
95. Article 75 of the Regulations enumerates a series of investigative powers that can be exercised either by the Board of Directors or the Directorate for Investigations, as appropriate. Among these is the power to carry out inspections, with or without prior notice, including the search of closed commercial or industrial facilities. Such searches require judicial authorization, but it is not mentioned by which court. It would be advisable, therefore, for the Act to establish the court, procedure and requirements for such judicial authorization. While this power is highly relevant in the case of investigations into cartels, it should be complemented by immunity and leniency programmes.
96. Indeed, global experience has shown that the best way to deter, detect and investigate a cartel is through such programmes. They consist of benefits for cartel participants who cooperate with the implementing authority by providing information on the unlawful conduct. These benefits may take the shape of an exemption from or reduction of the fine or prison term. The right incentives, in other words transparency and the threat of harsh penalties and the exercise of intrusive powers, are necessary for these programmes to function optimally.
97. At the end of the investigation stage, the Act provides for two possibilities: either the case is dismissed or charges are formulated. These charges are set out in an expert report that the Directorate for Investigations then submits to the Board of Directors.
- (b) *Disciplinary process*
98. The disciplinary process begins with the formulation of charges by the Directorate for Investigations. The accused party is notified of the charges and provided with all supporting background information, and then has 18 days to put forward a defence and 40 days to submit evidence. The Act does not regulate the manner in which the evidence is produced.
99. This stage includes pleadings, and the Board of Directors has a maximum of 40 days from the date on which the pleadings were filed or the deadline for their submission expired to issue a final decision. In its decision, the Board finds in favour or against the accused; in the latter case, it may adopt one or more of the measures set forth in article 59 (d) of the Act, in particular it may impose fines, order the cessation of the conduct or impose conditions or obligations.
100. The Act is extremely stringent when it comes to compliance with the aforementioned 40-day time limit: if the Board of Directors does not issue a decision before the deadline, the “positive silence” rule, whereby the Board’s silence is deemed to constitute a dismissal of the complaint, applies.

A comparison of past experience²⁵ shows that, for complex investigations, the time required far exceeded this 40-day period; it would therefore be helpful to extend it.

101. At any point in this process, the Directorate for Investigations may propose to the Board of Directors any precautionary measures necessary to ensure the effectiveness of the final decision. However, article 60 of the Act presents some problems that should be rectified. First, it requires the applicant to provide sufficient financial guarantees, which should not apply if the complainant is the Director of Investigations. Secondly, the Act enables third parties who are harmed by the precautionary measure to put up a counter-guarantee, leaving the measure without effect. This is inadvisable, as precautionary measures are often necessary in competition proceedings and cannot be reduced to a purely monetary issue. An example of a precautionary measure could be to request the suspension of a tendering process, which could then be resumed through the payment of a sum of money, thus maintaining the risks to competition.

(c) *Sanctions*

102. The system of sanctions is set forth in article 62 et seq. of the Act and article 90 et seq. of the Regulations. The main sanctions envisaged are fines and the annulment of acts or agreements. Sanctions may be imposed not only on the offending legal entity but also on the directors and senior executives of the legal entity and, broadly, anyone involved in the unlawful conduct.

103. The amount of the fine is in line with international experience and appears to be sufficiently dissuasive. It cannot exceed the equivalent of 150 per cent of the profit obtained from the unlawful conduct, or 20 per cent of the sales of the products subject to the practice in the last 12 months. Under no circumstances can the fine be less than the benefit obtained. CONACOM expressed concern about the fine being tied to the percentage of sales, arguing that the amount should not apply only to the products involved in the practice but to everything produced by the

offender. There is also the problem of applying the fines to a trade association, since they do not make a profit or sell products. Accordingly, when a trade association is found to be in breach of competition law, the fine is a fixed amount calculated in minimum wages. In addition, its members can be held jointly and severally liable. Finally, consideration should be given to enabling the implementing authority to order the modification or dissolution of trade associations.

104. The Act enumerates the most important factors to be taken into account when setting a fine, including the extent and duration of the restriction, the effects on competitors and consumers, and recidivism. However, it establishes that in no circumstances can the imposition of a fine lead to the ruin of the parties under investigation.

105. Sanctions are subject only to appeals for reconsideration or for reinstatement, which must be filed with CONACOM within 10 days. In the case of decisions issued by the Board of Directors, an administrative action may be brought before the Court of Auditors.

106. The Act does not include the sanction of disqualification from contracts awarded by State bodies and public companies, nor does it ban awarding oneself concessions. This sanction can be extremely dissuasive in cases of collusive public bidding in highly concentrated markets such as asphalt, cement or government tenders for medicines, so it would be advisable to introduce time-barred disqualification.

3.3.2 Procedure for notification of a concentration operation

107. The notification and registration procedure for concentration operations is set forth in article 14 of the Act and is detailed in article 15 et seq. of the Regulations. Despite extensive regulations, it is not clear whether the operation in question should be suspended until the authority issues its decision. This should be clarified in the Act. Once notification has been made, concentration operations should be suspended, and sanctions should be envisaged for the realization of operations while authorization is pending.

108. Two alternative notification thresholds are established. The first is based on the market share that the company resulting from the

²⁵ For example, in Spain, a period of six months is provided for a decision to be taken (art. 45 (5) of the Regulations implementing the Act on the Protection of Competition).

- concentration would obtain (45 per cent). The second is based on the global sales of the parties to the operation in the last accounting period (100,000 minimum monthly salaries,²⁶ equivalent to approximately US\$ 35 million). The well-known problems encountered in determining market share have led to the latter criterion being used more frequently. In the event of failure to give notice of a concentration in which these thresholds are exceeded, the Directorate for Investigations must inform the interested parties that they have a maximum of 20 days within which to submit the required notification.
109. All matters relating to the background information to be provided by the notifying parties are covered in the Regulations. Notifying parties may request that certain information that might affect their competitive development be declared confidential, in which case they must include a public summary of that information.
110. There are two phases to the notification and registration procedure, and a final decision must be issued within a maximum of 90 days. In the first phase, which should not exceed 30 days, CONACOM may: (i) declare the request inadmissible; (ii) authorize the operation provided it is evident that it does not create a significant obstacle to effective competition; or (iii) proceed to the second phase if further analysis is required.
111. Article 23 et seq. of the Regulations sets forth the procedure for evaluating a concentration operation. The evaluation includes an assessment of risks – a concentration incompatible with the market – and of productive and dynamic efficiencies, to be proved by the notifying companies. Where the efficiencies do not offset the risks generated by concentration, the operation must be rejected or authorized with conditions.
112. Under article 28 of the Regulations, the notifying parties have a chance to propose risk mitigation measures when a concentration operation turns out to be incompatible with the market. Furthermore, article 30 sets forth in detail the structural and behavioural conditions that CONACOM can impose in order to bring an operation into line with the law.
113. The “positive silence” rule also applies in this matter. In other words, if the Board of Directors does not issue the corresponding decision within 60 days, the operation will be deemed authorized. It is worth spending some time on this deadline. Although the Regulations allow for the period to begin only once the implementing authority has received all the information it requires, the total time frame of 90 days is considered insufficient in the case of complex transactions.
114. The Regulations also establish a series of non-compliance-related offences to which concentration processes might give rise. Specifically, the following acts constitute offences: (i) failure to give notification of an operation; (ii) providing false information; (iii) failure to respect compliance terms and conditions. In addition to constituting offences, these acts result in the annulment of the concentration operation. Since these are offences, it would be appropriate for them to be included in the Act.

3.4. Regulated sectors

3.4.1 Interaction with sector regulators

115. One of the most salient aspects of the enforcement of competition policy is the relationship between the competition authority and the public agencies responsible for regulating and overseeing certain sectors of the economy, as well as the consumer rights protection agency. This is because, although sectoral regulations and consumer rights legislation seek to correct different market failures, these State interventions and competition policy intersect.
116. For example, there are mechanisms for coordination with the authorities responsible for regulating the telecommunications, electricity, fuel, transportation, banking and financial markets, among others. The relevant provisions of the Act and Regulations are described below and will be followed by descriptions of how coordination has been handled.
117. First, under article 29 (f) of the Act, one of the Commission’s powers is to coordinate with sector regulators. Moreover, as established in article 61 of the Act specifically dedicated to this topic, as a general principle, not only do the

²⁶ The legal minimum wage is G2,550,307, or US\$ 344.

regulatory bodies have a duty to cooperate with CONACOM but all public institutions are under an obligation, subject to a fine, to provide the implementing authority with any information it might require and notify it of any situation that, in their opinion, could be detrimental to free competition. Article 78 of the Regulations establishes an exception to this duty, namely when the information is protected by banking, tax, commercial, industrial or stock market secrecy and is thus governed by its own legislation. Similarly, the authorities may request a non-binding opinion from CONACOM when necessary to resolve a dispute in judicial and administrative proceedings.

118. In practice, this duty of collaboration and coordination manifests in several areas. For instance, under article 11 of the Regulations, when evaluating concentration operations, the regulatory authorities must report the share of a given product or service provided by a natural or legal person subject to their jurisdiction in the national market or in the geographic markets defined within the national market. Similarly, when an investigation involves a regulated market, article 80 of the Regulations requires CONACOM to request from the relevant regulator a technical report on the products or services concerned.

3.4.2 Sector-specific studies

119. Closely related to this necessary coordination and collaboration with the regulatory bodies are the implementing authority's power and duty to issue sector-specific studies. On this point, it is worth noting that this kind of study can have a significant impact on the defence and promotion of competition. Sector-specific studies do not entail the opening of a formal investigation or the formulation of charges. Furthermore, a significant share of the information needed for their preparation is provided by the competent public bodies, thereby facilitating the authority's work.
120. This power is expressly provided for in article 29 (h) of the Act. More specifically, both the Director of Investigations (art. 57 (m) of the Regulations) and the Legal, Economic and Research Department (art. 61 (f) of the Regulations) can conduct these studies and submit them to the

Board of Directors for approval (art. 57 (m) of the Regulations). The main purpose of these studies is to determine the degree of competition in a market with low competitive intensity. When practices restricting free competition are detected, they can lead to legislative proposals and to the opening of ex officio investigations. Notwithstanding the foregoing, neither the Act nor the Regulations are clear about the powers that the implementing authority can exercise or the measures it can take to collect information from individuals; therefore, a rule in that regard should be included.

3.5. Other legal aspects of interest

3.5.1 Extraterritorial effects

121. As stated above, the Act applies to individuals and legal entities of Paraguayan and foreign nationality domiciled in Paraguay or abroad. As to the conducts covered by its provisions, the most important criterion is that they should have an effect on competition in the national territory and can thus be dealt with by CONACOM. Article 3 (2) expressly states that those who develop or engage in economic activities outside Paraguay are subject to the provisions of the Act, to the extent that their activities produce effects in that country.
122. In terms of the application of this provision in practice, according to the information provided by CONACOM, there have been no cases of conduct committed outside the country with effects in Paraguay. Neither the Act nor the Regulations explicitly indicate whether the implementing authority must be notified of legal steps taken abroad in relation to a concentration operation before it has legal or material effects in Paraguay. We assume, however, that the rule referred to in the preceding paragraph is the one that is followed, as CONACOM has handled cases of concentration operations conducted abroad with effects in Paraguay.
123. Without prejudice to the foregoing, as recommended internationally, the most efficient way to conduct an investigation involving foreign companies is through effective coordination and cooperation with other agencies. To date, CONACOM has signed 20 international agreements, 16 of which are

technical cooperation agreements concluded primarily with the objective of engaging in technical cooperation activities and exchanging experience of applying competition law and promoting competition policy in the parties' respective jurisdictions. This type of agreement provides a space for exchanging information that may be useful to the implementing authority in the conduct of its investigations, as long as the information is public and is exchanged in keeping with each country's restrictions, especially in terms of confidentiality. Information has been exchanged only once under these agreements, with the Costa Rican competition authority.

3.5.2 Compensation for damage

124. Anticompetitive practices undermine the legal right of free competition and are therefore subject to sanctions, mainly fines and other measures, although in some countries, hard-core cartels carry the sanction of imprisonment.
125. However, it should be borne in mind that the ultimate goal of competition policies is to correct market failures and market power imbalances with a view to promoting assignative efficiency and, thus, consumer welfare. Consequently, the legal framework for the protection of competition must establish rules enabling consumers to seek compensation for damage caused by conduct that restricts free competition. This is the only way to close the circle.
126. The Act includes provision for such situations in article 64. The following elements should be

taken into consideration. First, it is the judiciary – in general, the civil justice system – that has jurisdiction over such suits, in application of the Code of Civil Procedure. Secondly, it can be inferred from the Act that it is not necessary to prove the unlawfulness of the conduct, since the conduct must first have been declared to be an offence by CONACOM in a final, enforceable decision. Civil proceedings are thus limited to assessing the evidence of damage and the causal relationship between this damage and the offending act. Thirdly, CONACOM may be asked to issue an *amicus curiae* brief on the restrictive practice and on the appropriateness and amount of compensation.

3.5.3 Statute of limitations

127. The Act establishes a four-year limitation period for offences and petitions for annulment or compensation for damage or injury. It would be desirable for a distinction to be made between the statute of limitations applicable to public proceedings brought to penalize unlawful conduct and the period applicable to private actions brought to claim compensation, since the latter can only be initiated once CONACOM has issued a binding decision.
128. This limitation period starts on the day the infringement was committed and, in the case of continuous or permanent infringements, such as cartels, on the day the infringement ceases. The statute of limitations can be suspended by CONACOM, with formal notification of the party concerned.

4. ENFORCEMENT OF THE ACT ON THE PROTECTION OF COMPETITION

129. CONACOM is a very young institution. The Act establishing it is dated 23 June 2013, while its implementation began in 2015. In the first years, CONACOM focused its efforts on establishing its internal organization, raising awareness of relevant legislation and promoting competition. In addition, since a notification procedure for economic concentration operations has been set up, its investigations have focused mainly on this area. It should be noted that, due to the lack of human and financial resources in the Directorate for Investigations, officials are generally assigned to investigate one case at a time, whether the case concerns collusion, abuse of dominant position or the analysis of a merger, which explains the low number of cases involving restrictive agreements or abuses of dominant position that have been processed.

4.1. Restrictive agreements

130. Agreements between competitors and concerted practices aimed at fixing purchase or sale prices, limiting production, allocating market zones or quotas, or influencing the outcome of tendering processes are the most serious anticompetitive conducts. Most authorities usually prioritize the investigation of these cases, for which they have the necessary powers to collect direct evidence through leniency programmes and take intrusive measures, such as searches, the seizure of documents and the interception of communications.

131. However, as explained above, in the case of Paraguay there is no leniency programme to encourage self-reporting, hence the very few investigations into restrictive agreements. Two relevant cases can be found below.

Case involving a tender for medical supplies

The Directorate for Investigations ordered an investigation into alleged collusion between two companies, Eurotec S.A. and Imedic S.A., which, between 2018 and 2020, allegedly entered into an agreement to influence the outcome of eight public tenders related to various drugs, including special supplies for the treatment of COVID-19. After the investigation, a disciplinary process was initiated, with the Director of Investigations submitting to the CONACOM Board of Directors an indictment for entry into a collusive agreement.

The Board of Directors eventually dismissed the charge recommended by the Director of Investigations, invoking a rather formal argument, based on article 2 (4) of the Act, according to which “the exercise of a right, power or special prerogative granted or recognized by law shall not be considered as anticompetitive conduct or abuse of a dominant position”. The accused companies pointed out that, since the Public Procurement Act prohibits companies that share a director or partner, which was their case, from submitting more than one bid, they had to coordinate to avoid being disqualified. The final decision notwithstanding, the Board of Directors’ opinion led to the following noteworthy guidelines:

- (i) First, it established the sound doctrine whereby hard-core cartels (prices, production and bids) are considered, by their purpose, as unlawful and therefore it is unnecessary to prove their effects. However, under article 2 (3) and the final paragraph of article 8, efficiencies can be authorized and therefore this type of conduct is not prohibited per se.

- (ii) Secondly, even though it eventually dismissed the indictment, the Board of Directors found that coordination could be confirmed through indirect evidence. It cites the following evidence to prove coordination: (a) the fact that the companies have shareholders in common and kinship ties; (b) the fact that the companies' premises are in the same building and that they share items, including telephone numbers; (c) the identity of the individuals who withdrew the bid bond policies; (d) the numbers of the correlative policies and the numbers in the bid entry table; and (e) the fact that there were no overlapping bids in the tendering processes under investigation.
- (iii) Thirdly, following this case, the Board of Directors submitted a technical report to Congress, highlighting the problems with the Public Procurement Act and suggesting that it should be made clear that only companies that share a controller are banned from making joint bids.

No appeal against the decision of the Board of Directors of CONACOM was filed with the Court of Auditors.

Case involving advertisements by the Fuels Trade Association

Another investigation ordered by CONACOM into a violation of article 8 of the Act related to public advertisements produced by the Cámara de Distribuidoras Paraguayas de Combustibles, a trade association made up of 10 fuel wholesalers. These advertisements contained recommended sale prices for fuels.

In this case, the Board of Directors admitted the charge brought by the Directorate for Investigations but, owing to the impossibility of calculating the amount of fines for the conduct, it ordered remedial measures instead. The trade association was instructed to issue a press release stating that publishing an advertisement of this kind in a national newspaper was prohibited and to produce 1,000 copies of a leaflet containing information on the applicable legal provisions. In addition, a fine of one monthly minimum wage was established for each day by which compliance with the measures was delayed.

As in the case of the medical supplies, the Board of Directors established relevant jurisprudence in this case. First, it determined that the prohibition under article 8 of the Act applied to all forms of coordination between companies, including collective recommendations. Secondly, it reiterated that pricing practices, including recommendations, are, by their purpose, anticompetitive. Thirdly, this type of public advertisement seeks to reduce the uncertainty and competitive tension that should prevail in a market. Finally, it dismissed the argument of the trade association representatives that, inter alia, their constitutional right to free speech was being curtailed.

4.2. Abuse of dominant position

132. Although the Paraguayan economy is small and many markets, including the pharmaceutical, fuels, laboratory, payment method, shipping, banking and supermarket sectors, are highly

concentrated, CONACOM has not handled many cases of abuse of dominant position. The most important such case concerned the rights to broadcast national football matches on television.

Teledeportes Paraguay S.A.

In 2020, the Directorate for Investigations accused Teledeportes Paraguay S.A., a company belonging to the Millicom group, of having abused its dominant position in the wholesale signal distribution market, including the live broadcasting of football matches, by refusing to respond to requests from AMX Paraguay S.A. and Tuves Paraguay S.A. about the licensing of rights to broadcast Paraguayan first division football matches.

According to the Directorate for Investigations, this conduct is expressly prohibited under article 9 (3) of the Act, concerning the unjustified refusal to satisfy requests to purchase products or services, and that, as a result, the accused company should be found guilty. Moreover, it considered that, in the case of refusals to contract, there were two markets to be assessed: upstream, the wholesale distribution of signals and, downstream, the national subscription television market. Teledeportes Paraguay S.A. was demonstrated to be dominant in the upstream market.

The Board of Directors dismissed the charge because the complainant not only failed to prove that the input – Paraguayan football – was essential for the companies in the downstream market to compete effectively, but did not even put forward that argument.

The decision of the CONACOM Board of Directors was not subject to the administrative action referred to in article 68 of the Act. Nevertheless, both the Directorate for Investigations and AMX Paraguay S.A. filed applications for reconsideration of the acquittal. The Board of Directors considered that the Directorate for Investigations did not have either the standing or the authority to file the application; the other two applications were also rejected.

4.3. Concentrations

133. Investigations into economic concentrations have accounted for most of the Commission's workload. This was to be expected, as it is a consequence of having a mandatory reporting system in a country with a small economy such as Paraguay.
134. Between November 2015, when the Commission first began operating, and the date of completion of this report, CONACOM received 47 notifications of concentrations, all but three of which proceeded to the second phase of the process. Although some of these operations could have been approved in phase one, this did not happen, basically because, due to the lack of a flexible, streamlined procedure, the Directorate for Investigations takes the full statutory period (90 days) to evaluate this type of action.
135. In keeping with the trend at the international level, of the operations reported up to January 2023, 32 were approved outright, while 7 were approved with remedies and 1 was rejected. In one case, the notifying company failed to provide all the required information, so the notification was considered null. A new notification was given but was declared inadmissible for failure to meet the thresholds for mandatory notification. In addition, the notifying companies of two operations withdrew during the evaluation, and three other notifications are pending. There are currently five concentration cases pending before the Court of Auditors, of which four relate to breaches of conditions. The fifth and most significant is an administrative suit brought by the company Frigomerc against the decision of CONACOM rejecting its concentration notification.
136. The concentration operations that CONACOM has ruled on have affected markets that are extremely important for the country's economy. In the financial sector, notifications have been filed regarding six concentrations, most notably the acquisition of Banco BBVA by the GNB Group. Another market that has been affected is the fuels market, where there have been important acquisitions, for instance, the acquisition of Petrobas by the Copetrol Group. CONACOM has also assessed operations by large multinationals in the agriculture, vegetable seeds and agrochemicals sectors, including

the acquisition of Monsanto by Bayer and the acquisition of Nidera shares by Syngenta. Other markets that have been involved in multiple cases are telecommunications, with four reported operations, and beef processing plants, with three.

137. Descriptions of the sole operation to be rejected by CONACOM and of others that were approved with conditions can be found below.

Frigomerc S.A. with Frigorífico Norte S.A.

The operation that CONACOM refused to authorize involved an agreement between Frigomerc S.A., a subsidiary of the multinational Athena Foods and the largest beef producer in Paraguay, which has four cold storage plants nationwide and a distribution centre, and Frigorífico Norte S.A. (Frigonorte). Under the terms of the agreement, Frigonorte undertook to slaughter, process and package 12,000 head of cattle per month at its cold storage plant on behalf of Frigomerc S.A. The term of the agreement was one year, renewable for the same duration upon expiration.

The analysis of the concentration focused on two markets that would be affected by the operation. The first was the market for fresh meat sales, in which Frigomerc S.A. was the market leader with a share of around 30 per cent. The other was the market for the purchase of cattle for slaughter, in which Frigomerc S.A. had a 40 per cent share, which was far greater than that of its closest competitors (20 per cent for the second and 10 per cent for the others). In the latter market, the concentration ex post would have given Frigomerc S.A. a market share of around 50 per cent, since Frigonorte's share of the market was around 8 per cent. Thus, the market would have gone from being moderately to highly concentrated, with a result of 2,750 points and a delta of 292. Market shares related to the slaughter capacity of the authorized meat processing plants were also analysed. If Frigonorte's production of 12,000 head of cattle were added to the production of Frigomerc S.A., Frigomerc S.A. would have 47.36 per cent of the market. For CONACOM, the excess unused capacity in the market was an indication that the purpose of the contract was to block other actors' access to the market, making it impossible for third parties to contract Frigonorte's slaughter services.

In view of these risks and of the fact that the notifying companies failed to demonstrate any efficiencies to counterbalance them, CONACOM concluded that the operation would reinforce the dominant position of Frigomerc S.A. in the market for the purchase of cattle for slaughter, which made the operation incompatible with the Act. Accordingly, it rejected the operation, a decision that, as mentioned above, was challenged before the Court of Auditors.

Acquisitions by Millicom Group (TIGO)

A market that has been the subject of concentration analyses is that of subscription television, Internet and data transmission services. Two regional operations were conducted by Servicios y Productos Multimedia S.A., part of the Millicom Group.

In the first operation, Servicios y Productos Multimedia S.A. acquired part of the assets of the regional company Cable TV Paraná, which provided the aforementioned services in the districts of Presidente Franco, Ciudad del Este and Hernandarias. The assets involved in the transaction included the licences issued by the National Telecommunications Commission, the network infrastructure and the customer portfolio. The operation was eventually authorized with the following conduct conditions: (i) inform the seller's clients of the operation and expressly inform them of the possibility of changing operators, free of charge; (ii) apply the same commercial policy, including a ban on undue and unreasonable price hikes, in the districts concerned as in the rest of the country; (iii) replace the existing network infrastructure with newer, more technologically advanced, higher-capacity infrastructure; and (iv) a ban on the sale of bundled television and Internet services in the districts concerned except where consented to by the consumers.

In the second concentration, in the same manner as the previous operation, Servicios y Productos Multimedia S.A. acquired a regional company, Cable Visión del Sur S.A., to provide subscription cable television services, Internet access and data transmission in five districts of Itapúa Department. The gains also included operating licenses, assets and customers. In this case, CONACOM determined that the relevant geographic market was national in scope. As a result of the operation, the Millicom Group would acquire 53.1 per cent of the subscription television market (Herfindahl-Hirschman Index (HHI) of 3,497 points) and 70.3 per cent of the Internet provider market (HHI of 5,375 points).

Despite the acquiring company's high market share, CONACOM determined that it would not hold a dominant position in the markets concerned. This determination was based on two considerations: first, the competitive intensity of at least two major competitors, Personal (of the Telecom Group) and Claro, both subsidiaries of multinational companies; second, the levels of household service penetration with regard to subscription television (33 per cent) and Internet (20.38 per cent). The operation was approved subject to the same conditions as in the preceding case, which had been proposed by the notifying companies.

Prosegur with Wackenhut

Another concentration operation approved subject to conditions was the acquisition of the assets of Wackenhut Paraguay S.A. by Prosegur Paraguay S.A., a subsidiary of the Spanish multinational Prosegur Group, a dominant company in the market for the storage, safekeeping, management and transportation of assets. The post-operation HHI was very high, 7,138 points with a delta of 1,070 points, thus generating high risks for competition, which were increased by an absence of competitors to provide a counterweight and by barriers to entry, including high sunk costs, economies of scale and capital investments.

Despite the high concentration indexes, the lack of competitors and the existence of barriers to entry, CONACOM approved the operation, subject to compliance with the following conditions, that last of which is structural: (i) to permit its competitors to subcontract their storage services at Prosegur facilities in Ciudad del Este, Encarnación, Concepción and Coronel Oviedo (main cities in the interior of the country); (ii) to refrain from increasing the capacity of its vaults in the country's interior; (iii) to refrain from issuing advance payments to clients in the event of damage or loss, which should be governed solely by the terms and conditions of the policy, and from giving discounts or bonuses to clients under the "overnight" scheme (conditions designed to dissipate the effects of its financial strength); and (iv) to sell three semi-armoured and three armoured trucks to its competitors within the next 45 days so that they may have preferential access to equipment in order to improve their competitiveness and competence.

Acquisitions by Copetrol

Two of the most important concentrations took place in the fuels market. In the first, the Copetrol Group acquired the Brazilian multinational Petrobras. Based on its analysis, CONACOM determined that the operation involved four markets: (a) the import, distribution and marketing of liquid fuels; (b) the import, transportation, storage, division, distribution and retail of liquefied petroleum gas (LPG); (c) the import, distribution and marketing of lubricants; and (d) the marketing of various products in convenience stores. All these markets were national in scope, except for the retail of liquid fuels in service stations, lubricants and convenience stores, which were district-level markets.

Despite its magnitude, CONACOM concluded that the operation would only give the Copetrol Group a dominant position in the marketing of fuels in service stations in six districts of the country, including Asunción. For this reason, the operation was authorized subject to compliance with the following conduct conditions: (i) to limit the number of service stations that can operate under any of the Copetrol Group's banners (Copetrol and Petrobras at the time) in each of the six districts to no more than half of the total number of service stations authorized by the regulator; (ii) in service stations operated by third parties in the districts where the Copetrol Group is dominant, to maintain retail prices and suggested retail prices equivalent to those in the surrounding cities; (iii) to offer inland and river freight services to its competitors at market prices and under conditions no less favourable than those offered to its affiliates, as well as warehousing services to third parties amounting to 15 per cent of the capacity of one of its facilities. All the conditions were imposed for a period of three years from their entry into force.

Subsequently, Copetrol enquired acquiring the assets in Paraguay of the international group Axion. On that occasion, CONACOM determined that the operation would strengthen the acquirer's dominant position in the market for the retail of liquid fuels at service stations in the city of Asunción. Accordingly, it authorized the operation under conditions very similar to the first operation, namely: (i) to limit the number of service stations operating under any of the Copetrol Group's banners (Copetrol, Petrobras or Axion) in Asunción to no more than half of the total number of service stations authorized there; (ii) in the case of service stations operated by third parties, to maintain the same retail prices and suggested retail prices in all service stations operating under any of its banners in Asunción and the greater Asunción area (the area comprising the cities surrounding the capital); (iii) to offer freight and tank storage services to its competitors at reasonable market prices. All the conditions were imposed for a period of three years from their entry into force.

4.4. Sector-specific studies

138. At the time of writing, CONACOM has prepared a report on the competitiveness of the meat sector throughout its value chain and, in particular, on exports over the last five years. The study was conducted in April 2020 at the request of two senators, Fidel Zavala Serrati and Fernando Silva Facetti (members of the National Congress). The aim of the report was to review market behaviour studies and research on the national meat sector and activities carried out within the sector, assess competitiveness, analyse regulatory obstacles to competitiveness and outline the regulatory tools available to promote competitiveness at the national level.

139. The study shows that there are 157,000 cattle owners and 13.9 million head of cattle in the country, 93 per cent of which is destined for meat production. Additionally, the estimated total slaughter grew by 7.3 per cent between 2010 and 2019. There are 17 industrial plants authorized to export, of which 16 are large establishments with a total capacity of 8,000 head per day.

5. COMPETITION ADVOCACY

140. Advocacy or promotion of free competition is the other major task of any competition authority. There are two dimensions to this task. First, the competition agency can and should be involved in economic policies that have an incidence or impact on competition policy, whether they affect the structure of markets, the behaviour of economic agents or, in general, economic performance. This means issuing recommendations, which may be binding, concerning the legislative or regulatory processes to put into effect these economic policies.
141. Secondly, competition advocacy involves disseminating the principles of free competition at all levels of society through as many activities as possible. These can include seminars and events, presentations to economic actors, university courses, a website explaining the agency's functions, meetings with the media and the publication of promotional materials.
142. CONACOM has taken various measures to advocate competition. In this connection, it has a series of powers under article 29 of the Act, including: (i) to put forward policy guidelines for the defence of competition in the framework of economic policy; (ii) to inform, advise and make proposals to the executive and legislative branches concerning matters related to free competition; (iii) to issue opinions on draft legislation affecting competition; and (iv) to present reports, recommendations and projects on competition matters.
143. In this regard, the authority issued a considerable number of opinions on bills, regulations and tender specifications and conditions for public procurement processes in the period from 2020 to 2022. CONACOM issued the opinions *ex officio*, following a complaint or in response to a request from a public authority.
144. The table below, prepared by CONACOM, contains a summary of the opinions issued during that period.

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Advocacy opinions, 2020–2022

Year	Topic	Type of law	Affected institution	Category	Origin
2020	Sanction for speculation on price of basic goods	Act	Congress	Bill	Query
2020	Margin of preference given to national industry in public procurement	Act	Congress	Bill	Query
2021	Regulation of transportation chartered via digital platforms	Ordinance	Municipality of Ciudad del Este	Bill	Ex officio
2021	Procurement process of the National Directorate of Civil Aviation (DINAC) for luggage wrapping services	Specifications	DINAC	Tender	Complaint
2021	Certification of electric products	Decree	National Institute of Technology, Standardization and Metrology	Existing legislation	Complaint
2021	Regulation of minimum distance between service stations	Ordinance	Municipality of Asunción	Bill	Query
2021	Change to methodology for setting maximum prices for medication	Act	Congress	Bill	Query
2021	Licences for the production, industrialization and marketing of medicinal cannabis	Decree	Ministry of Public Health and Social Welfare	Existing legislation	Complaint
2021	Prior licences for the import of rods	Resolution	TIM Estructuras S.A.	Existing legislation	Complaint
2021	High security requirement in trust and confidence services for electronic transactions	Act	Congress	Bill	Ex officio
2021	Setting minimum price for freight	Act	Congress	Bill	Complaint
2021	Inclusion of crackers in tenders for school meals	Specifications	Departmental governments	Tender	Complaint
2021	Change to the public procurement system	Act	Congress	Bill	Ex officio
2021	Establishment in law of a minimum distance between pharmacies	Act	Congress	Bill	
2021	Change to the conditions for the construction of homes through the National Social Housing Fund	Act	Office of the President	Bill	Query
2021	Experience requirement for the purchase of ambulances	Specifications	Ministry of Public Health and Social Welfare	Tender	Complaint
2021	High security requirement in trust and confidence services for electronic transactions	Act	Office of the President	Bill	Query
2021	Ban on hiring related companies	Act	Congress	Bill	Ex officio
2022	Setting of reference prices in tenders for enriched milk	Specifications	Ministry of Public Health and Social Welfare	Tender	Query
2022	Subsidy to Petróleos Paraguayos	Act	Congress / Office of the President	Existing legislation	Ex officio
2022	Methodology for calculating rights for the provision of Internet services	Resolution	National Telecommunications Commission	Existing legislation	Complaint

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Year	Topic	Type of law	Affected institution	Category	Origin
2022	Regulation of transportation chartered via digital platforms	Ordinance	Municipality of Capiatá	Existing legislation	Ex officio
2022	Proposed rates for the SIPAP instant payment system	Resolution	Central Bank of Paraguay	Bill	Ex officio
2022	Change to the public procurement system (Chamber of Deputies version)	Act	Congress	Bill	Ex officio
2022	Advertising of the fuels cost and billing structure	Act	Congress	Bill	Ex officio
2022	Non-intrusive inspections in ports (terms of implementation)	Act	Congress	Bill	Complaint
2022	Advertising of the fuels cost and billing structure (Senate version)	Act	Congress	Bill	Ex officio

145. These opinions are not binding and, due to the Commission's lack of resources, it has not been possible to monitor their status. To remedy this, it would be helpful for the recipient of the proposal to publicly state the reasons for not accepting it.

146. Also noteworthy in the area of competition advocacy are the framework and specific agreements that CONACOM has signed with a number of public authorities to improve inter-institutional coordination and cooperation and, as part of this process, to train these authorities in the area of free competition. As at the date of this report, CONACOM had entered into 29 agreements of this type, including with the Central Bank, the National Directorate for Intellectual Property, the Ministry for Consumer Protection, the National Telecommunications Commission, the National Securities Commission and the National Institute of Statistics, among others, of which 24 are in force.

147. As for the dissemination of competition regulations and principles, CONACOM has made presentations to trade associations (e.g. the Paraguayan Chamber of Supermarkets and the Paraguayan Industrial Union) and held lectures and round tables with university

students ("CONACOM Conversa"), as well as public seminars and closed seminars on basic concepts of competition policy for regulators, public procurement associations and journalists. In addition, CONACOM has produced videos about itself and basic competition concepts and has published academic materials on the topic. In collaboration with the University of Zurich (Zurich School of Management and Law), it has organized an essay contest on regulatory barriers to free competition. Finally, the authority has made significant efforts to report on its activities through interviews in the press.

148. Although it has carried out numerous activities, CONACOM must maintain advocacy as a priority task because several relevant actors who were interviewed during the mission to Paraguay in October 2022 stated that there was little awareness of the Commission's work and a weak culture of competition. The lack of awareness applies also to the judiciary, whose members have no specific training in competition law or practice in reviewing decisions in this field. Therefore, measures should be adopted to improve awareness among the judiciary, in particular members of the Court of Auditors.

6. REGULATED SECTORS, RELATIONS WITH REGULATORS AND OTHER PUBLIC AGENCIES

149. In the early 2000s, certain key sectors of the Paraguayan economy were liberalized and agencies were established to regulate the activities of private service providers operating in these sectors. As explained in the section concerning the legal framework on competition, the Act attaches importance to coordination between CONACOM and regulatory agencies and with public authorities in general.
150. For the purposes of this report, the main regulated sectors are described below.

6.1. Telecommunications

151. Services in this area are regulated by Act No. 642 of 1995. The authority responsible for enforcing this law is the National Telecommunications Commission (CONATEL).
152. Under Act No. 642, telecommunications services are divided into basic services, broadcasting services and other value-added services. Basic services encompass local, national long-distance and international long-distance telephone services. Value-added services include cellular mobile telephony.
153. Article 92 of Act No. 642 establishes which telecommunications services are subject to regulation. It should be noted that the rates for public services are established in accordance with a ceiling price system, while the reasonableness of the rates for other services will be subject to oversight by CONATEL. Cellular mobile telephony services operate under a free competition regime.
154. CONATEL grants licences for the provision of mobile telephony services, television broadcasting, Internet services and radio broadcasting by private companies. These renewable licences are granted for five years. When there is a shortage of spectrum, public tenders are sought and awarded to the State for the best price. For these purposes, frequency bands are divided and block limits are set.

155. The State-owned Compañía Paraguaya de Comunicaciones S.A. also participates in the cellular mobile telephony market, through its affiliate VOX, together with private companies, namely, Telecel S.A.E., AMX Paraguay S.A. and Núcleo S.A. There is a reasonable degree of competition in the mobile telephony market, and no competition-related cases have been brought to CONACOM.
156. With regard to the relationship between the competition authority and the sector regulator, in November 2017, CONACOM and CONATEL signed a framework agreement on inter-institutional cooperation that sets out the general guidelines for such cooperation. In order to achieve this general objective, it was agreed to enter into specific agreements. However, CONATEL has yet to refer any cases related to free competition to CONACOM.

6.2. Energy

157. Act No. 966, establishing the National Electricity Administration as an independent body, was adopted in 1964. Under article 5 of Act No. 966, the *raison d'être* of the Administration is to satisfy the country's electricity needs. The Administration has exclusive responsibility for the public supply of electricity in the country (art. 64) and regulates the generation, transmission, distribution and marketing of electricity.
158. Regarding the generation of electricity, Act No. 3009/2006 distinguishes between conventional energy, which is produced from hydraulic, fuels, and liquid or solid fossil resources; and non-conventional energy, produced using natural gas, solar or wind energy, biomass, fuel cells, biofuels and hydrogen. According to the 2020 energy balance report, issued by the Ministry of Public Works in August 2021, "the structure of the energy matrix can be broken down as follows: 40 per cent hydropower, 36 per cent biomass and 24 per cent oil derivatives. As of the date of this report, the largest amount of

energy is produced at the Itaipu hydroelectric dam, built jointly by the Governments of Brazil and Paraguay”.²⁷

159. The energy transmission and generation sectors have been partially liberalized and are regulated by Act No. 3009/2006. Under article 5 of Act No. 3009/2006, private parties may obtain licences to produce and transmit energy, which are granted by the National Council for the Independent Production and Transmission of Energy in accordance with the principle of equal opportunity and the procedure set forth in chapter IV of Act No. 3009/2006. Under this procedure, the regulator, the National Electricity Administration, issues a report when a licence for a transmission line is granted, while it and the Natural Gas Coordination Board issue a report when a licence for the production of energy using natural gas is granted. The electricity distribution sector is not taken into account for the purposes of concessions to private companies, as explained below.
160. The electricity distribution sector has not been liberalized, except in certain respects, and distribution services continue to be provided solely by the National Electricity Administration in keeping with the powers established in Act No. 966, in particular article 5, whereby the Administration must design, build and acquire infrastructure for the generation, transmission and distribution of electricity, as well as other necessary facilities and assets. As for exceptions, there are two areas where electricity distribution services are provided by private actors: the first is the Mennonite colonies of the central Chaco, where distribution is done by the colonies themselves, and the second is the city of Villarrica, Guairá Department, where the distributor is Compañía de Luz y Fuerza S.A.
161. According to information gathered during the visit to Paraguay, the distribution services provided by the National Electricity Administration are reportedly inefficient because, as it is a monopoly, it has no incentive to modernize the electricity network. Thus, even though energy is available at a low cost and the sector could be

profitable, it remains problematic; accordingly, CONACOM should exercise its advocacy powers and, after a market study has been carried out, recommend the liberalization of the sector through concessions awarded through public tenders. In addition, a public entity with regulatory powers only should be established, leaving the National Electricity Administration to act exclusively as operator.

162. It should be noted that, unlike CONATEL, CONACOM has not entered into collaboration or coordination agreements with the National Electricity Administration.

6.3. Fuels

163. The refining, import, distribution and marketing of petroleum-derived fuels are regulated by Decree No. 10.911/2020. Under Decree No. 10.183/2000, *Petróleos Paraguayos* (PETROPAR) and the fuel distribution companies authorized by the Ministry of Industry and Trade to operate within the territory of Paraguay can freely market all types of naphthas. Although certain import restrictions and maximum sale prices were maintained, the restrictions were lifted in 2018.
164. PETROPAR was established pursuant to Act No. 1182/85. Under article 4, which defines its purpose and functions, PETROPAR can participate in all areas of the industry, namely, to market oil and its derivatives; to explore, assess and exploit hydrocarbon deposits; to import, export and reship hydrocarbons, their derivatives and related products; to transport, store, refine and distribute hydrocarbons, their derivatives and related products; and to market them on the national and international markets.
165. Although PETROPAR is a public company, it does not act as market regulator. This function is performed by the Ministry of Industry and Trade, acting through the Directorate General for Fuels of the Office of the Deputy Minister for Industry and Services. Nevertheless, PETROPAR has, on occasion, been used to implement, through its service stations, transitory measures, such as subsidized final user sale prices for fuel. In the 2000s, for example, it was also established that all other fuel companies were required to purchase a certain percentage from PETROPAR,

²⁷ Energy composition and energy matrix in Paraguay: <https://www.mf.com.py/medios/blog/composicion-y-comportamiento-de-la-matriz-energetica-en-paraguay.html>.

which, due to these regulatory measures, was the largest importer of diesel oil in Paraguay. It is worth mentioning that this measure was repealed.

166. Another example is the promulgation of Act No. 6900/2022 of 25 March 2022, which, *inter alia*, authorized PETROPAR to grant preferential prices per litre of type III diesel and 93 octane naphtha for marketing to end consumers through the network of PETROPAR service stations. CONACOM issued an opinion on this law, concluding that a study of its economic impact should be carried out as, according to the information at its disposal, Act No. 6900/2022 does not comply with the principles of efficient economic regulation, namely, proportionality and neutrality, that would justify State intervention. It should be noted that this recommendation was well received, and the Act was repealed on 11 April.

6.4. Transportation

167. According to a 2019 report by the Inter-American Development Bank,²⁸ public transportation services in Paraguay are provided by buses (*colectivos*) that cover the country's various urban and inter-city routes. The report classifies transportation services into the following five categories:
- a. Municipal transportation: Operated by private companies within the territorial limits and under the jurisdiction of a municipality.
 - b. Transportation in the Asunción metropolitan area: Also operated by private companies, connects at least one municipality within the metropolitan area. Demand is highest for this service compared to other means of transportation. Fares are paid in cash, and the driver can provide a ticket as proof of payment. There is an ordinary service and an upgraded service, the latter being more expensive because the vehicles are air-conditioned.
 - c. Inter-city transportation: Also operated by private companies, this category of service connects two or more municipalities in the same department by a direct, defined route; it is not considered metropolitan transportation.
 - d. National transportation: Service operated by private companies that connects two or more municipalities in two or more departments.
 - e. International transportation: Service to destinations in other countries that is operated by private companies and governed by international agreements and national laws and implementing regulations.
168. The agency that regulates national and international passenger and cargo transport services is the National Directorate for Transport (DINATRAN), which was established in 2000 by Act No. 1590/2000. The National Directorate has multiple functions, chief among which are to promote and stimulate the development of cargo and passenger transport services for greater efficiency and economy, to establish the organization, mode of delivery and operation of the system and to determine routes, frequencies and rates for national and international public passenger transport services. In addition, the Office of the Deputy Minister for Transportation regulates passenger transport within the metropolitan area.
169. Under article 37 of this Act, concessions to provide services are awarded for a limited period of time by means of a public tender process. Although public tenders should foster competition in the allocation of services, this has not occurred in practice, according to the Paraguayan Industrial Union, which says that the service provided by the concession holders is deficient – low frequency and poor vehicle condition, among others – and that there is no competition in the bidding process.
170. The lack of competition could be due to the fact that, under Act No. 2051 on Public Procurement, the awarding of public service concessions and of licenses for the exploitation of public goods, such as transportation, is not subject to oversight by the National Directorate of Public Procurement but, rather, is governed by special legislation (art. 2 (b)). According to CONACOM, the fact that tendering processes are left to the

²⁸ Technical Note No. IDB-TN-01634.

regulators has led to a series of complaints, including some filed by the Paraguayan Industrial Union.

171. Therefore, it would be advisable for CONACOM to conduct a sector-specific study to assess the degree of competition that currently exists in this market.

6.5. Water supply and sanitation services

172. Sanitation services in Paraguay are regulated by Act No. 1614, which establishes the regulatory and tariff framework governing public drinking water supply services and the sewage system. Noteworthy provisions include article 6, which establishes that these services must be provided by a public entity. Article 8 establishes the sector regulator, named the Regulatory Office for Sanitary Services (ERSSAN), and that one of its main functions is to regulate the tariff system established by law. Act No. 1614 also establishes that providers of sanitation services can operate under a concession or licence, thus liberalizing this market and allowing such services to be provided by private companies, as long as the requirements defined in Act No. 1614 and related regulations are met.
173. Notwithstanding the above, the main provider of sanitation services is Empresa de Servicios Sanitarios del Paraguay (ESSAP), which was established by Act No. 1615 of 31 October 2000 on the reorganization and transformation of decentralized public bodies and the reform and modernization of central government agencies. The former Corporación de Obras Sanitarias was reorganized to create ESSAP, which is the public entity responsible for the provision of drinking water and the sewage system in most of the country. CONACOM has not entered into any cooperation or coordination agreements with the Regulatory Office for Sanitary Services.

6.6. Consumer rights protection

174. Act No. 1334/98 on Consumer and User Protection was amended by Act No. 6366 of 2019. The purpose of the Act is to uphold the basic rights of consumers such as the right to freedom of choice and to clear and transparent information on the products and services available on the market. The authority responsible

for enforcing and ensuring compliance with the Act is the Ministry for Consumer Protection (SEDECO), established by Act No. 4974 of 2013. The Ministry's most important functions, which are enumerated in article 6, include consumer education and the reception of claims and complaints.

175. Despite the close relationship between competition policy and consumer rights protection policy, CONACOM has not received any complaints referred by SEDECO. However, it should be noted that SEDECO refers to CONACOM information on the products in the basic household food basket. In addition, SEDECO once transmitted to CONACOM information it had collected on fuel prices at various service stations.
176. The two entities have an institutional cooperation agreement, which establishes the following possible forms of cooperation: workshops, seminars, meetings, courses and mutual training; formal and informal consultations; and exchange of information and data for the effective implementation of their respective legislation. The cooperation agreement notwithstanding, the relationship between the two authorities should be deepened given the obvious synergies among the subject matters for which they are responsible. For example, they could support each other in the reception and referral of claims and complaints. Therefore, the recommendation would be for the SEDECO regional offices to be able to receive complaints of anticompetitive conduct and refer them to CONACOM.

6.7. Public procurement

177. Competition law assigns particular importance to public procurement. Article 6 of the Regulations explains what is meant by the term collusive tendering and the evidence or background information that CONACOM must take into consideration when investigating practices of this type. Furthermore, article 7 expressly states that the public authorities must take into account the principles of free competition when preparing the tender specifications. It also appears to establish that the authorities are required to submit to CONACOM any information relating to suspected collusion. In turn, when the Commission imposes penalties on companies

for collusive bidding, it must request the National Directorate of Public Procurement to add them to the register of persons disqualified from working with the Paraguayan State.

178. CONACOM liaises with the National Directorate of Public Procurement given the obvious competition-related risks that arise in public tendering for goods and services, in particular the risk of coordination among bidders. In fact, it is common for competition authorities to advise public procurement authorities on the design of tendering conditions and the detection of indications of collusive behaviour.
179. In this regard, on 24 July 2020, the two institutions signed a framework cooperation agreement, including a series of types of collaboration, such as workshops, courses, seminars, meetings, formal and informal consultations, preparation of guides for the implementation of best practices in the area of free competition and, more generally, the exchange of information and data.
180. The agreement notwithstanding, there have been some cooperation problems in practice. In the legislative process to update the Public Procurement Act, CONACOM was not involved in the drafting committee despite having expressly offered and requested to be so. Nevertheless, it submitted to the Senate two technical opinions warning of competition-related problems in certain provisions of the original bill and subsequently issued a new report that was submitted to the Senate and the Chamber of Deputies.
181. With regard to training and advice on competition matters, CONACOM issued guidelines on collusion in public procurement in September 2022 for all public entities that engage in procurement processes. The document stresses the importance of competition in public procurement and explains in detail the definition and risks of collusion. It also contains recommendations on how to prevent collusion and enumerates the internal and external factors conducive to coordinated conduct. Finally, the guide contains guidelines on the signs and evidence of collusion, providing a checklist and recommendations. As of October 2022, CONACOM had provided training on the guide to nine public institutions, specifically to officials in charge of contract units, with another session expected to be held with the National Directorate of Public Procurement.
182. According to information provided by the Director of the National Directorate of Public Procurement, when his staff suspect collusion, they transmit the relevant information to CONACOM. The case of the tendering process for medical supplies discussed above, for example, was initiated in this way. The National Directorate notes that bidding conditions can be set through proceedings or by consulting with CONACOM, but this has not been possible because the time frames for this are incompatible with public procurement deadlines.
183. In sum, although CONACOM is concerned about competition in public procurement and has taken steps to promote competition in these processes, these efforts should be expanded given the strategic importance of public procurement for the State budget and, as illustrated by relevant international experience, the high levels of collusion in such processes.
184. Accordingly, in the most important public tendering processes, the National Directorate of Public Procurement should seek the opinion of CONACOM. To this end, the National Directorate can put questions to the competition authority in keeping with article 29 (p) of the Act on the Protection of Competition.

7. INTERNATIONAL ASPECTS

7.1. Market access and international trade

185. In its investigations, CONACOM does not take into account the impact of international trade when defining the relevant market. Indeed, international trade is not mentioned in article 8 of the Act, on the definition of relevant market, or in the guidelines for determining the relevant market.
186. However, the Act and the Regulations do refer to the international dimension when regulating predatory pricing. The final paragraph of article 10 of the Act establishes the implementing authority's power to coordinate with the Ministry of Industry and Trade in enforcing anti-dumping measures by verifying the cost at origin of imported products. The Regulations are more specific on this point, stipulating that "the investigation and sanctioning of conduct constituting dumping that involves foreign trade operations are the exclusive competence of the Ministry of Industry and Trade. Where the National Competition Commission receives complaints of such conduct, it shall refer them to the Ministry of Industry and Trade" (art. 9).
187. Paraguay has been a member of the World Trade Organization (WTO) since 1995. As such, it has acceded to the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, among others, and is bound by the Central American Rules on Unfair Trade Practices and Safeguard Clause. To date, Paraguay has not been sued before WTO for practices undermining international trade, but some local companies have filed complaints of this type against importers of, for example, steel rods and reams of office paper.

7.2. International agreements

188. The main international agreements that Paraguay has entered into are under the framework of MERCOSUR.²⁹ In the area of competition, it is

worth mentioning the MERCOSUR Protocol on the Defence of Competition,³⁰ signed on 16 and 17 December 1996 and adopted through Act No. 1143 of 15 October 1997. Under article 2, the Protocol applies to conduct that is designed to produce effects or has effects on competition within MERCOSUR and that affects trade among the States parties.

189. More specifically, any individual or concerted acts whose purpose or effect is to limit, restrict, falsify or distort competition or market access or which constitute abuse of a dominant position in the relevant market for goods or services within MERCOSUR affecting trade between the States parties are in breach of the Protocol (art. 4). Article 6 contains a long and detailed list of prohibited conduct.
190. Title IV establishes the bodies responsible for the enforcement of these rules, namely, the Trade Commission and the Committee for the Defence of Competition. Title V establishes the enforcement procedure, whereby the Committee for the Defence of Competition provides guidelines to the national body conducting the investigation (in the location where the conduct occurred) and the Trade Commission decides whether there has been infringement. The Protocol also regulates undertakings to cease and the imposition of the following sanctions (art. 28): (i) fines calculated on the basis of profits, gross turnover or the value of the assets involved; (ii) a ban on participating in the public procurement systems of the member States; and (iii) a ban on working with public financial institutions of the States parties.
191. According to CONACOM, the Committee for the Defence of Competition is in operation and meets sporadically, but no information on the imposition of sanctions on economic agents guilty of infringing articles 4 and 6 of the Protocol has been provided.

²⁹ MERCOSUR is a process of economic integration whose founding members in 1991 were Argentina, Brazil, Paraguay and Uruguay. The Bolivarian Republic of Venezuela joined subsequently, but its rights and obligations are currently

suspended. The Plurinational State of Bolivia is in the process of joining. Chile, Colombia, Ecuador, Guyana, Peru and Suriname also participate, as Associated States.

³⁰ Adopted in Paraguay through Act No. 3026.

192. Subsequently, the MERCOSUR Defence of Competition Agreement³¹ was adopted on 16 December 2010 to, inter alia, promote competition and coordination among the States parties in the enforcement of national competition laws within MERCOSUR.
193. In addition, as a member of MERCOSUR, Paraguay has benefited from the free trade agreements that the bloc has signed with Egypt, India, Israel, the State of Palestine, the Syrian Arab Republic, South Africa and Türkiye, among others. However, these agreements do not include chapters on the protection of free competition.
194. MERCOSUR has also entered into free trade agreements with Canada, the European Free Trade Association and the European Union that do include chapters on competition but are not yet in force.
195. Individually, Paraguay has entered into trade or cooperation agreements or memorandums of understanding with Chile, the United States of America, the Russian Federation and Taiwan which have had a noteworthy impact on foreign trade. Only the agreement with Chile includes a chapter on competition policy.
196. In addition, in 2022, CONACOM participated in the Global Forum on Competition of the Organisation for Economic Co-operation and Development (OECD) for the first time. It has participated only once (in 2019 in Cartagena, Colombia) in the annual meeting of the International Competition Network, taking the opportunity to apply for membership in the organization, which was accepted in 2022. As for participation in UNCTAD activities, CONACOM attended the last three annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy (2020, 2021 and 2022), as well as the 2017 meeting. Since 2017, it has regularly attended and participated in the Latin American and Caribbean Competition Forum organized by OECD and the Inter-American Development Bank and in the annual Ibero-American Forum on Competition organized by Spain and Portugal. Finally, since its establishment, CONACOM has regularly participated in the annual meeting of the Working Group on Trade and Competition (Latin American Economic System, UNCTAD).
197. The authority's lack of resources explains why its presence in international forums remains limited.

³¹ Adopted in Paraguay through Act No. 6020.

8. FINDINGS AND RECOMMENDATIONS

8.1. Findings

198. The Republic of Paraguay has had a competition law in place for 10 years, which was published on 21 June 2013 and entered into force on 18 December of the same year. The law addresses and regulates the most important matters related to the effective implementation of rigorous competition policy. In preparing the bill, the authority received advice from a delegation of experts assembled by UNCTAD. It is worth noting that Decree No. 1490/2014 regulating Act No. 4856/2013 was adopted within the short span of a year.
199. As mentioned previously, both the Act and the Regulations regulate the most relevant matters for competition policy, namely, the scope of application, prohibited agreements, abuses of dominant position, the notification system for concentration operations and all aspects of the structure and functions of the implementing authority, CONACOM, including the sanctions procedure.
200. The Act establishes an economic criterion for analysing practices that restrict free competition, namely, the potential efficiency gains. Furthermore, the Act's scope of application is broad, as it is the location of the effects of anticompetitive acts that matters. The Act contains an appropriate enumeration of the main types of restrictive agreement, as well as the most frequent forms of abuse of dominant position. Finally, the Act and, above all, the Regulations provide for a concentration control notification system that closely regulates the matters pertaining to this type of operation.
201. Along with the practices usually prohibited by competition law, such as restrictive agreements and abuse of dominant position, the Act devotes a chapter to the regulation of predatory pricing, which is a particular concern in the country owing to the high rates of contraband trade.
202. At the institutional level, the country has opted to have a single authority, namely CONACOM, composed of the Board of Directors and the Directorate for Investigations. While the Act establishes the requisite safeguards to ensure the independence, autonomy and technical expertise of the institution, it is worth mentioning that the fact that the Directorate for Investigations must obtain authorization from the Board of Directors to open an investigation could undermine its independence and the required separation between the investigative and decision-making functions.
203. CONACOM, particularly its Board of Directors, has broad powers to protect and promote free competition in the markets. In terms of protection, its powers include resolving cases, authorizing the launch of investigations, conducting investigations, evaluating concentrations, monitoring compliance with its decisions and publishing sector-specific studies. As for promotion, CONACOM can, among other powers, propose economic policy guidelines, inform and advise the executive branch, answer queries and coordinate with sector regulators.
204. Regarding the procedure for imposition of sanctions, the Act contains certain basic provisions specific to competition litigation, in particular on: the power to initiate proceedings ex officio when the protected legal right is in the public interest; discretion and confidentiality rules; especially important investigative powers, such as the power to conduct inspections; and the possibility of terminating an investigation by agreement and through undertakings to cease, among others. The Act does not include an immunity and leniency programme, which is undoubtedly a major shortcoming in the investigation and sanctioning of hard-core cartels.
205. The time frames for investigation (90 days) and for the Board of Directors to adopt the final decision (40 days from the filing of the briefs or the expiration of the filing deadline) are extremely short, especially considering the complexity of some competition cases.
206. The sanctions regime is quite reasonable, providing for fines of up to the equivalent of 150 per cent of profits or 20 per cent of the sales of the products involved in the practice. The latter way

- of calculating the fine may not be commensurate with the seriousness of the infringement if all the products sold by the offending company are not considered. Therefore, the fines may be a poor deterrent.
207. As mentioned above, the notification procedure for concentration operations is properly and thoroughly regulated in the Act and, particularly, in the Regulations. In line with the international trend, the Regulations define two phases and lay down how an operation should be assessed, namely through a risk and efficiency analysis. In addition, there is an opportunity for notifiers to propose mitigation measures.
208. While CONACOM saw its budget increased in 2022, the amount remains insufficient for it to effectively carry out its mandate.
209. CONACOM has investigated only a few cases of restrictive practices and abuses of dominant position. Although it rejected the allegations of the Directorate for Investigations in all of the cases, it did issue guidelines in each one. The reason for the low number of cases is a lack of material and human resources. The Directorate for Investigations has focused primarily on evaluating concentration operations.
210. As noted, the authority has examined a decent number of concentration operations in its short existence, seven of which were authorized with conditions and only one was rejected. Operations have been assessed in significant markets, including the financial, fuels, agriculture and cable television markets.
211. With regard to competition advocacy, CONACOM has issued several non-binding opinions on bills, regulations, tender specifications and other matters. It has also established a series of framework agreements with public authorities to improve inter-institutional coordination and the training of public authorities in antitrust matters. Finally, CONACOM has carried out important work in the dissemination of antitrust regulations, including presentations to the business sector and university students and seminars for the public and for specific groups.
212. Several of the regulated sectors have been liberalized, although there remain public companies with important regulatory functions in some. The regulatory entity in the telecommunications sector, CONATEL, does not participate in the market as an operator, unlike what happens in the energy sector with the National Electricity Administration and in the fuels market with PETROPAR, which has occasionally been used to regulate some aspects of the market.
213. Although the Act expressly requires CONACOM to coordinate with sector regulators, in practice few collaboration agreements have been signed. Furthermore, so far, the authority has not conducted the sector-specific studies necessary to issue recommendations for improving the functioning of regulated markets.
214. The relationship between the competition authority and the consumer rights protection authority, SEDECO, is not as close as it should be considering how closely related these public policies are. CONACOM has not received any complaints from SEDECO, despite the existence of an institutional cooperation agreement. The situation is similar with the National Directorate of Public Procurement. The collaboration agreement notwithstanding, no mechanism has been established to allow CONACOM to know *ex ante* about the most important public procurement processes.
215. At the international level, CONACOM has signed a number of technical cooperation agreements with other competition agencies that enable the exchange of information that may be useful for the conduct of investigations. This has been the case, for example, with the Commission on the Promotion of Competition of Costa Rica and the National Commission on Markets and Competition of Spain. Furthermore, the authority does not consider the impact of international trade in its investigations when defining the relevant market, except in the case of predatory pricing. As regards the international commitments undertaken by Paraguay in the area of competition, it is worth mentioning the MERCOSUR Protocol on the Defence of Competition, whose rules apply to conduct that is designed to produce effects or has effects on competition within MERCOSUR and that affects trade among the States parties. Finally, CONACOM has participated in the most important competition forums, namely those

held by the OECD, the International Competition Network and UNCTAD.

216. Although the adoption of the Act has made it possible to lay the bases for developing a policy on competition and prohibiting anticompetitive practices, a review of the antitrust system that takes in the substantive provisions of the legal and regulatory instruments, institutional and budgetary provisions and the functioning of the system and CONACOM is needed.

8.2. Recommendations for the executive and legislative branches

8.2.1 Substantive changes

217. Following the international trend, it is recommended that a per se rule be established for hard-core cartels, in other words for agreements whose purpose is to fix prices, limit production, allocate market zones or quotas or affect the outcome of tendering processes. For this purpose, article 2 (3) of the Act should be amended to exempt the authority from the obligation to assess the possible efficiency gains of the practice under investigation and to prove the effects of anticompetitive conduct.
218. In keeping with international practice, it is recommended to remove consciously parallel practices from the list of prohibited agreements. To this end, article 8 of the Act should be amended.
219. Given the multiple forms that unilateral abuse can take, article 9 (a) of the Act should be amended to clarify that the list of abuses is merely indicative and not exhaustive.
220. Article 9 (b) of the Act should be amended to add artificial and structural barriers to the list of considerations in the determination of positions of dominance.
221. The requirement that the purpose of an abusive practice needs to be to obtain undue advantage and cause harm to others should be removed from the final paragraph of article 9.
222. It is highly recommended that the free competition system include a leniency programme that grants total or partial immunity to companies that choose to actively cooperate with the authority in the investigation of hard-core cartels.
- ### **8.2.2 Changes to the institutional order and sanctioning procedures**
223. The organizational chart or institutional structure of the competition authority is established in the regulatory decree, which is impractical, as the highest authority cannot freely decide how to organize itself for optimal functioning. Therefore, it is recommended that CONACOM be delegated the power to organize itself through internal regulations.
224. The appointment of the CONACOM Board of Directors also requires clarification. As raised above, it is not clear whether the Board can consist of three members from the same profession. Therefore, since the Act does not set any, there should be no limits on the margin of discretion accorded to the Evaluation Board when selecting members of the Board of Directors.
225. The situation of the alternate member needs to be regularized. Due to possible incompatibilities and the lack of budget, it is recommended to have an official advising the Board of Directors as rapporteur and who could stand in for a regular member who, for whatever reason, is absent. This official should be an agency staff member assigned exclusively to this position, which should be remunerated.
226. The members of the Evaluation Board must not have any cases or investigations pending before CONACOM.
227. The budget allocated to CONACOM must be increased so that it can recruit more professionals, especially for the Directorate for Investigations. The Directorate's current staffing is very limited, with only three professionals, in addition to the director, who in practice can dedicate themselves to resolving one concentration or prohibited conduct case at a time.
228. In order to ensure the effective autonomy of the Directorate for Investigations, the requirement to obtain the approval of the Board of Directors prior to initiating an investigation should be eliminated. The Directorate for Investigations should merely notify the Board of Directors that an investigation has been opened.

229. The power of CONACOM to terminate an investigation by agreement should not have the sole purpose of terminating unlawful actions but should also be exercised in cases where the conduct has already taken place. Article 88 of the Regulations should be clarified because it is contradictory to require termination agreements to include an undertaking to cease given that such undertakings do not entail recognition that the conduct was unlawful.
230. It would be advisable for the Act to establish the court, procedure and requirements for obtaining judicial authorization to conduct inspections.
231. In addition, the time limits for the conduct of investigations provided for in the Act are clearly insufficient, especially in particularly complex cases. They should therefore be extended in order to provide greater guarantees that all investigative formalities can be concluded.

8.2.3 Changes to the way the system operates

232. Article 60 of the Act, on precautionary measures, should be amended. The obligation to provide sufficient financial guarantees should be removed when a measure is requested by the Director of Investigations. Moreover, it should not be possible for the subject of a precautionary measure to provide a counter-guarantee to have the measure cancelled.
233. In calculating the fines imposed by CONACOM in cases of prohibited practices, the total sales of the offending companies should be taken into consideration, not just sales of the products involved in the conduct.
234. A rule should be included in the Act, establishing that when a trade association is found guilty, the amount of the fine should be calculated in fixed terms – minimum wages – and that some of its members may be held jointly and severally liable. Furthermore, consideration should be given to empowering CONACOM to order the trade association's modification or dissolution.
235. Disqualification from contracts awarded by State bodies and public companies and from concessions for a term of 3 or 5 years should be included in chapter II of the Act as a sanction for collusive conduct.

236. In the electricity sector, a public agency with exclusively regulatory powers should be established, while the National Electricity Administration should act only as an operator.
237. In order to encourage the private enforcement of competition law, different statutes of limitations from those fixed for prosecuting offenders and securing compensation for damages should be established, as compensation can only be claimed once the sanctioning procedure has ended, which, in practice, means that the available time is often very short.
238. Finally, administrative acts likely to obstruct effective competition should be subject to investigation and, where necessary, should be open to challenge by CONACOM before the Court of Auditors.

8.3. Recommendations to CONACOM

8.3.1 Concentrations

239. It should be made clear in the Act that once notification has been made, concentration operations should be suspended and that sanctions should be envisaged when operations are concluded before authorization is given. Furthermore, the Act should regulate the infringement of obligations arising from the authorization of concentration operations.
240. The phrase “by creating or strengthening a dominant position in the national market or in a substantial part of it” should be removed from article 13 of the Act to make the presence of a significant obstacle to effective competition the sole criteria by which to deny a concentration operation.
241. The time frame for the analysis of concentrations should be revised. Ninety days may be insufficient in the case of complex operations.
242. In this regard, the authority should issue guidelines in which it explains its methodology for analysing concentration operations with a view to providing predictability and legal certainty to economic agents.

8.3.2 Sector-specific studies

243. The powers CONACOM can exercise to gather the information it needs for sector-specific studies should be made more explicit.
244. Moreover, to the extent that the institution's resources permit, conducting such studies would be highly recommended owing to the strong impact they have on the promotion of free competition.

8.3.3 Enforcement of the Act

245. CONACOM should prioritize the investigation of prohibited conducts in the affected markets, as this is the *raison d'être* of the competition policy.

8.3.4 Competition advocacy

246. Efforts to promote a culture of competition should be redoubled with the aim of informing and educating the population and, above all, the business sector about the benefits of competition. To this end, an increase in the authority's budget is key.
247. Regarding the authority's non-binding advocacy in the form of the analysis of laws and regulations with an impact on economic activities, CONACOM should be informed of the measures taken in this domain. Where the Commission's recommendations are not accepted, the requesting entity should justify its position.
248. Concerning the judiciary, it is important to consider the role of judges in reviewing and interpreting the law. Thus, cooperation mechanisms should be established to improve training on competition matters for judges, and particularly for members of the Court of Auditors.

8.3.5 Regulated sectors, consumer agencies and public procurement

249. Article 78 of the Regulations should be amended to require public institutions to

provide all information CONACOM requests, including information protected by banking, tax, commercial, industrial or stock market secrecy that is governed by its own legislation. The competition authority should take due care in ensuring the confidentiality of such information.

250. CONACOM should intensify coordination with the regulatory authorities of certain sectors of the economy by concluding cooperation agreements. Specifically, institutional cooperation agreements should be signed with regulators in the energy, sanitation (water), transportation and fuel sectors.
251. Cooperation with SEDECO should be deepened by making use of the institutional cooperation framework agreement. As CONACOM does not have offices outside Asunción, regional SEDECO offices should receive complaints of violations of competition law and transmit them to CONACOM.
252. With respect to the National Directorate of Public Procurement, CONACOM should be made aware of and participate in the most important public procurement processes.
253. According to information gathered during the visit to Paraguay, the transportation sector has serious deficiencies, some of which stem from competition problems. For this reason, it would be highly advisable to conduct a sector-specific study to measure the degree of competition in the industry and make recommendations to the public authorities in order to improve the functioning of what is such an important sector for the population.
254. Also according to information gathered in Paraguay, the electricity sector could benefit from a sector-specific study by CONACOM; depending on the findings, it might be recommended to liberalize the sector.

ANNEX

List of interviewed professionals and representatives of Paraguayan institutions, organizations and business associations.

- Luis Castiglioni, Minister of Industry and Trade
- Rolando Díaz, President, National Competition Commission
- Ricardo Gavilán, Director of Investigations, National Competition Commission
- Carlos Trapani, Advisor, Office of the President of the Republic of Paraguay
- Pablo Seitz, National Director, National Directorate of Public Procurement
- Stephan Rasmussen, Senator
- Fernando Silva Facetti, Senator
- Sebastián Villarejo, Deputy, National Assembly
- Santiago Bofferon, President, Paraguayan Association of Christian Entrepreneurs
- Gonzalo Sosa Nicoli, Member, Court of Auditors, Supreme Court
- Rodrigo Escobar, Member, Court of Auditors, Supreme Court
- Juan Marcelo Estigarribia, Minister-Executive Secretary, Ministry for Consumer and User Protection
- Juan Carlos Duarte Duré, President, National Telecommunications Commission
- Verónica Franco, Lawyer, Ferrere Law Office
- Gabriela González, Journalist, ABC Color
- Diego Zavala, Lawyer, Mersán Law Office
- Enrique Duarte, President, Governing Board of the Paraguayan Industrial Union
- Lorena Méndez, Member, Governing Board of the Paraguayan Industrial Union
- Pedro Galli, President of Production, Federation of Production, Industry and Commerce
- Ernesto Figueredo, Presidente of Commerce, Federation of Production, Industry and Commerce
- Isabelino Galeano, Director, Academy of the Council of the Judiciary
- Amílcar Ferreira, Economist, press sector
- Marta Martínez, Competition lawyer
- Daniel Álvarez, Professor of Competition Law, Nuestra Señora de la Asunción Catholic University
- Víctor Raúl Benítez González, Economist, journalist and teacher
- Fernando Rivarola, Manager of Analysis and Regulation, Office of the Superintendence of Banks, Central Bank of Paraguay

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