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**Voluntary peer review of competition law and  
policy: Uruguay**

**Overview\***

**First draft**

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\* The present document is being issued without formal editing. The views expressed in this report are those of the authors and do not necessarily reflect the views of the United Nations secretariat.

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## I. Background information on competition law

1. The Constitution of Uruguay contains two provisions that set out the principles of competition and form the basis of a market economy. Article 36 safeguards freedom of industry and trade, while article 50 establishes State control over trustified commercial or industrial organizations.

2. For a long time these provisions were not reflected in law in a way that would properly protect the principles of competition. The first legislative step was the promulgation of Act No. 17.243 of 29 June 2000, which laid down the first rules on competition in Uruguay. Its three articles defined the scope of the Act, drew up a list of prohibited practices and provided for the possibility of arbitration in any dispute.

3. These rules were subsequently supplemented by the 2001 Budget Act (Act No. 17.296) and Decree No. 86/001 of 28 February 2001, which established the Directorate-General for Trade within the Ministry of Economic Affairs and Finance as the enforcement agency with powers to investigate and punish prohibited conduct and to issue opinions on competition matters.

4. For some experts, the first law on competition had little impact because the provisions were incomplete and the requirements for handing down penalties were so stringent.<sup>1</sup> It has also been said that the competition system did not work because the enforcement agency was not independent and did not have the necessary resources, and the culture of competition was just beginning to emerge. As a result, few cases were brought before the enforcement agency while this law was in force.<sup>2</sup>

### A. Act No. 18.159

5. A first draft of this Act was introduced during the 2000-2005 legislative period. However, despite being provisionally approved by the House of Representatives, the draft Act was not adopted by the Senate.<sup>3</sup>

6. A new bill was submitted during the following legislative period. On 10 July 2007, after two years of analysis and discussion, Act No. 18.159 on the promotion and defence of competition was adopted.<sup>4</sup> At the time of promulgation, it was said that “the priority of the new law was to investigate anticompetitive conduct rather than analyse economic concentrations”.<sup>5</sup>

7. Act No. 18.159 was an improvement over the previous law in that it established a more coherent set of rules that contain the core elements of all competition legislation, although, as will be discussed below, some areas for improvement remain.

8. The Act is divided into four chapters: Chapter I — General provisions; Chapter II — Procedure for the investigation and punishment of prohibited practices; Chapter III —

<sup>1</sup> S. Milnitsky (2015). La promoción y la defensa de la competencia, In: Bergara, M., *Las nuevas reglas de juego en Uruguay*. Department of Economics, Faculty of Social Sciences, University of the Republic, Montevideo, p. 251.

<sup>2</sup> C. Martínez Blanco (2007). *Manual básico de derecho de la competencia: Comentario exegético de la Ley de Promoción y Defensa de la Competencia — Ley núm. 18.159 de 20/07/2007, Decreto Reglamentario núm. 404/007 de 29/10/2007*. Fundación de Cultura Universitaria, Montevideo, p. 42.

<sup>3</sup> *Ibid.*, p. 41.

<sup>4</sup> S. Milnitsky (2015). La promoción y la defensa de la competencia, p. 251.

<sup>5</sup> Interview with Mario Bergara, President of the Central Bank of Uruguay. Montevideo, 17 December 2015.

Enforcement agency; and Chapter IV — Final provisions. The following sections cover the current legal framework and its enforcement by the competent authorities.

## **II. Substantive aspects**

### **A. Purpose**

9. Most legal systems adopt one of two positions on the purpose of competition law: the first centres on the welfare of consumers; and the second gives priority to economic efficiency.<sup>6</sup>

10. Uruguayan legislation opts for consumer welfare as the main value to be protected. Economic efficiency, along with free and equal access, are cited as means of achieving this end and not as ends in themselves.

### **B. Scope and exceptions**

11. Act No. 18.159 enumerates the activities to be “governed by the principles and rules of competition”. From the outset, article 2 applies the Act to all economic activities.

12. Article 3 states that the Act applies to all natural and legal persons who engage in economic activity, whether for profit or not for profit. Regarding its geographic scope, it states that any economic activity carried out inside or outside the territory of Uruguay is covered by the Act if its effects are totally or partially generated in the country. Thus, in keeping with international best practice, the legislation establishes a broad implementation framework that covers all economic activities that have any effect in Uruguay.

13. As for exceptions and exclusions, they are not listed in detail but rather laid down in general statements. Article 2 of the Act stipulates that it applies to all economic activities, except “where restricted by law for reasons of public interest”. The last paragraph of the article states that “the exercise of a right, power or special prerogative granted or recognized by law” is not considered as anticompetitive conduct.

14. The two instances of the word “law” leave the discussion open as to whether exceptions and exclusions should be set out in a formal law or whether the word “law” is used generically to cover all types of rules. The competition authority has supported the former position, which ensures the cross-cutting implementation of competition legislation.<sup>7</sup>

### **C. Prohibited practices**

15. Article 2 of Act No. 18.159 contains a general prohibition of anticompetitive conduct:

Abuse of dominant position and all practices, conduct and recommendations, whether individual or concerted, whose effect or purpose is to restrict, limit, block, distort or prevent current or future competition in a given market shall be prohibited.

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<sup>6</sup> UNCTAD (2000). Model Law on Competition (TD/RBP/CONF.5/7/Rev.3), pp. 13-15. Available at: [http://unctad.org/en/Docs/tdrbpconf5d7rev3\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf).

<sup>7</sup> However, some of the country’s legal experts have supported the second position. See C. Martínez Blanco (2007). *Manual básico de derecho de la competencia*, p. 68.

## 1. Classification of prohibited practices

16. The legislation of Uruguay does not contain a classification of prohibited practices but, rather, places all such practices in a single category, without distinguishing between horizontal and vertical practices and abuse of dominant position. Nor does it give any indication of the level of severity.

17. Article 4 provides an indicative list of prohibited practices. It has been argued that indicative classification is justified in cases where it is impossible to predict all practices and conduct in which businesses might engage. Faced with a conflict between the legal security of an exhaustive list and the efficacy of a law, the authorities have chosen to safeguard the latter.<sup>8</sup> However, when it comes to penalties, it is always useful to maximize legal security for the persons or entities concerned.

18. The Act does not mention some anticompetitive practices that are typically prohibited in other laws. Likewise, some of the categories of punishable practices encompass a range of practices of varying nature to which differing rules of analysis apply and even include, in some instances, practices that are not usually considered to be anticompetitive.

19. The various prohibited practices might usefully be described and classified either through amendments or secondary legislation, in order to increase enforcement predictability and legal security.

## 2. Analysis of practices

20. Additionally, the Act establishes that all anticompetitive practices must be examined under the “rule of reason”. In this regard, article 2 states that:

In order to evaluate the practices, conduct and recommendations enumerated in the preceding paragraph, the enforcement agency shall take into account whether they result in gains in economic efficiency for the individuals, economic units or businesses involved, the possibility of obtaining the same gains through alternative means and the benefit accrued to consumers.

21. The application of the rule of reason in all cases could cause the enforcement agency to unnecessarily invest resources in information gathering and expend additional efforts to investigate and analyse cases that, owing to their intrinsic severity, can be determined as being anticompetitive by definition.

22. Another particularity of the Act is that it requires the enforcement agency to conduct an efficiencies analysis in all cases, irrespective of whether or not the investigated party claims to have made any efficiency gains.<sup>9</sup> According to international practice, it is incumbent on the enforcement agency to demonstrate that a practice has occurred and has had anticompetitive effects, whereas the business under investigation must demonstrate the efficiencies generated and the way in which these have benefited consumers.<sup>10</sup>

## 3. Abuse of dominant position

23. The generic prohibition in article 2 of the Act also covers abuse of dominant position. Dominant position is defined in article 6 as follows: “It is understood that one or several agents enjoy a dominant position in the market when they can have a substantial

<sup>8</sup> C. Fernández-Lerga Garralda (1994). *Derecho de la competencia: Comunidad Europea y España*, Ed. Aranzadi, Pamplona, p. 114.

<sup>9</sup> Article 3 of Decree No. 404/007 of 29 October 2007, *Diario Oficial*, 6 November 2007.

<sup>10</sup> A. Elbittar and M. Salinger (2013). White paper on vertical restraints. Regional Competition Centre for Latin America, p. 52. Available at: <http://crcal.org/guias-y-estudios/guias/consentraciones>.

impact on the relevant variables in the market independently of the conduct of their competitors, purchasers or providers.”

24. The second paragraph of article 6 defines abuse of dominant position as follows:

“Abuse of dominant position is considered to have occurred when the agent(s) in this position act inappropriately with a view to obtaining advantage or causing harm to others which would not have been possible if they were not in a dominant position.”

25. These provisions are in line with the internationally accepted definitions.<sup>11</sup> In most legal systems the definitions are accompanied by a definition of the various practices. In the case of Uruguay, some of the practices described in article 4 are typical of abuse of dominant position, so the two articles should be read in conjunction with each other.

26. In addition, article 6 refers expressly to article 2, meaning that for the practices to be considered unlawful the other requirements of the generic prohibition, including the analysis of efficiencies and pro-competition effects, must also be met.

#### **4. Relevant market**

27. Article 5 of the Act stipulates that the market must be defined in order to assess the impact of the practice under investigation. The analysis should take into account “the existence of substitute products and services, as well as the geographical area covered by the market, thereby defining the relevant area of effective competition”.

28. Thus, the general principle is applied whereby market definition consists of a substitutability analysis that has two dimensions, namely the product market and the geographical market.<sup>12</sup>

29. The same article states that “the enforcement agency is responsible for setting the general criteria for delineating the relevant market”. The enforcement agency has issued a decision in which it lays down the general criteria for delineating relevant markets.<sup>13</sup>

### **D. Economic concentrations**

30. The Act provides for concentrations to be examined in advance. Article 7 provides that acts of economic concentration can include “transactions involving a change in the structure of control over the participating companies through: company mergers, the acquisition of corporate equities, equity interests or shares, the acquisition of commercial, industrial or civil establishments, the total or partial acquisition of business assets, and any other kind of legal transactions that involve the full or partial transfer of control of economic units or companies”.

31. This definition is in line with the one used in various legal systems that links economic concentration to the acquisition or transfer of control between independent entities.<sup>14</sup>

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<sup>11</sup> UNCTAD (2000). Model Law on Competition.

<sup>12</sup> Ibid., art. 2.1 (c).

<sup>13</sup> Commission on the Promotion and Defence of Competition decision No. 2/009 of 12 May 2009. Available at: [https://www.mef.gub.uy/innovaportal/file/1246/1/mercado\\_relevante.pdf](https://www.mef.gub.uy/innovaportal/file/1246/1/mercado_relevante.pdf).

<sup>14</sup> In this respect, see the definition contained in article 3 of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en.pdf>.

32. In accordance with article 7, prior notification must be given for concentrations that meet at least one of the following conditions:

(a) As a result of the operation, the market share is 50 per cent or more;

(b) In any of the past three years, the combined annual gross turnover of the parties has been equal to or greater than 750 million Indexed Units (UI) (equivalent to approximately US\$ 78 million).

33. International best practice recommends setting thresholds that are easy to verify and based on objective and quantifiable data, such as sales or assets. Conversely, it is recommended to avoid thresholds that are based on evaluative criteria, such as market share.<sup>15</sup>

34. The level of the threshold is also relevant. On the one hand, the aim is to avoid overburdening the authority with concentrations that will not generate significant negative effects<sup>16</sup> and, on the other, to avoid excessively high thresholds, as these will result in a failure to notify transactions with a potentially significant impact on the market. The sales threshold established under Uruguayan law appears high for a relatively small economy.

## 1. Procedure

35. Article 7 of Act No. 18.159 provides that concentrations should be notified 10 days before they are due to take place. The duty of notification lies with the companies' administrators, directors and representatives, who are personally responsible for non-compliance. Article 39 of Decree No. 404/007 (the Regulations) and decision No. 50/009 of 20 November 2009 set out the penalties for failure to notify concentrations.

36. Article 43 of the Regulations states that the authority may request the available information within three working days of the notification. In addition, it may request additional information within 10 working days. Information may not be requested more than twice, except in exceptional cases.

37. In accordance with article 42 of the Regulations, the Commission may disagree with the notifying parties' definition of the market, in which case a period of five days will be granted to provide the new information on the market.

38. The same article stipulates that, upon completion of the notification process, the Commission has broad powers to periodically request information from the parties to monitor market conditions. The duration of this prerogative is not specified.

39. The National Register of Legal Persons requires the approval of the enforcement agency in order to definitively register the act.

## 2. Substantive analysis

40. The analysis of concentrations seeks to verify whether a position of power in the market will be acquired or consolidated as a result of the concentration or whether the transaction may have the effect of restricting or preventing competition and, if so, whether any action should be taken to prevent it.<sup>17</sup>

<sup>15</sup> International Competition Network (ICN), Merger Working Group (2002). *Prácticas recomendables para procedimientos de notificación de concentraciones*. September 2002, p. 4. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc589.pdf>.

<sup>16</sup> *Ibid.*, p. 1.

<sup>17</sup> Regional Competition Centre for Latin America (2014). *Remedios (condicionamientos) para las concentraciones: Principios y enfoques generales*, p. 1. Available at: <http://www.crcal.org/>.

41. In the case of Uruguay, article 9 of the Act provides that the Commission's authorization is required only "in cases in which the act of economic concentration involves the establishment of a de facto monopoly".

42. Article 44 of the Regulations deals with matters relating to the efficiency gains that can be considered by the authority. In accordance with international best practice, they are assessed only if they arise directly from the concentration and cannot be achieved without it. Furthermore, according to this article, "cost reductions that involve a transfer between two or more agents, such as those derived from the greater bargaining power of the concentrated company as a result of the transaction, may not be invoked as efficiency gains".

43. According to article 45, the Commission may accept or reject monopolistic concentrations. In addition, the applicant may, at any time during the procedure, propose to the enforcement agency measures to mitigate the expected impact on the relevant market. Once these proposals have been made, the agency has 10 working days in which to decide to approve the measures and the corresponding authorization for the concentration.

## **E. Remedies and sanctions**

44. Sanctions in the area of competition primarily seek to put an end to undesirable conduct and to discourage such conduct in future.<sup>18</sup> In some cases they might seek to restore conditions of competition in the market.<sup>19</sup>

45. In Uruguay, article 17 of the Act sets out the applicable sanctions. In the event that an anticompetitive practice is proven to exist, the competition authority may order the cessation of the practice, and of any effects that might persist. It may also impose, concurrently, the following sanctions:

- A warning
- A warning with publication of the decision in two national newspapers
- A fine of between 100,000 UI<sup>20</sup> and whichever is higher of 20 million UI,<sup>21</sup> 10 per cent of the offender's annual turnover, or the equivalent of three times the injury caused by the practice

46. The authority may also impose the same sanctions on their board members and representatives, and also on companies that refuse to cooperate during the procedure.

47. In determining the sanctions, the criteria to be taken into account by the authority are: the damage caused, the level of involvement of those responsible, intent, whether it is a repeat offence and the offender's attitude during the investigation. Notably, the Act does not take into account the gravity of the conduct, which is one of the main factors considered in other countries.

48. Finally, the Regulations add that the authority must keep a register of sanctioned companies and individuals.

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<sup>18</sup> J.M. Connor (2006). Effectiveness of antitrust sanctions on modern international cartels. Purdue University, West Lafayette, Indianapolis, p. 198. Available at: [http://www.agecon.purdue.edu/staff/connor/papers/effectiveness\\_antitrust\\_sanctions\\_ghosal.pdf](http://www.agecon.purdue.edu/staff/connor/papers/effectiveness_antitrust_sanctions_ghosal.pdf).

<sup>19</sup> OECD (2008). Remedies and sanctions for abuse of market dominance: Policy brief. Paris, December, p. 1.

<sup>20</sup> Approximately US\$ 10,400.

<sup>21</sup> Approximately US\$ 2,084,356.



## 1. Leniency programme

49. Uruguayan legislation provides that “the reporting by one of the parties to the agreement or the contribution it makes to obtaining sufficient evidence to sanction the remaining offenders shall be regarded as special mitigating factors”.<sup>22</sup>

50. The Regulations limit this benefit to cases of concerted practices between competitors. It may involve a total exemption from sanctions, but it is granted only to the first company to provide information, as long as it did not initiate the agreement.

51. According to article 35 of the Regulations, upon receipt of the documentation from the company, the Commission considers it and issues a decision within 20 working days on the relevance of the plea. If it is considered relevant, the company must provide details of all the proposed information, as agreed.

52. The competition authority initiates an investigation and, in the event of sanctions, will take account of the previously established mitigating circumstances and exemptions, unless the company fails to comply with the requirement to provide information, or falsifies or alters the evidence proposed.

53. Some of the conditions that normally govern such procedures are lacking, such as the rules that apply if the information comes from a person in their personal capacity or if it is provided on behalf of a company; the rules to ensure the cooperation of the economic agent throughout the investigation; and guarantees to ensure that the agent refrains from engaging in the anticompetitive practice.<sup>23</sup>

## III. Institutional aspects

54. The Commission on the Promotion and Defence of Competition is a decentralized body of the Ministry of Economic Affairs and Finance<sup>24</sup> responsible for the implementation of Act No. 18.159.<sup>25</sup> It reports to the Minister, to whom all its decisions can be appealed.

55. The authority began its work on 16 March 2009.<sup>26</sup> It is composed of three members appointed by the executive branch. They have a mandate of six years, but may be reappointed. The Commission is represented by its president.<sup>27</sup>

56. The members are full-time civil servants. They work only for the Commission, except for teaching and research activities. Members of this body must have a personal and professional background and knowledge of the subject area that will guarantee their independence of judgment, efficiency, objectivity and impartiality in the performance of their duties.<sup>28</sup>

<sup>22</sup> Decree No. 404/007, art. 33.

<sup>23</sup> OECD (2002). Fighting hard core cartels: Harm, effective sanctions and leniency programmes. Paris, pp. 7-10. Available at: <http://www.oecd.org/competition/cartelsandanticompetitiveagreements/1841891.pdf>.

<sup>24</sup> Act No. 18.159, art. 21.

<sup>25</sup> Articles 9, 10 and 26 of Act No. 18.159 and article 16 of Decree No. 404/007 set out the functions and powers of the Commission on the Promotion and Defence of Competition.

<sup>26</sup> Commission on the Promotion and Defence of Competition, 2009 annual report, p. 2. Available at: [https://www.mef.gub.uy/innovaportal/file/1439/1/2010\\_03\\_22\\_memoria\\_2009.pdf](https://www.mef.gub.uy/innovaportal/file/1439/1/2010_03_22_memoria_2009.pdf).

<sup>27</sup> General Operating Regulations of the Commission on the Promotion and Defence of Competition (decision 1/009 of 5 May 2009). Available at: [https://www.mef.gub.uy/innovaportal/file/1247/1/regl\\_gral.pdf](https://www.mef.gub.uy/innovaportal/file/1247/1/regl_gral.pdf).

<sup>28</sup> Decree No. 404/007, art. 12.

57. They can be dismissed by the President of the Republic, acting in the Council of Ministers, in cases of: (a) negligence or poor performance of their functions; (b) sudden incapacity; (c) prosecution for a crime that carries a prison sentence or a criminal conviction; and (d) commission of acts that affect their reputation or the standing of the Commission.<sup>29</sup>

58. The Commission adopts its decisions as a collegial body, by the vote of at least two of its three members.<sup>30</sup>

59. The authority has a team of advisers to support it in the performance of its duties.<sup>31</sup> They are all full-time public officials, appointed under the civil service regime.

60. Article 11 of the Regulations provides for the Ministry to supply the resources needed by the authority, which does not have budgetary autonomy or the power to authorize expenditure, as it is dependent on the approval of the Directorate-General of the Secretariat.<sup>32</sup>

61. For 2015, the Commission was allocated 13,377,900 Uruguayan pesos (approximately US\$ 445,910). With regard to human resources, at present, the Commission is composed of one lawyer and two economists. The technical team consists of seven people: two administrative assistants, two economists and three lawyers.<sup>33</sup>

62. Thus, some elements of the institutional design of the Uruguayan authority are conducive to its independence. However, there are a number of issues that could be addressed to boost its independence: they include its considerable dependence on the Ministry for its budget and administration, its limited financial and human resources and the fact that its decisions can be appealed to the Minister.

## **IV. Procedural aspects**

### **A. Investigation procedure**

#### **1. Initial phase**

63. In accordance with article 10 of the Act, the Commission is responsible for the investigation, examination, analysis and final resolution phases of the procedure, which can be started pursuant to a complaint or an initiative taken *ex officio*.<sup>34</sup>

64. Article 12 of the Act and article 21 of the Regulations grant broad standing to any natural or legal person to submit complaints. The complaint must comply with minimum formalities, and complainants must identify themselves, except where, for justifiable reasons, it is agreed to keep their identity confidential.

65. The Commission has broad authority to conduct preliminary investigations, including the power to compel individuals to provide information and request (with the support of the judicial authorities) the conduct of on-site investigations.<sup>35</sup>

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<sup>29</sup> Act No. 18.159, art. 24.

<sup>30</sup> General Operating Regulations of the Commission on the Promotion and Defence of Competition, art. 1.

<sup>31</sup> *Ibid.*, art. 4.

<sup>32</sup> Interview with Adriana Riccardi and Javier Gomensoro, president and member of the Commission on the Promotion and Defence of Competition, respectively. Montevideo, 14 December 2015.

<sup>33</sup> Information provided by the Commission on the Promotion and Defence of Competition.

<sup>34</sup> Act No. 18.159, art. 10.

<sup>35</sup> Act No. 18.159, art. 11.

66. A noteworthy aspect of the preparatory phase is the authority's explicit power to order, as a preventive or precautionary measure, the cessation of conduct capable of causing serious harm.<sup>36</sup> This measure may be ordered at any time during the proceedings.<sup>37</sup> If the preventive measure is granted before the trial, the authority has 30 days to initiate the trial.<sup>38</sup>

## 2. Course of the proceedings

67. The Act has no further provisions related to the continuation of the proceedings after the initial phase, except for article 14 on the obligation of all persons to cooperate with the authority. Failure to comply with this obligation leads to a presumption of guilt.<sup>39</sup>

68. This lack of regulation in the Act is made up for by the Regulations, which contain provisions on the conduct of the proceedings. Article 23 of the Regulations, for example, gives the party targeted by the complaint 10 working days to respond and to provide all evidence for the defence.

69. Once the hearing has been held, the authority must decide within 10 working days whether to continue with the proceedings or, if it is of the view that there are not sufficient grounds to do so, discontinue them. If it decides to continue, a decision on the admissibility of the evidence submitted must be made.<sup>40</sup> The authority will then process the evidence found admissible, as well as any other evidence it deems appropriate and necessary for the investigation.<sup>41</sup>

70. Once this phase is complete, the Commission will make a draft final decision available to the parties, who will be given 15 working days to contest the draft and submit additional evidence, which is to be processed in no more than 60 working days. After this period, the parties will be given another 10 working days to make their final arguments.<sup>42</sup> In accordance with article 26 of the Regulations, the final decision must be made within the next 60 working days.<sup>43</sup>

71. During the proceedings, the entire case, from the moment it is initiated to the final decision, is considered confidential. This confidentiality should not affect the parties concerned in any way.<sup>44</sup>

72. The law provides for other forms of termination of the proceedings, such as withdrawal of the complaint, in which case the authority may decide whether to close the case or continue the investigation.<sup>45</sup>

73. The proceedings can also be terminated through what is referred to as an "undertaking to cease and desist", which is not an acknowledgement of wrongdoing.<sup>46</sup> In accordance with article 16 of the Act, such an undertaking is inappropriate when the illegitimacy of the conduct and the identity of the person responsible for it are clear. Article 28 of the Regulations states that what is warranted in those cases is an acknowledgement of

<sup>36</sup> According to article 30 of Decree No. 404/007, the Commission may also ask the judicial authorities to take other kinds of preventive measure.

<sup>37</sup> Act No. 18.159, art. 13, and Decree No. 404/007, art. 27.

<sup>38</sup> Act No. 18.159, art. 15.

<sup>39</sup> Decree No. 404/007, art. 29.

<sup>40</sup> Decree No. 404/007, art. 24.

<sup>41</sup> *Ibid.*, art. 25.

<sup>42</sup> *Ibid.*, art. 26.

<sup>43</sup> *Ibid.*

<sup>44</sup> Pursuant to article 1 (E) of Ministerial Decision No. 8398 of 21 May 2013, adopted by the Ministry of Economic Affairs and Finance.

<sup>45</sup> *Ibid.*, art. 22.

<sup>46</sup> *Ibid.*, art. 28.

wrongdoing and a reduction of the penalty. There is a practical difficulty here, in that the rejection of such an undertaking could constitute a prejudgment.

74. For the offending party to be fully exonerated, it must offer to submit a cease-and-desist undertaking before the beginning of the investigation phase. If it is submitted later, only a reduction of the sanction is possible. The procedure does not provide for a scenario where the competition authority does not fully accept the offending party's proposal but finds that it could be acceptable if amended.

75. Finally, Uruguayan law establishes the possibility for parties to agree to conciliation.<sup>47</sup> Conciliation, as set out in the Regulations, could be incompatible with the nature of this kind of proceedings, which involve the pursuit of the public interest. In practice, the Commission has interpreted it as the possibility to arrange for the cessation or modification of the conduct.

76. A petition for reconsideration of a decision to end the proceedings may be filed for up to 10 days after notification of the decision. In the alternative, and within the same time period, an appeal may be filed with the higher authority, namely the Minister.<sup>48</sup> The final decision to impose a fine has executory force.<sup>49</sup>

## **B. Procedure for enquiries**

77. Article 46 of the Regulations provides for a procedure that allows individuals to submit enquiries about actions or concentrations that they are undertaking or planning, or that others are undertaking.

78. When the enquiries concern action taken by itself, the party submitting the enquiry will decide whether or not the outcome will be binding for the competition authority. If not, the party should submit all the evidence it considers relevant, and the response of the authority should be given within the following 30 working days. If the outcome is binding, the authority will have the same powers of investigation as for the analysis of cases, and individuals will have a duty to cooperate. Requests for binding reviews of action taken by third parties cannot be made.

79. This binding review procedure could divert resources from the authority, which could find itself obliged to first carry out a full investigation to respond to the enquiry and then to bring punitive proceedings. This risk would be reduced if, for example, the authority could choose whether to issue an opinion and its opinions referred exclusively to general criteria.

## **C. Judicial review**

80. Final decisions issued by the Commission may be challenged before the Administrative Court established by article 307 et seq. of the Constitution.

81. The Court is not specialized in this field; rather, it is a general court for matters of public law. In its rulings, it may uphold or overturn administrative decisions, but it may not amend or replace them.<sup>50</sup> The Court's rulings apply only to the case in question, but if the

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<sup>47</sup> Ibid., art. 32.

<sup>48</sup> Constitution, art. 317, and Decree No. 500/1991, art. 142.

<sup>49</sup> Decree No. 404/007, art. 38.

<sup>50</sup> Constitution, art. 310.

petition targets widely applicable administrative decisions, the decision has *erga omnes* effects.<sup>51</sup>

82. A distinguishing feature of the Uruguayan system is that nullification of a decision and compensation for damages are not considered in a single action. If the decision is annulled, the claimant may seek compensation before the appropriate court but may not request nullification if he/she opts first to bring an action for damages.<sup>52</sup>

83. The judicial procedure to be followed before the Administrative Court and the Court's internal organization are regulated by Decree-Law No. 15.524.

## V. Competition law enforcement

### A. Defence of competition<sup>53</sup>

84. The defence of competition takes two forms: the investigation of anticompetitive practices and the analysis of economic concentrations. From 2009 to 2015, the Commission received 126 cases and resolved 118.5. These covered 65.5 investigations, 23 preparatory studies and 30 cases of economic concentration. Most of the cases stemmed from complaints by economic agents. The authority initiated an average of one *ex officio* investigation a year.

85. According to the Commission's annual report for 2014, the average duration of investigations into prohibited practices was over one year. The average time taken for cases that lead to investigations was 28.3 months. Only one case has been resolved by use of the "cease-and-desist" mechanism.

86. Of the investigations carried out, 15 resulted in the imposition of sanctions by the authority. Most of the cases in which penalties were imposed were related to vertical agreements or abuse of dominant position.

87. As a result of its investigations, the competition authority sanctioned 30 economic agents. In nine cases, a warning was given, and in the six remaining cases a total of 15 economic agents were fined.

88. In relation to the maximum amounts permitted under article 17 of the Act, the fines imposed were for the most part relatively low. Ten of the agents were fined 100,000 UI (about US\$ 11,048). Even so, in at least one case the complainant benefited from the leniency programme.

89. This kind of programme tends to be successful when the penalties imposed are relatively stiff.

90. Of all the penalties handed down, only one had been revoked by the Ministry of Economic Affairs and Finance as at December 2015; the revocation was upheld by the Administrative Court.

91. In view of its experience in enforcing the law, the competition authority has clearly demonstrated its ability to successfully carry out investigations that end in the imposition of corrective measures and fines on the economic agents concerned.

<sup>51</sup> Ibid., art. 311.

<sup>52</sup> Ibid., art. 312.

<sup>53</sup> The information in this section comes essentially from the Commission on the Promotion and Defence of Competition and its annual reports for 2009 to 2014. Available at: <http://competencia.mef.gub.uy/7961/5/areas/memorias-de-actividades.html>.

92. However, a few specific changes could be made which would help the Commission to improve its decision-making, working and investigative methods, as well as its case management. The authority should develop the legal and economic arguments in its decisions; standardize procedures for carrying out investigations or producing technical reports; better equip the team with the skills needed to investigate and analyse anticompetitive practices; and create a database that would allow better monitoring of the cases at different stages of the investigation.

## **B. Concentrations**

93. The authority has done little work on concentrations. None of the 33 cases reported up to 2015 required the authorization of the Commission, as no de facto monopoly had been formed.

94. Once it has been established that this requirement has not been met, the decisions are limited to noting whether the information presented by companies complies with the requirements established in article 40 of the Regulations. If it does, it is taken that the formation of an economic concentration has been notified. In only one case were two economic agents sanctioned for failing to give notification of a concentration in due time and form.

95. In light of the experience of applying the rules on concentrations, it can be concluded that applying these rules as they stand is tantamount to having no checks on competition in this kind of transaction.

## **C. Competition advocacy**

### **1. Legal powers**

96. Article 26 of Act No. 18.159 gives the authority the following powers to act as an advocate of competition: (a) advise the executive branch on the promotion of competition and competition policy; (b) issue non-binding recommendations to the executive branch, the legislature, the judiciary, local authorities and other public bodies; (c) issue non-binding recommendations of a general or sector-specific nature on the practicalities of market competition.

97. Article 26 also states that the Commission may issue opinions on enquiries from any party regarding specific measures they are taking or intend to take, or that others are taking. The Commission may also issue general standards and specific instructions that could contribute to meeting the goals of the law.

### **2. Activities<sup>54</sup>**

98. The Commission's competition advocacy activities have basically focused on two areas: dealing with enquiries and publicizing competition legislation.

99. From 2009 to 2015, the Commission handled 90 enquiries, of which 53 were informal and 37 formal. Of these, 14 were submitted by public regulatory bodies and 23 by individuals. On average, the Commission dealt with 18 enquiries a year. Formal enquiries were dealt with within the 30-day deadline established by law and informal enquiries were dealt with upon receipt.

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<sup>54</sup> The information in this section comes essentially from the Commission on the Promotion and Defence of Competition and its annual reports for 2009 to 2014. Available at: <http://competencia.mef.gub.uy/7961/5/areas/memorias-de-actividades.html>.

100. The Commission has no system for monitoring the effects of its competition advocacy activities on the market. Nevertheless, some enquiries have led to complaints or investigations.

101. In addition, it has organized a series of meetings, courses, workshops and seminars to coordinate, publicize and offer training in the principles of competition. These activities have been aimed at various actors such as businesspeople, public servants, regulators, lawyers, consultants and academics, sometimes with support from other competition authorities, international organizations or the private sector. It emerged from meetings with various chambers of commerce, consultants and specialized lawyers that, even though the sample was not scientifically selected, the majority of them clearly understood the scope of the law.<sup>55</sup>

102. The Commission on the Promotion and Defence of Competition undertakes no proactive or planned communication activities. However, it does respond to queries on procedures under way and to information requests from the news media. In general, there is good coverage of the important cases brought before the Commission.

103. Finally, the Commission has a website<sup>56</sup> that gives information on legislation and on the institution itself, as well as basic technical information and the texts of decisions and reports on various matters brought before it. The website is regularly updated.

104. As in its defence of competition, the Commission has been in reactive rather than proactive mode in its advocacy activities. Because of the constraints mentioned earlier, the Commission has very little room to manoeuvre in terms of setting a strategic agenda in this area. It is vital to step up these efforts to promote a competitive environment, through its relations with other governmental and judicial bodies, and to raise public awareness of the benefits of competition.

## VI. Regulated sectors

105. Article 27 of the Competition Act stipulates that in all sectors subject to the “oversight or supervision of specialized regulatory bodies, the protection and promotion of competition is the responsibility of those bodies”, which can request non-binding advice from the Commission. This regulatory power also extends to markets that might be related to a regulated market, either horizontally or vertically, insofar as the relationship may affect competitive conditions in that market.

106. The law has been interpreted fairly broadly in determining the sectors that are included. For example, in a case dealing with sports bets, the Ministry of Economic Affairs and Finance ruled that the National Lotteries Directorate is the competent body to conduct investigations of anticompetitive conduct and concentrations.<sup>57</sup> This decision was upheld by the Administrative Court.<sup>58</sup>

107. This interpretation reduces the Commission’s scope of action and could lead to inconsistency in the opinions of the various authorities, as well as uncertainty among businesses regarding how their activities are regulated. Another of the disadvantages

<sup>55</sup> Between 14 and 18 December 2015 interviews were held with members of various associations and chambers of commerce, including the Uruguay Chamber of Industry, the Uruguay Chamber of Telecommunications and the Uruguay Union of Exporters.

<sup>56</sup> <http://competition.mef.gub.uy/>.

<sup>57</sup> Ministry of Economic Affairs and Finance, decision of 24 July 2012 (2011/05/008/415-2), p. 2.

<sup>58</sup> Administrative Court judgment No. 411/2014 of 30 September 2014. *Banca de Cubierto Colectiva de Quinielas v. State, Ministry of Economic Affairs and Finance*. Petition for annulment (File No. 660/10).

identified by local experts is that the enforcement of competition rules has not been a priority of the regulatory agencies.<sup>59</sup> The lack of meaningful sanctions in cases in which the regulator confirms that anticompetitive practices have occurred is striking.

## VII. International cooperation

108. Article 26 (i) of Act No. 18.159 stipulates that the authority should maintain relations with like bodies around the world and take part in forums where competition-related issues are discussed.

109. The most important instruments the Commission can draw on to ban practices and concentrations with cross-border effects are: the Agreement on the Defence of Competition in MERCOSUR,<sup>60</sup> supplemented by Decision No. 15/06, adopting the cooperation agreement between the competition authorities of MERCOSUR member States on the control of economic concentrations of regional scope;<sup>61</sup> and Decision No. 04/04 adopting the memorandum of cooperation between the competition authorities of MERCOSUR member States on the enforcement of national competition laws.<sup>62</sup>

110. These instruments basically lay down rules for the implementation of four mechanisms for cooperation and coordination: consultation and notification between competition authorities; coordination of enforcement activities in specific cases; technical cooperation; and information exchange.

111. The members of the Commission regularly attend the meetings of the MERCOSUR Technical Committee on the Defence of Competition (Technical Committee No. 5) to advance the incorporation into domestic legislation of common rules and the sharing of practical experience that might be useful to the various countries. The existing regulations have not yet been invoked in any specific cases.

112. In addition, the Commission takes part in other competition forums that promote cooperation and technical assistance, such as the Competition and Consumer Protection for Latin America (COMPAL) programme and the Regional Competition Centre for Latin America. It has also established relations with the competition authorities of other countries, such as Spain, Brazil and Mexico.<sup>63</sup>

113. Relationships that promote the sharing of experience between competition authorities are invaluable for enhancing the technical capacities of any authority, institution and other economic agent involved in the enforcement of competition law.

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<sup>59</sup> Interview with Daniel Hargain, a lawyer specializing in competition law. Montevideo, 16 December 2015.

<sup>60</sup> Act No. 19.173 of 4 December 2013, adopting the MERCOSUR Agreement on the Defence of Competition, concluded in the city of Foz do Iguaçu, Brazil, 16 December 2010.

<sup>61</sup> Decree No. 383/008 of 11 August 2008, adopting Decision No. 15/06 of the MERCOSUR Common Market Council, by which the cooperation agreement between the competition authorities of MERCOSUR member States on the control of economic concentrations of regional scope was adopted.

<sup>62</sup> Decree No. 386/005 of 7 October 2005, adopting Decision No. 04/04, by which the memorandum of cooperation between the competition authorities of MERCOSUR member States on the enforcement of national competition laws was adopted.

<sup>63</sup> *Ibid.*



## VIII. Recommendations

114. It is suggested that the recommendations below be taken into consideration for the purpose of strengthening the system for the protection and promotion of competition in Uruguay.

### Scope

- Promote the regulatory amendments needed to restrict the possibility of making exceptions to the enforcement of the law through other regulations and interpretations

### Anticompetitive practices

- Categorize the various prohibited practices according to their characteristics, nature and gravity
- Establish the “per se” rule of analysis with regard to the so-called hard-core cartels
- Consider adopting a de minimis rule, especially if the preceding recommendation on the per se rule is accepted
- Redistribute the burden of proof in proceedings where the rule of reason is being applied so that the party under investigation is responsible for demonstrating pro-competition effects and efficiency gains
- Draw up a list of prohibited practices, including those that are internationally recognized as anticompetitive
- Clarify how competition rules apply to the actions of associations and trade union organizations
- Consider publishing manuals or guides with a focus on such topics as prohibited conduct, the imposition of sanctions, the definition of the market and the assessment of market power

### Concentrations

- Establish notification thresholds based on objective, easily verifiable indicators
- Assess whether the level of an established threshold is appropriate for the size of the local economy
- Change the rules on the substantive analysis of concentrations so that the competition authority can intervene in cases involving the establishment or consolidation of market power, as well as facilitate coordination
- Establish a more detailed procedure for proposing dialogue-friendly solutions
- Publish guides on the analysis of concentrations to clarify the criteria being followed for the parties concerned

### Institutional aspects

- Modify the institutional design of the enforcement agency to give it greater decision-making independence and autonomy, either under the Ministry or as a completely autonomous entity
- Significantly increase the budget of the competition authority
- Improve the competition authority’s knowledge management

- Improve the skills of the technical team with regard to the investigation and analysis of anticompetitive practices and concentrations

**Enforcement of competition law**

- Adapt the procedure to the requirements of the investigation of this type of conduct, as suggested by international best practice
- Set out all the grounds for administrative action in the text of the final decision
- Devise internal procedures and manuals for the investigation and analysis of anticompetitive practices and economic concentrations
- Promote the use of undertakings to cease and desist, and regulate them more closely
- Promote leniency programmes and regulate them more closely

**Competition advocacy**

- Within available resources, pursue and intensify competition advocacy efforts
- Train the judiciary in legal and economic analysis in the field of competition
- Carry out market studies to identify failings in the market

**Promote prevention programmes**

- Set up prevention programmes and activities as a means of avoiding anticompetitive conduct

**Regulated sectors**

- Consider changing the law so as to establish a single entity for the enforcement of competition law and thereby promote and protect the principles of competition more consistently and effectively
- Improve coordination with sector-specific regulators

**Involvement in regional cooperation**

- Continue taking part in relevant international forums
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