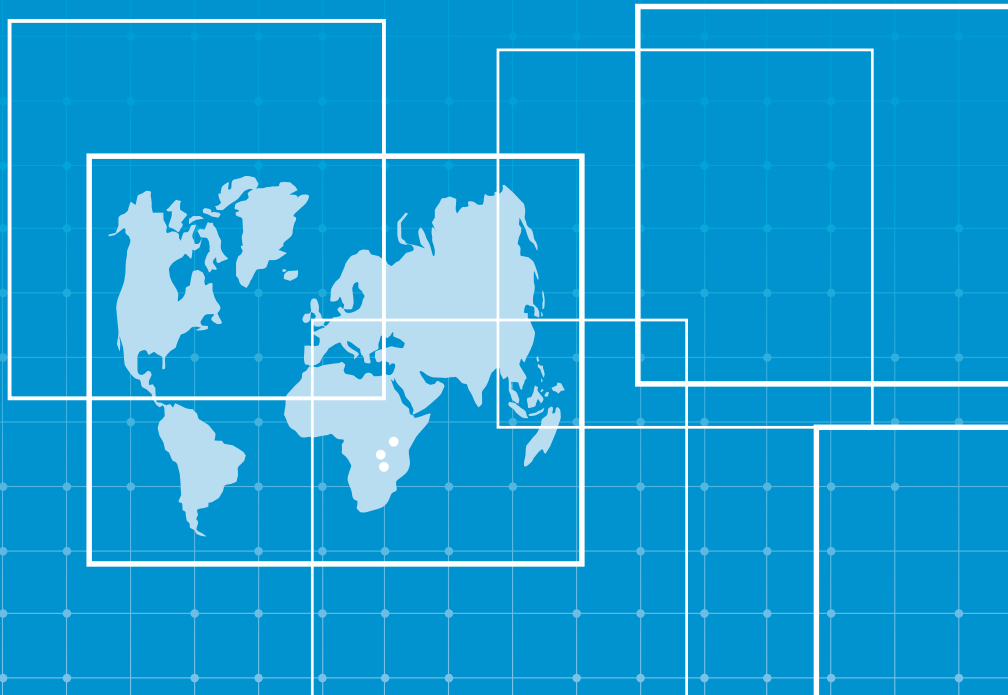




# VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

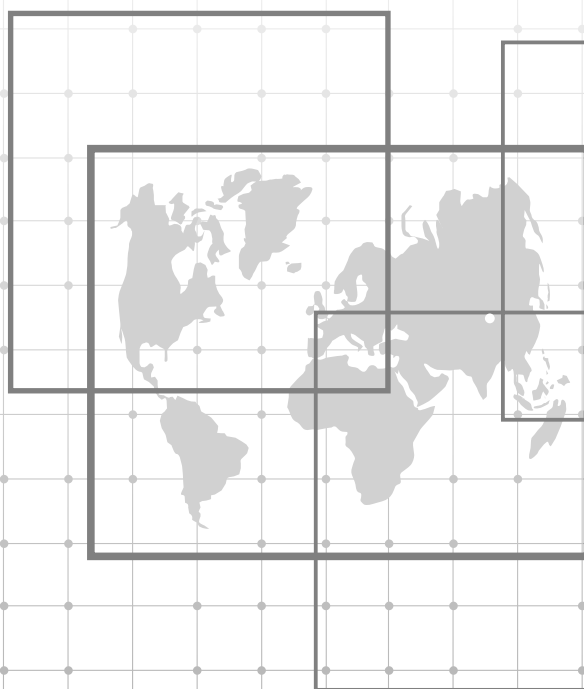
## **NICARAGUA**





# VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

## **NICARAGUA**



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## ACRONYMS AND ABBREVIATIONS

AID	U.S. Agency for International Development
ASOBANP	Nicaraguan Association of Private Banks ( <i>Asociación de Bancos Privados de Nicaragua</i> )
BIMBO	Bimbo de Nicaragua, S.A.
CAFTA-DR	Central American and Dominican Republic Free Trade Agreement
COMIECO	Council of Ministers of Economy of Central America ( <i>Consejo de Ministros de Economía de Centroamérica</i> )
COMPAL	“Competition and Consumer Protection for Latin America”. Technical Assistance Program for the Institutional Strengthening and Capacity Building in the Areas of Competition and Consumer Protection in Latin America
CONIPYME	Nicaraguan Council of Micro, Small and Medium Enterprises ( <i>Consejo Nicaragüense de la Micro, Pequeña y Mediana Empresa</i> )
COSEP	Superior Council of Private Enterprise ( <i>Consejo Superior de la Empresa Privada</i> )
SDC	Swiss Agency for Development and Cooperation
CR	Concentration Ratio
DDC	Consumer Defense Office ( <i>Dirección de Defensa del Consumidor</i> )
DGCTM	General Directorate for Competition and Market Transparency ( <i>Dirección General de Competencia y Transparencia en los Mercados</i> )
DICEGSA	Distribuidora Cesar Guerrero Lejarza S.A.
CPS	Country Partnership Strategy
ENITEL	Nicaraguan Telecommunications Company ( <i>Empresa Nicaragüense de Telecomunicaciones</i> )
HHI	Herfindhal-Hirschman Index
ICN	International Competition Network
DI	Dominance Index
IMF	International Monetary Fund
INAFOR	National Forestry Institute ( <i>Instituto Nacional Forestal</i> )
INE	Nicaraguan Energy Institute ( <i>Instituto Nicaragüense de Energía</i> )
INIDE	National Development Information Institute of Nicaragua ( <i>Instituto Nacional de Información de Desarrollo de Nicaragua</i> )
LIDO	Industrial Lido Pozuelo, S.A.
MAG	Ministry of Agriculture and Livestock ( <i>Ministerio de Agricultura y Ganadería</i> )
MIFIC	Ministry of Development, Industry and Trade ( <i>Ministerio de Desarrollo, Industria y Comercio</i> )
OECD	Organization for Economic Cooperation and Development
WTO	World Trade Organization
PROCOMPETENCIA	National Institute for the Promotion of Competition ( <i>Instituto Nacional de Promoción de la Competencia</i> )
TELCOR	Nicaraguan Institute of Telecommunications and Postal Services ( <i>Instituto Nicaragüense de Telecomunicaciones y Correos</i> )
ECF	Extended Credit Facility

SIBOIF	Superintendency of Banks and Other Financial Institutions ( <i>Superintendencia de Bancos y de Otras Instituciones Financieras</i> )
SIN	National Interconnected System ( <i>Sistema Interconectado Nacional</i> )
SINASSAN	National System of Nutritional and Food Security and Sovereignty ( <i>Sistema Nacional de Soberanía y Seguridad Alimentaria y Nutricional</i> )
UAM	American University of Nicaragua ( <i>Universidad Americana de Nicaragua</i> )
UCC	University of Commercial Science ( <i>Universidad de Ciencias Comerciales</i> )
UNCTAD	United Nations Conference on Trade and Development
UPOLI	Polytechnic University ( <i>Universidad Politécnica</i> )
USD	U.S. Dollar



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

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## PREFACE

This report is part of the Voluntary Peer Review of Competition Law and Policy in the Republic of Nicaragua. The purpose of the exercise is to evaluate the country's competition law framework and enforcement experience up to the present.

The report examines the current state of competition law and policy in Nicaragua on the basis of an extensive review of relevant documents -including the Constitution, the Law for the Promotion of Competition (hereinafter *Law 601*<sup>1</sup>) and its Regulation (hereinafter *Competition Regulation*<sup>2</sup>), different sector rules and provisions of civil and procedural law, decisions and resolutions by PROCOMPETENCIA and other public bodies, and diverse market studies-, and a country study visit from the 8<sup>th</sup> to the 12<sup>th</sup> of October 2012. During the visit, some interviews were conducted with various authorities and private sector representatives competent, or with specific interest, in competition matters<sup>3</sup>.

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<sup>1</sup> Law 601, Law for the Promotion of Competition of September 28, 2006.

<sup>2</sup> Decree No. 79-2006, "Competition Regulation, of December 21, 2006.

<sup>3</sup> Including Honorable Rafael Solís, Presiding Judge of the Constitutional Chamber of the Supreme Court of Justice, Mr. José Figueroa, Congress Member, Mr. Hernán Estrada, Attorney General, Ms. Lilliam Marengo, Competition and Consumer Protection Prosecutor; Mr. Luis Humberto Guzmán, PROCOMPETENCIA President; Mr. Gustavo Torres, PROCOMPETENCIA Senior Legal Officer; Mr. Orlando Castillo, Nicaraguan Telecommunications Institute; Mr. David Castillo, Nicaraguan Energy Institute, and academicians, businesspeople and legal practitioners.



## **1. ECONOMIC, POLITICAL AND HISTORICAL CONTEXT OF NICARAGUA**

### **1.1 Introduction**

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

The majority of the Nicaraguan population is young (53.4% is under the age of 24), and the mortality rate has declined thanks to improved access to potable water and basic health services. However, persisting poverty and inequalities in the distribution of income still impede talking about generalized access to public services such as education and health.<sup>4</sup>

As for politics, according to the 1987 Constitution Nicaragua is a democratic republic with powers of State divided into three branches: the legislative branch, with a unicameral National Assembly; the executive branch, under the direction of the President of the Republic, and the judicial branch, whose highest authority is the Supreme Court of Justice. The Constitution also provides for an autonomous election organization.

Since Daniel Ortega's election to the presidency in 2006, the political force in power in Nicaragua, both in the National Assembly and the Government, is the Sandinista National Liberation Front (*Frente Sandinista de Liberación Nacional-FSNL*).

Different political, economic and even environmental factors have contributed to Nicaragua ranking as the second poorest economy in the American continent after Haiti, according to the World Bank.<sup>5</sup> These factors include natural disasters such as earthquakes and hurricanes, which have caused significant human life and material losses<sup>6</sup>, the civil war in the 1980s-onset of the 1990s, economic crises and infrastructure deficiencies<sup>7</sup>, and long periods of political instability and institutional weakness.

### **1.2 Economic Situation**

After the Sandinista revolution, which put an end to the Somoza dynasty in 1979 and installed a leftist regime, Nicaragua went through a deep economic crisis that lasted until the 1990s (in 1979 the economy declined by 27% in real terms). In general, private investment during this period gave way to state intervention in several fronts. Moreover, the country's inflation spiraled out of control, and it was not until 1991 that some stability was recovered around Central America's average inflation rates.<sup>8</sup>

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<sup>4</sup> *The World Factbook*, CIA. <https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html>

<sup>5</sup> *Nicaragua: Panorama General* at the World Bank's official website (in Spanish), <http://www.bancomundial.org/es/country/nicaragua/overview>

<sup>6</sup> For example, the 1972 earthquake that destroyed Managua and Hurricanes Mitch (1998) and Felix (2007), which caused huge of human life and property losses.

<sup>7</sup> As a result of the domestic armed conflict and the economic embargo imposed by the United States, in this same period Nicaragua experienced a serious economic crisis evidenced by the 1.9% average annual shrinking of the gross domestic product. (Country Intelligence Report: Nicaragua, 2012).

<sup>8</sup> For more information about the Nicaraguan economy during this period see *Gasto Público en Servicios Sociales Básicos en América Latina y el Caribe*. <http://www.eclac.org/publicaciones/xml/8/4648/NICARAGUA.pdf>.

The following table, taken from *Nicaragua*, in *Gasto Público en Servicios Sociales Básicos en América Latina y el Caribe* shows the country's main economic indicators between 1980 and 1997:

**Table 1**  
**NICARAGUA: Indicadores macroeconómicos seleccionados. 1980-1997**

	1980	1985	1988	1991	1992	1993	1994	1995	1996	1997
Población miles	2.741	3.176	3.469	3.643	3.763	3.885	4.013	4.139	4.263	4.391
PIB Real (Mill.CS's de 1996)	16.946	17.491	15.050	14.769	14.830	14.776	15.270	15.902	16.624	17.463
PIB Real (Mill.US\$ de 1996)	2.008	2.073	1.783	1.753	1.750	1.757	1.751	1.809	1.890	1.970
PIB per cápita US\$ (1996)	733	653	514	481	465	452	436	437	443	449
Crecim.%PIB*	4,5	-4,1	-12,5	-0,2	0,4	-0,3	3,3	4,5	5,5	5,0
Tasa de Inflación										
Media Anual (%)	35,3	219,5	14293	2945	27,7	30,1	7,8	11	11,6	9,2
Acumulada Anual (%)	24,9	334,3	33603	865,6	9,9	25,4	11,2	15,3	12,1	7,2
Tasa de Inversión/PIB (%)	16,8	22,3	17,8	18,2	19,5	20,7	25,1	24,1	28,2	31,8
Déficit fiscal/PIB (%)	-8,4	-23	-25,6	-7,9	-8,4	-8,7	-12,4	-11,2	-14,2	-7
Tasa subutil. global (%)	18,3	23,1	33,5	52,2	50,3	50,1	53,6	27,4	25,7	24
Salario Base 1980 y 1991***	100	83,8	42,3	100	119	110,5	116,3	113,3	108,4	111,9
Balance Comercial (Mill.US\$)	-371	-489	-483	-396	-547	-402	-433	-339	-382	-555
Exportac. FOB (Mill.US\$)	445	305	230	272	223	267	351	526	670	746
Importaciones CIF (Mill.US\$)	887	892	807	751	855	744	875	961	1160	1421
Ter. Intercambio Intl.(1980)	100	65,4	ND	ND	ND	ND	58,6	70,7	62,6	ND
Balance en Cuenta Cte. **	-430	-587	-634	-7,8	-716	-483	-533	-720	-698	-707
Deuda Externa (Mill.US\$)	1.567	5.067	7.220	10.313	10.792	10.987	11.695	10.248	6.094	6.001
Servicio Deuda Ext. Pagado	136	142	107	616	172	194	242	324	228	342
Mora Acumulada	296	959	2.556	3.804	4.366	5.060	6.063	4.609	2.007	1.971
RIN (Mill.US\$)				123	128	40.5	105	99	165	356

\* Incluye 1.4 millones US\$ de transferencias por condonación de deuda externa.

\*\* En 1991 se incluye US\$ 305 Mills de pago a organismos multilaterales. En 1995 y 1996 se incluye condonación de deuda. Todo expresado en millones de dólares.

\*\*\* Basado en el MITRAB.

FUENTE: Elaborado en base a información de distintas fuentes. (BCN-INEC-MIFIN-MEDE-MCE).

[Population in thousands  
Real GDP (millions 1996 C\$)  
Real GDP (millions 1996 US\$)  
Per Capita GDP (1996 US\$)  
%GDP Growth\*  
Inflation Rate  
Annual Average (%)  
Annual Accumulated (%)  
Investment Rate/GDP (%)  
Fiscal Deficit/GDP (%)  
Overall Under-use Rate (%)  
Base Wage 1980 and 1991\*\*\*  
Balance of Trade (millions US\$)  
FOB Exports (millions US\$)  
CIF Imports (millions US\$)  
Intl. Exchange Ter. (1980)  
Current Account Balance\*\*  
Foreign Debt (millions US\$)  
Foreign Debt Service Paid  
Accumulated Default  
NIR (millions US\$)

\*Includes US \$1.4 million in transfers for debt relief

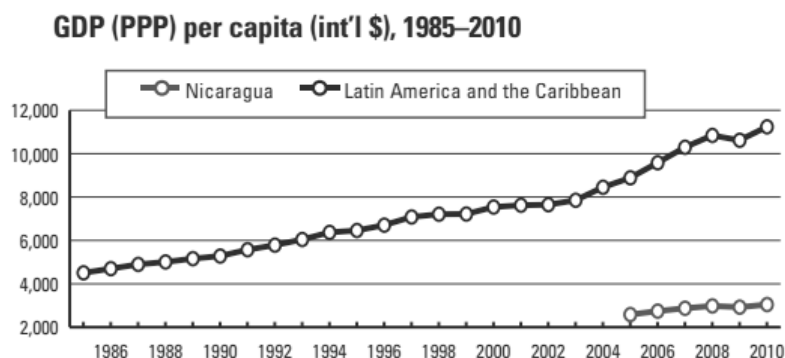
\*\*In 1991, includes US \$305 million in payment to multilateral organizations. In 1995 and 1996, includes debt relief. All expressed in millions of dollars.

\*\*\* Based on the MITRAB

Source: Based on information from different sources (BCN, INEC, MIFIN, MEDE and MCE)]

The country continues to suffer the effects of that crisis and is still one of the poorest countries in Latin America. The following table shows Nicaragua's gross domestic product, by purchasing power parity, compared to the rest of Latin American countries.

**Table 2**



Source: *The Global Competitiveness Report 2011-2012* © 2011 World Economic Forum

The prolonged economic crisis started to ease off in the 1990s and the outlook for Nicaragua as of today is generally positive, with growth rates main macroeconomic indicators expected to improve. Indeed, several international organizations are forecasting higher development and growth rates for Nicaragua over the medium-long-term.<sup>9</sup> For example, Global Insight's *Country Intelligence Report: Nicaragua* predicts growth rates of 3% to 3.5% in 2012 and 2013, driven by heavy public and private investment, greater availability of private credit, and higher consumption stimulated by family remittances.

Nicaragua's current fiscal policy is in line with what the International Monetary Fund advocates in the framework of the Extended Credit Facility given to the country, including engagement to prioritize poverty reduction and implement procompetitive policies, while keeping the deficit under control.<sup>10</sup> This fiscal deficit is however still high, apparently due to the fact that some various European donors stopped providing financial support to the country after President Ortega's party being object of corruption charges in the 2008 municipal elections.<sup>11</sup>

Nicaragua ranks 115<sup>th</sup> of 139 on the Global Competitiveness Index,<sup>12</sup> indicating the tremendous challenges the country has to face in this area. According to this Index the country is in stage one

<sup>9</sup> *Nicaragua en Cifras* by the Nicaraguan Central Bank, [http://www.bcn.gob.ni/estadisticas/economicas\\_anuales/nicaragua\\_en\\_cifras/2011/Nicaragua\\_cifras\\_2011.pdf](http://www.bcn.gob.ni/estadisticas/economicas_anuales/nicaragua_en_cifras/2011/Nicaragua_cifras_2011.pdf); *Country Intelligence Report: Nicaragua*; IHS Global Insight. September 4, 2012, p. 20; *Nicaragua: Panorama General*, <http://www.bancomundial.org/es/country/nicaragua/overview>; *Public Information Notice (PIN) No. 12/75. IMF Executive Board Concludes 2012 Article IV Consultation with Nicaragua* <http://www.imf.org/external/pubs/ft/scr/2012/cr12256.pdf>

<sup>10</sup> *Nicaragua: Country Conditions Climate for Investment & Trade*; 2011.

<sup>11</sup> *Country Forecast* by The Economist Intelligence Unit Ltd., 2011, p. 2; *Retrospectiva: de Robert Downes a Phyllis Powers*, El Nuevo Diario, June 18, 2012 <http://www.elnuevodiario.com.ni/politica/254988>, and *Nicaragua: Se Consolida el Estado por Derecho (y se debilita el estado de derecho)*, Pérez-Baltodano Andrés, *Revista de Ciencia Política*, Volume 30, N° 2, 2010 pp. 397 – 418, [http://www.scielo.cl/scielo.php?pid=S0718-090X2010000200012&script=sci\\_arttext](http://www.scielo.cl/scielo.php?pid=S0718-090X2010000200012&script=sci_arttext).

<sup>12</sup> "The competitiveness of nations is a field of economic knowledge that analyzes the events and policies determining a nation's capacity to create and maintain an environment for sustaining greater generation of value by its companies and prosperity for its people." "Nations' competitiveness relates to how they create and maintain an environment that can sustain the competitiveness of their enterprises." World Competitiveness Yearbook, IMD 2003 (in Spanish). Cited by Warner, Andrew, in *Definición y Evaluación de la Competitividad: Consenso sobre su Definición y Medición de su Impacto*, National Bureau of Economic Research Cambridge, Massachusetts, and Center for Global Development Washington, D.C. [http://www3.weforum.org/docs/WEF\\_GCR\\_Report\\_2011-12.pdf](http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf).

of development, the “factor-oriented” stage of development.<sup>13</sup> Countries with similar competitiveness indices would be the Dominican Republic, Senegal, Surinam, Zambia, Ghana, Cameroon, Malawi, Pakistan, Cape Verde and Tanzania.

Closely linked to the Competitiveness Index is the Doing Business Index,<sup>14</sup> which compares the different economies in terms of how easy or difficult it is to do business there.<sup>15</sup> Nicaragua obtained a score of 119 points (1 being the best and 185 the worst), once again evidencing major challenges for the country’s authorities.

### 1.3 Reference to the Constitution

Through several articles the 1987 Constitution describes the economic model the country seeks to develop and the role of the State in attaining it. Thus, for example, the Preamble sets as a goal that of “building a new society where all types of exploitation are removed and social, political and economic equality is achieved for Nicaraguan people.” Articles 2<sup>16</sup> and 5<sup>17</sup> set forth the principle of participation in the economic system for the Nicaraguan people, while Article 150<sup>18</sup> charges the President of the Republic with the responsibility of managing the country’s economy and setting public policies and social and economic plans for the country, with the help and collaboration of other State bodies such as the National Assembly (Article 138, sections 1 and 21) and the Central Bank (Article 99).

The Constitution dedicates an entire chapter to the national economy (Chapter I of Title VI, Articles 98-105), where the country’s economic regime is systematically addressed. According to Article 98, “the State’s primary function in the economy is to materially develop the country, to eliminate the legacy of dependency and backwardness, to improve the people’s living conditions, and to promote an increasingly fairer distribution of wealth.”

The intervention of the State in the economy translates into different functions, among others: promoting comprehensive development, fostering different methods of ownership and economic and business management, ensuring the principle of free enterprise, guaranteeing the democratic coexistence of community, associative, cooperative, private and public ownership, regulating the monetary system through the Central Bank and enabling the existence of state banks and other state financial institutions that can serve as instruments for progress, investment and development, promoting, facilitating and regulating the provision of basic public services of energy, communication, water, transportation, road infrastructure, ports and airports, enacting a

---

<sup>13</sup> “In a first stage (the “factor-orientated stage”), countries compete on the basis of natural resources and unskilled workforce. Competition is price-based, goods produced are relatively undifferentiated, and low productivity derives in low wages. Maintaining competitiveness in this stage requires public and private institutions working adequately, a developed infrastructure, a stable macroeconomic framework, and a healthy and educated workforce, at least at a primary level.” The next development stages are “efficiency-oriented” and “innovation-oriented”. [http://conocimiento.incae.edu/ES/clacd/nuestros-proyectos/archivo-proyectos/proyectos-de-competitividad-clima-de-negocios/WebsiteWEF/index\\_files/Page324.htm](http://conocimiento.incae.edu/ES/clacd/nuestros-proyectos/archivo-proyectos/proyectos-de-competitividad-clima-de-negocios/WebsiteWEF/index_files/Page324.htm)

<sup>14</sup> World Bank. *Doing Business 2012* <http://espanol.doingbusiness.org/rankings>

<sup>15</sup> The index is calculated on the basis of ten factors: the ease or difficulty of starting a business, construction permits, access to electricity, registering property, getting credit, protection of investors, taxes, international trade, contract enforcement and shut down proceedings.

<sup>16</sup> “National sovereignty resides in the people and is exercised through democratic instruments, deciding and participating freely in the building and refining of the nation’s social, political and economic system...”

<sup>17</sup> “Political pluralism ensures the existence and participation of all political organizations in the country’s social, political and economic affairs, without ideological restriction, except for those seeking to reestablish any type of dictatorship or any antidemocratic system...”

<sup>18</sup> Number 13: “The functions of the President of the Republic are as follows: 13) Manage the country’s economy by establishing social and economic plans and policies. Create a National Council for Social and Economic Planning that can offer support in the task of managing the country’s social and economic policy. The Council shall include representatives from business, workers, cooperative and community organizations, among others as determined by the President of the Republic.”

law on foreign investment which "contributes to the country's social and economic development without detriment to national sovereignty", preserving the environment and ensuring the rational use of natural resources, controlling the quality of goods and services, and preventing speculation and hoarding of basic consumption goods.

Article 99 recognizes a dominant role for private initiative in the economy ("the exercise of economic activities corresponds primarily to private parties") and Article 104 guarantees "full exercise of economic activities, without any other limitations than those imposed by law for social reasons or reasons of national interest."

The Constitution therefore safeguards the principle of free enterprise, although regulating certain activities such as financial activities, foreign trade, insurance and reinsurance (Article 99), use of natural resources (Article 102) and basic public services of energy, communication, water, transportation, road infrastructure, ports and airports, health and education (Article 105). The Constitution thus provides the basis for Law 601 of 2006, "Law for the Promotion of Competition".

Since 1992 some privatization processes and regulations to promote free competition have been implemented. There is still significant state participation in strategic economic sectors, however, through state monopolies such as the Nicaraguan Water and Sewage Company (*Empresa Nicaragüense de Acueductos y Alcantarillados-ENACAL*), the National Ports Company (*Empresa Portuaria Nacional-EPN*), and the National Electric Transmission Company (*Empresa Nacional de Transmisión Eléctrica-ENATREL*). The Government is also the exclusive manager of public pension funds.

In addition, the State intervenes as one more competitor in such sectors as insurance, through the Nicaraguan Insurance Institute (*Instituto Nicaragüense de Seguros-INISER*), and energy, through the Nicaraguan Electricity Company (*Empresa Nicaragüense de Electricidad-ENEL*) and the Nicaraguan Gas Company (*Empresa Nicaragüense de Petróleo-PETRONIC*).

## **1.4 International Economic Relations**

### **1.4.1 International Relations**

Nicaragua is a member of the United Nations and currently has permanent relations with different international organizations. Since 2007 it has enjoyed a Country Partnership Strategy (CPS) with the World Bank<sup>19</sup> and is beneficiary of an IMF Extended Credit Facility.

The country has also intensively cultivated multilateral and regional relations, especially in the area of trade. For example, in 2006 the Central America- Dominican Republic-United States Free Trade Agreement (CAFTA-DR) entered into effect in Nicaragua. In addition, when President Daniel Ortega took office in 2007, Nicaragua joined the Bolivarian Alliance for the People of Our America (*Alianza Bolivariana para los Pueblos de Nuestra América-ALBA*),<sup>20</sup> and in 2012

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<sup>19</sup> "The Country Partnership Strategy (CPS), approved in October 2007, includes financial aid of up to US \$240 million over five years (2007-2012). The goal of the strategy is to buttress the government's development objectives: creation of wealth and reduction of poverty by means of widely shared economic growth." World Bank website.

<sup>20</sup> Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, St. Vincent and the Grenadines and Venezuela.



Nicaragua, together with the other Central American countries, signed a trade agreement with the European Union.

Bilaterally, Nicaragua has put forward an independent foreign policy, and since 2007 has sought to strengthen relations with Iran, Russia and ALBA countries, particularly Venezuela. The country has signed bilateral trade agreements with Chile, the Dominican Republic, Mexico, Panama and Taiwan Province of China, as well as investment treaties with Argentina, Chile, Taiwan Province of China, the Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, Republic of Korea, and United Kingdom.

#### **1.4.2 Foreign Trade**

For several years Nicaragua has shown deficit in its balance of trade, which will hold at 13-15% of the GDP in 2012 and 2013. The reasons for this deficit include the high costs of international oil and increased purchases of industrial goods, transportation equipment and construction materials, which have not been counterbalanced by the greater revenue obtained from larger export volumes<sup>21</sup> sold at higher prices for certain product such as gold, sugar, peanuts, dairy products and beans (international prices for other raw materials such as coffee have fallen, though). Exports of manufactured goods have also been quite active lately.<sup>22</sup>

Nicaragua's main trading partner is the United States, which absorbs most of its exports, followed by the Central American countries, Venezuela and more recently China.

#### **1.4.3. Nicaragua in the CAFTA-DR Agreement**

Talks for the CAFTA-DR began in February and concluded in December 2003, but it was not until 2006 that the agreement took effect in Nicaragua. The CAFTA-DR opens attractive opportunities for the Nicaraguan economy, as it grants preferential access for the country's goods and services to a market of more than 360 million consumers. Moreover, the United States and Central America, Nicaragua's two main trading partners, from where significant foreign investment, tourism and family remittances come into the country, are parties to the agreement.

Main themes of the CAFTA-DR include administrative and institutional issues, trade of goods and services, investment, public procurement, intellectual property, environment and labor.<sup>23</sup> In some areas some changes in the Parties' internal legislations have been necessary to bring them in line with CAFTA-DR agreements and commitments. Law 601 is an example of that.

As a result of the CAFTA-DR, trade has grown between Nicaragua and the other Parties to the agreement. In 2012, 48% of all Nicaraguan exports headed to these other Parties (30.6% to the United States and 17.5% to Central America).<sup>24</sup> In 2011, remittances from abroad reached USD 905 million, of which 91% were from the CAFTA-DR area, and 1,100,000 tourists visited Nicaragua, of which 75% came from this same area.

<sup>21</sup> *Informe Mensual de Comercio Exterior de Mercancías: Enero-Agosto de 2012*. Nicaragua Central Bank: <http://www.bcn.gob.ni/publicaciones/mensuales/externo/externior/2012/0.pdf>

<sup>22</sup> *Nicaragua en Cifras*, 2011, p. 20 et seq.

<sup>23</sup> <http://www.sic.gob.hn/drcfta/index2.htm>

<sup>24</sup> Ver <http://www.cetrex.gob.ni/web/site/servicios/regionecon12.html>, [http://www.trade.gov/mas/ian/build/groups/public/@tq\\_ian/documents/webcontent/tq\\_ian\\_003368.pdf](http://www.trade.gov/mas/ian/build/groups/public/@tq_ian/documents/webcontent/tq_ian_003368.pdf), [http://www.bcn.gob.ni/publicaciones/mensuales/externo/externior/2012/6\\_volumen.pdf](http://www.bcn.gob.ni/publicaciones/mensuales/externo/externior/2012/6_volumen.pdf) y <http://www.cafta.sieca.int/sitio/VisorDocs.aspx?IDDOC=Cache/20990000000010/20990000000010.swf>

## 2. LAW 601 FOR THE PROMOTION OF COMPETITION: SUBSTANTIVE ASPECTS

### 2.1 Background

In the 1990s, Nicaragua entered a process of institutional and legal modernization that included the privatization of public enterprises, the liberalization of markets, the deregulation of various sectors, the elimination of paperwork to facilitate start-ups and the approval of new regulations. Nevertheless, the first attempt at passing a competition law in 1994 was unsuccessful.<sup>25</sup>

In 1998, the Ministry of Development, Industry and Trade (MIFIC) was assigned the task of protecting free competition and consumer rights, and thus, its General Directorate for Competition and Market Transparency (DGCTM) took on the function of promoting competition policy.<sup>26</sup> These efforts intensified in 2001, in the context of the CAFTA-DR talks, since the agreement was to include the obligation to enact a competition law.

Within the framework of CAFTA-DR complementary agenda, the Nicaraguan government was asked to design an institutional and legal framework for the promotion of competition and consumer protection including a competition law in keeping with already existing legislation in the Central American region; the creation and training of a competition authority; the strengthening of municipal governments to turn them into expeditious conflict resolution authorities for consumer protection issues; the inclusion of consumer protection and competition in primary and secondary school curricula to improve consumer education; the development of an effective system for consumer rights information and dissemination; and the equipping and training of consumer associations.<sup>27</sup>

With this major push, Law 601 was passed in September 2006 although it was not until May 2009 that the new competition authority began to function. The structure of Law 601 is similar to most of the world's competition laws<sup>28</sup> and as in other Central American countries was written after the Mexican model.<sup>29</sup>

The Law consists of 55 articles grouped into nine chapters: Chapter I covers general provisions including the object of the law, basic definitions and exceptions to its application; Chapter II refers to the authority charged with enforcing the law, and defines its powers, composition and structure; Chapter III regulates the functions of the authority; Chapter IV bans anticompetitive practices; Chapter V regulates unfair competition conduct; Chapter VI deals with economic concentrations or mergers; Chapter VII contains procedural rules; Chapter VIII defines the sanctions regime; and Chapter IX contains final and transitional provisions.

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<sup>25</sup> See Sandino, Haraxa and Torres, Gustavo. *Análisis de la Legislación de Competencia, Protección al Consumidor, Propiedad Intelectual y Propuesta de Reforma a la Ley de Promoción de la Competencia*. PROCOMPETENCIA. UNCTAD. Managua, Nicaragua. December 2012.

<sup>26</sup> *Ibid*

<sup>27</sup> Red LATN. *Las Agendas Complementarias al CAFTA-DR en Centroamérica*. San José, Costa Rica, 2007. <http://unpan1.un.org/intradoc/groups/public/documents/icap/unpan033246.pdf>

<sup>28</sup> See common elements of competition laws in: UNCTAD. *Ley Tipo de Defensa de la Competencia*. TD/RBP/CONF.5/7/Rev.3 Geneva, Switzerland. October, 2000, at <http://unctad.org/es/Docs/tdrbpconf5d7.sp.pdf>.

<sup>29</sup> This is the case, for example, of the competition laws of Honduras, Costa Rica and El Salvador.

## 2.2. Objective, Scope of Application and Exceptions

According to Article 1, the objective of Law 601 is “to promote and safeguard free competition among economic agents, to ensure market efficiency and consumer well-being (...).” The ultimate end to be pursued by competition laws has been debated in the international arena. On one side are those who think it should be to promote economic efficiency exclusively; on the other are those who suggest that other non-economic forms of securing consumer well-being should also be encouraged.<sup>30</sup> In this regard, Law 601 appears to opt for the second alternative, without excluding the purpose of fomenting economic efficiency.

Article 2 of Law 601 provides that the law shall apply to the acts, conduct, transactions or agreements of economic agents in any sector of the economy, whether in Nicaragua or abroad, to the extent that they produce or are able to produce anticompetitive effects in the national market.

With respect to the outline and to the limits of the scope of application of the law, Article 4 sets forth the following “exceptions”:

- a) The exercise of the intellectual property rights recognized by law to their holders, as long as these holders are not engaging in anticompetitive practices.
- b) Activities among economic agents aimed at achieving greater production and/or marketing efficiency, such as the harmonization of technical and product quality standards, the adoption of collective brands, and cooperation on environmental or technological development, as long as these do not involve any of the conducts banned by the law.
- c) Employer perquisites or benefits for workers, when they are the result of collective bargaining and agreements, as long as they do not involve any of the conducts banned by the law.
- d) Commercial agreements and pacts among economic agents for the purpose of promoting exports, as long as these are compatible with the rules and regulations of the World Trade Organization and any agreements and conventions ratified by the Nicaraguan government, and do not produce any anticompetitive effects in the national market.
- e) Actions promoted by the State for the purpose of ensuring the health, and the nutritional and food security of the Nicaraguan people.

Sections a, b, c and d are somewhat singular. They do not appear to constitute true exceptions to the application of Law 601 in that if they were to produce anticompetitive effects they would be equally subject to the consequences of the law. The only real exception would be the one that applies to State-promoted actions aimed at ensuring the health and the nutritional and food security of the Nicaraguan people.

The apparent legitimacy given to export anticompetitive agreements or cartels in section d calls attention, since the condition that they be “compatible with the rules and regulations of the World

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<sup>30</sup> See UNCTAD. *Ley Tipo de Defensa de la Competencia*. TD/RBP/CONF.5/7/Rev.3 Geneva, Switzerland. October 2000, pp. 16-17. <http://unctad.org/es/Docs/tdrbpconf5d7.sp.pdf>

Trade Organization” makes it highly unlikely that any case would fit under this proposed exception.<sup>31</sup>

The last paragraph of Article 18 of Law 601 states that “...any agreements between domestic producers and foreign purchasers which give favorable conditions for national products shall not be construed as practices limiting free market competition.” This exception seems to be giving preference to the interests of domestic producers over those of consumers, and legitimizing some kind of discrimination by reason of nationality, unquestionably contradicting the principles that should govern the application of a competition law and the trade agreements to which Nicaragua is a Party. The law itself appears to recognize this by conditioning the legality of a conduct to its adherence to WTO provisions. In any case, the elimination of this exception should be considered in an eventual amendment to the law.

## **2.3 Banned Practices**

Following the international practice, Law 601 bans practices between competitors (also known as “horizontal” practices) and practices involving non-competitors (“vertical” practices), and establishes a regimen for controlling mergers. Moreover, it bans acts or conduct of unfair competition, which are those contrary to honest trade practices and uses that cause (or threaten to cause) damage to one or more competitors.

In analyzing allegedly anticompetitive practices, competition authorities tend to apply two rules, the “*per se* rule” and the “rule of reason”. According to the former, some behaviors are so harmful to competition that they can always be deemed illegal without the need to prove their effects on the market or analyze possible justifications invoked by the offender.<sup>32</sup> In contrast, the rule of reason requires a detailed analysis of the conduct to assess anticompetitive versus pro-competitive effects to elucidate whether or not the conduct violates the law.<sup>33</sup>

With certain nuances, in Nicaragua the *per se* rule applies to the analysis of practices between competitors, and the rule of reason to those between non-competitors.

### **2.3.1 Practices between Competitors**

Article 18 of Law 601 bans the following anticompetitive practices between competitors: a) price fixing, including information sharing with this same purpose or effect; b) market allocation; c) limiting the supply of goods or services; d) collusive bidding; and e) agreements to limit market entry by other agents.

The first four practices coincide with those known internationally as hard core cartels, normally deemed the most harmful to competition and consumers as they have the effect of increasing prices and reducing the supply of goods and services.<sup>34</sup> The fifth practice has been explicitly recognized by some laws as anticompetitive.

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<sup>31</sup> [http://www.wto.org/spanish/thewto\\_s/minist\\_s/min03\\_s/brief\\_s/brief08\\_s.htm](http://www.wto.org/spanish/thewto_s/minist_s/min03_s/brief_s/brief08_s.htm).

<sup>32</sup> ICN. ICN Cartels Working Group. *Defining Hard Core Cartel Conduct. Effective Institutions. Building Blocks for Effective Anti-Cartel Regimes*. Vol. 1. Bonn, Germany. June 2005, p. 14.

<sup>33</sup> <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>.

<sup>34</sup> OECD. *Glossary of Statistical Terms*. March 2002. <http://stats.oecd.org/glossary/detail.asp?ID=3305>

<sup>34</sup> OECD. *Reports. Hard Core Cartels*. Paris, France. 2000, p. 11. <http://www.oecd.org/competition/cartelsandanti-competitiveagreements/2752129.pdf>

Law 601 does not expressly stipulate the nullity of the banned practices by operation of law. Neither does it expressly stipulate the application of the *per se* rule in horizontal practices cases. Nevertheless, since the Law does not establish any additional item or requirement to be shown in these cases beyond the conduct itself, it could be interpreted, as did PROCOMPETENCIA, that this is the test to apply.<sup>35</sup>

However, Article 22 of the Competition Regulation would appear to establish that the rule of reason be applied in all cases, since it establishes that when analyzing the practices referred to in Articles 18 and 19 of the Law, the authority must consider whether the interests of consumers or other economic agents have been harmed or whether efficiencies and consumer benefits are derived from such practices.

Albeit with exceptions, the international practice is to analyze cartels under the *per se* rule. The analysis is simpler and requires fewer resources, and the approach provides legal certainty to economic agents. It has its critics, though, who believe that it could lead to sanctioning conduct with insignificant anticompetitive effects in certain cases. The rule of reason would avoid this problem, but requires complex analyses consuming more authority's resources, which would be drained from other functions such as competition advocacy -important in all jurisdictions, but even more so in those new to Competition-.

Since there is widespread agreement that cartels entail so significant damage that I would be extremely difficult to counterbalance through efficiencies (efficiencies which, moreover, would have to be transferable to consumers), application of the *per se* rule would appear appropriate, at least for new agencies with very limited resources.

In any case, in the future it might be useful to consider establishing a *de minimis* rule whereby conduct lacking the potential to affect a specific share of the market would not be punishable despite its illegality.

Article 20 of the Competition Regulation is supposed to list “assessment criteria” for alleged anticompetitive practices, but what it really provides is a list of potential indicators that a banned conduct exists, which could be used in the absence of direct evidence (unjustified correlation of prices, few competitors in the market, market behavior that can only be explained by the existence of a banned practice, the fact that economic agents have been meeting or communicating in other ways, instructions or recommendations by guilds or associations to their members or associates, etc.).

Law 601 has provided for “leniency” in the Nicaraguan system. This leniency consists of partial or total exemption from penalties which would otherwise apply, granted to any cartel member that reports on the cartel to the competent authority.<sup>36</sup> Article 48 of Law 601 provides full exemption for the informant, as long as the authority has no prior knowledge of the practice and nobody is already cooperating in the investigation. However, leniency has not yet been regulated nor requested in Nicaragua.

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<sup>35</sup> See PROCOMPETENCIA. Cases 002-2010 to 010-2010; PROCOMPETENCIA. *Manual para la Evaluación de Acuerdos entre Competidores*. Managua, Nicaragua. December 2009.

<sup>36</sup> The terms leniency, immunity and amnesty are used in many jurisdictions, but their definitions vary. In the United States, the terms “amnesty” and “pardon” are used indifferently to refer to full immunity from a criminal sentence and fines for anticompetitive conduct. In the European Union, the term “leniency” is used to refer to any reduction of fines up to 100%. ICN. *Subgroup 2: Enforcement Techniques. Cartels Working Group. Anticartel Enforcement Manual. Chapter 2. Drafting and Implementing an Effective Leniency Policy*. May 2009, p.2. <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>.

In principle, leniency could begin to operate when the authority has full use of all possible tools for investigating suspicious practices, and can impose important sanctions on offenders. Indeed, it can be expected to operate when wrongdoers perceive a serious risk of significant sanctions and have confidence in the program and the authority managing it.<sup>37</sup>

For a leniency program to be successful well-defined procedural rules and conditions for receiving the benefit of leniency are crucial, including the order in which leniency applicants arrive, the characteristics of the information provided (how useful it should be for confirming the practice and for sanctioning the other members of the cartel), confidentiality rules, cases where information comes from a person and not a company, the obligation of leniency applicants to cooperate during the investigation, the cessation of the anticompetitive practice, etc.<sup>38</sup>

It might also be useful to reconsider some details of the program provided by Law 601. For example, some international experiences have shown that collaboration from a cartel member may be very advantageous even after an investigation has begun, so Law 601 might consider granting leniency benefits in such cases. Another matter that could be assessed is whether leniency should be granted to whoever organized and/or instigated the practice, or to a repeat offender. Likewise, consideration could also be given to the possibility of reducing sanctions for those who, though not arriving first, disclose useful information for the investigation.

The program may also run into practical difficulties unrelated to the authority or any procedural matters, deriving from a business environment not yet permeated by a culture of competition, fearful of commercial retaliation or mistrustful of the System. But these issues could be overcome over time if PROCOMPETENCIA could obtain and maintain institutionality, independence and a real ability to detect and sanction anticompetitive practices.

### **2.3.2 Practices between Non-competitors**

“Vertical” anticompetitive practices -those between non-competitors- are typified in Article 19 of Law 601, which prohibits: a) exclusive distribution; b) imposition of prices or other resale conditions; c) sale of one good or service conditioned on the purchase or provision of another; d) purchases or sales subject to the condition of not using or acquiring goods or services offered by third parties; e) unjustified refusal to deal; f) application of dissimilar conditions for equivalent provisions; g) agreement or invitation to join several economic agents in pressuring a customer or supplier to cease a specific behavior or to apply retaliatory measures; and h) sale of goods or services at prices below marginal costs, or any anticompetitive action aimed at raising competitors’ costs for the purpose of restricting competition.<sup>39</sup>

As in the case of practices between competitors, by virtue of the typification principle this list should be understood as exhaustive, even when not expressly stated in the text of the Law.

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<sup>37</sup> *Ibid*, p. 3

<sup>38</sup> See OECD. *Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes*. Paris, France. 2002, p. 7-10. <http://www.oecd.org/competition/cartelsandanti-competitiveagreements/1841891.pdf>.

<sup>39</sup> Article 19 of Law 601 refers literally to “predatory practices”, but this term is defined in Article 3 of the law as stated in the paragraph above.

Unlike other legislation (e.g., that of the European Union<sup>40</sup>), the Law does not divide banned practices into agreements and abuses of a dominant position; classification criteria is rather whether or not the effects of the unilateral or coordinated conduct occur in the same link of the production and marketing chain. Thus, this second category of anticompetitive practices – between non-competitors- would include both vertical agreements and abuses of market power.

The list of behaviors includes vertical practices usually typified internationally, without differentiating between them in terms of their seriousness.<sup>41</sup> This is also common in the rest of the region.<sup>42</sup> Consideration might be given in the future to including a classification of practices according to their seriousness in interpretative manuals or similar documents. This would be very useful for PROCOMPETENCIA in determining the amount of sanctions and would also enhance transparency. In addition, any amendment to Law 601 would have to consider including the seriousness of the violation among the criteria to be taken into account when establishing sanctions (Article 47). Existing incipient jurisprudence has not as yet addressed this issue.

The treatment of the practice usually known as “predatory pricing” deserves special mention. The Law typifies the sale of goods or services “at a price below marginal costs”.<sup>43</sup> The marginal cost, however, is rarely used as reference in other jurisdictions, primarily due to the complexity of its calculation.<sup>44</sup> Neither do competition agencies necessarily use the same cost reference for all cases; instead they choose depending on the circumstances of each case and the nature of the market.<sup>45</sup> The Nicaraguan law does not allow for such flexibility.

To determine the illegality of vertical conduct, Article 20 of Law 601 provides the following additional factors: a) the incumbent has a dominant position in the relevant market; b) the behaviors are engaged in for the respective goods or services or those related to the relevant market; and c) the practices block or limit market entry or drive out competitors and, in any case, cause harm to consumer interests.

The preliminary inference that can be drawn from this is that the rule of reason applies in the analysis of vertical conduct, since anticompetitive effects must be demonstrated. So at least in theory, the alleged offenders could argue the pro-competitive effects of their conduct, which PROCOMPETENCIA should assess. This would be in line with the provisions of Article 22 of the Competition Regulation above analyzed.

Article 23 of the Competition Regulation describes the potential efficiency gains to be considered in a case, among others: a) savings that permit more efficient production; b) reduced costs if two or more goods or services are produced jointly rather than separately; c) significantly reduced administrative expenses; d) transfer of production technology or market knowledge; and e) reduced production or marketing costs deriving from an expanded distribution or infrastructure network.

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<sup>40</sup> See Articles 101 and 102 of the EU Treaty.

<sup>41</sup> Jurisprudence in other countries has shown that these conducts imply different degrees of seriousness. For example, conducts affecting prices may be more serious than others so “competition authorities rarely oppose vertical restrictions not based on price.” UNCTAD, *Model Law on Competition*, TD/RBP/CONF.5/7/Rev.3. Geneva, Switzerland. October 2000, p. 29.

<sup>42</sup> As in the competition legislation of Costa Rica and El Salvador, for example.

<sup>43</sup> Law 601, Article 3.

<sup>44</sup> ICN. Unilateral Conduct Group. *Report on Predatory Pricing*. Kyoto, Japan. April 2008, p. 10.

<sup>45</sup> <http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf>.

<sup>45</sup> *Ibid*, p. 12.

Moreover, Article 21 of the Regulation provides a non-exhaustive list of the criteria for evaluating these practices: a) there is market exclusion; b) access to production inputs is made difficult or an artificial cost increase is induced; c) powers conferred by legal enablement are unduly used; d) in the case of predatory practices, goods or services are consistently sold at prices under total average cost, or occasional sales are at prices under variable average costs for a continuous time period, and once the competitor has left the market there is a price rise that cannot be explained by increased costs; e) different prices or conditions are unjustifiably set for buyers or sellers in similar situations; f) discounts are granted provided exclusivity; g) there are no economic agents capable of influencing the behavior of the alleged offender; and g) there is abuse of economic dependency.

However, more than just “assessment criteria”, this article describes the conditions of the sanctioning provision in some cases, and in others the usual anticompetitive effects for some of these behaviors, which can be confusing.

Moreover, section d sets “total average costs” and “variable average costs” as references in the assessment of allegedly predatory practices, in contradiction to the text of the Law, which uses “marginal costs”. PROCOMPETENCIA has not investigated any case like that yet, but regardless of the inconvenience of using marginal costs as a reference (as stated above), the Regulation cannot contradict the text of the Law as it ranks lower.

To determine whether the incumbent has substantial power in the relevant market, that market must first be delimited. Article 3 of Law 601 states it is “the line of business in a specific geographical area, including all the products or services that can reasonably substitute for each other and all immediate competitors to whom a wholesaler, intermediary or consumer might go in the short term.” Law 601 differs on this point from other laws in the region, which simply indicate criteria for determination of the relevant market in a case, without defining the concept, a situation which has not lacked criticism.<sup>46</sup>

Article 22 of the Competition Regulation establishes a non-exhaustive list of criteria to define the relevant market in a given case: a) substitutability of a good or service; b) distribution costs; c) chances of consumers to go to other markets; and d) the legal restrictions limiting access to alternative supply sources.

In addition, according to Article 25 of the same Regulation PROCOMPETENCIA must establish the following when defining the market: a) the goods or services being investigated and those that can substitute for them; b) the existence of potential suppliers; c) short-term availability of substitute products as a consequence of technological innovation; d) the geographical area in which goods or services are supplied or demanded; and d) legal or economic restrictions limiting access to substitute goods or services.

A dominant position, according to Article 3 of Law 601, consists of “the situation or condition that enables an economic agent to control the relevant market for a specific good or service without other economic agents being able to counter that situation.” This description corresponds to the traditional definition of a dominant position.

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<sup>46</sup> Ten Kate, Adriaan. *El concepto de mercado relevante y su falta de claridad en la legislación mexicana sobre la competencia*. Boletín Latinoamericano de Competencia, N° 27. December 2010. <http://ec.europa.eu/competition/publications/blc/>



Article 21 of Law 601 sets forth the following “criteria” for determining if an agent has a dominant position in the relevant market: a) the existence of entry barriers to the market; b) chances to access supply sources; c) recent behavior; d) chances to substitute, or compete with, other brands, products or patents in the relevant market; and e) the economic power of competitors.

Article 24 of the Competition Regulation establishes additional criteria for the analysis, which if read carefully are more examples of entry barriers: the financial costs or costs of developing alternative channels; limited access to financing, technology or efficient distribution channels; required investment; the need for special authorization from the authority or for intellectual property licenses; required advertising, etc.<sup>47</sup>

The fact that there is no reference in Law 601 to joint situations of dominant position is worth noting; neither have there been any cases or opinions by PROCOMPETENCIA to this respect.

Finally, it would appear that the benefit of leniency provided in Article 48 of Law 601 could be extended to vertical practices, as these are not expressly excluded. However, this may not be appropriate, since these are cases of unilateral conduct by dominant agents. In fact, in the majority of legislations the leniency program can only apply in cartel cases.<sup>48</sup>

For this type of conduct (vertical), early termination of cases through commitments or settlements would appear more suitable. These figures put an early end to investigations -and as a consequence save resources of the authority- in exchange for commitments by the alleged offender in the former case, and reduced fines upon acknowledgement of the violation in the latter case. Early case termination is not foreseen in Law 601, except perhaps indirectly as a way of mitigating the penalty when the practice is suspended during the investigation.<sup>49</sup>

### **2.3.3 Anticompetitive Practices in the Criminal Code**

Article 273 of the Criminal Code typifies the crime of "anticompetitive practices" by way of imposing resale prices or sharing information for the same purpose or with the same effects, limiting production, sharing market and excluding competitors from the market. The crime would be committed when an agreement exists which restricts competition and puts the country's economic stability at risk or affects basic goods. To date no such case has been tried in criminal courts.<sup>50</sup>

Although examination of these matters by the criminal authorities does not seem imminent, here the recommendation might be for PROCOMPETENCIA to advocate free competition be protected by criminal sanctions too and, when the time comes, PROCOMPETENCIA provide concrete assistance and technical support to criminal courts.

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<sup>47</sup> In this respect, see the entry barriers cited in: ICN . Unilateral Conduct Working Group. *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*. Moscow, Russia. May 2007, p. 52-53. <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>

<sup>48</sup> See Hammond, Scott D. and Barnett, Belinda A. Department of Justice. *Frequently asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*. Washington D.C., United States of America. November 2008. <http://www.justice.gov/atr/public/criminal/239583.htm>

<sup>49</sup> Law 601. Article 47, section f.

<sup>50</sup> According to Article 273 of the Criminal Code, the sanctions to be imposed in these cases are as follows: a) a fine of six hundred to one thousand days, b) two to six years of prison, and c) special disqualification for this same period from exercising a profession, holding office or engaging in industry or commerce.

## 2.4 Mergers

### 2.4.1 Generalities

Using merger control as a mechanism for state intervention in the economy has been controversial, especially when it comes to small or developing countries.<sup>51</sup> Arguments against include the need for domestic companies to achieve economies of scale in order to compete with larger foreign companies.<sup>52</sup> Most, however, have defended merger control in all cases.<sup>53</sup>

In concurrence with this majority stance, Law 601 grants PROCOMPETENCIA the power to authorize mergers, reject them or condition authorization on compliance with certain requirements. Also, it may order deconcentration of what has been unduly concentrated.<sup>54</sup>

Article 24 describes different operations that would lead to a “merger” in the sense of Law 601, including the concentration of previously independent companies, the takeover of one company by another, or the transfer of assets granting a decisive influence on decision-making. Note that all these entail a change of “control” in the companies involved, the fundamental feature as internationally recognized.

Consequently, Article 26 of Law 601 expressly excludes agreements entered into for a limited time period to develop a particular project, e.g. certain joint ventures or strategic partnerships. The text here is not completely clear, however, and appears to give excessive importance to time (although it does not set limits) when the essential factor should be structural (control).

Law 601 stipulates that advance notice be given of concentrations that reach certain thresholds, which is adequate since *a posteriori* controls can be less effective due to the difficulty of undoing transactions that have already been done.

Article 25 of the Law establishes the thresholds that trigger the obligation to notify. These are in terms of either market share -when a share of 25% or more of the relevant market is purchased or increased through the merger- or gross revenue -when the merging parties have combined gross revenue<sup>55</sup> of more than an average of 642,857 minimum wages<sup>56</sup> (around USD 87 million)-.

Best international practices recommend not to set thresholds in terms of relevant market shares and other evaluative criteria, since they are uncertain and require prior investigation and analysis that can become complicated especially in settings such as Nicaragua’s, with potential difficulties of accessing some relevant information. Instead, the use of objectively quantifiable criteria such as assets value or revenue is recommended.<sup>57</sup>

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<sup>51</sup> This discussion is currently underway in Peru.

<sup>52</sup> OECD. *Competition Policies and Small Economies*. CCNM/GF/COMP(2003)5. February 2003, p. 2.

<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2486724.pdf>

<sup>53</sup> ICN. Prepared by the Swiss Competition Commission and Israel Antitrust Authority. *Competition Law in Small Economies*. June 2009, p. 30-31 <http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf>.

<sup>54</sup> Law 601, Article 28.

<sup>55</sup> Calculation of total gross revenue should take account of all assets and income received and earned by the economic agents during the last fiscal year, regardless of their origin or frequency, before taxes (Article 30 of Decree No. 79-2006)

<sup>56</sup> Average minimum wage in effect on the day before notification. In the case of transactions in foreign currency, the official rate of exchange on the day before notification as published by the Nicaraguan Central Bank will apply (Article 30 of Decree No. 79-2006).

<sup>57</sup> ICN. Merger Working Group. Recommended Practices for Merger Notification Procedures.

<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>

Notification thresholds should be established in such a way to exclude concentrations that will most probably not generate significant adverse effects, since mandatory notification of such operations would generate superfluous administrative costs for both the parties and the authority.

<sup>58</sup> But setting thresholds so high that the authority may fail to analyze concentrations with potential significant effects on the market should also be avoided. In this sense, the threshold of 642,857 minimum wages may be relatively high for such a small economy like Nicaragua's, and thus some transactions whose analysis would eventually be relevant may be being excluded from the obligation to notify.

Article 26 of Law 601 provides the test to assess whether or not a concentration must be authorized. Authorization should not be given to mergers which could have the effect of reducing, restricting, impairing or hindering free competition of equal, similar or closely related goods or services, that is to say: a) when as a result of the transaction substantial power in the relevant market is to be conferred to one economic agent; b) when its purpose is to drive competitors out of the market or to hinder entry; or c) when it would substantially facilitate anticompetitive practices.<sup>59</sup>

Article 28 of the Competition Regulation establishes additional criteria concerning the acquisition of market power and potential efficiency gains deriving from the transaction. With regard to efficiencies, Article 27 of Law 601 provides that PROCOMPETENCIA cannot deny authorization when the parties to mergers can demonstrate that significant gains in efficiency and direct benefits for consumers can be derived from it that could not be achieved by other means, as long as the result is not a reduction of market supply.

This text is not fully clear as to the balance between a transaction's pro-competitive and anticompetitive effects. A literal interpretation would obligate PROCOMPETENCIA to approve all concentrations for which efficiency gains could be expected (and which fulfill the above conditions), regardless of the importance of their anticompetitive effects. In any case, however, it appears that considerable efficiency gains have to be shown and that the authority retains a certain degree of discretion in its assessment.

#### **2.4.2 Procedure**

*Ex ante* notification of mergers above the thresholds must be given before any action is taken to realize the transaction. This does not impede the parties reach an agreement on the merger, but in such case its effects shall be suspended and conditioned to the results of PROCOMPETENCIA assessment. As for transactions made abroad, notification must be given before they become legally and materially operative in Nicaraguan territory.<sup>60</sup>

When notifying, the parties must meet a series of requirements and provide certain pieces of information.<sup>61</sup> A fee must also be paid: a) USD 50,000 for concentrations affecting more than 25% of the relevant market, and for up to USD 5 million; b) USD 75,000 for concentrations affecting more than 25% of the relevant market, and for between USD 5 million and USD 10

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<sup>58</sup> *Ibid*, p. 1.

<sup>59</sup> Law 601, Article 27.

<sup>60</sup> Decree No. 79-2006, Article 32.

<sup>61</sup> Article 33 of the Competition Regulation details the pieces of information the economic agents must present.

million; and c) USD 100,000 for concentrations affecting more than 25% of the market, and for more than USD 10 million.<sup>62</sup>

There has been criticism that the fee is too high and disproportionate for an economy the size of Nicaragua's. Even when the reason for this might be the need for sufficient funding to move ahead with tasks requiring specialized knowledge and highly qualified staff, the fee may need to be lowered.

When a notification does not meet the established requirements, PROCOMPETENCIA President will ask the parties to amend it within 10 business days. He can also request additional information. In the absence of a response from the parties, the notification is filed away.<sup>63</sup> Proceedings will begin on the day following full submission of the notification or its amendment.<sup>64</sup>

Information can also be requested from other economic agents and from sector regulators.<sup>65</sup> The Office of the Attorney General (*Procuraduría General de la República*) can intervene in the proceedings in representation of the State.<sup>66</sup>

Once the proceedings have been initiated, the President has 30 business days to conduct a preliminary study on the effects of the merger.<sup>67</sup> If there is no evidence that it could significantly limit competition, the Director in charge of the case will issue an opinion recommending its authorization. Based on this opinion, the President would issue the respective authorization within five days, giving detailed reasoning and putting forward evidential elements.

If the concentration cannot be authorized after the preliminary study period, the Director can open a second phase of proceedings for 90 more business days. At the end of this second phase of proceedings and within 60 business days, he must remit the case to the President with his opinion and resolution proposal. The President will then issue his reasoned resolution within 30 business days, which will either prohibit the concentration or authorize it in full or subject to conditions.

The law is not clear with regard to the reasons for which the analysis of the concentration would move on to phase II of analysis. Since no technical reasoning -uncertainty about the impact of the merger on the market after having conducted a preliminary analysis- need be established, some transactions could end up in phase II simply because the authority lacked the time or resources to do any analyses in phase I. This circumstance should be review, though bearing in mind the authority's very scarce resources. Otherwise, the two-phase analysis is common in other jurisdictions and the periods set for each phase are in line with international practices.<sup>68</sup>

In the event of a partial or conditioned authorization, PROCOMPETENCIA may establish the following conditions, among others: "a) engage in a specific conduct, or abstain from engaging in

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<sup>62</sup> PROCOMPETENCIA. Board of Directors. *Minutes No. 63-2012 of June 12, 2012*.

<sup>63</sup> Decree No. 79-2006. Article 34.

<sup>64</sup> Decree No. 79-2006. Article 35.

<sup>65</sup> Decree No. 79-2006. Article 37.

<sup>66</sup> Law 601. Article 28, section (e). This section was added to Article 28 by amendment on September 21, 2011, for the purpose of protecting the collective interest.

<sup>67</sup> Decree No. 79-2006. Article 38.

<sup>68</sup> ICN. Merger Working Group. Recommended Practices for Merger Notification Procedures <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>

it; b) sell specific assets, rights, company shares or stock to third parties; c) eliminate a specific line of production; d) modify or eliminate terms or conditions in planned contracts; e) commit to carrying out actions for fomenting participation of competitors in the market, and provide access or sell goods or services to them; or f) any other conditions to keep the concentration from reducing, impairing or hindering competition and free market participation.”<sup>69</sup>

Best international practices advise to establish “remedies” very carefully and consistently with the findings of the analysis. The purpose of a remedy must be in any case and only that of offsetting the damage a transaction may occasion. A remedy should in no case try to improve competition conditions existing prior to the concentration.<sup>70</sup> In other words, remedies are mechanisms to counterbalance the anticompetitive effects of a merger and not a tool to regulate markets.

Any resolution denying authorization of a concentration must include an explanation why it is thought that it would lead to reducing, restricting or impeding free market competition.

A procedure for prior consultation is not expressly provided in the Nicaraguan competition legislation. Since there is no minimum deadline for notification, requests could be submitted in early stages of the merger negotiations but even so, a procedure for prior consultation could be considered that allow the parties learn the preliminary opinion of PROCOMPETENCIA before the big effort to submit a formal and final notification is made.

## **2.5 Unfair Competition**

Unfair competition practices generally involve private disputes between competitors and only in very exceptional cases affect the competition process itself. In many countries, matters of unfair competition are heard in courts, not by a competition authority, but Nicaragua has recognized that unfair competition conduct can sometimes affect the collective interest and thus has given powers to PROCOMPETENCIA to investigate it and, as the case may be, sanction it, just as in the case of anticompetitive practices. Nicaragua then has followed the model where the competition authority has specific functions in matters of unfair competition,<sup>71</sup> without prejudice of the courts’ powers in damages actions.

According to Article 23 of Law 601 unfair competition is “any act or conduct engaged in by economic agents in the exercise of a commercial activity, which violates honest practices and uses in commercial matters”: acts of deceit, denigration, comparison, harmful plot, confusion, fraud, inducement and imitation, when they tend to shift market demand, they are exercised against agents that enjoy property rights, and they cause effective or potential harm to consumers and competitors.

Up to September 2012, PROCOMPETENCIA had received eight complaints on unfair competition.<sup>72</sup> Three cases were closed due to abandonment by the parties (this is somewhat paradoxical considering that the conduct that could potentially affect a collective interest), one

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<sup>69</sup> Decree No. 79-2006. Article 40.

<sup>70</sup> ICN. Merger Working Group: Analytical Framework Subgroup. *Merger Remedies Review Project*. Bonn, Germany. June 2005, p. 2. <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf> and ICN. Merger Working Group. <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>

<sup>71</sup> As in Ecuador and Colombia.

<sup>72</sup> PROCOMPETENCIA. Cases: 001-2009, 011-2010, 012-2010, 003-2011, 001-2012, 002-2012, 003-2012, 005-2012.

was dismissed, and the other four are currently being investigated. The cases are essentially in the telecommunications market.

## 2.6 Consumer Protection

Consumer protection and competition rules are closely related since both tend to protect consumers, though from different standpoints and by different means. It has been said in this respect that competition defense and consumer protection converge in protecting what is called “consumer choice”; competition law seeking to give consumers increasingly more options and better conditions, and consumer protection law seeking to enable consumers to choose freely among such options.<sup>73</sup>

In some countries consumer protection and competition defense are handled by the same authority, but not in Nicaragua. The Nicaraguan Consumer Protection Law, Law 182, was passed in September 1994 in the context of the liberalization process started in the 1990s, and it aims at guaranteeing high-quality goods and services for consumers, and a fair and equitable relationship of them with public and private organizations.

The body charged with enforcing the Law is the Consumer Defense Office, which is a department of MIFIC. It is not, therefore an independent authority and its funding comes from this ministry’s general budget. Primary functions of the Office include: a) establishing consumer protection policies and programs; b) protecting consumer rights by investigating complaints; c) carrying out consumer education and information activities; d) establishing a registry of consumer associations; and e) conducting market inspections.<sup>74</sup>

Law 182 Regulation created the National Council for the Protection of Consumer Rights as an advisory body to the Consumer Defense Office. This Council is comprised of the Director General of Domestic Trade, a member from the Association of Municipalities, and two members from consumer associations.<sup>75</sup>

Law 182 is applicable to all goods and service markets, except for professional services and labor relations. A recent decision by the Supreme Court of Justice, however, questioned the authority of the Consumer Defense Office to hear and investigate cases in the energy sector.<sup>76</sup>

The law includes provisions on information and advertising, promotions, warranties, contracts of adhesion, door-to-door sales, credit transactions, product liability and other related issues. It also regulates consumer associations and gives the government authority to regulate prices for medicines and take measures in hoarding cases.

The law also establishes a procedure for consumers to assert their rights. It all must start with consumers complaining to the supplier. In absence of response, consumers may then file a complaint with the Consumer Defense Office. After a conciliation stage, the Office may impose remedies or sanctions if a violation of consumer rights is found.

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<sup>73</sup> Averit, Neil W. and Lande, Robert H. *Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law*, *Loyola Consumer Law Review*, Volume 10, No. 1, 1998.

<sup>74</sup> Decree No. 2187-99, Article 6.

<sup>75</sup> *Ibid.* Articles 7, 8 and 9.

<sup>76</sup> Supreme Court of Justice. *Decision No. November 10, 2009*. Case: 148-2010.

Statistics show a significant decline in the Office's activity regarding complaints: in 2010 it received 3,280 complaints, compared to 322 complaints in 2011 and only 119 in 2012 up to October. Some experts feel this is due to the fact that the authority no longer analyzes cases in the energy sector and that it has adopted a more preventive and less repressive approach.

After 18 years of enforcing Law 182, the Nicaraguan authorities are discussing amendments to converge to best international practices. Some of the proposed changes merit special mention including those aiming at expanding the scope of application of the Law by giving micro and small enterprises consumer status, or transforming the current Consumer Defense Office into a new entity with offices throughout the Nicaraguan territory, or empowering the authority to review contracts of adhesion *ex ante*, or detailing the proceedings by establishing times and conditions for each stage, or typifying banned conduct, or expanding the implicit supplier obligation to provide warranties.<sup>77</sup>

Some experts feel it necessary to reinforce the independence of the authority charged with hearing consumer complaints, since the Consumer Defense Office is formally part of MIFIC, and thus case appeals are consequently heard by this ministry.

### **3. INSTITUTIONAL ASPECTS: PROCOMPETENCIA**

#### **3.1. Structure**

PROCOMPETENCIA is a technical institution of public law with a legal status, its own assets, and administrative and budgetary autonomy.<sup>78</sup> With a head office in the capital of Nicaragua,<sup>79</sup> it is charged with promoting and advocating competition,<sup>80</sup> investigating<sup>81</sup> anticompetitive practices<sup>82</sup> and acts of unfair competition<sup>83</sup> and, as the case may be, sanctioning them, and analyzing economic concentrations<sup>84</sup> in order to prevent adverse effects on competition.

Under the Nicaraguan model, investigation and resolution of competition cases are done by the same single entity. Several alternatives are possible here: 1) the two-pronged legal model, whereby the authority has investigative powers and takes legal action to bring offenders before the courts, with a right of appeal existing before courts of appeal; 2) the two-pronged agency model, whereby there is an authority with investigative powers which brings offenders before specialized competition tribunals/authorities, with a right of appeal existing before other specialized bodies or the courts; and 3) the integrated agency model (that of Nicaragua) whereby

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<sup>77</sup> Information sent by Ms. Anielka Aguilar Rivera, Head of the Investigations Department of the Consumer Defense Office in the Nicaraguan Ministry of Development, Industry and Trade.

<sup>78</sup> Law 601, Article 5.

<sup>79</sup> Law 601, Article 5. However, PROCOMPETENCIA is granted the power to set up offices anywhere in the national territory.

<sup>80</sup> Law 601, Chapter III.

<sup>81</sup> Pursuant to Article 53 of Law 601, "...all government bodies and authorities in general, as well as all individuals and legal entities, have the obligation to provide PROCOMPETENCIA with any necessary support and cooperation, including information and documents required during investigation of competition cases." Article 14, section n, states that one of the President's powers shall be that of "...requesting any information needed to investigate potential violations of the law to any domestic or foreign authority."

Moreover, Article 46 states that PROCOMPETENCIA may conduct interviews and dawnraids at the incumbents' premises.

<sup>82</sup> Law 601, Chapter IV.

<sup>83</sup> Law 601, Chapter V.

<sup>84</sup> Law 601, Chapter VI.

the functions of investigation and resolution are concentrated in one authority, with a right of appeal existing at general or specialized appeal bodies.<sup>85</sup>

The third alternative is subject to criticism on the grounds that independence and impartiality is not ensured in the decision stage.<sup>86</sup> In some countries the controversy has taken years and the legality of the system has even been challenged on the basis of due process arguments.<sup>87</sup> But the model has been defended for countries where resources devoted to the protection of competition are limited and there is little experience in competition matters,<sup>88</sup> in the understanding that the rights of defense would be safeguarded in any case by the possibility of appealing the competition authority's decisions in court.

Within this type of structure investigations should be carried out by a body whose members take no part in the decision-making process. With the organizational structure provided for PROCOMPETENCIA (see below), separation of investigation and resolution could be possible, should the institution be granted enough resources.

### 3.2 PROCOMPETENCIA Bodies

Article 3 of the Competition Regulation establishes that PROCOMPETENCIA shall be comprised of a Board of Directors, a President, operational directorates, support directorates and a Management Committee.

#### 3.2.1 The Board of Directors

The highest body in the institution is the Board of Directors, which is charged with “dictating policy for the prevention, promotion, protection and guarantee of free competition, and overseeing its enforcement.”<sup>89</sup> The Board consists of the President, three members<sup>90</sup> and their respective alternates.<sup>91</sup>

The members of the Board, including the President, are appointed by the President of the Republic and ratified by an absolute majority in the National Assembly. Candidates are chosen from lists of three submitted by the Superior Council of Private Enterprise (COSEP), the Nicaraguan Council of Micro, Small and Medium Enterprises (CONIPYME), and MIFIC.<sup>92</sup>

The fact that Board members represent certain private sector and government groups could, in principle, compromise the body's independence or give rise to conflicts of interest. Nevertheless,

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<sup>85</sup> UNCTAD. *Model Law on Competition (2010) – Revised Chapter IX*. TD/B/C.I/CLP/L.29 Geneva, Switzerland. May 2011, p. 3. [http://unctad.org/en/Docs/ciclpL2\\_en.pdf](http://unctad.org/en/Docs/ciclpL2_en.pdf)

<sup>86</sup> Gordon, Peter-John. *The Case for Maintaining a Single Competition Agency for Investigation and Adjudication of Anti-Trust Cases*. Jamaica Fair Trading Commission, pp 16-17.

[http://www.jftc.gov.jm/Libraries/Speeches and Presentations/The Case for Maintaining a Single Competition Agency for Investigation and Adjudication of Antitrust Cases - Dr Peter- John Gordon.sflb.ashx](http://www.jftc.gov.jm/Libraries/Speeches%20and%20Presentations/The%20Case%20for%20Maintaining%20a%20Single%20Competition%20Agency%20for%20Investigation%20and%20Adjudication%20of%20Antitrust%20Cases%20-%20Dr%20Peter%20John%20Gordon.sflb.ashx)

<sup>87</sup> See background of the debate in the European Court of Human Rights (ECHR), October 26, 1984, of *Cubber v. Belgium*, case no. 9186/80.

<sup>88</sup> *Ibid*, p. 11.

<sup>89</sup> PROCOMPETENCIA. *Manual de Organización y Funciones*. Managua, Nicaragua. July 2009, p. 6.

<sup>90</sup> Law 601, Article 7. Amended by Law 668 of August 14, 2008.

<sup>91</sup> Pursuant to Article 5 of the Competition Regulation, alternates will exercise their duties *ad honorem*, unless called to office, in which case they will have a right to the fee established by decision of the Board of Directors.

<sup>92</sup> Law 601, Article 7.



there is no evidence that such circumstance has taken place up to now, and in any event Law 601 has foreseen a series of inhibiting circumstances.<sup>93</sup>

Board members are required to be of recognized integrity and honorability and have a master's degree in economics or law, at least five years of professional experience, and some experience in competition matters.<sup>94</sup> Board members' appointments are for five-year terms, to avoid the political cycle, and are not simultaneous<sup>95</sup>, so the transmission of accumulated experience and knowledge is facilitated.

Standing board members work full-time and cannot take on any professional activities other than teaching. They cannot be removed from office but for a reason stipulated in the Law<sup>96</sup> and after a hearing at the National Assembly at the request of the President of the Republic.

The Board of Directors must meet at least once a month and may hold special meetings as deemed necessary.<sup>97</sup> Meetings must have a quorum of three standing members or their alternates. Decisions are made by majority. In the event of a tie the President has a double vote.<sup>98</sup>

Article 13 of Law 601 establishes the functions of the Board of Directors. Its duties with respect to cases of anticompetitive practices include:<sup>99</sup>

- a) Resolving Law 601-related cases submitted for hearing;
- b) Hearing and resolving appeals filed against decisions of PROCOMPETENCIA President on appeals for review. A recent amendment to Law 601 rightly excluded the President's participation in appeals filed before the Board;<sup>100</sup>
- c) Hearing and resolving on appeals for review filed against the Boards' decisions;
- d) Informing the sector regulators when as a result of an investigation it is found that the problem is in sector regulations so that the respective measures can be taken; and
- e) Informing and requesting the intervention of the Attorney General when the situation so merits.

Its functions also include carrying out a public education program to promote a culture of competition, approving the organizational structure and regulatory bases for PROCOMPETENCIA, approving PROCOMPETENCIA's annual budget and submitting it to the

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<sup>93</sup> Pursuant to Article 12 of Law 601, the members of the Board of Directors must refrain from hearing any matters which may entail a direct or indirect benefit to them. According to this same article, an interest in the matter shall be deemed to exist whenever they or their spouses have personal or up to four-degree relative ties to it.

<sup>94</sup> Law 601, Article 9.

<sup>95</sup> Law 601, Article 50.

<sup>96</sup> In accordance with Article 11 of Law 601, the following are grounds for removal from office: "a) entering into conflicts of interest in the exercise of functions after appointment; b) serious noncompliance with the obligations and functions of the office; c) acting with duly proven negligence or incompetence; d) physical or mental incapacity which renders impossible the exercise of the office; e) failure to attend three consecutive meetings for unjustified reasons; f) final criminal judgement ordering severe penalties; g) any of the reasons given in Article 10 of this law."

<sup>97</sup> Pursuant to Article 6 of the Regulations, the meetings may be regular or special. Regular meetings are held at least once a month. Special meetings shall be called by the president or the person acting in his stead.

<sup>98</sup> Law 601, Article 8.

<sup>99</sup> Law 601, Article 13.

<sup>100</sup> Law 601, Article. Amended by Law 773 of October 24, 2011.

Ministry of Finance and Public Credit, ordering and commissioning specific consultations on technical aspects, and naming an internal auditor to PROCOMPETENCIA.

### 3.2.2 The President

The President is in charge of “enforcing policies for the promotion, protection and guarantee of free competition pursuant to the law”.<sup>101</sup> The President is responsible for the institution’s administrative and technical management, and concentrates most of the decision-making functions.

According to Article 14 of Law 601 and Article 9 of the Competition Regulation, the President of PROCOMPETENCIA has the following functions:

- a) PROCOMPETENCIA’s legal representation;
- b) Hear, *ex officio* or upon complaint, competition cases, by ordering investigations and issuing the necessary instructions;
- c) Declare the admissibility or inadmissibility of complaints;
- d) Request any applicable preventive measures from a competent court authority, *ex officio* or at a party’s request;
- e) Deliver decisions on the investigated cases and impose the applicable sanctions in each case;
- f) Order partial or full de-concentration in merger cases;
- g) Hear appeals for review against his own decisions;
- h) Call meetings of the Board of Directors and chair them;
- i) Take the necessary measures to guarantee and protect confidential information in PROCOMPETENCIA archives;
- j) Issue requests for information to any domestic or foreign authority when needed in the context of investigations;
- k) Propose coordination mechanisms with regulators to prevent and combat anticompetitive practices.

Moreover, the President is charged with coordinating PROCOMPETENCIA’s operations, financial resources and assets, and assisting the Board of Directors in performing its functions.<sup>102</sup>

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<sup>101</sup> PROCOMPETENCIA. *Manual de Organización y Funciones*. Managua, Nicaragua. July 2009, p. 7.

<sup>102</sup> Law 601, Article 14. Other functions of the President include: a) Representing the country at national and international levels in matters of competition policy; b) Managing and coordinating the operations of PROCOMPETENCIA; c) Granting any powers necessary, with the prior authorization of the Board of Directors; d) Entering into cooperation agreements with peer institutions; e) Appointing and dismissing administrative staff, pursuant to the procedures of the relevant law, ensuring proper use of PROCOMPETENCIA’s human resources; f) Compiling decisions and publishing them; g) Reporting annually in writing to the National Assembly and publishing an annual report on activities with the approval of the Board of Directors; h) Proposing

Clearly most of the authority's functions fall on the figure of the President, the functions of the Board of Directors limited in practice to hearing appeals on the decisions made by the President. This turns PROCOMPETENCIA into a one-person body, a situation which could eventually place the authority's independence at risk, since "capture" of the decision-maker is potentially easier in this context. Furthermore this system does not seem to make the most of resources. Indeed, PROCOMPETENCIA having a collective body with full-time paid members performing few functions is out of line with its level of funding. The Board could take on additional functions.

### 3.2.3 Other Bodies within the Authority

The Competition Regulation creates operational and support directorates. The organizational chart<sup>103</sup> originally planned and approved by the Board of Directors of PROCOMPETENCIA in compliance with the law includes a legal directorate that would have under it a legal studies department and a complaints department, an economics directorate that would have an economic concentrations department and an economic studies department, a competition prosecution directorate that would have an investigation department and a monitoring and compliance department, and a competition advocacy directorate that would have a competition promotion department and a technical standards department.

There would also be an administrative and financial directorate that would have a human resources and general services unit, an accounting unit, a budget unit, an information technology unit and an internal auditor office. The management committee, composed of the president, operational directors and support directors,<sup>104</sup> would plan and coordinate the institution's tasks and activities, and design its annual operating plans.<sup>105</sup>

But due to severe budget restrictions, it has not been possible to implement the planned organizational structure. In fact, the current organizational chart sent to the Ministry of Finance and Public Credit in 2013<sup>106</sup> includes only the Board of Directors, the Presidency, an Administrative and Finance Unit, a Legal Directorate, the Prosecutor's Office, and an Economic Directorate.

## 3.3 Financial Resources

PROCOMPETENCIA's assets consist of State funding, allocations in the national budget, assets acquired to carry out its functions, subsidies and contributions conferred by the State, funding from international cooperation, revenue from the sale of publications, bequeathals and donations, nontax income, duties and fees for services, and other legally obtainable income.

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mechanisms for coordination with regulatory bodies to prevent and combat anticompetitive practices; i) Participating in negotiations and discussions on international conventions or treaties concerning competition policies; j) Preparing a draft annual budget and reporting on budget execution; k) Proposing the administrative organization of PROCOMPETENCIA to the Board of Directors; l) Raising any proposal for law amendments needed for PROCOMPETENCIA's successful operation to the Board of Directors for consideration; and m) Exercising all functions and powers provided by Law 601 and those the Board of Directors may delegate to him.

<sup>103</sup> See Appendix 1.

<sup>104</sup> Decree 79-2006, Article 12.

<sup>105</sup> Decree 79-2006, Article 14.

<sup>106</sup> See Appendix 2. *PROCOMPETENCIA Functional Organizational Chart for 2013 (remitted to the Ministry of Finance and Public Credit)*

PROCOMPETENCIA has then funds independent of the Government. Nonetheless, it must submit an annual budget to the Ministry of Finance and Public Credit, which then submits it for approval by the National Assembly as part of the overall State budget.<sup>107</sup> Thus, the final amount allocated to PROCOMPETENCIA is beyond its control, PROCOMPETENCIA's requests being subject to the Ministry of Finance's scale of priorities.

The budget approved for the institution has been very limited, almost symbolic: one million cordobas (around USD 41,500) in 2009, six million cordobas (around USD 250,000) in 2010, and seven million cordobas (around USD 290,000) in 2011. One hundred thousand cordobas (around USD 4,150) were allocated to PROCOMPETENCIA in 2009, and 321,000 (around USD 13,350) in 2010, for the purchase of fixed assets.<sup>108</sup>

In 2012 the budget approved was 8,997,000 cordobas (around USD 374,000), of which 78% went to personal services, primarily salaries, and 22% to operating expenses. PROCOMPETENCIA's budget does not even cover the cost of the officers currently on the payroll (and remember here that not even the positions originally foreseen have been provided). International cooperation funds received amounted to around USD 30,000. .

There are thirteen people employed in PROCOMPETENCIA: four board members including the President, four lawyers, an economist, an accountant, a secretary, an office head and a janitor. Only the salaries of eight of them are covered by the budget (those of the board members, the office head, the accountant, the technical secretary for the Board of Directors, and the janitor). The positions of lead lawyer and competition prosecutor, which in reality are the day-to-day drivers of the institution's work, have been funded up to now by international cooperation through UNCTAD's COMPAL program and USAID's Companies and Jobs (*Empresas y Empleos*) program. The continuity of these programs is uncertain, however, and in any event the current dependency on international cooperation does not seem ideal.

The authority has not yet been able to hire an internal auditor or a senior economist.<sup>109</sup> The "Socioeconomic Impact of Private Barriers on SME Development in Nicaragua" Program, sponsored by the Swiss Agency for Development and Cooperation (SDC) used to provide the authority with intern economists but at present PROCOMPETENCIA only has one junior economist.

PROCOMPETENCIA's situation contrasts with that of other regulators in Nicaragua -INE's 2012 budget, for example, was 82,495,110 cordobas (around USD 3,430,000)<sup>110</sup> - and that of other competition authorities in the region -in 2012, it was more than USD 900,000 in Honduras with 22 staff members,<sup>111</sup> USD 650,000<sup>112</sup> in Costa Rica, with 23 staff members,<sup>113</sup> and almost USD 2 million in El Salvador, with 40 staff members.<sup>114</sup>

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<sup>107</sup> Law 601, Article 6.

<sup>108</sup> PROCOMPETENCIA. *Informe a la Asamblea Nacional del Año 2011*. Managua, Nicaragua. May 2012, p. 2.

<sup>109</sup> *Ibid.*

<sup>110</sup> See in: <http://www.ine.gob.ni/>

<sup>111</sup> Information sent by Mr. Oscar Lanza, President of the Honduran Commission for the Defense and the Promotion of Competition.

<sup>112</sup> COPROCOM members do not work full time and only receive allowances for the meetings they attend.

<sup>113</sup> Information sent by Ms. Victoria Velázquez, Executive Director of COPROCOM.

<sup>114</sup> Information sent by Ms. Regina Vargas, Head of Competition Advocacy in El Salvador Superintendency of Competition.

### 3.4 Independence and Ability to Perform

It is generally accepted that competition authorities must base their decisions on objective criteria through neutral and transparent processes and that a competition policy can only be effective if the authority's decisions are free of political or particular groups' interferences. For this reason competition authorities are normally separate from governments' traditional structures.<sup>115</sup>

The *de jure* independence of authorities (according to the regulations) should be differentiated from their *de facto* (actual) independence.<sup>116</sup> The law should protect the authority's independence, but it should in addition provide the authority with the necessary tools to make that independence also be *de facto*. The specific measures for achieving independence may vary according to the country.

In the case of Nicaragua many aspects of the authority's institutional design foster its independence, but in practice its power to act, and therefore its *de facto* independence, is hugely limited by the shortage of funds.

### 3.5 Transparency and Accountability

All authorities must report on their efforts and activities for the sake of transparency and control. PROCOMPETENCIA is no exception and is obliged to report in writing to the National Assembly every year, according to Article 14 of Law 601. It must also publish an annual report, which it has been doing since 2009. Also, PROCOMPETENCIA's website offers relevant information on legislation, decisions, guidelines, annual reports, etc.

It is worth mentioning that PROCOMPETENCIA's decisions are subject to judicial review, this constituting a mechanism for control and oversight of its substantive work. Nevertheless, as in many other developing countries, there is still not enough technical mastery of competition issues by judges,<sup>117</sup> a circumstance PROCOMPETENCIA could help overcome by exercising its advocacy functions with this group in particular. In fact, some efforts have recently been made to train judges on competition issues.<sup>118</sup>

### 3.6 Strategic Planning

Strategic planning is an institution's periodic decision-making process, usually aimed at answering the following questions: What is the authority's mission? What does it want to achieve in a specific period of time? How? How will it use its resources? How will it measure success? Planning should help the authority meet its goals, evaluate its work, improve resource-allocation and accountability, and communicate with the people.<sup>119</sup>

Planning, which involves prioritizing goals and actions, is especially important for agencies with so scarce resources as PROCOMPETENCIA. And for that, some degree of discretion as to which cases to investigate, and which advocacy actions to undertake, is crucial. For example,

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<sup>115</sup> UNCTAD. *Independence and Accountability of Competition Authorities*. TD/B/COM.2/CLP/67 Geneva, Switzerland. May 2008, pp. 3-4. [http://unctad.org/en/docs/c2clpd67\\_en.pdf](http://unctad.org/en/docs/c2clpd67_en.pdf)

<sup>116</sup> *Ibid*, p.4.

<sup>117</sup> See *Ibid*.

<sup>118</sup> To a large extent also with the support of international cooperation.

<sup>119</sup> ICN . *Agency Effectiveness Handbook. Chapter 1. Strategic Planning and Prioritisation*. March 2010, p. 6. <http://www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf>

some strategic sectors could be identified on which to focus efforts. In the case of PROCOMPETENCIA, however, budget limitations and uncertainty regarding funding beyond the very short term make it extremely difficult to conduct any planning exercise. Nevertheless, when it first started PROCOMPETENCIA drew up a list of key sectors and another of opinion leaders, and came up with a competition advocacy plan.<sup>120</sup>

PROCOMPETENCIA has concluded 17 cases in anticompetitive practices and 3 merger cases,<sup>121</sup> all initiated by complaints (or notification). Beyond the budgetary problem, the most pressing as has been shown, reforms could be made to enable the authority to simply reject complaints on practices considered of minor importance. This way it could focus on investigations of greater significance (which could be initiated *ex officio*).

### 3.7 Knowledge Management and Institutional Memory

As they work, competition authorities should accumulate knowledge that can be shared and used in the future. That way it will build institutional capacity to effectively enforce competition laws, despite staff turnover and also providing more legal certainty to economic agents.<sup>122</sup>

Adequate knowledge management and preservation of institutional memory is a key issue for all competition agencies, but especially for those in developing countries, which for budgetary reasons tend to experience difficulty in hiring and retaining qualified staff.<sup>123</sup> “Knowledge management” includes initiatives such as those aimed at training staff and those of keeping and organizing legislation, decisions, documents, databases, bulletins, etc. and putting them at the disposal of those who should access them, etc.

PROCOMPETENCIA has prepared guidelines and manuals for case analysis and competition advocacy activities, and also posts actions and decisions on its website. However, it needs to improve its databases since, for example, there are no statistics on competition advocacy activities carried out or about whether they were followed-up in some way. To the extent permitted by the funding, it would eventually be useful to set a basic training program for new staff members.

## 4. PROCEDURAL ASPECTS

### 4.1 Generalities

PROCOMPETENCIA has been entrusted with many functions related to the identification, investigation and sanctioning of anticompetitive practices and unfair competition conduct, as well as to merger control.

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<sup>120</sup> See Chapter 7.

<sup>121</sup> See Appendices 3 and 4.

<sup>122</sup> To this respect, see UNCTAD. *La Gestión de los Conocimientos y de los Recursos Humanos con Miras a La Aplicación Eficaz del Derecho de la Competencia*. TD/B/C.I/CLP/15/Rev.1 Geneva, Switzerland. June 2012.

[http://unctad.org/meetings/es/SessionalDocuments/ciclpd15-rev1\\_sp.pdf](http://unctad.org/meetings/es/SessionalDocuments/ciclpd15-rev1_sp.pdf)

<sup>123</sup> *Ibid.*

To comply with these functions, Law 601 has provided some specific procedures which need the supplement of other rules and regulations, mainly the Code of Civil Procedure and the Competition Regulation.

Two items stand out that are deemed relevant and need be explained below before going into the detail of the procedures: the legal standing for the case and procedural principles.

#### 4.1.1 Legal Standing for the Case

Article 48 of the Competition Regulation establishes that the President may initiate proceedings *ex officio* or at the request of a party.<sup>124</sup> The 2009 PROCOMPETENCIA Manual for Evaluation of Agreements between Competitors describes the factors that would prompt *ex officio* action by the President: a) the public interest; b) PROCOMPETENCIA's strategic plan; c) the availability of human and financial resources; d) the applicable legislation; e) the economic, political, legal and regulatory context; f) international developments; g) government priorities; and h) the activities of other domestic and international agencies and regulators -the criterion in section g calls attention as it appears inappropriate in a system seeking to guarantee the authority's independence from the very outset-.

Since this is an administrative procedure intended to preserve the common good and make sure public interests prevail (in line with the provisions of Article 99 of the Constitution), it is at least natural for PROCOMPETENCIA to be empowered to initiate proceedings *ex officio*. As for complaints, Article 31 of Law 601 states they can be lodged by agents with a legitimate interest or by any type of legally constituted profit or non-profit organizations.

It would seem that only those whose interests have been directly affected by anticompetitive practices are entitled to file a complaint before PROCOMPETENCIA, even when public interests are at stake. Fortunately, PROCOMPETENCIA would be entitled to initiate proceedings *ex officio* following information received from a common citizen.<sup>125</sup>

The Manual for Evaluation of Agreements between Competitors states that "...alternatively, through legally constituted representatives of consumer interests, a complaint may be brought by any person suspecting cartel activities." However, consumer organizations have not been active in this respect.<sup>126</sup> In 2010 some consumer organizations reported they found the task of the complainant too difficult.<sup>127</sup>

A review of the concept of 'party' and the role of PROCOMPETENCIA in the proceedings should be conducted.

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<sup>124</sup> Insofar as Article 31 of Law 601 states that unfair competition practices can only be investigated at the request of a party, there is an apparent contradiction between Law 601 and the Competition Regulation which should be resolved in favor of the higher ranking rule.

<sup>125</sup> Articles 31 of Law 601 and 48 of the Competition Regulation would allow the President of PROCOMPETENCIA to open proceedings *ex officio* based on information included in a complaint that does not meet the requirements of law.

<sup>126</sup> <http://www.procompetencianic.org/info/2012/Denunciasconcentracionesanteprocompetencia.pdf>

<sup>127</sup> "..., but this anticompetitive practice can only be pursued by complaint, which leaves the defenders of consumer rights with an enormous task of legally representing the affected parties." *Memoria Anual de PROCOMPETENCIA, 2010*.

#### 4.1.2 Procedural Principles

Article 29 of Law 601 states that PROCOMPETENCIA must respect the principles of confidentiality, initiative in proceedings, loyalty, due process and good faith, to which Article 27 of the Competition Regulation add speed and procedural economy. Apparently these principles need not be applied uniformly in all actions. Neither are they defined in Law 601<sup>128</sup> nor in the Code of Civil Procedure.

In addition, the principles governing the actions of public servants apply to PROCOMPETENCIA staff, pursuant to Article 5 of Law 438 of 2002. These principles are dignity, integrity, equality, capacity, responsibility and legality.<sup>129</sup>

Given this panorama, it is essential to articulate the general principles permeating all the procedural actions by PROCOMPETENCIA and its staff.

#### 4.2 Procedures for Banned Practices

##### 4.2.1 The Complaint and Formal Initiation of the Proceedings

In matters of anticompetitive practices, unfair competition and noncompliance with the obligation to notify a concentration, a complaint must be in writing<sup>130</sup> and contain:<sup>131</sup>

- a) The name of the allegedly offender.
- b) His address.
- c) A description of the practice or legal violation.
- d) The damage that has been caused or may be caused in the future to the complainant.
- e) The elements shaping the anticompetitive practice and the arguments that demonstrate the complainant has suffered or may suffer substantial economic damage.
- f) Signature by the complainant or its legal representative, together with the respective public document.
- g) Original complaint and two copies.

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<sup>128</sup> Except for the special attention given to the principle of confidentiality in Article 30 of Law 601.

<sup>129</sup> The Constitution of the Republic of Nicaragua states: "Article 131. The officers of the four State branches, elected directly or indirectly, answer to the people for the proper performance of their functions and must report on their work and official activities. They must hear the people's problems and seek to resolve them. The public function must be exercised in benefit of the people's interests. Pursuant to law, the State is financially liable for any sustained damage caused to the assets, rights and interests of private individuals as a consequence of actions or omissions by public officers in exercise of their office, except in cases of *force majeure*. The State may take recourse against the officer or public employee causing the damage. Public employees and officers are personally liable for violations of the Constitution, lack of administrative integrity and any other crime or infringement committed in exercise of their functions. They are also liable to the State for damages caused due to abuse, negligence or omission in the exercise of their office. Civil functions cannot be militarized. The civil service and administrative careers shall be regulated by law."

<sup>130</sup> Although the law clearly states that the complaint must be made in writing, in the *Manual para la Evaluación de Acuerdos entre Competidores* (PROCOMPETENCIA in 2009), the possibility is opened to filing complaints in person or over the telephone.

<sup>131</sup> Law 601, Article 32.



- h) Address for notification in Managua, if PROCOMPETENCIA does not have an office in the complainant's municipality.<sup>132</sup>

The Competition Regulation also lists complaint requirements, repeating some in the Law, leaving others out, at times using different terms for the same, and including some additional aspects that add complexity to the task of filing a complaint. Among other things, the Regulation requires an exhaustive description of the constituent facts of the allegedly illegal practices, a description of the evidence and all supporting documentation, a description of the elements needed to define the relevant market and determine the dominant position of the offender, the reasons why it is thought that not-notified concentrations should have been reported, and identification of other potentially affected parties.

The minimum content of the complaint appears to be what is said in the text of the Law, but in any case a considerable effort is required of the complainant to provide evidence which could perhaps be reduced.

Once the complaint is filed, if it does not fulfill the requirements in the law -an opportunity is given to complainants to amend it within 10 business days after so requested by the authority- the complaint will not be processed and the submitted documents will be filed away.<sup>133</sup>

Once the complaint is filed and complete, the President of PROCOMPETENCIA can only dismiss it in two situations: a) when the case has already been subject to investigation and resolution before, and b) when the reported facts do not constitute an infringement.<sup>134</sup> It calls attention that there is no provision on the notification of this decision to dismiss a complaint and setting the possibility for the complainant to challenge it.

If the complaint fulfills the requirements or is amended as required by the Law, within the next 10 business days the President will issue an order (*auto*) initiating administrative proceedings,<sup>135</sup> as long as there is sufficient indication that violation of the Law has taken place. This order<sup>136</sup> must contain:

- a) The name of the officers who will investigate the case and act by delegation.
- b) A summary of the facts justifying the investigation, the type of infringement to be investigated and the sanction which may correspond in the end.
- c) Together with a copy of the order initiating proceedings, the alleged offender will receive a copy of the complaint in case a complaint is in the origin of the investigation.

The Competition Regulation adds the following:<sup>137</sup>

- a) Time and place.

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<sup>132</sup> It must be noted that at present PROCOMPETENCIA only has one office in Managua, located on Sandino Avenue next to *La Gaceta*, although section g of Article 32 of Law 601 foresees a potential and systematic territorial expansion of PROCOMPETENCIA.

<sup>133</sup> Law 601, Article 33. Decree 79-2006, Article 50.

<sup>134</sup> Decree 79-2006, Articles 50 and 52.

<sup>135</sup> Decree 79-2006, Article 51.

<sup>136</sup> Our attention is also called to the fact that the law qualifies this type of decision as an "order" and not an action.

<sup>137</sup> Decree 79-2006, Article 53.

- b) Indication of the transfer of procedures to the respective directorate.
- c) Same as b above
- d) Indication of the rights of defense of the alleged offender including the right to invoke the law or legal reasons to justify its actions, to present rebuttal evidence and to make use of hearings and all other guarantees of due process.

The date of notification of the order to interested parties is the start date of the investigation period. An extract of the order containing, at least, an identification of the practice and the market -in no case it will reveal the name of the alleged offenders- can be published at the expense of the complainant, with an invitation to anyone able to help in the proceedings, to step forward and participate in the investigation or file new complaints.

The Competition Regulation (Article 53) provides for the intervention in the proceedings of sector regulators when the alleged offenders operate in regulated sectors. These regulators would be able to participate in the proceedings as any other party and would receive notification of PROCOMPETENCIA's decisions.

Once the order initiating proceedings has been notified, the alleged offender has 30 business days to argue in writing against each of the facts in the order, and counter the evidence submitted by the complainant. He may present all evidence he considers appropriate and propose any means of proof. Any accusation to which the alleged offender does not oppose, shall be deemed confirmed unless evidence is found to the contrary.<sup>138</sup>

The investigator in the case has *ex officio* powers to accumulate investigations, expand on the investigated facts or initiate new proceedings whenever: a) the alleged violations adversely affect other markets related to the relevant market; b) other economic agents are involved; or c) unreported violations exist.<sup>139</sup> In a process with an obvious dispositive tendency, the fact that it is so dependent on the initiative of the parties stands out.

#### 4.2.2 Evidentiary Phase

In proceedings at PROCOMPETENCIA the burden of proof falls on the complainant where there has been a complaint, or on the institution in cases initiated *ex officio*.<sup>140</sup>

The goal of the proceedings being that of safeguarding the common good and preserving the general interest, one could think that PROCOMPETENCIA would be invested with strong powers of investigation and the possibility to add evidence to that put forward by the parties even when the proceedings have been instituted on the basis of a complaint. However, Article 35 of Law 601 refers to the evidence presented by the parties only.

PROCOMPETENCIA's 2012 Manual for the Evaluation of Unfair Competition Conduct appears to share this idea when it states the following: "A relevant fact is that in all Law 601 procedures the burden of proof is on the complainant (...), thus preventing senseless complaints filed for the

<sup>138</sup> Law 601, Article 35. Decree 79-2006, Article 55.

<sup>139</sup> Decree 79-2006, Article 54.

<sup>140</sup> Law 601, Article 31. On the other hand, Article 58 of Decree 79-2006 states that "the burden of proof of the economic efficiencies resulting from allegedly restrictive practices and concentrations shall fall on the economic agents under investigation."

purpose of wearing the system down or damaging the image and/or reputation of a competitor.” The aim is commendable, but perhaps too much is being required of complainants, excessively complicating their task, even for those representing the collective interest such as consumer associations. It may not be in the collective interest that a case be cut short because a complainant failed to obtain certain evidence.

Perhaps to somewhat offset this rigidity the Competition Regulation provides a very brief period (3 business days) after presentation of the evidence by the complainant and the alleged offender for PROCOMPETENCIA to order additional evidence to be gathered, after first having notified the parties to the proceedings so they can plead as they deem appropriate.<sup>141</sup>

Once the complaint has been answered, PROCOMPETENCIA officially admits the pertinent evidence and sets place, date and time for the hearing in no more than 30 business days.

Article 58 of Competition Regulation allows for interpretation that during the evidentiary phase the parties may submit new evidence that would add to the evidence originally presented by these parties.<sup>142</sup>

Notably, the President of PROCOMPETENCIA may ask any domestic or foreign authority for information needed for the investigation.<sup>143</sup> Despite this, nothing in Law 601 or the Competition Regulation provides for gathering evidence abroad for this type of proceedings, except in a reference to the Code of Civil Procedure<sup>144</sup>, where issues such as the extension of deadlines for gathering evidence, the validity of private documents and the taking of witness testimony, are addressed.<sup>145</sup>

Law 601 states that the evidence will be evaluated as provided in the Nicaraguan Code of Civil Procedure, as confirmed by PROCOMPETENCIA Manuals<sup>146</sup>, which state that the means of proof to be used are those in Article 1117 of that Code of Civil Procedure: a) *res judicata*;<sup>147</sup> b) documentary evidence; c) confession; d) judicial investigation; e) expert opinions;<sup>148</sup> f) witness testimony; and g) presumption and circumstantial evidence.

#### 4.2.3 Concluding Arguments and Evaluation of the Evidence

At the end of the evidentiary phase, a period of no more than 10 business days will be set for the parties to formulate final arguments.<sup>149</sup> Express reference is made by Law 601 to the Code of Civil Procedure, which provides guidelines on how to present these final arguments:

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<sup>141</sup> Decree 79-2006, Article 60.

<sup>142</sup> Decree 79-2006, Article 58: “During the evidentiary phase, the respondent and, if applicable, the complainant, may present the evidence they deem appropriate.”

<sup>143</sup> Law 601, Article 14.

<sup>144</sup> Decree 79-2006, Article 42.

<sup>145</sup> Articles 27, 246, 1091 to 1096, 1099, 1115, and 1349 to 1352.

<sup>146</sup> PROCOMPETENCIA. *Manual de Evaluación de Conductas de Competencia Desleal*. Managua, Nicaragua. December 2010.

PROCOMPETENCIA. *Manual para la Evaluación de Prácticas Anticompetitivas*. Managua, Nicaragua. August 2009.

<sup>147</sup> In Nicaraguan civil proceedings *res judicata* is presented both as an exception precluding proceedings (article 820 of the Code of Civil Procedure) and as a means of proof, when these two figures have very different purposes. “Exceptions that preclude proceedings are: payment, *res judicata*, wilfull misconduct, serious fear, transaction, remission, agreement of non-request, and any other that proofs inaction of the claimant” (Article 280 of the Civil Code).

<sup>148</sup> With regard to expert opinions, the Competition Regulation provides that experts must render their opinions within ten days starting the day after they have agreed to and have been confirmed for the task. PROCOMPETENCIA may double the time period in duly justified cases.

<sup>149</sup> Law 601, Article 35. Decree 79-2006, Article 61.

“1) Each of the facts under debate shall be expressed clearly and as briefly as possible in enumerated paragraphs, giving a brief and methodical summary of the evidence each party feels justifies or contradicts those facts; 2) Also in brief enumerated paragraphs and following the same order as the facts, the opposing party’s evidence will be assessed; and 3) It will then be noted, simply and fully, if the grounds of law argued in the complaint and in the answer to the complaint are upheld in full or in part. Other legislation or legal doctrine providing grounds for resolution can also be argued, but they should just be cited, without comments or explanations other than why they are relevant to the case.”<sup>150</sup>

At the end of the evidentiary phase the case file will be complete and the investigators will have 10 days to submit their analysis and proposal for resolution to the PROCOMPETENCIA President.<sup>151</sup>

### 4.3 PROCOMPETENCIA Decisions

The President must issue a duly reasoned final decision within 60 business days, although when the circumstances so merit, he may extend this period one time only for 30 more business days.<sup>152</sup>

To safeguard the rights of defense,<sup>153</sup> the decision shall be based on the facts giving rise to the investigation and no others, and shall include a statement of the grounds of fact and grounds of law leading to the conclusion that the practice took place and that it constitutes a violation of the Law.

In the decision, the President may:<sup>154</sup>

- a) Declare the existence or nonexistence of anticompetitive conduct or unfair competition practices.
- b) Declare the existence or nonexistence of abuse of dominant position.
- c) Authorize or reject mergers or exempt agreements.
- d) Order cessation of the practices by a specified deadline.
- e) Order full or partial de-concentration in mergers cases.
- f) Impose specific obligations or conditions on the offender to restore the situation to the way it was prior to the illegal action and to prevent its continuation.
- g) Impose sanctions with indication of how and when they are to be complied with.<sup>155</sup>

The Competition Regulation is not completely consistent with Law 601 concerning the content of the President’s decision, which could confuse the interpreter<sup>156</sup>.

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<sup>150</sup> Code of Civil Procedure of the Republic of Nicaragua, Article 1399.

<sup>151</sup> Law 601, Article 35. Decree 79-2006, Article 63.

<sup>152</sup> *Ibid.*

<sup>153</sup> Constitution of the Republic of Nicaragua, Article 34, number 4.

<sup>154</sup> Law 601, Article 36. Decree 79-2006, Article 64.

<sup>155</sup> Decree 79-2006, Article 65.

#### 4.3.1 Interim measures

Interim measures may be dictated in the course of the proceedings, at a party's request. This reaffirms the dispositive nature of Law 601 and appears in conflict with the public interest it seeks to protect. Regulation of interim measures is superficially touched upon in Articles 42 to 44 of Law 601. Nothing is said of them in the Competition Regulation.

The Manual for Evaluation of Agreements between Competitors states that the Board of Directors may decree interim measures at any time during the proceedings when there is an imminent risk of market competition being limited, an operator's entry to the market being impeded, or an operator being removed from the market, or of damage to third parties or to the public or collective interest.

The party (usually the complainant) must provide in its request any economic or qualitative studies justifying that a continuation of the practice will have such effects if interim measures were not approved. Once again the excessive burden of proof could discourage action the parties.

It seems Article 13 of Law 601 forgot to list the function of the Board of Directors consisting in taking decisions on interim measures. But given the infrequency of Board meetings (at least once a month according to the law), with them needing to be called at least five business days in advance, maybe all this should be reconsidered.

In addition, nothing is regulated on who is to initiate the procedure and report on it to whoever will make the decision. What Law 601 does stipulate (Article 42) is that any interested parties wishing to be heard, shall be heard.

Pursuant to Article 44 of the same Law, at any time during the investigation PROCOMPETENCIA may decide, *ex officio* or at the request of the interested parties, to suspend, modify or revoke interim measures when unexpected circumstances arise or circumstances that were unknown before get to be known. In any case, interim measures cease when the decision issued by PROCOMPETENCIA is made final.

In the case of noncompliance with interim measures, Articles 45 and 46 section e of Law 601 provide for the imposition of penalties.

Finally, the law warns that the proposal, adoption, suspension, modification or revocation of interim measures does not suspend sanctioning procedures.

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<sup>156</sup> Decree 79-2006, Article 64. "The President shall issue a decision in accordance with Article 36 of the law, wherein he must declare the existence or otherwise of violations of the law, stating the grounds of fact and grounds of law for his decision, the legal provisions that were violated, and the technical and economic evidence for conviction. Where and illegal practice has been found, the President may: 1. Declare the existence of an abuse of dominance by one or various economic agents or declare its nonexistence; 2. Order cessation of the practice within a specific period of time; 3. Order total or partial deconcentration of the economic agents; 4. Impose specific obligations or conditions aimed at restoring the situation to the way it was before the illegal action took place, and any others he may deem appropriate and necessary; and 5. Impose the sanctions provided by the law."

### 4.3.2 Remedies and Sanctions

In the field of competition, sanctions may have different purposes: discourage future anticompetitive conduct, restore opportunities for competition, compensate victims, or simply put an end to the conduct. Most experts agree that the most important objective is to discourage agents from engaging in banned practices.<sup>157</sup> Even though the objective may be clear, there is no infallible design for achieving it.<sup>158</sup> Besides fines, there are other possible types of remedies and sanctions, such as behavioral or structural corrective measures, nullification of agreements, criminal penalties and disqualification of executives. The competition authority should have an extensive menu of sanctions at its disposal for adapting to each case, including the possibility of sanctioning individuals.

In Nicaragua, pursuant to Articles 36 and 46 of Law 601, PROCOMPETENCIA can order the cessation of banned practices and can impose fines, without prejudice to any civil actions that may correspond. It seems that compensation for damages cannot be imposed as a sanction, but the rights and obligations arising from practices or agreements declared illegal must be construed as null and void (Article 36 of Law 601).

The fines provided by Law 601 can be imposed separately or in combination.<sup>159</sup>

Conduct	Fine
HORIZONTAL AGREEMENTS (between competing economic agents): In the case of violations judged by PROCOMPETENCIA to be particularly serious	From one hundred (100) minimum wages to a maximum of ten thousand five hundred (10,500) minimum wages Fine equal to a minimum of one percent (1%) to a maximum of ten percent (10%) of the annual net sales obtained by the wrongdoer during the previous fiscal year
VERTICAL AGREEMENTS (between noncompeting economic agents): In the case of violations judged by PROCOMPETENCIA to be particularly serious	From twenty-five (25) minimum wages to a maximum of eight thousand (8,000) minimum wages Fine equal to a minimum of one percent (1%) to a maximum of six percent (6%) of the economic agent's annual net sales
UNFAIR COMPETITION CONDUCT: In the case of violations judged by PROCOMPETENCIA to be particularly serious	From twenty-five (25) minimum wages to a maximum of eight thousand (8,000) minimum wages Fine equal to a minimum of one percent (1%) to a maximum of six percent (6%) of the economic agent's annual net sales
CONCENTRATIONS: For participating in an illegal concentration	PROCOMPETENCIA can order de-concentration From one hundred (100) minimum wages to a maximum of six hundred (600) minimum wages
For having failed to notify concentrations	Fifteen (15) minimum wages for each day of delay
For each day of delay in providing the required cooperation and information, or for doing so incompletely or inaccurately	

<sup>157</sup> Connor, John M. *Effectiveness of Antitrust Sanctions on Modern International Cartels*. Purdue University, West Lafayette, Indianapolis, United States of America. June 2006, p. 198.

<sup>158</sup> [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>159</sup> OCDE. *Remedies and Sanctions for Abuse of Market Dominance*. Policy Brief. December 2008, p. 1.

<http://www.oecd.org/daf/41814852.pdf>

<sup>159</sup> Law 601, Article 46.

Participation of individuals as accomplices or accessories	From fifteen (15) minimum wages to a maximum of one hundred (100) minimum wages
In case of recidivism	Fine equal to double the sanction imposed on the first occasion
In case of undue complaints and confirmation that the intention was to limit competition, to hinder entry of a competitor into the market, or to drive a competitor out of the market	Sanction for the amount that would have applied if the violation had been confirmed

In case of noncompliance with its final decisions, PROCOMPETENCIA can decree a temporary shutdown of domestic activities until there is compliance or guarantees of compliance are provided.

Article 47 of Law 601 establishes a set of criteria for grading sanctions: a) the damage caused to competition; b) premeditation and intentionality; c) the size of the affected market; d) the duration of the agreement, practice or banned conduct; e) recidivism; and f) voluntary suspension of the practice during the investigation.

It would be premature to evaluate PROCOMPETENCIA's application of these criteria, since it has only imposed fines in one case for horizontal practices and in another for vertical practices. However, in both these cases, sanctions were close to the lower limits established by Law 601, which raises doubts as to their dissuasive effect. For greater certainty, the possibility regulate these criteria in further detail could be considered in the future.

It should be recalled that certain anticompetitive practices are typified as crimes in Nicaragua,<sup>160</sup> so that an offender could be sanctioned with a fine of six hundred to one thousand days of fine and two to six years of prison, or special disqualification from exercise of profession, office, industry or commerce for the same period.<sup>161</sup>

#### 4.4 Appeals against PROCOMPETENCIA Decisions

The decisions of the PROCOMPETENCIA President are subject to administrative and judicial revision.

Once the original decision of the President is final (because no appeal has been filed by the established deadline, or because the appeal was denied), it becomes legitimate and enforceable. The President then enforces it by his own means or, if necessary, with the help of the police.<sup>162</sup>

If fines are imposed in the final decision, they must be paid to the General Treasury at the Ministry of Finance and Public Credit within 5 business days following notification of the final decision.<sup>163</sup> The offender must then present the original and a photocopy of the receipt issued by the Office of the Treasurer within 3 days after having made the payment.

<sup>160</sup> The following practices are typified as crimes: a) imposing prices or other conditions for the purchase or sale of goods or services, or sharing information for the same purpose; b) imposing restrictions or limits on the production, processing, distribution and marketing of goods or services; c) sharing of markets, supply areas, customers or provisioning sources; d) impeding, hindering and blocking other economic agents from entry or permanence in a market, or excluding them from the market.

<sup>161</sup> Law 641. Criminal Code of the Republic of Nicaragua, Article 273.

<sup>162</sup> Law 601, Article 37.

<sup>163</sup> Decree 79-2006, Article 65.

If confirmation of the payment is not received by the deadlines, PROCOMPETENCIA will ask the Office of the Treasurer for a statement of nonpayment, which will lead to the additional sanction not to be allowed to deal with the State, along with default interests. PROCOMPETENCIA may also decree a temporary shutdown of the offender's domestic activities until it complies with the final decisions or provides sufficient guarantees of compliance,<sup>164</sup> which may turn out to be extremely onerous, thereby providing strong incentive to pay.

#### **4.4.1 Reviews and Appeals**

Firstly, a request "for review" (*recurso de revisión*) of a decision by PROCOMPETENCIA President can be filed within 5 business days following notification of the said decision. This must be done in writing and providing enough grounds. Once the request is admitted, the President will notify the other opposite party within 3 business days. The President will have 10 business days to resolve.<sup>165</sup>

A "review" does not involve reconsideration or reassessment of the case, since no analysis of the merits of the case is due. Only procedural violations, about the form and formalities of the proceedings, can be alleged.<sup>166</sup>

A hierarchical appeal can be filed before the Board of Directors against the President's decision on the review (Article 40 of Law 601). But if only formal aspects enter into the decision on the review, there is some doubt whether aspects of substance can be settled within this appeal before the Board.

Pursuant to the due process principle consisting on the right to appeal to a higher authority, it should be possible to argue matters of substance in the appeal, so that the parties are not deprived of that right. This is how PROCOMPETENCIA has interpreted it, although the Law has not made it clear (it should be clarified).

The Board of Directors has 30 business days to decide on the appeal.<sup>167</sup> In the absence of a decision by the end of that period, the appeal will be deemed resolved in favor. The decision on the appeal exhausts administrative remedies.

#### **4.4.2 Judicial review of PROCOMPETENCIA Decisions**

Article 188 of the Nicaraguan Constitution provides the *amparo* appeal (*recurso de amparo*), which can be filed against any provision, act or decision and, in general, any action or omission by an officer, authority or agent of the same that violates or attempts to violate the rights and guarantees set forth in the Constitution.

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<sup>164</sup> Law 601, Articles 37 and 46.

<sup>165</sup> Law 601, Article 39. Decree 79-2006, Article 66.

<sup>166</sup> In this respect, PROCOMPETENCIA administrative decision of October 31, 2011 in case No. 0010-2010, states: "With respect to the motion for review, this authority feels it proper to explain that in this type of procedure (REVIEW) no hearing should be given to the substance of the appellant's request, since that is a matter for an appeal motion, and only matters concerning compliance with procedural formalities should be analyzed (...)."

<sup>167</sup> It must be emphasized that an unprepared reading of Article 13 of Law 601 could quite easily lead to the understanding that an appeal against the Board of Directors' decision on the appeal could be filed, to the extent that section d of the that article provides for the functions of the Board of Directors consisting on "d) Hearing and resolving any appeal for review of its own decisions." This interpretation would be erroneous and would go against the spirit of the law, which provides that the Board of Directors' decision on the appeal exhausts administrative remedies



On the other hand, article 35 of Law 350 of 2000, the Contentious Administrative Proceedings Law (*Ley de lo Contencioso-Administrativo*), sanctions the possibility to file “actions against administrative decisions” (*recursos contencioso-administrativos*) against all acts, decisions, general provisions, omissions or *ultra vires* acts by the Public Administration when they decide directly or indirectly on the substance of a matter and administrative remedies are already exhausted.

Thus, PROCOMPETENCIA’s decisions are subject to judicial control through both *amparo* appeals and actions against administrative decisions. The latter only would apply against the decision of the Board resolving the appeal, since this decision exhausts administrative remedies.

Law 49, known as the *Amparo* Act, establishes that the *amparo* appeal can only be lodged by the injured party, meaning an individual or legal entity that has been harmed or could be imminently harmed as a result of a provision, act or resolution, or of an action or omission by an officer, authority or agent of the same, which violates or attempts to violate the rights and guarantees set forth in the Constitution.

For competition cases the *amparo* appeal is to be filed before the Court of Appeal of Managua, which will hear the initial proceedings through suspension of the act, with the Supreme Court of Justice giving it further hearing until a final decision is made. If the Court of Appeal refuses to admit the appeal, the injured party can apply for *amparo* directly to the Supreme Court of Justice.

This Supreme Court of Justice has 45 days to make a ruling after receiving the proceedings from the Court of Appeal. When the denounced acts are by nature of commission, the sentence conceding the *amparo* will aim at reinstating full enjoyment of the injured party’s rights, restoring things back to the way they were before the infringement. When the acts are of omission, the effect of the *amparo* will be to obligate the authorities responsible to act in respect of the law or comply with what is required of them.

In the action against an administrative decision, as regulated by Law 350 the plaintiff may request the declaration of unlawfulness and, when appropriate, of nullity of acts, omissions, general provisions and *ultra vires* acts. Moreover, the plaintiff can ask for recognition of an individualized legal situation and the adoption of any necessary measures for full restoration, including declaration of the right to claim material and moral damages, as relevant, without prejudice of other possible liabilities.<sup>168</sup>

Should an *ultra vires* act be established,<sup>169</sup> the concerned party may ask the concerned Administration –PROCOMPETENCIA in this case- to address the problem. If no action follows from the Administration in the following ten days, then the plaintiff may appeal directly before the administrative jurisdiction, which may declare the unlawfulness of the act and order its cessation and the measures necessary to restore legality.<sup>170</sup>

The term to file actions against administrative decisions is 60 days as of the day following express notification of the decision when the decision is notified in person or by writ, or as of the

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<sup>168</sup> Law 350, Article 39.

<sup>169</sup> Law 350, Article 1, number 20.

<sup>170</sup> Law 350, Article 38.

day when the plaintiff was informed of the decision. When the plaintiff was not directly involved in the proceedings or notified of the decision, the term begins on the day following full publication of the decision. In the event publication is not forthcoming, the term is 90 days after the date of its last notification.<sup>171</sup>

#### **4.5 Damages Actions**

There are two types of damages that can derive from the application of Law 601: those claimable from PROCOMPETENCIA which may be claimed through actions against administrative decisions, and those claimable between private parties, which are analyzed in the framework of the Civil Code (tortious liability).<sup>172</sup> For these claims, Article 38 of Law 601 establishes a statute of limitation of one year, shorter than in other actions foreseen in this same law (five years), and also shorter than the general statute of limitation provided in Title V, Chapter V of the Civil Code (two years).

There seems to be no reason to establish a particularly short period for claiming damages deriving from illegal anticompetitive conduct, all the more so when this type of infringements has the potential to be very harmful to competitors and consumers.

### **5. REGULATED SECTORS**

#### **5.1 Enforcement of Competition Law by Sector Regulators**

By virtue of a specific provision in the Law 601, PROCOMPETENCIA lacks functions with respect to certain sectors of the economy, in particular, regulated sectors. Indeed, as interpreted by the Supreme Court of Justice,<sup>173</sup> Article 15 of Law 601 opens an inconvenient and anti-technical gap to exclude several extremely important sectors of the economy from PROCOMPETENCIA's control.

Article 15 states as follows: "When the investigations into practices covered by this law are conducted in economic sectors and markets subject to regulation, PROCOMPETENCIA will issue an opinion prior to resolution by the sector regulators. The opinion must be requested of PROCOMPETENCIA by the regulator within 30 business days after conclusion of the investigation by the regulator. The opinion issued by PROCOMPETENCIA will only determine the practice under investigation. In no case should PROCOMPETENCIA pronounce on technical aspects inherent to the sector's regulation. The relevant parts PROCOMPETENCIA's opinion must be dictated and published in the media within 90 business days. The regulator must take PROCOMPETENCIA's opinion into consideration when making its decision on the case. Failure to issue an opinion on time does not impair the regulator's resolutive capacity."

Since Article 15 expressly refers to the resolutions of regulatory bodies in cases of anticompetitive practices, there can be little doubt that PROCOMPETENCIA's competence in these cases has been excluded.

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<sup>171</sup> Law 350, Article 47.

<sup>172</sup> Civil Code of the Republic of Nicaragua, Articles 2509 to 2520.

<sup>173</sup> See: Supreme Court of Justice. Constitutional Chamber. *Ruling 864 of May 31, 2012*. Case: 911-11, and *Ruling 760 of July 20, 2011*. Cases: 1049, 832, 925, 924-2010 and 628-2011.

In other matters, however, PROCOMPETENCIA's competence has been safeguarded, as Article 15 provisions do not affect merger control or investigations into unreported concentrations. Indeed, provisions regarding anticompetitive practices (including Article 15) are in Chapter IV, while concentrations, including investigations into unreported concentrations, are dealt with in Chapter VII.

Furthermore, it should be noted that at least the rules the regulators would apply to matters of free competition are the ones in Law 601.

The Competition Regulation (Article 43) apparently tried to correct what was originally provided by the law by stating that "PROCOMPETENCIA shall be able to investigate the alleged anticompetitive conduct of economic agents operating in regulated markets, such as telecommunications and postal services, the electricity industry, the provision of hydrocarbons, water and sewage, transportation, ports and other basic infrastructure services, as well as banking and financial services". However, the Supreme Court confirmed the regulators' competence in the case of credit cards.

It seems inappropriate that PROCOMPETENCIA cannot hear competition cases in specific sectors, as it is the authority specializing in the enforcement of Law 601 and the regulators have different missions and enforce different rules and regulations. For example, the mission of the Superintendency of Banks is to ensure the stability the financial system,<sup>174</sup> and although this is a praiseworthy mission it might not be completely consistent with the objective to protect free competition. Moreover, there is no knowledge of any punitive measure imposed by a sector regulator by virtue of Law 601. The Superintendency of Banks did not even hear on the credit card case once the decision on the *amparo* suit confirmed its authority in these matters.

A debate over whether a single authority should have competence in all sectors or whether each regulator should hear competition cases in the sectors under their regulation may be appropriate where sector regulators have been assigned clear functions to enforce competition law and, perhaps, where there is already some enforcement experience in regulated sectors. In Nicaragua's case, in the current scenario, the dilemma seems to be whether or not to pursue anticompetitive conduct in those sectors. In this respect it is paradoxical that Article 2 of Law 601 establishes its applicability to all sectors of the economy, and Article 15 of this same law opens the door to the exclusion of regulated sectors.

The inconsistencies between the provisions in Law 601 and in the Competition Regulation must in any case be resolved, but it is recommended that in this case they be settled in favor of the interpretation made by the Regulation that PROCOMPETENCIA should hear competition cases in all sectors.

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<sup>174</sup> <http://www.siboif.gob.ni/index.php?web=contenido&idd=10&idw=4>

## 5.2 Some Regulated Sectors of the Nicaraguan Economy

### 5.2.1 Finance<sup>175</sup>

In the 1980s, during the Sandinista revolution, public banking prevailed. The following decade was of growth and opening of the market to private banking, but culminated in a serious crisis between 2000 and 2002 that reached the point of threatening the country's financial stability. Once over the hump of the crisis, the country entered a period of consolidation and bank concentration from 2002 and 2005 as the surviving banks bought the assets of those that had collapsed. In 2006, six banks controlled 95% of domestic credit. By 2010 there were a total of eight banks in Nicaragua, the system managed satisfactory liquidity levels, the capital adequacy rate was 16.6%, and the number of nonproductive loans was relatively low.

According to experts,<sup>176</sup> the system's main weakness is the high dollarization of banks' portfolio, with most loans being granted in dollars, and the high concentration of the portfolio in foreign currency, with a small percentage of customers receiving most of the total credit.

This is a particularly concentrated sector, and a highly sensitive one because of its direct impact on the Nicaraguan people. Up to now it has not been subject to intervention by virtue of Law 601. There was one attempt made by PROCOMPETENCIA but, as noted earlier, in Ruling 760 of 2011 the Constitutional Chamber of the Supreme Court of Justice granted *amparo* to several banking entities claiming that PROCOMPETENCIA lacked the authority to hear cases in the financial sector.<sup>177</sup>

From the beginning of the 1990s the sector has evolved in a setting of free competition. In 1999 a legal framework was provided consisting of three complementary laws that sought to consolidate the regulation, operation and supervision of the Nicaraguan financial system. These three laws were the General Law for Banks, Non-bank Financial Institutions and Financial Groups (Law 314 of 1999), the Organic Law of the Central Bank (Law 317 of 1999) and the Banking Superintendency Law (Law 316 of 1999), of which only the latter is still in effect.

At present the legal framework regulating the Nicaraguan financial sector consists of several laws including the General Law for Banks, Non-bank Financial Institutions and Financial Groups (Law 561 of 2005), the Banking Superintendency Law (Law 316 of 1999), the Organic Law of the Central Bank (Law 732 of 2010), the Deposit Guarantee Law for Institutions in the System (Laws 551 and 563 of 2005) and the Law for the Promotion and Ordering of Credit Card Use (Law 515 of 2005).

Pursuant to Article 1 of Law 561 of 2005, the State's basic function with respect to financial intermediation and provision of financial services with funds deposited by the people consists of "watching over the interests of depositors who entrust their money to legally authorized financial institutions, and to reinforce the security and public confidence in these institutions, through an adequate supervision to procure proper liquidity and solvency (...)."

<sup>175</sup> For an extensive analysis of competition and regulation in the Nicaraguan financial sector, see Ansorena, Claudio; *Competencia y Regulación en la Banca: el Caso de Nicaragua*; ECLAC, Studies and Perspectives Series No. 85; Mexico D.F., July 2007. [http://www.eclac.cl/publicaciones/xml/1/29571/serie\\_85.pdf](http://www.eclac.cl/publicaciones/xml/1/29571/serie_85.pdf)

<sup>176</sup> *Country Intelligence Report: Nicaragua*; IHS Global Insight, September 4, 2012, p.4.

<sup>177</sup> In the words of the Court: "In this case, Doctor LUIS HUMBERTO GUZMÁN AREA, in his capacity as President of the Institute for the Promotion of Competition (PROCOMPETENCIA), has worked outside his scope of competence, invading an exclusive matter of the Superintendency of Banks and Other Financial Institutions ...."

This same article applies to banks, non-bank financial institutions providing stock brokerage services or financial services with people's funds -such as insurance companies, stock exchanges and financial leasing companies- and financial groups.

The Superintendency of Banks and Other Financial Institutions (SIBOIF) was created by means of Law 316 of 1999<sup>178</sup> as the regulator of the financial sector. According to Article 2 of this Law the primary objective of the Superintendency is to watch over "the interests of depositors who entrust their money to legally authorized financial institutions, and to preserve the security and public confidence in these institutions, through an adequate supervision to procure proper liquidity and solvency (...)." The entity is thus charged with authorizing, supervising, monitoring and overseeing the constitution and operation of all banks, bank agencies, bank branches, and non-bank financial institutions specified by the law.<sup>179</sup>

Financial sector legislation does not set the promotion of competition as a priority. The objective of the sector regulator is defined in terms of stability and solvency, with no reference to questions of market concentration, abuse of dominant position or anticompetitive practices.<sup>180</sup>

The requirements for market entry (minimum capital)<sup>181</sup> have been eased and conditions for the participation of foreign institutions have been eliminated.<sup>182</sup> Beyond this, however, no actions aiming at for enforcing Law 601 have been undertaken in the sector. As noted before, the Superintendency did not even open an investigation -after the *amparo* in the credit card case was resolved- to verify the reasons leading PROCOMPETENCIA initiate proceedings at that time for anticompetitive practices.

### 5.2.2 Energy

Law 272 of 1998, the Electricity Industry Act (LIE), was enacted for the purpose of regulating the activities of electricity generation, transmission, distribution and marketing, to make the most of resources for the collective benefit, foment the country's economic development and encourage competition and private capital investment in the electricity industry.

This law regulates all links through the chain: energy generation, transmission, distribution, marketing, importation and exportation. It also establishes licensing requirements under the principle of *national treatment* for foreign agents.

Electricity generation is open to competition;<sup>183</sup> the law guarantees freedom of investment in general but sets specific restrictions on vertical integration with transmission and/or distribution

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<sup>178</sup> The law was amended by Laws 552 and 564 of 2005 and Law 576 of 2006.

<sup>179</sup> Law 316, Article 2.

<sup>180</sup> An analysis put forth by the ECLAC on the Nicaraguan banking sector concluded: "It should be noted that building a competition environment does not seem to be a public policy priority in the sector. Even though the Superintendency is charged with authorizing and supervising the constitution and operation of all banks, branches and bank agencies operating in the country, its mission seems to be solely that of assuring solvency and stability in the sector by means of regulation of capital adequacy, provision of credit, portfolio provisioning and classification. No reference whatsoever is made in the Superintendency functions set forth in Law 316 to concerns about concentration, dominance or market power, abuses and their implications for competition. The criteria for approval of mergers have to do the system's soundness only." Ansorena, Claudio, *Competencia y regulación en la banca: el caso de Nicaragua*. ECLAC, Studies and Perspectives Series No. 85, 2007, p. 29.

<sup>181</sup> According to Article 17 of Law 561, as updated by Decision 712 of 2012, minimum capital of 270 million cordobas (around USD 11,256,300) is needed to set up a bank; this amount does not represent a true market entry barrier.

<sup>182</sup> Since 1999 the legal requirements for market entry have been the same for domestic and foreign entrants

<sup>183</sup> LIE, Article 21 et seq.

service providers, except in isolated systems. Transmission is considered an essential public service and is provided under a monopoly<sup>184</sup>. By express legal mandate, the company that owns the national transmission system is state-owned.<sup>185</sup> ENTRESA transmits the energy over its lines and substations charging tolls approved by the regulator. It does not intervene in the buying and selling of electricity. Distribution,<sup>186</sup> that is, the supplying of electricity to end consumers, is considered an essential public service requiring a concession.

There is pricing freedom in the sector for transactions between generators, co-generators, self-producers, marketers and large consumers<sup>187</sup>, as well as for imports and exports. Transmission and transactions between distributors and small end consumers are subject to price regulation.

The LIE provides for electricity to be distributed by companies governed by private law, even when their legal owner is the State. It also prohibits the same economic agent from being a shareholder or owner of generation, transmission and distribution companies, but allows generators and distributors to be owners of secondary transmission systems.<sup>188</sup>

The Nicaraguan Energy Institute (INE), created in 1979 and restructured by Law 271 of 1998,<sup>189</sup> is an autonomous state entity charged with planning, policy formulation and regulation of company activities in this sector. The INE's primary objective is to promote competition in order to foster lower costs and better service quality for consumers in the medium term, ensuring at the same time the financial sufficiency to providers in the market.<sup>190</sup>

In addition to general sector regulation and oversight, INE's functions include the following: watching over consumer rights, approving and controlling prices to end consumers and related services (tolls), approving and controlling fuel prices in the hydrocarbon sector, resolving disputes between economic agents participating in the electricity industry, and applying sanctions as provided in the laws, rules, regulations and other provisions. This last function includes preventing and taking the measures needed for deterring anticompetitive practices "...in the supply or provision of regulated products and services in the electricity subsector" and "...in the provision of services and products in the hydrocarbons subsector."<sup>191</sup>

The Nicaraguan National Energy Commission is the inter-institutional body in the Executive Branch charged with policy formulation and planning in this sector, in order to foment development and optimum use of the country's energy resources.

### 5.2.3 Telecommunications

Telecommunications in Nicaragua are considered as public utilities provided under a regime of free competition but subject to the public interest and the surveillance of the State. Pursuant to

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<sup>184</sup> LIE, Article 27 et seq.

<sup>185</sup> LIE, Article 27.

<sup>186</sup> LIE, Article 31 et seq.

<sup>187</sup> Large consumer is one connected at a tension equal to or higher than 13.8 KV, with concentrated load equal to or greater than 2 MW with free choice of energy supplier.

<sup>188</sup> In addition, the generator or distributor may be a shareholder or owner of distribution systems or generating plants if his capacity is less than or equal to 10 MW and he is interconnected to the National Interconnected System (SIN).

<sup>189</sup> Which amends INE Organic Law.

<sup>190</sup> <http://www.ine.gob.ni/marcoInstitucional.html>

<sup>191</sup> Law 271, Articles 4 and 5.

Article 105 of the Constitution,<sup>192</sup> the State is obligated to promote, facilitate and regulate the provision of telecommunications services, without reserving it to itself as it must encourage the participation of private parties, intervening only for the purpose of guaranteeing universal access to such services.

The Nicaraguan Institute of Telecommunications and Postal Services (TELCOR) is the regulator of telecommunications and postal services. An autonomous entity under the direction of the President of the Republic, this state institution has the functions of expediting technical standards, setting and authorizing rates, regulating, technical planning and supervising, and enforcing and controlling compliance with the laws and regulations governing the installation, interconnection and provision of telecommunications and postal services.

By virtue of Law 210 of 1998 TELCOR's productive functions and related assets were transferred to a new company called the Nicaraguan Telecommunications Company (ENITEL), which was later purchased by a Mexican company (América Móvil), thus keeping only its regulatory functions.

The main law for this sector is Law 200, the General Law for Telecommunications and Postal Services of 1995, which distinguishes between essential public, general interest and special interest services. Despite recognizing a preference for the provision of telecommunications and postal services under a regime of free competition, the law allows for exclusivities, concessions, licenses, etc. as required.

Thus TELCOR is charged with granting concessions for operating essential public services (for a term of up to 20 years, under specific operating conditions and at rates approved by TELCOR on a regular basis). Basic telephone services fall under this category. As for general interest services (cellular telephony, radio, and open and subscription television) and special interest services (mobile personal radio location, trunk links, radiodetermination, and satellite communication stations), Article 16 of Law 200 establishes obligatory licenses.

Providers of telecommunications services must allow interconnection of their network to other duly authorized networks in order to enhance competition and guarantee freedom of choice to customers. According to Article 37 of Law 200, "the parties will agree on special interconnection conditions including prices and operational and technical aspects. If they fail to reach an agreement within ninety calendar days after the request for interconnection by one of the parties has been filed, TELCOR will decide upon the terms of the interconnection contract at competitive rates and will order the interconnection under penalty of sanction." Interconnection and/or access charges, as well as interconnection agreements signed between operators, must be reviewed and approved by TELCOR.

In a controversial decision by the Constitutional Chamber of the Supreme Court in Ruling 21 of 2006, however, ENITEL was granted *amparo* thereby blocking the regulator's attempt to force the company share certain infrastructure with other operators. Applying an unusual and questionable interpretation of the principle of equality, the court stated: "... we find that TELCOR officials did not observe the principle of equality when issuing the Regulation for

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<sup>192</sup> "It is the obligation of the State to promote, facilitate and regulate the provision to the people of the basic public services of energy, communication, water, transportation, road infrastructure, ports and airports, and it is the inalienable right of the people to have access to them. Private investment in these sectors and concessions to private agents for the provision on these services shall be regulated by the law for each case (...)."

Interconnection and Access, since this Regulation harms the subject that has been given a specific status (that of market dominant) only to place it at a disadvantage vis-à-vis market entrants. This Chamber recognizes the fact that the existence of healthy market competition is beneficial for customers, but competition should not be promoted by curtailing already existing operators or by creating discriminatory entailing violations of their rights.”<sup>193</sup> This decision is cause for concern, as it would tend to limit the regulatory mechanisms in the very sensitive telecommunications sector.

Finally, Articles 81 to 98 of Law 200 grant sanctioning powers to TELCOR that range from the imposition of fines to the suspension or cancellation of concession agreements, licenses, permits and authorizations, depending on the seriousness of the violation.

TELCOR’s situation with respect to Article 15 of Law 601 is especially complex insofar as Article 26 of Law 200,<sup>194</sup> which granted TELCOR the authority to take corrective measures against concession or license holders engaging in anticompetitive practices, was expressly revoked by Article 52 of Law 601. The revocation of Article 26 appears to be aimed at concentrating the functions of oversight and control of anticompetitive practices in PROCOMPETENCIA, but this is incompatible with Article 15 of Law 601. The regulator feels it lacks the competence to enforce competition laws, interpreting Article 15 of Law 601 instead as obligating it to provide any necessary support to PROCOMPETENCIA in its fight against anticompetitive conduct in the telecommunications sector.<sup>195</sup>

In developing the general competition provisions of Law 200 -Article 25 prohibits telecommunications operators from using their advantageous situation to introduce practices that hinder free competition or give rise to acts of unfair competition-,<sup>196</sup> in 2005 TELCOR issued its Regulation for the Promotion and Defense of Competition in the Telecommunications Market.<sup>197</sup> Article 3 section d of this Regulation states as follows: “TELCOR will intervene in the market in cases where anticompetitive practices are discovered. Its intervention shall be neutral, transparent and objective.”

The Regulation on this point is extensive and systematic, covering relevant markets and dominant positions, cost assessments, banning of anticompetitive agreements between operators, abuse of dominance conduct and unfair competition conduct, concentrations, and intervention procedures for TELCOR.

In reality, ENITEL operates all fixed lines and competes in the mobile telephony market with the Spanish operator Telefónica Móvil, the two operators forming a duopoly in the cellular telephony market. The possibility is being considered to include a new entrant who would join the two existing mobile telephony operators in Nicaragua. No strict monitoring seems to exist of the sector’s competition environment.<sup>198</sup>

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<sup>193</sup> The decision can be consulted at <http://www.poderjudicial.gob.ni/piupload/sconst/pdf/sentencias2006.pdf>

<sup>194</sup> Law 200, Article 26. “Where anticompetitive practices are discovered, TELCOR may ask for the necessary information and take the pertinent corrective measures, which will be of obligatory compliance for concessions or licenses holders.”

<sup>195</sup> This is how the President of TELCOR put it during an interview.

<sup>196</sup> The law also establishes that “basic telephony operators are obligated to provide satisfactory access to the telephone network at competitive rates to authorized service providers.”

<sup>197</sup> TELCOR. Administrative Decision No. 20-2005.

<http://legislacion.asamblea.gob.ni/Normaweb.nsf/9e314815a08d4a6206257265005d21f9/5d3fe9693e5db7a6062570c200622f52?OpenDocument>

<sup>198</sup> In an interview with TELCOR’s President.



#### 5.2.4 Agriculture

Article 60 of the Constitution states that “Nicaraguans have the right to be protected against hunger. The State shall promote programs that ensure adequate availability and equitable distribution of food.” The objectives of Law 693 on Food and Nutrition Security and Sovereignty (2009) and Law 291 on Basic Plant and Animal Health (1998) are, respectively, to guarantee food supply to Nicaraguans, and to protect sustained agricultural activity, human health, natural resources, biodiversity and the environment.<sup>199</sup>

Should a conflict arise between free competition and food security, both of which are constitutionally protected public interests, the latter should prevail. That is why Article 4 section e of Law 601 exempts “the actions promoted by the State for the purpose of ensuring the health and nutritional and food security of the Nicaraguan people” from the scope of application of the Law.

The maximum regulatory authority for the sector is the Ministry of Agriculture and Forestry (MAGFOR), charged with formulating and enforcing the country’s agricultural and forestry policies. Law 693 of 2009 created the national system for food and nutritional security and sovereignty (SINASSAN) as the set of national public and private institutions and nongovernmental organizations whose purpose is to order, articulate, integrate and implement any actions needed for achieving food security and sovereignty.<sup>200</sup>

### 6. ANALYSIS OF PROCOMPETENCIA’S ENFORCEMENT PRACTICE

Given the paucity of experience to date in enforcing competition legislation, it is difficult to talk about tendencies in the interpretation of Law 601 and the Competition Regulation. Even so, an analysis can be made of the main cases taken on, up to now, by PROCOMPETENCIA.

#### 6.1 Banned Practices

##### 6.1.1 Credit Cards Case<sup>201</sup>

As already mentioned, in the case of credit cards the Constitutional Chamber of the Supreme Court of Justice ruled that PROCOMPETENCIA’s President had operated outside the scope of his authority, as this sector was of exclusive competence of the SIBOIF even in competition matters.<sup>202</sup>

The case was initiated on June 17, 2010 after a complaint was filed by the Association “National Consumer Defense Network” against seven private banks and the Association of Private Banks of Nicaragua for allegedly having violated Articles 17 and 18(a) of Law 601 by fixing interest rates in the internal credit card market. On June 23, PROCOMPETENCIA opened the case, later

<sup>199</sup> For more information on the food security policy, see: Sánchez, Ilda and Díaz, Tania. *Luchando Contra la Inseguridad Alimentaria en Nicaragua, un Acercamiento a la Política de Seguridad y Soberanía Alimentaria Nacional*. El Observador Económico, September 9, 2011. <http://www.elobservadoreconomico.com/articulo/1166>

<sup>200</sup> Decree 74 of 2009, Article 2. (Regulations to Law 693 of 2009)

<sup>201</sup> PROCOMPETENCIA. Cases: 002-2010, 003-2010, 004-2010, 005-2010, 006-2010, 007-2010, 008-2010, 009-2010 and 010-2010.

<sup>202</sup> See: Supreme Court of Justice. Constitutional Chamber. *Ruling 864 of May 31, 2012*. Case: 911-11, and *Ruling 760 of July 20, 2011*. Cases: 1049, 832, 925, 924-2010 and 628-2011.

dividing the investigation into various cases when several of the alleged offenders questioned the authority's competence.

The primary evidence in the case was a press release by the Association of Private Banks informing that they had agreed to reduce interest rates in order "to take mitigating and relief actions to ensure the financial system's stability and the country's economic activity, on the one hand, and to contribute to solving the payment capacity problem in lower income sectors, on the other."<sup>203</sup> PROCOMPETENCIA collected additional evidence, such as the rates that were effectively charged.

In its analysis of the case PROCOMPETENCIA applied what would seem a *per se* rule, without getting into the analysis of potential anticompetitive or pro-competitive effects of the conduct. In this respect PROCOMPETENCIA stated: "In an analysis of horizontal or absolute monopolistic practices, two things must be determined. First, that the conduct occurs between competitors (that is to say, between economic agents operating on the same market level, for which reason they are also called "horizontal practices"), which in this case is true. Second, that the conduct is one typified in the law (...). Confirmation is not required of the size of the affected market or the intention of the economic agents involved. These practices are void as a matter of law and illegal *per se*."<sup>204</sup>

In their defense, the parties basically invoked two arguments: PROCOMPETENCIA's lack of authority in the financial sector, and the impossibility to sanction associations in cartel cases. There was no discussion around the existence of the practice.

PROCOMPETENCIA rejected the first argument on the basis of Articles 2 and 52 of Law 601. Article 2 establishes that the competition law shall apply to all sectors of the economy, and Article 52 revoked the provisions in other legislations that opposed the competition law.<sup>205</sup>

On the other hand, it was argued that the Association of Banks could not be considered a "competing economic agent" since it did not carry out economic activities as such. PROCOMPETENCIA rejected this argument too on the grounds that the acts of guilds directly or indirectly affect the development of their members' economic activities and could lead to anticompetitive practices banned by Law 601 if they limited the freedom of action of their members or made recommendations encouraging their uniform behavior.<sup>206</sup>

This interpretation of the role of guilds and trade or professional associations is correct. Nevertheless, unlike other legislation<sup>207</sup> Law 601 does not expressly typify these groups' conduct of facilitating banned agreements among their members. Instead, only members would be held liable, associations being considered as mere vehicles to engage in anticompetitive practices. This is another aspect of the law that would be worth revising.

Finally, a bank was fined three hundred minimum wages (around USD 40,000) and ordered to stop engaging in anticompetitive practices, while the Association of Private Banks was sanctioned with one hundred minimum wages (around USD 14,000) and ordered to abstain from

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<sup>203</sup> PROCOMPETENCIA. *Administrative Decision of April 15, 2011*. Case: 002-2010, p. 23.

<sup>204</sup> *Ibid*, p. 30.

<sup>205</sup> PROCOMPETENCIA. *Administrative Decision of May 17, 2011*. Case: 003-2010.

<sup>206</sup> PROCOMPETENCIA. *Administrative Decision of August 19, 2010*. Case: 0002-2010, pp. 4-5.

<sup>207</sup> For example, Article 101 of the EU Treaty

making recommendations to its members that would potentially result in a violation of the competition law.

Several of the investigated agents filed *amparo* appeals questioning PROCOMPETENCIA's authority to hear cases in the financial sector. As a result, the Constitutional Chamber of the Supreme Court of Justice annulled the PROCOMPETENCIA's decisions. In the Chamber's opinion, Article 15 of Law 601 and the laws regulating the sector grant the authority over competition investigations and decisions to the sector regulator rather than PROCOMPETENCIA. "When investigations into practices covered by this law are conducted in economic sectors and markets subject to regulation, PROCOMPETENCIA will issue an opinion prior to resolution by the regulatory bodies. (...) The opinion issued by PROCOMPETENCIA shall only determine the existence of the anticompetitive practice, in no case shall it go into technical aspects inherent to the economic sector's regulation. (...) The regulator must take PROCOMPETENCIA's opinion into consideration in its resolution (...)." <sup>208</sup>

### 6.1.2 Liquid Petroleum Gas Case<sup>209</sup>

The case began on July 5, 2011, with a complaint lodged against two liquid gas distributors who had allegedly engaged in a series of practices typified in Article 18 (practices between competitors) and Article 19 (practices between non-competitors): agreements on price-fixing and conditions of sale, agreements to drive competitors out of the market or to limit entry to the market, exclusive distribution of goods or services, sale subject to the condition not to use or sell goods supplied by third parties, and refusal to deal.

PROCOMPETENCIA determined that irrefutable evidence had not been presented to establish many of the reported infringements (recall that the law puts the burden of proof on the complainant). With regard to refusal-to-deal charges, documentary evidence was provided of the existence of a business relationship which the alleged offender had interrupted in 2010. This party failing to provide an objective justification for such conduct, PROCOMPETENCIA determined the violation of Law 601 once it was shown that: a) the incumbent held a dominant position in the relevant market; b) the practice was conducted with regard to goods or services related to the relevant market involved; and c) the practice limited entry to, or drove competitors out of, the market and harmed consumers (the requirements set forth in Article 20 of Law 601).

With respect to the delimitation of the relevant market, the decision refers to the concepts of geographic and product market and demand- and supply-side substitutability, but does not explain how they were applied in this specific case. It merely indicates that the offender participated in the market for storage, distribution and marketing of liquid petroleum gas in Nicaragua.

To determine the dominant position of Tropigás de Nicaragua S.A., PROCOMPETENCIA analyzed market shares, concluding that the incumbent accumulated 65.87%, with four other operators participating in the market. It also applied three concentration indices, to wit, the Herfindhal Hirschman Index (HHI), the Dominance Index (DI), and the Concentration Ratio

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<sup>208</sup> Supreme Court of Justice. Constitutional Chamber. *Ruling No. 760 of July 20, 2011*. Cases: 1049-932-925-924-2010 and 628-2011, p. 8.

<sup>209</sup> PROCOMPETENCIA. Case: 0002-2011.

(CR), concluding that the market was highly concentrated. Moreover, the decision included references to the hypothetical monopolist test and to the concept of demand elasticity.

In the analysis of anticompetitive and pro-competitive effects of the practice, the decision only indicates that it had the effect of driving competitors out of the market. The parties did not argue efficiencies either. Thus, Tropicigás de Nicaragua was fined 153 minimum wages (around USD 22,000) and forced to stop the practice.

The sanctioned company requested a review of the decision with the President, and then an appeal with the Board of Directors -in this case PROCOMPETENCIA's authority in the energy was challenged-, but the both decisions confirmed the original by PROCOMPETENCIA President.

### **6.1.3 LIDO and BIMBO Cases<sup>210</sup>**

On June 17, 2010, the representative of Distribuidora César Guerrero Lejarza S.A. (DICEGSA) filed a complaint against Compañía Industrial Lido Pozuelo, S.A. de C.V. (LIDO) and Bimbo de Nicaragua, S.A. (BIMBO) for alleged violations of Article 18 sections a, c and d (price-fixing, agreements to drive other companies out of the market, and limitation of the production of goods and services), and Article 19 sections e and f (refusal to deal, and sale conditions and price discrimination).

With regard to practices between competitors, PROCOMPETENCIA determined that the complainant had not presented sufficient evidence. It was found that the incumbent had stopped supplying DICEGSA and providing it with advertising support, but there was an objective justification for such behavior, since DICEGSA had fallen behind in its payments. For the same reason the alleged discrimination charges were also rejected.

Thus, PROCOMPETENCIA dismissed the complaint. However, it ordered the incumbent to resume sales and advertising support to DICEGSA as soon as this company complied with its obligations.<sup>211</sup> PROCOMPETENCIA said all products shall be supplied to any economic agent meeting the requirements established by law and good business practices. In this case the grounds for the decision are not completely clear, as it imposes an obligation on an incumbent that had been acquitted. The incumbent appealed the decision, but PROCOMPETENCIA confirmed all the arguments in it.

## **6.2 Mergers**

### **6.2.1 Poultry Market Case<sup>212</sup>**

On November 10, 2010, Sun Valley Foods of Central America Ltda. and Rica Foods Inc., both active in the poultry industry and the latter with operations in Costa Rica and Nicaragua, notified PROCOMPETENCIA of their concentration.

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<sup>210</sup> PROCOMPETENCIA. Case: 010-2010.

<sup>211</sup> PROCOMPETENCIA. *Administrative Decision of October 10, 2011*. Case: 010-2010, p. 18.

<sup>212</sup> PROCOMPETENCIA. Case: 001-2010.

PROCOMPETENCIA analyzed some elements such as industry characteristics, margins and price trends, the relevant market, demand- and supply-side substitutability, degree of market concentration, potential coordinated and unilateral effects, entry barriers, access to distribution channels, investment and financing needs, economies of scale, etc.

Potential efficiencies and justifications argued by the parties were also analyzed: consolidation of the industry and sharing of experiences, improved customer service, reduced costs and improvements in product distribution, economies of scale, improved production as a result of technology and market knowledge transfer, and enhanced competitiveness.

PROCOMPETENCIA concluded that the relevant product market was chicken meat in its three categories (fresh chicken, frozen chicken and by-products) and the relevant geographic market was the Nicaraguan domestic market. As potential anticompetitive effects of the transaction, PROCOMPETENCIA identified an increased market power and facilitation of market cartelization, but it also recognized efficiencies which could be transferred to consumers.

In the end it ruled that the transaction would not irrationally diminish free competition in the Nicaraguan poultry market and authorized the merger with conditions: continue participating in the market and abstain from engaging in anticompetitive practices, continue supplying the wholesale and retail channels and attempt to expand them, deliver USD 50,000 for three years to consumer associations through the Ministry of Finance and Credit, to deliver training on responsible consumption and food security, continue and expand support programs to small and medium producers, respect job stability of rank and file workers for a period of twelve months, offer the acquired brand (Pollo Real) for sale to a third potential foreign competitor through public tender, and limit the non-competition agreement to a maximum period of 36 months.<sup>213</sup>

The pertinence of several of these measures is questionable. For example, the obligation to give money to consumer associations for training has no relationship whatsoever with the effects the merger would eventually have. Neither does the condition to maintain jobs, which could actually be imposing limits to efficiency gains deriving from the merger. The condition to sell the brand to a foreign firm is not justified either.

Measures of this type do not easily follow from the options provided in Article 40 of the Competition Regulation, and would seem to go beyond the purpose of the conditions, which should be only that of restoring the pre-concentration competition situation. The powers provided by law to PROCOMPETENCIA should be exercised according to strict proportionality criteria, since they definitely limit -though legitimately- the principle of free enterprise set forth in the Constitution.

## **6.2.2 Hydrocarbons Market Case<sup>214</sup>**

On June 8, 2011, Inversiones en Combustibles y Lubricantes de Nicaragua S.A. and ECCLESTON Co. Ltd. reported the former's acquisition of the latter's operations in Nicaragua. The two groups were engaged in the wholesale distribution of hydrocarbons.

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<sup>213</sup> PROCOMPETENCIA. *Administrative Decision of March 24, 2011*. Case: 001-2011, p. 28-30.

<sup>214</sup> PROCOMPETENCIA. Case: 003-2011.

In this case PROCOMPETENCIA also analyzed some basic elements and expected effects of the transaction and considered the parties' efficiency arguments: improved quality and safety of the service, a new distribution network, best management practices, investments in corporate social responsibility, improved supply, promotions and marketing management for the distribution network, etc.

The sector regulator, INE, presented a series of regulatory requirements and recommendations on pricing, quality, safety and environmental issues, leaving questions of competition up to PROCOMPETENCIA without questioning its authority in this sector.

PROCOMPETENCIA identified the relevant product market as that of wholesale distribution of gasoline, diesel, fuel oil and kerosene, and the geographic market as that of western, pacific and central Nicaraguan regional market. The company resulting from the merger would have 26% market share (with the four largest companies, out of a total of six, controlling 83.43% of the market). In the kerosene segment, however, the new company's share would rise to 77.52%. The overall market concentration would increase slightly.

Finally, PROCOMPETENCIA concluded that the parties in the concentration were medium-sized and that there would still be strong companies in the market that would limit the merger's unilateral effects. In addition, it felt that the increased degree of concentration would be offset by efficiencies.

Despite this, PROCOMPETENCIA subjected approval to several conditions, some of which coincided with what the regulator had recommended: maintain prices, submit investment and expansion plans to the regulator for approval, assume environmental and industrial safety commitments, present a plan to improve customer service at stations, respect job stability of workers, and give to the *Universidad Nacional de Ingeniería* USD 100,000 (in the review of the decision the amount was reduced to USD 50,000) per year for three years to finance research and projects on renewable energy<sup>215</sup>.

As in the previous case, the relationship between the effects of the concentration and the conditions imposed by PROCOMPETENCIA is not clear. Some of the conditions are not even related to the objectives of Law 601.

### **6.3. Conclusions**

In sum, the following aspects stand out as areas for improvement:

- The situation generated by Article 15 needs amendment by the National Assembly.
- The liability of guilds and trade and professional associations when they promote anticompetitive activities among their members should be clarified.
- The provision putting the entire burden of the proof on the complainant should be reformed to share it with PROCOMPETENCIA.
- PROCOMPETENCIA should put more effort in the definition of relevant markets.

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<sup>215</sup> PROCOMPETENCIA. *Administrative Decision of October 31, 2011*. Case: 003-2011.

- The remedies imposed on the parties should focus in solving the problems created by the practice or the merger and not try to solve other problems.
- PROCOMPETENCIA should analyze more deeply the anticompetitive and pro-competitive effects of practices and mergers. Its economic team needs be reinforced.
- The capacity of PROCOMPETENCIA to initiate *ex officio* investigations should be widened. Not a single investigation has been initiated like that, the reason for that probably being the authority's budgetary and staff limitations.

Appendix 3 of this report gives a table with the details of the cases and decisions issued by PROCOMPETENCIA in the exercise of its duties.

## 7. COMPETITION ADVOCACY

Competition advocacy refers to all those activities carried out by the competition authority aiming at promoting a competitive environment within the government, legislators and regulators, or at raising awareness of the benefits of competition.<sup>216</sup>

A substantial part of a competition authority's task is to convince other public bodies to adopt pro-competition regulatory measures or at least abstain from adopting measures that are harmful to competition. The authority also has to promote a culture of competition within the different sectors of society: public institutions, the private sector, consumer associations, etc.<sup>217</sup>.

The function of advocacy, though important for any competition authority, is especially critical in developing countries in the process to consolidate a market economy. These countries typically lack a mature competition culture, so the authority plays an extremely important role in explaining the benefits of competition. At the beginning the competition authority will quite likely lack some of the tools for performing its advocacy duties adequately, due to problems of independence, credibility and/or resources.<sup>218</sup>

### 7.1 Legal Framework

Law 601 (Chapter III) sets forth the advocacy functions of PROCOMPETENCIA. Article 16 establishes PROCOMPETENCIA's advocacy responsibilities as the following: "a) Propose the removal of legal barriers to market entry that exclude or limit the participation of new economic agents; b) Prepare, present and disseminate technically justified proposals to liberalize and deregulate markets and economic sectors key for development; c) Advise national, regional or municipal public administrations so that in fulfilling their duties they do not establish bureaucratic barriers or red tape to economic freedom and competition; d) Propose initiatives for simplifying administrative procedures and follow up on them; e) Carry out pro-competition activities, providing advice to state bodies and entities, economic agents, academic organizations and professional associations on economic and business matters; and f) Promote and carry out

<sup>216</sup> ICN . Advocacy Working Group. *Advocacy and Competition Policy*. Naples, Italy. 2002. p. i.  
<http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>

<sup>217</sup> *Ibid.*, p. ii.

<sup>218</sup> OECD. *Competition Advocacy: Challenges for Developing Countries*. p.10.  
<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>

studies, investigations and other research and dissemination activities for the purpose of building a competition culture in the country.”

With respect to the function in section d above, Article 19 of the Competition Regulation establishes a series of principles that PROCOMPETENCIA should advocate<sup>219</sup>, and a series of guidelines on how to make recommendations.<sup>220</sup> This function allocated to PROCOMPETENCIA goes beyond the promotion and the protection of free competition and has more to do with good administrative practices in general in the country.

In sum, the law grants PROCOMPETENCIA functions in the two typical areas of competition advocacy –promotion of a competition culture and of pro-competition regulatory decisions– but also in other areas that are more common to bodies specially charged with procedures simplification and improved regulation. It would be worth assessing whether this model, which has been followed by various authorities in the region, is the most appropriate for an authority with such limited resources as PROCOMPETENCIA, in a country with still little culture of competition at all levels as Nicaragua.<sup>221</sup>

## 7.2 PROCOMPETENCIA Advocacy Actions

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

According to the annual report presented to the National Assembly in 2012,<sup>222</sup> PROCOMPETENCIA has trained more than 500 people including judges, regulators, business people, legal practitioners, consumer associations, etc., in the benefits of competition and the scope of Law 601.

Among the main events organized, special mention should be given to the First National Competition Forum in Managua, the workshops held in the cities of Estelí, León and Granada, the First Regional Competition Forum and the First Local Meeting of Consumer Organizations.

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<sup>219</sup> “1. Good faith; 2. Simplicity, transparency, speed and efficiency; 3. Public Administration at the service of citizens; and 4. Compliance with the principle of legality in decision-making.

At the request of PROCOMPETENCIA, public administration bodies must inform of any administrative modifications or changes that affect or may affect the free exercise of the right to economic freedom and competition.”

<sup>220</sup> “PROCOMPETENCIA shall advise and formulate recommendations to public administration bodies to prevent the placement of legal barriers to economic activities or remove existing ones, deregulate economic sectors, simplify procedures and promote studies and research on free competition that can help reduce transaction costs and foster the country’s competitiveness. To that effect, PROCOMPETENCIA’s recommendations must be along the lines to: 1. Rationalize administrative procedures, standards and technical norms applicable to industry or commerce and eliminate those that are not legally justified; improve their effectiveness, pertinence and usefulness to make them speedier and more functional; reduce operating expenses; obtain budget savings; cover fiscal shortages and improve public administrations’ relations with citizens. 2. Establish simple, clear, speedy, rational, pertinent and useful administrative procedures that are easily understood by citizens, in order to improve their relations with the Administration and render administrative activity more effective and efficient. 3. Minimize the adverse impact of technical norms and standards on the exercise of the right to free competition. 4. Concentrate procedures, avoiding repetition before different entities. To this end, simplification will seek to increase the number of entities benefitting from the same procedure and reduce requirements to citizens. 5. Establish effective mechanisms to keep the Administration from adding requirements to those provided by law when a right or activity has been regulated in a general manner. 6. Propose measures for keeping administrative bodies from requiring copies of documents it already has or is legally empowered to access by virtue of the principle of cooperation which must prevail in inter-agency relations. To this end databases should be put in place.”

<sup>221</sup> COPROCOM originally had functions along these lines but in 2002 the Law for the Promotion of Competition and Effective Consumer Protection, Law 7472 of December 19, 1994 was amended by the Fiscal Contingency Law, Law 8343 of December 18, 2002, which created the Commission for Regulatory Improvement.

<sup>222</sup> PROCOMPETENCIA. *Informe a la Asamblea Nacional*. Managua, Nicaragua. May 2012.



PROCOMPETENCIA has also worked very closely with universities. In March 2012 the first Competition Diploma Program opened in the Institute for Public Policy Administration of the University of Engineering (*Universidad de Ingeniería*). In addition, various undergraduate and postgraduate competition courses were included in the Master's Program in Business at the Central American University (*Universidad Centroamericana*). Furthermore, agreements are being negotiated with the American University of Nicaragua (*Universidad Americana de Nicaragua*), the Politechnic University (*Universidad Politécnica*) and the University of Commercial Science (*Universidad de Ciencias Comerciales*). This is essential not only with a view to train professionals in the medium and long term, but also because these centers can conduct competition research (as they have already done) that can be extremely useful to PROCOMPETENCIA.

PROCOMPETENCIA has also issued opinions on consultations coming from the private sector. In 2012 it issued opinions on medicine distribution and supermarket pricing policies. It has also issued opinions on decrees, laws and international conventions, such as the Tax Pact Bill and the Consumer Protection Law. However, PROCOMPETENCIA is not keeping statistics on these advocacy activities and appears not to be following them up, undoubtedly opening up another area for improvement.

Moreover, a series of studies have been made among which that on Nicaragua's General Competition Conditions (*Condiciones Generales de la Competencia en Nicaragua*) is worth noting. The study covered 14 sectors, mainly public service and agricultural markets (sugar, rice, wheat flour, milk, chicken, beef, cooking oil, medicines, cement, agrochemicals, beer, hydrocarbons, banking and mobile telephony). The study was disseminated among different groups and constitutes a basis for investigations in these sectors.

Several guides have also been published -a Competition guide for business associations, a Guide for filing complaints, a Basic guide for the promotion of competition, a Popular guide and a Competition guide for the prevention and detection of anticompetitive practices in public procurement<sup>223</sup>-, and PROCOMPETENCIA has a website where the relevant information on its actions is made available to the public.

Despite PROCOMPETENCIA's boldness and its laudable advocacy actions -even more so if we take into account its limited resources- there is still little awareness in the country regarding the scope of competition legislation, so efforts should be redoubled along these lines (the need for more resources will still remain at the top of the list).

For its advocacy program to bear fruit, the authority must continue to enforce the law. It would be useful for PROCOMPETENCIA to undertake visible cases of major economic significance with a reasonable probability of success, to later give them publicity as to gain over defenders of competition who could help PROCOMPETENCIA build and disseminate a competition culture in Nicaragua.<sup>224</sup>

Participation in the regulatory process has been identified as a key component to competition defense. Early intervention by the authority in this process produces the best results. Here, the authority's transparency, credibility and political neutrality increase effectiveness in this task.

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<sup>223</sup> To date there have been no bid rigging cases.

<sup>224</sup> See OECD: *Competition Advocacy: Challenges for Developing Countries*. p.10.  
<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>

With respect to transparency, developed countries with a strong competition culture make use of specialized communication media, while countries with weaker competition culture generally prefer mass communication media. Obviously, the better prepared the authority's staff is (think, for example, of the complex technical questions in regulated sectors), the higher the quality of the authority's job.<sup>225</sup>

For PROCOMPETENCIA it is especially important to work, or continue to work, on training and raising awareness in the judicial branch, the National Assembly, sector regulators and public procurement agencies. Judges should be in the best technical condition to resolve on the competition cases filed with the courts; the National Assembly should understand the need to provide more resources to PROCOMPETENCIA and undertake the legal reforms needed to ensure its effectiveness; regulators should abstain from promoting rules contrary to competition and should cooperate effectively with the competition authority in pursuing anticompetitive conduct (advocacy with sector regulators is even more urgent if they are to enforce Law 601 in regulated sectors); and public procurement agencies should take competition into account when designing procurement processes and be on the alert for potential collusive practices, with subsequent savings in State spending.

Moreover, although PROCOMPETENCIA's actions are quite transparent, it would be a good idea to take some opportunities to provide additional explanations of the benefits of competition.

## **8. INTERNATIONAL RELATIONS**

### **8.1 International Cooperation**

Whether the competition authorities are in developed or developing countries, they all need to cooperate with each other, since many times the effects of anticompetitive practices have cross-border effects, and in any case there is always room to learn from each other. This necessity for cooperation is even greater in the case of Nicaragua and all Central American countries, as they are small commercially integrated economies and therefore practices committed in one country can quite likely have effects in another (or others) and the strategies of the companies operating in the region may not vary greatly between countries.

This has been the object of extensive analyses in international forums such as the OECD, UNCTAD, EU and WTO, where the conclusion seems to be that a certain degree of convergence or standardization of competition laws is desirable along with international cooperation, which helps reduce inconsistencies among the decisions of the different authorities regarding the same matters and the costs for companies to comply with competition laws.<sup>226</sup>

Setting up international systems for cooperation among agencies is no easy task, however, and less so if the goal is deep-seated global cooperation.<sup>227</sup> Moreover, it appears that developed

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<sup>225</sup> See ICN: *Advocacy and Competition Policy*. Naples, Italy. 2002. pp. xiii-xiv. <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>

<sup>226</sup> To this respect, see Matsushita, Mitsuo. *International Cooperation in the Enforcement of Competition Policy*. Washington University Global Studies Law Review Vol. 1:463. 2002. <http://www.worldtradelaw.net/articles/matsushitacompetition.pdf>

<sup>227</sup> ICN. ICN Steering Group. *International Enforcement Cooperation Project*. pp. 1-2. <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>

countries have been more successful than developing ones in establishing cooperation mechanisms.<sup>228</sup>

### 8.1.1 The Theory of Effects and the Need for Cooperation

Law 601 (Article 2) states that its provisions are applicable to all acts, conduct, transactions or agreements executed by economic agents, including those carried out outside the country, to the extent that they produce or may produce anticompetitive effects in the national market. This provision is an example of what is internationally known as the “theory of effects”.

The implementation of this principle poses obvious difficulties, given the legal and institutional limitations for conducting investigations outside a jurisdiction. There is a need, then, to establish different mechanisms for international cooperation, as shown with several past cases such as that of PROCOMPETENCIA’s poultry merger referred to earlier<sup>229</sup>, and the airline cases of the Costa Rican Commission for the Promotion of Competition<sup>230</sup> and the Panamanian Authority for Consumer Protection and Competition Defense.<sup>231</sup> Along these same lines, regional studies on different markets have also recommended more in-depth cooperation among the region’s competition authorities.<sup>232</sup>

### 8.1.2 Regional Cooperation Mechanisms

There are several regional instruments that have fostered the establishment and standardization of competition laws in these countries.

The Protocol to the General Treaty on Central American Economic Integration (Guatemala Protocol) of 1993<sup>233</sup> establishes in Article 25 the obligation of the Parties to “adopt common provisions to prevent monopolistic activities and promote free competition in the countries of the region.” The Framework Agreement for the Establishment of the Central American Customs Union of 2007 (Article 21)<sup>234</sup> states the Parties’ obligation to develop a regional competition law.

<sup>228</sup> UNCTAD. *Cross-border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition*. TD/B/C.I./16 Geneva, Switzerland. April 2012. [http://unctad.org/meetings/en/SessionalDocuments/ciclpd16\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd16_en.pdf)

<sup>229</sup> PROCOMPETENCIA. *Case: 001-2010*. In this case, Sun Valley Foods of Central America Ltda. acquired Rica Foods Inc., both doing business in the poultry industry, the latter with operations in Costa Rica and Nicaragua. Only the Nicaraguan authority, however, analyzed the concentration.

<sup>230</sup> COPROCOM. *Case: 01-2000*. In this investigation the authority initiated proceedings against American Airlines Inc., Continental Airlines Inc., United Airlines Inc., Líneas Aéreas Costarricenses S.A., Taca International Airlines S.A., Grupo Taca S.A., Compañía Panameña de Aviación S.A., Aviateca S.A., Delta Airlines Inc. and Compañía Mexicana de Aviación S.A. for committing absolute monopolistic practices.

<sup>231</sup> ACODECO. “*Análisis de la Duración de los Procesos Judiciales por Prácticas Monopolísticas Interpuestos ante los Tribunales de Justicia por ACODECO*”. Technical Report No. 30, Panama. December 2012, pp. 4-5.

[http://www.autoridaddelconsumidor.gob.pa/uploads/pdf/nuestra\\_labor/NotaTecnica-AnalisisDuracionProcesosJudicialesPracticaMonopolisticasTribunalesJusticiaACODECO\\_Diciembre2012.12\\_10\\_2012\\_08\\_36\\_41\\_a.m..pdf](http://www.autoridaddelconsumidor.gob.pa/uploads/pdf/nuestra_labor/NotaTecnica-AnalisisDuracionProcesosJudicialesPracticaMonopolisticasTribunalesJusticiaACODECO_Diciembre2012.12_10_2012_08_36_41_a.m..pdf). In this case, “(t)he CLICAC filed a formal complaint on May 29, 2001, against Continental Airlines, INC, American Airlines, INC, Delta Airlines, INC, TACA International Airlines, S.A., and Compañía Panameña de Aviación, S.A., for absolute monopolistic practices according to Article 11, number 1 of Law 29 of the 1<sup>st</sup>....”

<sup>232</sup> See Petrecolla, Diego. *Condiciones de Competencia en el Sector de Medicamentos de Centroamérica*. Estudio Regional de las Condiciones de Competencia en la Cadena de Distribución Mayorista y Minorista de Medicamentos en Centroamérica y Panamá. Central American Integration Working Group on Competition Policy and the Inter-American Development Bank. January 2011, pp. 149-150. See also Schatan, Claudia and Avila Marcos. *Condiciones de Competencia en el Contexto Internacional: Cemento, Azúcar y Fertilizantes en Centroamérica*. Studies and Perspectives Series. Economic Commission for Latin America and the Caribbean (ECLAC). Mexico D.F. September 2003.

<sup>233</sup> *Protocol to the General Treaty on Central American Economic Integration (Guatemala Protocol)*. Signed by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama on October 29, 1993.

<sup>234</sup> *Framework Agreement for the Establishment of the Central American Customs Union*. Signed by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua on December 12, 2007.

On May 4, 2006 at the 47<sup>th</sup> Vice Ministers for Economic Integration Meeting, a working group on Competition Policy of the Central American Integration was formed, comprised by the competition authorities of Central America and Panama. The primary goal of the working group is to strengthen competition policy through the design of a regional policy and to foster a competition culture in the region.

At its meeting the following year the working group established the following specific objectives: “a) increase and optimize actions and achieve compliance by competition authorities with their functions for preventing, detecting and pursuing any anticompetitive practices that may occur in regional trade; b) promote regional international cooperation for building institutional capacities; and c) foster a competition culture in the Central American region.”<sup>235</sup>

Legal competition frameworks have therefore consolidated nationally, some technical international cooperation activities have been carried out, training has been conducted for staff of the authorities and for civil society, dissemination and promotion events have been held, and regional institutional capacities have been strengthened.<sup>236</sup> In addition, several regional forums have been held, market studies have been prepared on strategic sectors such as passenger air transportation and medicines, national and regional regulations have been analyzed, and several editions of the Central American Competition Bulletin have been issued.<sup>237</sup>

Mention can also be made of a study issued within the framework of the COMPAL program which analyzes the region’s legislations and identifies convergences, divergences and cooperation opportunities. At the end, the report recommends improving coordination among trade and competition authorities in Central America and the Caribbean, developing regional awareness programs for expanding the scope of application of competition law to regulated sectors, improving information-sharing mechanisms, and working to standardize laws and strengthen institutions.<sup>238</sup> Later, also under the COMPAL program, factors hindering stronger cooperation among the region's competition agencies were identified and various measures for improvement were proposed.<sup>239</sup>

Not all the efforts have been kept up over time, but at present the working group is commissioning a study which includes a proposal for an institutional and regulatory model for a regional competition policy, with the help of the Inter-American Development Bank.<sup>240</sup>

<sup>235</sup> Secretariat for Central American Economic Integration (SIECA). *Declaración del Grupo Centroamericano de Política de Competencia del Primer Foro Centroamericano de Política de Competencia*. Given in the city of Antigua, Guatemala on April 11, 2007.

<sup>236</sup> *Presentación del Grupo de Trabajo de Política de Competencia en la Integración Económica Centroamericana*. Honduras, May 13, 2009.

<http://www.google.co.cr/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CEkQFjAD&url=http%3A%2F%2Fwww.cdpc.hn%2Fppt%2Fpresent1.ppt&ei=v88fUbK7lpD89gSU-4DwDQ&usq=AFQjCNHAPhiAeeWbv7vQQUd2UXvWvVJRqw&bvm=bv.42553238.d.eWU>

<sup>237</sup> See [http://www.sc.gob.sv/pages.php?Id=269&Id\\_menu=307010](http://www.sc.gob.sv/pages.php?Id=269&Id_menu=307010) See also *Presentación del Grupo de Trabajo de Política de Competencia en la Integración Económica Centroamericana*. Honduras, May 13, 2009.

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<sup>238</sup> Bendaña, Julio C. *Análisis Crítico de la Legislación de Competencia en Centroamérica, Panamá y República Dominicana*. COMPAL Programme. Regional Component Project. Managua, June 2010, p. 52.

<sup>239</sup> Bendaña, Julio C. *Recomendaciones para mejorar la cooperación regional en Centroamérica*. COMPAL Programme. Regional Component Project. Geneva, 2011.

<sup>240</sup> <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=rg-t1689>. The first steps have already been taken on this project with the preparation of a first draft of an Institutional and Regulatory Model for a Regional Competition Policy by Mr. Jairo Rubio, former Superintendent of Industry and Trade of Colombia.

PROCOMPETENCIA is the chairman pro tempore in 2013 for the Central American Competition Group.

### 8.1.3 Competition Provisions in Free Trade Agreements

International cooperation on competition issues is also a common theme in free trade agreements, and the ones signed by Nicaragua are no exception.

One of the objectives of the Canada-Central America 4 (CA4) Free Trade Agreement is to “promote the conditions for free and fair competition in the free trade zone.” To achieve this, legislations prohibiting anticompetitive practices and regulating monopolies and state-owned enterprises actions are needed. Also, consulting mechanisms must be established.<sup>241</sup>

The Nicaragua-Taiwan Province of China Free Trade Agreement includes a chapter on competition whose objective is “to ensure that the advantages of market liberalization are not weakened by anticompetitive activities, and to promote cooperation and coordination between the Parties’ competent authorities.”<sup>242</sup> To this end it establishes information-sharing and consulting mechanisms in respect of the principle of confidentiality. The Treaty creates a “Free Competition Committee” whose function is to put the provisions established in the competition chapter into practice.

As stated earlier, the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) does not have a specific chapter on competition, but the complementary agenda establishes the obligation of enacting a competition law.

The Free Trade Agreement between Central America and Panama of March 6, 2002 includes a chapter (Chapter 15) on competition establishing that the parties will work toward adopting common regulations to prevent anticompetitive practices. It also includes a work plan to develop the contents of the chapter in two years.<sup>243</sup>

Finally, the European Union-Central America Association Agreement, signed on June 29, 2012,<sup>244</sup> binds the Parties to the Association to adopt competition laws and create competition authorities charged with enforcing those laws (in all countries within three years),<sup>245</sup> and to approve Central American competition regulations<sup>246</sup> (in seven years).

It also provides for mechanisms to facilitate the sharing of non-confidential information, cooperation between authorities and the development of technical assistance activities.<sup>247</sup>

### 8.1.4 Cooperation Agreements with Peer Agencies

Bilaterally, PROCOMPETENCIA has entered into cooperation agreements with various Central

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<sup>241</sup> PROCOMPETENCIA. *Marco General de Política Nacional de Competencia*. October 2011, p. 30.

<sup>242</sup> *Ibid*, pp. 30-31.

<sup>243</sup> *Free Trade Agreement between Central America and Panama*. Signed by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama on March 6, 2002.

<sup>244</sup> European Commission. *Comunicado de prensa del 29 de junio del 2012*.

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=815&serie=529&langId=en>

<sup>245</sup> Article 279, paragraph 1 of Title VII on Trade and Competition of the European Union-Central America Association Agreement.

<sup>246</sup> See Articles 277 and 279 of Title VII on Trade and Competition of the European Union-Central America Association Agreement.

<sup>247</sup> Article 281 of Title VII on Trade and Competition of the European Union-Central America Association Agreement.

American competition authorities: the Salvadoran Competition Superintendency,<sup>248</sup> the Costa Rican Commission for the Promotion of Competition,<sup>249</sup> and the Panamanian Authority for Consumer Protection and Competition Defense.<sup>250</sup>

All these agreements have similar structures and content and were signed for cooperation in preventing and identifying anticompetitive practices. All include mechanisms to exchange non-confidential information. They also provide for joint competition advocacy activities and technical assistance.

Article V of the agreements sets forth a series of obligations for each of the parties in the framework of investigations into anticompetitive practices: to help the other Party locate and obtain evidence, and facilitate all pertinent public information concerning a case; to provide information about enforcement actions concerning anticompetitive practices that could have adverse effects in the territory of the other Party; and to provide information about anticompetitive practices that may justify the other Party's taking actions to enforce its competition law.

To date PROCOMPETENCIA has not used any of the formal cooperation mechanisms established in these agreements. However, there is a fairly strong flow of informal communication with the rest of the agencies in the region on topics of common interest. It would be worthwhile providing reinforced mechanisms in the future for cooperation in cases (to share confidential information for instance), especially given the plans to adopt a regional law with a common authority.

### 8.1.5 Participation in Competition Networks

PROCOMPETENCIA has also joined various competition networks that provide best practices standards, promote informal cooperation and hold workshops and seminars on different topics.

Specifically, PROCOMPETENCIA is a member of the International Competition Network (ICN), an informal network of competition authorities around the world that advocates for the adoption of higher standards and procedures, formulates proposals for substantive and procedural convergence, and facilitates international cooperation.<sup>251</sup> Recently, PROCOMPETENCIA has been participating in ICN activities more actively (it attended four teleconferences in 2012).

It is also a member of the Inter-American Competition Alliance, a network of competition agencies in the Americas created in September 2010 for the purpose of analyzing competition issues and promoting cooperation among its members.<sup>252</sup> PROCOMPETENCIA has participated in monthly teleconferences since 2012.

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<sup>248</sup> *Acuerdo entre el Instituto Nacional de Promoción de la Competencia (PROCOMPETENCIA) de la República de Nicaragua, y la Superintendencia de Competencia (SC) de la República de El Salvador sobre Cooperación Interinstitucional en Materia de Competencia*. Signed in Managua, Nicaragua on October 7, 2009.

<sup>249</sup> *Acuerdo entre el Instituto de Promoción de la Competencia (PROCOMPETENCIA) de la República de Nicaragua y la Comisión para Promover la Competencia (COPROCOM) órgano adscrito al Ministerio de Economía, Industria y Comercio de la República de Costa Rica, sobre Cooperación Interinstitucional en Materia de Competencia y Libre Concurrencia*. Signed in San Jose, Costa Rica on January 27, 2010.

<sup>250</sup> *Acuerdo entre la Autoridad de Protección al Consumidor y Defensa de la Competencia de la República de Panamá y el Instituto Nacional de Promoción de la Competencia de Nicaragua, sobre la Aplicación de su Legislación en Materia de Competencia*. Signed in Panama on February 23, 2010.

<sup>251</sup> <http://www.internationalcompetitionnetwork.org/>

<sup>252</sup> See <http://www.cfc.gob.mx/index.php/alianza-interamericana>

## 8.2 Technical Assistance

Technical assistance programs are of great help to incipient competition agencies with scarce funds such as PROCOMPETENCIA. Special mention has to be made to the COMPAL Program, funded by the Swiss Government and administered by UNCTAD, which provides technical assistance in competition and consumer protection issues to many countries in Latin America and the Caribbean.<sup>253</sup>

The goal of COMPAL I in Nicaragua was to raise awareness of the benefits of competition and the need for a law and an authority (several training and competition advocacy activities were carried out with the Government, the National Assembly, the private sector and universities), and to support the development of the law and the authority. Once the law was passed and the competition authority was in place, COMPAL II has contributed to building the authority's institutional and human capacities. In 2012 Nicaragua received some USD 174,000 through COMPAL II.<sup>254</sup>

Other actions in the framework of COMPAL II have included the preparation of reports on Nicaragua's main markets, dissemination of information on the law, training for judges and for the private sector, and programs with universities. COMPAL has also helped PROCOMPETENCIA define its strategy, an advocacy plan, a list of key sectors for case analysis and a list of opinion leaders, the idea being that they could support the authority in its advocacy work. In addition, training has been delivered to the authority's officers in merger and anticompetitive practice analysis, and some guides and manuals have been developed. COMPAL's contribution was crucial for PROCOMPETENCIA to open doors and hear its first cases.

PROCOMPETENCIA will also benefit from the work of the new Regional Competition Center headquartered in Mexico and funded by the World Bank and the Inter-American Development Bank.<sup>255</sup>

PROCOMPETENCIA has also signed technical assistance and cooperation agreements with the competition authorities of Spain,<sup>256</sup> Mexico,<sup>257</sup> Colombia and Brazil, which include the possibility of attending courses and doing internships in these countries.<sup>258</sup> They also provide the possibility to organize joint advocacy activities. PROCOMPETENCIA has also participated in the Ibero-American Competition School since 2010.

The contribution of international cooperation to PROCOMPETENCIA's operation is definitely appreciable, actually more than desirable, as its dependency at present is deemed excessive (recall that cooperation funds have been paying the salary of some of PROCOMPETENCIA's officers, and that even so, some essential positions in the authority's organizational chart are still

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<sup>253</sup> <http://www.programacompal.org/>

<sup>254</sup> Lindahl, Claes et al. *Una Evaluación de Compal*. July 2012, p. 20.

<sup>255</sup> <http://www.crcal.org/>

<sup>256</sup> *Convenio de Colaboración entre la Comisión Nacional de la Competencia (España) y el Instituto Nacional de Promoción de la Competencia (Nicaragua) para la Cooperación Técnica entre Ambas Autoridades*. Signed in Managua, Nicaragua on August 25, 2010.

<sup>257</sup> *Memorandum de Entendimiento para la Asistencia Técnica entre la Comisión Federal de Competencia de los Estados Unidos Mexicanos y el Instituto Nacional de Promoción de la Competencia de la República de Nicaragua*. Signed on August 16, 2011.

<sup>258</sup> PROCOMPETENCIA. *Informe a la Asamblea Nacional*. Managua, Nicaragua. May 2012, p. 3.

vacant). It is imperative that the institution's sustainability be guaranteed, independent of international cooperation.

## **9. CONCLUSIONS AND RECOMMENDATIONS**

From the analysis of PROCOMPETENCIA's work over the past few years and the way the institution has interacted with different entities, it can be concluded that it has made huge efforts toward building a culture of free competition among businesses and institutions involved in producing laws and regulations. PROCOMPETENCIA has not been alone in its advocacy task, since in addition to international cooperation, it has received significant support from some of the country's institutions -especially universities; in fact, the academia has demonstrated genuine commitment to the cause of free competition-.

Nonetheless, there is clearly still much work to be done. In the first place, PROCOMPETENCIA might be formally independent (fixed term for the President, formal separation from the Government, no hierarchical control by the Government), but it is not financially autonomous and depends too much on international cooperation. With just two senior lawyers and a group of temporary assistants, no matter how strong their commitment to the institution, it is impossible to carry out all the functions assigned to PROCOMPETENCIA in Law 601. In fact, at present the task of analyzing the complaints filed takes up the institution's entire capacity.

It is also imperative to strengthen competition advocacy efforts, especially with sector regulators, the Central Bank, the Office of the Attorney General and the Supreme Court of Justice, as there is still a tremendous lack of knowledge about PROCOMPETENCIA's specific functions and field of specialization among institutions that are expected to cooperate in enforcing competition law.

Although Law 601 and the Competition Regulation appropriately include all the functions a competition authority should perform according to international standards, there are some aspects that would be worth considering in a revision of the law, especially PROCOMPETENCIA's competence to hear competition cases in regulated sectors, and the complainant's role and the concept of "party" to proceedings before PROCOMPETENCIA.

International experience shows that a leniency program is the best tool the authority has for detecting and sanctioning cartels, but there has been no application of leniency provisions in Nicaragua. This might be in part because the sanctions imposed up to now have been set close to the lower levels provided by the law, and because there is still scant experience in enforcing the law. A potential leniency applicant will only approach the authority if it perceives a high probability of detection by the authority of anticompetitive practices (or of other members of the cartel blowing the whistle ahead of them) and a high cost to the offenders in such case (a strong sanction or an elevated cost to reputation, for which a certain level of competition culture is essential).

An effort to modify the conditions and limits of merger control would also be justified. As has been mentioned, a notification threshold in terms of market share is technically difficult to apply; neither is it the best alternative from the standpoint of legal certainty. The notification threshold defined in terms of gross revenue also seems somewhat excessive, at least compared with the thresholds set for this same purpose in other countries in the region.



Finally, it must be acknowledged that although the PROCOMPETENCIA officers have made a commendable effort to enforce the law, they still need assistance and training (more so if some new staff were to be hired, as this report also recommends), not only in economic analysis and other tools important for the analysis of anticompetitive practice and mergers, but also in strategies for investigating cases. With this support and a minimum team of professionals working permanently for the authority, together with the already proven attitude, willingness and criteria of its current officers, PROCOMPETENCIA would be able to tackle the objectives set out in Law 601 with greater chance of success.

Below is a recompilation of these and other questions that merit review, or attention, for the purpose of improving competition law in Nicaragua, its enforcement by PROCOMPETENCIA, and, ultimately, the competition environment in the country.

### **The Scope of Application of Law 601**

Article 4 of Law 601 sets forth a series of “exclusions” for application of the law: “a) Exercise of the intellectual property rights recognized by law to their holders, as long as these holders are not engaging in anticompetitive practices; b) Activities among economic agents with the purpose of achieving greater production and/or marketing efficiencies, such as technical and product quality standardization, adoption of collective brands, and cooperation on environmental or technological development, as long as this does not involve any of the behaviors banned by the law; c) Perquisites or benefits given by employers to their workers, when such benefits are the product of collective bargaining or agreements, as long as they do not involve any of the behaviors banned by the law; d) Commercial agreements and pacts among economic agents for the purpose of promoting exports, as long as these are compatible with the rules and regulations of the World Trade Organization and any agreements and conventions ratified by the Nicaraguan Government, and do not produce any anticompetitive effects in the national market; and e) Actions promoted by the State for the purpose of ensuring the health and nutritional and food security of the Nicaraguan people.”

At least the first 4 sections are not true exclusions insofar as they would be censured if they were in violation of the law. Regarding section d, it is difficult to think of an anticompetitive practice that is in line with WTO rules or trade agreements. Thus the only true exclusion would be that of actions promoted by the State to ensure the health and food and nutritional security of the Nicaraguan people.

### **Structure of PROCOMPETENCIA**

- The provision that the members of the Board of Directors be named from groups of three candidates proposed by COSEP, CONIMIPYME and MIFIC, would be worth reconsidering, regardless of the fact that their qualification and knowledge need in any case be proven.
- For Article 13 of Law 601 to take full account of the functions assigned to the Board of Directors, it should include its power to decree interim measures.

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- Article 14 of Law 601 grants the President investigative and decision-making powers over cases. This convergence of functions runs counter to the international tendency to separate the two phases of the procedure in order to preserve impartiality and due process principles. If PROCOMPETENCIA could fill the positions in its originally conceived organizational structure, it could propose a separation of the investigation and decision-making functions, possibly reserving final decisions for the President.
- In any case, a revision is recommended of the President's functions, as too many may have been accumulated in him.
- A solution to PROCOMPETENCIA's budgetary weakness cannot be postponed. The agency cannot continue to depend on international cooperation, and anyway the shortage of funds compromises the institution's planning and accomplishment of its functions. The recommendations in this report that entail new tasks for PROCOMPETENCIA, or more effort from PROCOMPETENCIA, would depend on stronger funding for the institution.
- Procedures described in Law 601 and the Competition Regulation enable the President to order a Director to take a series of actions. This position is essential and needs to be provided.
- Knowledge and institutional memory management is a major challenge for all organizations. There is an advantage to setting up a good system from the start, when accumulated memory and knowledge are still not very voluminous. It would make it easier for the staff to share their knowledge and experience from the very beginning, and PROCOMPETENCIA's institutionality would be strengthened. There have been significant efforts made up to now in this direction, but they can (and should) be improved. For example, PROCOMPETENCIA would have to make an effort to keep track of its advocacy activities and opinions and follow them up.

### **Coordination of PROCOMPETENCIA with Other Public Entities on the Enforcement of Law 601**

- Article 15 of Law 601 impedes PROCOMPETENCIA hear cases of anticompetitive practices in regulated sectors. There is a need to advocate for a single authority with competence for enforcing Law 601 in all its aspects and in all sectors of the economy, without prejudice to the necessary cooperation of sector regulators.
- In this regard, Article 37 of the Competition Regulation provides for the possibility to ask for the technical opinion and collaboration of sector specialized entities. Although this article is circumscribed to merger control cases, its spirit should also rule over other actions taken by PROCOMPETENCIA in regulated sectors. Obviously, this would occur once the current limitation in Article 15 of Law 601 is removed.

### **Competition Advocacy**

- The question whether PROCOMPETENCIA should be asked to advocate for simplified procedures and best administrative practices as part of its mandate needs to be considered, since in principle it would be better to focus its efforts on disseminating and explaining

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Law 601 and on building competition culture in Nicaragua (all the more so in the current budgetary situation of the institution).

- It is essential for PROCOMPETENCIA to continue its efforts in advocating the benefits of competition among certain key public institutions and private sector representatives, and in providing training to them. This would appear to be even more urgent in the cases of judges, lawmakers and sector regulators.
- In many jurisdictions, and especially in those newcomers to competition, there is a need to train those charged with reviewing competition decisions in the more technical aspects of competition law enforcement, which fall outside their usual realm of activity. PROCOMPETENCIA would have to continue to bolster its advocacy work with judges.
- PROCOMPETENCIA's work with the National Assembly should focus, at least at first, on transmitting the importance of having enough resources for carrying out its tasks.
- Attention must be paid to sector regulators so they can provide useful cooperation to the competition authority in the context of investigations. In Nicaragua raising awareness of these agencies and training them on competition issues is even more important as long as they are competent –by virtue of Article 15 of Law 601– to enforce competition law in their respective sectors.
- It would be a good idea to set up a training plan with public procurement agencies with the dual goal of helping them design pro-competition procurement procedures and detect anticompetitive practices among bidders.
- Acknowledgement should be made of the excellent advocacy work done with universities and consumer associations, which could be replicated with other interest groups.

### **Anticompetitive Practices**

- The test for analysis of allegedly anticompetitive practices (*per se* rule or rule of reason) should be clarified. In principle, the *per se* rule can be recommended in cases of anticompetitive agreements between competitors, especially for authorities with relatively little enforcement experience and scarce resources.
- The reference to the legitimacy of agreements between domestic producers and foreign purchasers which give favorable conditions for the former should be eliminated from Article 18 of Law 601. This exception to the enforcement of Law 601 seems to put the interests of domestic producers ahead of those of consumers and legitimize discrimination on the basis of nationality.
- Article 20 of the Competition Regulation seeks to set out the criteria for assessing practices between competitors but in reality describes potential indicators that a banned conduct exists. This is confusing and merits revision.
- Likewise, Article 21 of the same Regulation aims at establishing criteria for assessing practices between non-competitors, but actually gives the conditions of the sanctioning

provision in some cases, and the usual anticompetitive effects for some of these behaviors in others. Also, section d of this same Article 21 refers to ‘total average costs’ and ‘variable average costs’ as measures for determining the existence of predatory practices, while Law 601 refers to ‘marginal costs’. This inconsistency needs to be resolved, preferably to the benefit of the Regulation proposal.

- Article 22 of the Competition Regulation provides that when assessing allegedly anticompetitive conduct, consideration must be given to whether consumer interests are harmed. It is not clear, however, if this is a necessary requirement for declaring a violation, or if it is just a criterion to consider when grading the sanction.
- Article 21 of Law 601 defines a series of criteria for determining if an economic agent has a dominant position in the relevant market. Article 24 of the Competition Regulation establishes additional criteria to be taken into consideration in the analysis of practices between non-competitors, but more than that what it establishes are examples of entry barriers. Once again, greater clarity is recommended.
- Article 273 of the Criminal Code typifies “anticompetitive practices” as crimes, but it seems there are no real possibilities of enforcing this for the time being. PROCOMPETENCIA may play a role in advocating that free competition be also protected through criminal sanctions, and that in this eventuality the competition authority could provide technical support to the relevant authority.

## **Unfair Competition**

Article 26 of the Competition Regulation seeks to set forth criteria for assessing unfair competition conduct, but actually merely gives common characteristics of the unfair competition acts typified in Article 23 of the Law. It is therefore recommended that some assessment guidelines be established. PROCOMPETENCIA has received a quite significant number of complaints on this type of conduct.

## **Merger Control**

- Special attention should be paid to the imposition of remedies, which should aim strictly at restoring pre-merger competition conditions in the market and should not become a regulatory tool for correcting other problems.
- A procedure for prior consultation could be considered for potential notifiers to find out in advance what PROCOMPETENCIA’s opinion would be of its concentration plans, before they engage in the task of preparing a formal notification.
- With respect to notification thresholds (Article 25 of Law 601), that based on market shares should be eliminated and that based on revenue should be reduced.
- In the case of Article 26 of Law 601, which states that “associations entered into for a specific period of time for developing a particular project are not considered concentrations”, the criterion that should decide whether or not there is an obligation to notify should not be time but rather whether or not the association entails a change in the

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market structure that could be permanent. It is recommended that this point be clarified when the opportunity comes, bringing it into line with the provision in Article 29 section 2 of the Competition Regulation.

- Article 32 of the Competition Regulation stipulates that notification must be made before any action is taken to realize the transaction. It is not clear what is meant by “an action taken to realize the transaction”. It could be understood as an act binding two wills, so that the mere offer by one party, for example, would not give rise to the obligation to notify, but this should be made clear.
- The law is not clear either on the reasons why a merger case would be taken to second phase of the analysis. It seems that the case could be that the authority just did not have the time or resources to undertake any analysis during the first-phase. The reasons to take a merger case to second phase of the analysis should therefore be established.
- Article 39 of the Competition Regulation seeks to define the procedures for investigating non-notified mergers. It would be worth unifying these with the general procedures for investigations into anticompetitive practices.
- Merger fees should be reduced, since they are quite high and disproportionate for an economy the size of Nicaragua’s.

## Procedures

- A comprehensive review is recommended of the principles established in Law 601 and the Competition Regulation for enforcing competition law. It would be worth considering one set of principles to be applied in all the authority’s actions.
- Article 48 of the Competition Regulation provides that PROCOMPETENCIA President may initiate investigations on anticompetitive conduct, unfair practices and failures to notify mergers, either *ex officio* or at the request of a party. Article 31 of Law 601 states, however, that in the case of unfair practices PROCOMPETENCIA shall act solely at the request of a party. This contradiction should be resolved in favor of the higher ranking rule.
- Even though the aim of Law 601 is to promote market competition, which is a public good, nearly the entire initiative in the procedures falls to the interested parties, leaving little room for PROCOMPETENCIA’s *ex officio* intervention. The role of the complainant in the procedure should be revised, and the authority's power to take the initiative in the proceedings reinforced. Article 60 of the Competition Regulation already stipulates that the authority shall undertake *ex officio* examinations to clarify the facts of the case, but at least the three-day term for making a proposal should be extended.
- Law 601 establishes the minimum requirements that a complaint must meet, and Article 49 of the Competition Regulation readdresses the matter using different terminology, excluding some requirements and adding others. For reasons of legal certainty and clarity, the Law and its Regulation should be brought into line, establishing what the minimum necessary requirements really are in order to facilitate the filing of complaints.

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The Competition Regulation could also expressly permit PROCOMPETENCIA to initiate actions, rectifying in the act any purely formal requirements.

- It should be clarified that the decision on an appeal before the Board of Directors exhausts administrative remedies such that no request for review can then be filed.
- With respect to interim measures, it would be useful if PROCOMPETENCIA could also decree them *ex officio*. In addition, it does not make much sense that the Board of Directors takes decisions on these measures, since speed is of the essence in this procedure and the Board may be meeting just once every month. In addition, the Competition Regulation should state who is responsible for hearing the parties' arguments and deciding on the suspension of interim measures. Finally, in section b of Article 43 of Law 601, the criterion for imposing interim measures stating “that no possibility exists of causing irreparable harm to the interested parties” should be changed to say exactly the opposite.
- With respect to the content of PROCOMPETENCIA’S decision on a case, provisions under Article 64 of the Competition Regulation do not fully coincide with those under Article 36 of Law 601, leading to the understanding that the President could lack certain powers. The Regulation should be brought into line with the Law on this matter as well.
- It is recommended that Article 47 of Law 601 include a section on the seriousness of the conduct as a criterion to be taken into account when setting sanctions, and to include –in the Law or in the Regulation or in some manual or interpretive guide– indications as to what type of conduct would be considered more or less serious.
- The review of PROCOMPETENCIA cases has shown the need at times for more complex economic analyses.
- For a leniency policy to be successful, PROCOMPETENCIA must demonstrate that it is ready to detect violations of Law 601 and impose serious sanctions, within the limits provided by Law 601 of course. This can only be achieved little by little as PROCOMPETENCIA evolves.
- Right now however, the procedural rules and specific conditions for granting leniency should be specified. Also, it should be clarified that leniency only applies to anticompetitive practices between competitors.
- Especially in the case of practices between non-competitors, the possibility should be considered of early conclusion of the procedures through commitments or settlements.
- The authority’s powers of investigation should be expanded so that tools other than just those of inspection and document-gathering are made available to it.

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## **Damages Actions**

Damages actions referred to in Article 41 of Law 601 should be analyzed pursuant to the relevant provisions of the Nicaraguan Civil Code. Article 38 of Law 601, which deals with competition law infringers' liability, establishes a particularly short statute of limitations for damages claims, which is a problem. This period should be at least two years (Title V, Chapter V of the Nicaraguan Civil Code) to facilitate this type of actions.

## **International Cooperation**

- Cooperation efforts made regionally and bilaterally seem to evolve in the right direction but are still not enough to fight cross-border anticompetitive practices and mergers effectively. Existing cooperation mechanisms need to be strengthened, especially vis-à-vis the other agencies in the Central American region. Tools for deeper cooperation that go beyond sharing public information could be foreseen to prepare for a regional competition system.
- PROCOMPETENCIA's current dependence on international cooperation resources is dangerous because it makes the institution extremely vulnerable to circumstances beyond its control. The Nicaraguan economy deserves an authority with ample room for maneuver and independent from budgetary concerns.

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## **INTERVIEWS**

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Hernán Estrada. Attorney General of Justice

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Lilliam Marengo. Competition and Consumer Protection Prosecutor

Luis Humberto Guzmán. President, PROCOMPETENCIA

Orlando Castillo. Regulator, Nicaraguan Telecommunications Institute

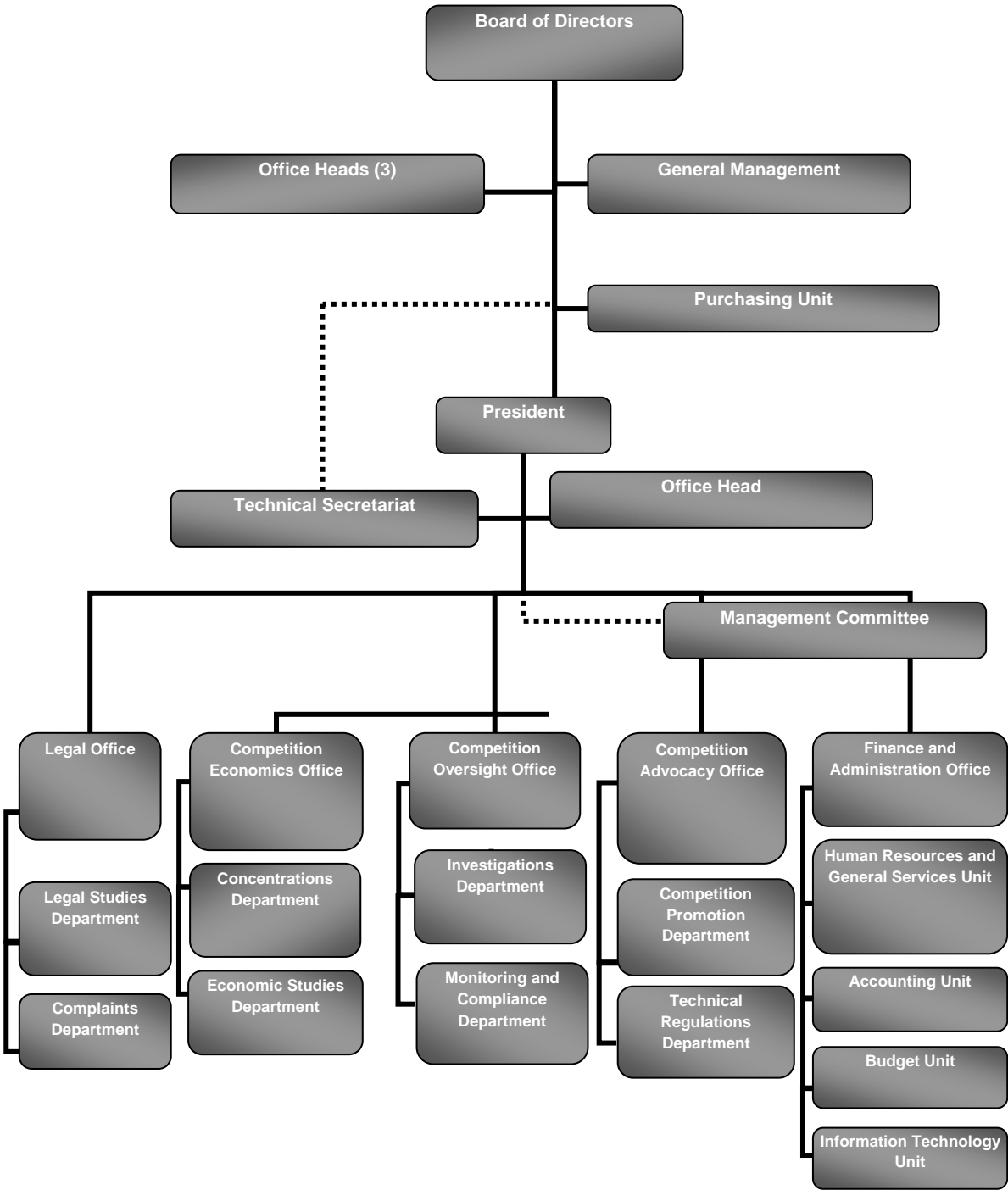
Rafael Solís. Presiding Judge, Constitutional Chamber of the Supreme Court of Justice

Ruth Rojas. Legal Advisor, Central Bank

Sara Zavala. Officer, Ministry of Development, Industry and Trade

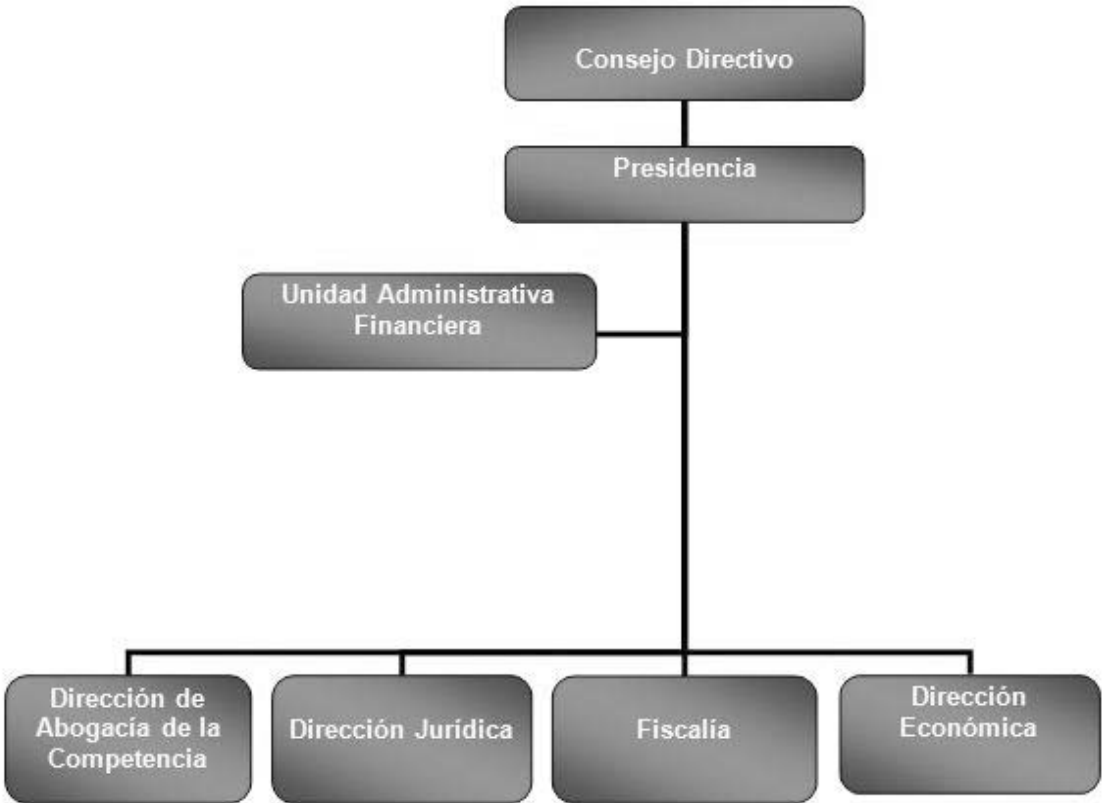


**Appendix 1. PROCOMPETENCIA Organizational Chart as in PROCOMPETENCIA Organization and Functions Manual**



**Appendix 2. PROCOMPETENCIA Functional Organizational Chart for 2013 (remitted to the Ministry of Finance and Public Credit)**

*Board of Directors*  
*President*  
*Financial Administration Unit*  
*Competition Advocacy Office* *Legal Office* *Prosecutor Office* *Economic Office*



### Appendix 3. PROCOMPETENCIA Cases

#### Complaints Filed at PROCOMPETENCIA

Case No.	Complainant	Respondent	Reason	Start Date	Current Status
<b>0001-2009</b>	Cooperativa de Alcohol y Agua Ardiente Fernando Guadalupe Ocón Palacios (COOFOP)	Compañía Licorera de Nicaragua S.A	Art 17 and Art 23. sections a) Acts of deception e) Acts of confusion	October 6, 2009	Case resolved. Complaint dismissed.
<b>0001-2010</b>	Envases Nicaragüenses Sociedad Anónima (ENVANIC)	Fabrica de empaques Nicaragüenses S.A (FENICSA) and Astro Cartón Nicaragua S.A (ASTRO CARTON)	Art. 17 Art. 18 Sections a) Price-fixing agreement and c) Elimination and limitation of companies; Art 19. Section f) Application of unequal conditions for equivalent goods and services	March 11, 2010	Case resolved. Complaint dismissed.
<b>0002-2010</b>	RNDC	BDF	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case resolved. Complaint upheld.  Case closed due to Supreme Court ruling in favor of the financial system.
<b>0003-2010</b>	RNDC	ASOBANP	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case resolved. Complaint upheld.  Case closed due to Supreme Court ruling in favor of the financial system.
<b>0004-2010</b>	RNDC	BAC	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.
<b>0005-2010</b>	RNDC	CITI-BANK	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.
<b>0006-2010</b>	RNDC	BANCENTRO	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.

Case No.	Complainant	Respondent	Reason	Start Date	Current Status
0007-2010	RNDC	BANPRO	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.
0008-2010	RNDC	BANEX	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.
0009-2010	RNDC	PROCREDIT	Art.18 Section a) Price-fixing agreement	June 17, 2010	Case closed due to Supreme Court ruling in favor of the financial system.
0010-2010	DICEGSA	BIMBO S.A.	Art.18 Section a) Price-fixing agreement	August 18, 2010	Case resolved. Complaint dismissed.
0011-2010	CLARO	MOVISTAR	Art.23 Sections a) Acts of deception Acts of denigration	October 15, 2010	Case closed, withdrawn by both parties.
0012-2010	MOVISTAR	CLARO	Art. 23 Sections a) Acts of deception b) Acts of denigration c) Acts of comparison e) Acts of confusion h) Acts of imitation	October 21, 2010	Case closed, withdrawn by both parties.
0001-2011	Marlon José Arróliga H.	William Alberto Grande T.	Art. 19 Section h) Predatory practices Art. 23 Section h) Acts of imitation	March 10, 2011	Case resolved. Complaint upheld.
0002-2011	Dionisio Francisco Muñoz Bárcenas	Tropigas S.A Nicaragua	Art 17 General Prohibition Art 19, Section e) Refusal to deal	July 5, 2011	Case resolved. Complaint upheld.
0003-2011	Yota de Nicaragua Sociedad Anónima (YOTA)	Empresa Nicaragüense de Telecomunicaciones Sociedad Anónima and its authorized agent, ACA Nicaragua.	Art. 23, Sections a) Acts of deception, b) Acts of denigration, d) Acts of collusion, e) Acts of confusion, g) Acts of inducement	November 18, 2011	Answer to complaint
0001-2012	Sacos de Nicaragua S.A	Industrias del Continente, Sociedad Anónima; INCO S.A and its authorized agents Wei Dou Hwang, Jose Coronel Cuadra and Zhixian Huang	Art. 23, Sections a) Acts of deception, b) Acts of denigration, d) Acts of collusion, e) Acts of confusion, f) Acts of fraud, g) Acts of inducement	January 25, 2012	Case closed, withdrawn by both parties.

Case No.	Complainant	Respondent	Reason	Start Date	Current Status
<b>0002-2012</b>	Mario Alberto Chacón Pacheco in his individual capacity and as legal representative for the economic agent Técnicas Especializadas de Carga Teca, S.A and/or Chr-Teca Carga Logistics	Georgia Raquel Rodríguez Fuentes	Art. 23, Sections a) Acts of deception, d) Acts of collusion, e) Acts of confusion, f) Acts of fraud, h) Acts of imitation	April 11, 2012	Complaint rectification
<b>0003-2012</b>	Llamadas, S.A.	Edgard Hollman and/or Cyber Alo	Art. 23, Sections a) Acts of deception, b) Acts of denigration, c) Acts of comparison, e) Acts of confusion, h) Acts of imitation	April 12, 2012	Answer to complaint
<b>0004-2012</b>	Proyectos Préstamos e Inversiones Inmobiliarias, S.A (PRISA)	Banco de Finanzas (BDF)	Art. 19, Sections e) Refusal to provide a service, f) Application of equal conditions for equivalent goods and services	April 16, 2012	Complaint filing
<b>0005-2012</b>	Rolter S.A.	Caribbean Shoes S.A.	Art. 19, Section h) Predatory practice; Art. 23, Section a) Acts of deception, e) Acts of confusion, f) Acts of fraud	September 20, 2012	Answer to complaint

From: PROCOMPETENCIA.

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## PROCOMPETENCIA Merger Cases

Case No.	Company	Company	Reason	Start Date	Current Status
<b>0001-2010</b>	CarGill	Pipasa	Horizontal concentration	November 10, 2010	Decision / the concentration is conditionally authorized
<b>0001-2011</b>	American Móvil	Estesa/Cablenet	Vertical concentration	April 13, 2011	Constitutional Chamber of the Supreme Court, without having exhausted administrative remedies
<b>0002-2011</b>	Astro Cartón	Fenicsa	Vertical concentration	April 14, 2011	Decision / the concentration is conditionally authorized
<b>0003-2011</b>	Inversiones en Combustibles y Lubricantes de Nicaragua S.A	ECCLESTON Co. Ltd (Chevron Nicaragua CCRL)	Horizontal concentration	June 8, 2011	Decision / the concentration is conditionally authorized
<b>0001-2012</b>	Plásticos Modernos, S.A (Moplastic)	Plásticos de Nicaragua, S.A (Plastinc)	Horizontal concentration	July 27, 2012	Underway
<b>0002-2012</b>	Nestlé S.A.	Pfizer, Inc	Horizontal concentration	August 7, 2012	Underway

From: PROCOMPETENCIA.

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