



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

URUGUAY



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Contents

Note	ii
Acknowledgements	ii
I. ECONOMIC, POLITICAL AND SOCIAL CONTEXT	1
A. Background information on competition law	2
B. Promulgation of Act No. 18.159	4
II. SUBSTANTIVE ASPECTS OF ACT NO. 18.159.....	5
A. Purpose, scope and exceptions	5
1. Purpose.....	5
2. Scope.....	5
3. Exceptions.....	6
B. Prohibited practices.....	6
1. Classification.....	6
2. Analysis rule.....	7
3. Prohibited conduct	8
4. Abuse of dominant position	11
C. Economic concentrations	12
1. General.....	12
2. Definition of concentration	13
3. Duty of notification.....	13
4. Concentration notification procedure	13
5. Substantive analysis	14
D. Remedies and sanctions	15
III. INSTITUTIONAL ASPECTS.....	17
A. Organizational structure.....	17
B. Ministry of Economic Affairs and Finance.....	17
C. Commission on the Promotion and Defence of Competition.....	17
1. Responsibilities.....	17
2. Resources	18
IV. PROCEDURAL ASPECTS.....	22
A. Punitive administrative proceedings	22
B. Due process in punitive proceedings	22
C. Proceedings before the enforcement agency.....	22
1. Initial phase.....	22
2. Course of the proceedings.....	23
D. Procedure for enquiries.....	25
E. Judicial review of decisions.....	25
V. COMPETITION LAW ENFORCEMENT	26
A. Defence of competition.....	26
1. Cases related to anticompetitive practices.....	28
2. Cases related to concentrations.....	34
3. Competition advocacy	34
4. Legal powers.....	34
5. Competition advocacy activities.....	34

6.	Relevant enquiries.....	34
7.	Dissemination and training.....	37
8.	Communication.....	37
9.	Relations with other institutions.....	38
VI.	REGULATED SECTORS	40
A.	Enforcement of competition rules in regulated sectors in Uruguay.....	40
B.	Principal regulated sectors.....	41
1.	Banking and financial sector.....	41
2.	Energy and water.....	41
3.	Telecommunications and electricity.....	42
VII.	INTERNATIONAL COOPERATION MECHANISMS	43
A.	Participation of the Commission on the Promotion and Defence of Competition in MERCOSUR.....	43
B.	Relations with other competition authorities and participation in competition networks.....	43
VIII.	CONCLUSIONS AND RECOMMENDATIONS	45
A.	Conclusions.....	45
B.	Recommendations.....	45
	References.....	50
	ANNEX 1. Organigram of the Ministry of Economic Affairs and Finance	56
	ANNEX 2. Administrative procedure flow chart.....	57

List of tables

Table 1.	Budget of the Ministry of Economic Affairs and Finance, 2015.....	19
Table 2.	Annual financial resources of the Commission on the Promotion and Defence of Competition, 2015.....	18
Table 3.	Economic affairs regulatory authorities: 2015 budget.....	19
Table 4.	Competition authorities in Latin America: resources and number of cases handled, 2015.....	20
Table 5.	Number of cases concerning prohibited practices and concentrations, 2009-2015.....	26
Table 6.	Cases of anticompetitive practices investigated and sanctioned, 2009-2015.....	27
Table 7.	Enquiries handled, 2009-2015.....	35

List of boxes

Box 1.	Case in the market for tomato-based processed foods.....	28
Box 2.	Case in the market for manufactured cigarettes.....	29
Box 3.	Case in the market for frozen foods.....	30
Box 4.	Case in the market for beer.....	32
Box 5.	Study on public procurement rules.....	35
Box 6.	Enquiry about authorizations issued by the Ministry of Transport and Public Works — tests for drivers.....	35
Box 7.	Study on professional services.....	36
Box 8.	Complaint submitted by Tekellmar SA and Isleña SRL against the National Directorate of Hydrography.....	38

I. ECONOMIC, POLITICAL AND SOCIAL CONTEXT¹

The Eastern Republic of Uruguay is located in South America and is bordered to the northeast by Brazil, to the west by Argentina, to the southwest by the Atlantic Ocean and to the south by the Rio de la Plata. It has a population of approximately 3,467,054 inhabitants² and an area of 176,215 km².

The form of government established by the Constitution³ is a republican democracy. Sovereignty is exercised directly by the electorate through elections, initiatives and referendums and indirectly by the people's representatives. The political system is based on the principle of the separation of powers.

Executive authority is exercised by the President, in conjunction with the relevant minister or ministers or with the Council of Ministers. If the presidency is temporarily or definitively vacant, the Vice-President exercises the same powers and performs the same duties.

The President is both the Head of State and the Head of Government and is elected for a five-year term that cannot be renewed until at least one term has lapsed since the end of his or her mandate. Mr. Tabaré Vázquez, of the Frente Amplio party, has been President of Uruguay since 1 March 2015.

Legislative authority is exercised by the General Assembly, which consists of the House of Representatives and the Senate. Parliamentary elections are held concurrently with presidential elections.

Judicial authority rests with the Supreme Court, tribunals and courts. The General Assembly appoints the members of the Supreme Court, which is the final level of appeal and is responsible for ensuring the constitutionality of laws.

Uruguay stands out among Latin American countries for having a long and strong democratic tradition that has broken down on only two occasions. The first was in 1933 when a coup d'état resulted in the dissolution of parliament and censorship of the press. The second occurred during the military dictatorship of 1973-1984. The country also stands out in the region for its high social and economic standards, largely attained or consolidated in the last century.

The history of Uruguay in the twentieth century is characterized by four stages: the consolidation of democracy, social reform and economic prosperity

(1903-1930); the economic and political crisis, restoration of democracy and growth through import substitution industrialization (1930-1958); economic stagnation, the fragmentation of traditional political parties, the rise of the left and the military dictatorship (1959-1985); and the restoration of democracy, the entry of Uruguay into the Southern Common Market (MERCOSUR) and the crisis of 2002.⁴

During the first stage, key political, social and economic reforms were undertaken under the leadership of José Batlle y Ordóñez; for example, universal and secret suffrage, free and fair elections, the separation of Church and State, and the eight-hour work day were introduced. The State played a central role in the economy and the provision of public services. In the first half of the twentieth century, the country built a wealthy, integrated and modern society.

The country's economy was based primarily on agricultural products and livestock. The import substitution model was intended to promote industrial development. However, the country fell into crisis in the early 1950s as a result of a drop in commodity prices. This period was marked by economic stagnation and social unrest. The bipartisan political system, made up of the Partido Colorado and the Partido Nacional, began to change in 1960. Small leftist parties joined with other groups and dissident leaders from traditional parties to form a new political party called Frente Amplio. Following the 1971 election, the traditional parties began to systematically shed votes, leading to the election in 2004 of Frente Amplio, which went on to be the majority party for three consecutive terms.

The economic, social and political crisis led to a coup in 1973 and a 12-year military dictatorship that ended in 1985. After the Constitution was reinstated, economic and State reforms were gradually implemented by successive governments of the traditional parties. However, while the democratic transition was rapidly concluded, various privatizations and State reforms were blocked by the leftist opposition and social organizations.

In that context, the traditional parties converged on the centre right of the ideological spectrum, advocating pro-free market reforms, such as the demonopolization of certain markets and the privatization of State enterprises. Frente Amplio took on the role of defender of State-owned enterprises and workers' rights.

Nowadays, the insurance market, the pension system and the mobile telephone network operate as competitive markets in which State-owned enterprises participate. However, some sectors, such as fuel or landline telephone networks, are still State monopolies.

Even though during most of the 1990s economic growth rates were around 5 per cent and inflation and unemployment rates were around 10 per cent, that phase ended in 2002 with a deep recession and a financial crisis.

The Uruguayan banking system had traditionally acted as a regional financial centre thanks to its liberalized regulations and reliability, and Argentine savers had been depositing their money in Uruguayan banks for several years. When the economic crisis hit Argentina in 2001, depositors from that country made a run on the banks, prompting the State to inject considerable amounts of cash to shore up struggling banks. Since then, some requirements and control of the banking system have been tightened and the share of non-resident deposits has decreased. The system is currently well-capitalized, with high levels of international reserves and liquidity, and low non-performing loan ratios.

In the 1990s, Uruguay also began to liberalize its foreign trade when it joined MERCOSUR. Most of its exports went to Argentina and Brazil. However, as a consequence of the 2002 crisis and its impact on imports, foreign trade policy was widened to include other countries, chiefly the United States of America. Currently, 77 per cent of exports go to 15 different markets.⁵ Exports were a key element in the recovery starting in 2003.⁶

Thanks to the roll-out of programmes to introduce macroeconomic adjustments, strengthen the financial system and restructure public spending, the country recovered well from the 2002 crisis.⁷ According to the World Bank, the country's economic growth in the last decade has been inclusive and has led to a reduction in poverty and more widely shared prosperity.⁸

In July 2013, the World Bank ranked Uruguay as a high-income country. Its gross national income per capita was US\$ 16,810 in 2014, having grown at an average annual rate of 5.2 per cent between 2006 and 2014.⁹

Moderate poverty declined from 32.5 per cent in 2006 to 9.7 per cent in 2014, while extreme poverty

practically disappeared — falling from 2.5 per cent to 0.3 per cent over the same period. In terms of equality, the income of the poorest 40 per cent of the Uruguayan population rose by 5.8 per cent between 2003 and 2013. This sound macroeconomic performance was also reflected in the labour market, which recorded a historically low unemployment rate in 2014 (6.6 per cent), although, given the current slowdown, it increased to 7.4 per cent in June 2015.¹⁰

Uruguay is a regional leader in various welfare indicators. In 2014, the country's Human Development Index was 0.793, placing it in the high human development category. Uruguay ranked 52nd out of 188 countries, higher than the category average (0.744) and higher than the average of countries in Latin America and the Caribbean (0.748). Between 1980 and 2014, its Human Development Index rose from 0.664 to 0.793, an increase of 19.4 per cent, or an approximate annual average increase of 0.52 per cent.¹¹

In 2014, Uruguay obtained a score of 68.6 on the Index of Economic Freedom, according to which it is a moderately free country and ranks 43rd out of the 178 countries that have been evaluated. It is in fifth position at the regional level.¹²

According to the Human Opportunity Index, Uruguay has also achieved a high degree of equal opportunity in terms of access to basic services such as education, drinking water, electricity and sanitation.¹³

In light of the foregoing, there is no doubt that the country's transformation in recent years has been very successful. Its main challenge now is to achieve sustainable economic development. The country remains structurally vulnerable owing to its size, dependence on the performance of neighbouring countries and foreign markets, and its high dollarization level.

A. Background information on competition law

The Constitution of Uruguay contains two provisions that set out the principles of competition and form the basis of a market economy. First, article 36 safeguards freedom of industry and trade,¹⁴ stating: "Every person may engage in labour, farming, industry, trade, a profession or any other lawful activity, except where restricted by law for reasons of public interest."

Second, article 50 establishes State control over trustified commercial or industrial organizations:

The State shall guide the foreign trade of the

Republic, by protecting productive activities whose purpose is exportation or the replacement of imported goods. The law shall promote investments to this end, preferably using public savings. All trustified commercial or industrial organizations shall be subject to the supervision of the State comptroller. Likewise, the State shall launch decentralization policies to promote regional development and general well-being.

However, for a long time these provisions were not reflected in law in a way that would appropriately promote and protect the principles of competition. According to Daniel Hargain, a professor of commercial law and international trade law and a lawyer specialized in competition law: "Given that neither of these two rules had been reflected in the law, their implementation was nearly impossible, rendering them useless in preventing anticompetitive conduct."¹⁵

The first legislative step was the promulgation of the Act on Public and Private Services, Public Safety and Conditions for the Development of Productive Activities of 29 June 2000 (Act No. 17.243), which laid down the first rules on competition in Uruguay. Its three articles defined the scope of the Act, drew up a list of prohibited practices and provided for the possibility of arbitration in any dispute. The Act, according to some experts, was "rudimentary and difficult to implement".¹⁶

Under article 13 of Act No. 17.243, all businesses engaged in economic activities were subject to competition rules, except where provided for by law for reasons of public interest or if the business was considered a public service. Article 14 enumerated the prohibited practices, including certain types of agreements and concerted practices, as well as abuse of dominant position, which have the effect of preventing, restricting or distorting competition and free access to the market. More specifically, the article prohibited price maintenance and the imposition of conditions; the undue restriction of production, distribution and technological development; the application of different conditions to equivalent services; the subordination of contracts to the acceptance of obligations that, by their nature, are extraneous to the purpose of the contract; and sale at below-cost prices.

Article 14 stated that the rules came into play when a distortion in the market jeopardized the public

interest. For some, this constituted the main obstacle to the implementation of Act No. 17.243 insofar as the "biggest problem with the initial law was the need to demonstrate harm to the public interest".¹⁷

Article 15 stipulated that any dispute could be taken to arbitration, in accordance with the General Procedural Code.

The aforementioned rules were subsequently supplemented by the 2001 Budget Act (Act No. 17.296) and Decree No. 86/001 of 28 February 2001, which established the Directorate-General for Trade within the Ministry of Economic Affairs and Finance as the enforcement agency.

Article 158 of Act No. 17.296 set forth the responsibilities and powers of the enforcement agency, which can be summarized as follows: (a) to request information from public institutions and individuals in fulfilment of their obligations; (b) to set up specialized arbitration centres; (c) to issue opinions on matters submitted to it for consideration; (d) to enforce the penalties provided for by law; (e) to request the collaboration of specialized bodies to carry out inspections, investigations, expert analyses, audits and checks; (f) to summon those under investigation and third parties for the purpose of obtaining information; (g) to apply to the competent judge for the adoption of precautionary measures; (h) to develop and submit for consideration by the executive branch a procedure for determining that prohibited conduct has occurred and for enforcing penalties; and (i) to encourage the signing of agreements, settlements or undertakings to cease and desist in matters submitted for its consideration.

Article 157 laid down the penalties for anticompetitive practices, namely dismissal, the temporary or definitive cessation of the conduct and its effects, and a fine ranging from 500 to 20,000 Indexed Units (UI).¹⁸ The gravity of the offence was determined on the basis of the harm caused, the type and reach of the restriction of competition, the offender's market share, the duration of the prohibited practice and the offender's record.

Articles 2 to 9 of Decree No. 86/001 set forth the procedure for investigating anticompetitive conduct. Basically, investigations could be launched ex officio or following a complaint. The Directorate-General for Trade was required to grant a hearing within 10 days to those allegedly responsible for the reported conduct or those who reported it. If the hearing was contested or the deadline had passed, the Directorate-General

was required to issue a decision within 10 days on whether to keep the procedure open or conclude it as groundless. Evidence had to be produced within 60 days, after which the parties were given another hearing within 15 days. The Directorate-General was required to issue a final decision within 60 days. It could reach an agreement or settle with the alleged offender or order the temporary or definitive cessation of the conduct at any stage of the procedure.

The law was clearly inadequate with regard to the institutional design of the enforcement agency and its substantive and procedural provisions were inadequate for the proper defence and promotion of competition. Various Uruguayan experts were of the opinion that the law had little impact because the provisions were incomplete and the requirements for handing down penalties were overly stringent.¹⁹

It has also been said that the competition system did not work because the enforcement agency was not independent and did not have the necessary resources. The culture of competition was just beginning to emerge and few economic actors were aware of the scope of the law. As a result, few cases were brought before the enforcement agency while this law was in force.²⁰

B. Promulgation of Act No. 18.159

During the 2000-2005 legislative period, the Special Commission on the Study of Legislative Solutions for Free Trade in Uruguay was established. The Special Commission requested Siegbert Rippe, a professor of commercial law at the Faculty of Law and the Faculty of Economics and Management, to draft a bill, which was developed jointly with Daniel Hargain and was submitted to the Special Commission on 5 August 2002. However, the legislature was dissolved in 2005 and, although the House of Representatives had provisionally approved it, the bill was not adopted by the Senate.²¹

A new bill was submitted in July 2005, during the following legislative period. After two years of analysis and discussion, Act No. 18.159 on the promotion and defence of competition was adopted almost

unanimously by both chambers.²² At the time of promulgation, it was said that “the priority of the new law was to investigate anticompetitive conduct rather than analyse economic concentrations”.²³ In fact, the control of economic concentrations was one of the topics that generated the most discussion among lawmakers.²⁴

The preamble of the bill stated that the law’s main objective was to introduce “a number of mechanisms to control anticompetitive conduct that harms the population and to produce and develop the necessary guidance to orient markets towards greater competition”.²⁵

Act No. 18.159 was without a doubt an improvement over the previous law in that it established a more coherent set of rules that contain the core elements of all competition legislation, although, as will be discussed below, some areas for improvement remain. In that connection, Mario Bergara, President of the Central Bank and instigator of the new law, stated that “it is necessary to prioritize this issue, regardless of progress made in the regional integration process and in Uruguay’s integration in the world, and to that end it is indispensable to have modern and comprehensive legislation that sets priorities in this field and makes life easier not only for business-owners and consumers in their respective roles but also for the authorities who will be enforcing the laws on the promotion and defence of competition”.²⁶

In addition, it should be noted that the new legal framework gave greater autonomy to the enforcement agency to discharge its duty to promote and defend competition, established the criteria for determining the lawfulness or unlawfulness of conduct, and included a rule on concentrations.

The following sections cover the current legal framework and its enforcement by the competent authorities. Act No. 18.159 is divided into four chapters: Chapter I — General provisions; Chapter II — Procedure for the investigation and punishment of prohibited practices; Chapter III — Enforcement agency; and Chapter IV — Final provisions.

II. SUBSTANTIVE ASPECTS OF ACT NO. 18.159

A. Purpose, scope and exceptions

In order to better understand the content of the law on the promotion and defence of competition, it is essential to begin by delineating its scope, which will be done by examining its purpose and sphere of application, as well as the areas or activities that are outside its scope.

1. Purpose

The purpose or objective of competition laws is not an entirely neutral matter, nor is it dealt with in the same manner in the various national laws.

Most legal systems adopt one of two positions (or variations thereon): the first sees the purpose of competition rules as the welfare of consumers; and the second sees economic efficiency as the objective.²⁷ Some competition laws, such as that of the European Union, also seek to achieve the integration of a regional market, which must be in line with the supranational law.

There is a significant school of thought, led by the Chicago School, that promotes the idea that the sole purpose of a competition law must be economic efficiency. Other authors have refuted this stance, arguing that the purpose of such laws should be the protection of consumers.²⁸

Although consumer welfare and economic efficiency do not, at first glance, appear to contradict each other, there could arise specific situations where it is necessary to choose between protecting one or the other, particularly when it comes to analysing concentrations and joint ventures. Hence the importance of being clear on the purpose of a law in order to enforce it in a manner consistent with its purpose.

In the case of Uruguay, article 1 of Act No. 18.159 reads:

Article 1 (Purpose): This law is of a public nature and its purpose is to foster the welfare of current and future consumers and users by promoting and defending competition, stimulating economic efficiency and ensuring free and equal market access to companies and products.

Thus, Uruguayan competition law opts for consumer welfare as the main value to be protected. Economic

efficiency, along with free and equal access, are cited as means of achieving this end and not as means or ends in themselves.

The enforcement agency has taken the same view, stating that the “purpose of the law on the promotion and defence of competition is not to protect the specific interests of competitors but, rather, the rights of consumers through the defence of competition”.²⁹

However, the discussion on this point during the adoption of the Act did not address the need to prioritize consumer welfare or economic efficiency (which, as seen, are the most common positions in the economics literature). Rather, the debate regarding the wording of article 1 centred on whether the purpose of the Act should be to protect consumers only or to also protect other economic actors, such as producers, retailers and even the State.³⁰

Even though the final text is in line with one of the most internationally accepted positions, i.e. the promotion of consumer welfare as the ultimate purpose of the law, the approach to the topic and the discussion that led to that point were atypical.

2. Scope

The Act enumerates the activities, geographical area and subjects to be “governed by the principles and rules of competition”. Although the scope of application of the Act is not explicitly indicated, it is possible to infer from the context that, by submitting an activity to the principles of competition, the intention is precisely to submit it to the provisions of the Act. From the outset, article 2 applies the Act broadly to all economic activities, save for the exceptions to be discussed later.

Article 3 establishes a wide scope, from both the substantive and geographical standpoints (while the title of the article refers only to the substantive scope, the last paragraph refers to the geographic dimension as well).

The Act applies to all natural and legal persons who engage in economic activity, whether for profit or not for profit. This provision is in line with most competition laws around the world.³¹

The breadth of the Act’s substantive scope has resulted, on occasion, in the authority applying the Act to regulatory activities and/or activities carried out within the sphere of competence of a State entity. It has traditionally been argued that contesting an anticompetitive regulation or decision is usually

done through advocacy, but this did not prevent the enforcement agency from issuing a binding decision against the Departmental Council of Maldonado for promulgating an anticompetitive decision.³²

Regarding the geographic scope, the last paragraph of article 3 refers to the theory known internationally as the “effects doctrine”, whereby any economic activity carried out inside or outside the territory of Uruguay is covered by the Act if its effects are totally or partially generated in the country.

Thus, in keeping with international best practice, Act No. 18.519 applies broadly to all economic activities that have any effect in Uruguay, subject to the exceptions to be discussed below.

3. Exceptions

It is internationally recognized that other laws may conflict with competition policy by encouraging or even requiring anticompetitive conduct (which, in the absence of such a law, would carry sanctions).³³ Actions undertaken under these laws do not constitute a punishable offence. However, the authorities’ advocacy efforts are the appropriate way to challenge these regulations and promote the introduction of competition requirements where necessary.

In the case of Uruguay, Act No. 18.159 does not provide a restrictive list of exceptions and exclusions; rather, they are laid down in general statements, which have been fleshed out by jurisprudence and special laws.

Article 2 of the Act stipulates that it applies to all economic activities, except “where restricted by law for reasons of public interest”. The last paragraph of article 2 states that “the exercise of a right, power or special prerogative granted or recognized by law” is not considered as anticompetitive conduct.

The two instances of the word “law” leave the discussion open as to whether exceptions and exclusions should be set out in a formal law or whether the word “law” is used generically to cover all types of legislation — in other words, whether the exceptions to the application of competition law have to be contained in a law or whether it is possible to derogate from the competition system through another, lower ranking, type of rule.

Requiring exceptions to be laid down in a formal law is a position that would favour the enforcement of policies and laws on competition. Nevertheless, the opposite interpretation, i.e. that rules of lower

rank are also a valid means of setting exclusions and exceptions, is also possible.

The latter position is the one favoured in the country’s legal doctrine, as in the following comment:

We consider that the term “law” should be interpreted in the broadest sense of the word because otherwise we could not accept — as we should — the rights, powers and prerogatives defined at the municipal and regulatory levels and adopted within the limits of the competence of the relevant body and in keeping with established procedures.³⁴

In this connection, the Special Commission supported the former position; in other words, in its opinion, a formal law is required in order to exclude an economic activity from the scope of competition legislation. Thus, it can be concluded that the objectives and scope of Act No. 18.159 are in line with international best practice.

B. Prohibited practices

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

Abuse of dominant position and all practices, conduct and recommendations, whether individual or concerted, whose effect or purpose is to restrict, limit, block, distort or prevent current or future competition in a given market shall be prohibited.³⁵

From this wording it can be noted that the legal ban includes different types of anticompetitive conduct, whether they are unilateral or concerted. This general prohibition is fleshed out in subsequent provisions of the Act.

1. Classification

It is common for the various competition laws in the world to classify and group different prohibited practices according to their common characteristics, as this makes it easier to analyse conduct and promotes greater consistency of enforcement.

For example, European Union legislation on competition, as well as the national laws that are based on it,³⁶ classifies prohibited conduct as either agreements (including horizontal and vertical agreements) or abuse of dominant position. Other laws, such as those of Mexico and Central American countries, divide prohibited practices into horizontal (involving competitors) and vertical (not involving competitors) practices.

In other countries with well-established institutions and a culture of competition, the law sets out only a few basic principles and it is left for the courts to classify conduct according to type and severity, in much the same way that it is classified by written law elsewhere. Chile and the United States of America are two such countries.

In addition to differentiating between types of conduct, international practice has also identified different levels of severity among them. For instance, practices that have an impact on prices are usually considered more serious than those that do not, and horizontal practices tend to be more serious than vertical ones.³⁷

The Act appears not to take either of these courses, given that it does not contain a classification of prohibited practices but, rather, places all such practices in a single category, without distinguishing between horizontal conduct, vertical agreements and abuse of dominant position.³⁸ Nor does it give any indication of the level of severity. Decree No. 404/007 regulating Act No. 18.159 does not differentiate between the various types of conduct either, but follows the Act in placing all anticompetitive conduct in a single category.

Although the Act is applied despite having no such classification, it is less explicit with regard to the typology and intrinsic severity of each form of prohibited conduct, making its application less certain and predictable. An appropriate classification of the various types of practices would help identify common characteristics and facilitate analysis.

In this connection, some experts have pointed out that “the classification of anticompetitive conduct in Act No. 18.159 is not very precise, especially in terms of individual conduct. There is no clarity with regard to the rules for determining the lawfulness or unlawfulness of the conduct. For example, the Act does not clearly establish whether economic agents must be in a dominant position in all cases or what the precise meaning of a negative impact on consumers is.”³⁹

In practice, this has resulted, for example, in a lighter punishment for collusive tendering than for predatory pricing,⁴⁰ when in fact it is internationally accepted that the former, as a form of cartel, is much more serious and the penalties tend to be harsher.

It would be apposite to clarify this issue, whether through an amendment of the law or secondary

legislation (e.g. a regulation or guideline), by grouping the different prohibited practices according to their nature and common characteristics. The authorities might also consider the possibility of including a classification according to level of severity. This could facilitate the resolution of cases, promote more uniform and transparent enforcement of the Act and make it easier to determine penalties.

2. Analysis rule

The competition authorities generally analyse potential cases of anticompetitive practices using two rules known as the “per se rule” and the “rule of reason”.

Conduct examined under the per se rule is presumed to be harmful to competition and is, therefore, always illegal; no justification is accepted and there is no need to demonstrate its effects on the market.⁴¹ The rule of reason entails a more detailed analysis to weigh the anticompetitive effects of a given conduct against its pro-competition features, with a view to deciding whether or not the conduct infringes the law.⁴²

Most competition laws agree that so-called hard-core cartels are the anticompetitive practice most harmful to competition and consumers because they raise prices and restrict the supply of goods and services.⁴³ This practice, being the most serious, is usually examined under the per se rule.

Other anticompetitive practices, such as vertical agreements or abuse of market power, tend to be examined under the rule of reason because they often result in ambiguous effects; therefore, their lawfulness is measured by weighing up their pro- and anticompetitive effects on the market.⁴⁴

Act No. 18.159 does not differentiate between practices, establishing instead that all anticompetitive practices must be examined under the rule of reason. Article 2 of the Act states, immediately following the aforementioned generic prohibition, that:

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

Article 4, which lists the prohibited practices, stipulates that these practices are prohibited “if they correspond to one of the situations described in article 2”. In other

words, in order to determine whether there has been an infringement, the efficiency factors mentioned in the paragraph cited above must be taken into account.

Examining all anticompetitive practices under the rule of reason is unusual compared to other countries; as stated above, most competition laws establish the intrinsic lawfulness (per se rule) of specific practices.⁴⁵

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

In this connection, local experts have stated that: “The wording of article 4 of Act No. 18.159 should be changed because none of the practices it lists are prohibited per se; rather, they are subject to the ‘rule of reason’ by virtue of the reference to article 2. It would be advisable to introduce per se prohibitions in the law in order to facilitate the work of the enforcement agency.”⁴⁶

The uncompromising nature of the per se rule is lessened in some legal systems by a “de minimis rule”, whereby actions which are typical of a prohibited practice but have an insignificant effect on the market are not punishable.⁴⁷ Although the de minimis rule does not apply universally (and there are some who oppose it), it is included in the laws of various countries, both developed and developing.⁴⁸ If a per se rule is introduced in Uruguay in the future, lawmakers might also consider introducing a rule of this type in order to avoid imposing sanctions for practices with insignificant effects on the market. The Act does not currently set this type of threshold or minimum impact rule.

Another particularity of the Act is that, as seen previously, article 2 requires the enforcement agency to conduct an efficiencies analysis in all cases, irrespective of whether or not the investigated party claims to have made any efficiency gains.⁴⁹ In practice, the enforcement agency has concluded in some cases that it is not necessary to quantify the negative impact on consumers as long as the facts attest to a substantial effect.⁵⁰

International practice on this point is that it is incumbent on the enforcement agency to demonstrate that a practice has occurred and has had anticompetitive

effects, whereas the business under investigation must demonstrate the advantages and efficiencies generated by its conduct and the way in which these have benefited consumers.⁵¹

This distribution of the burden of proof stems from the fact that the business under investigation is best placed to claim and demonstrate efficiencies and so justify conduct that in other circumstances would be punishable, as it has all the information on its actions, motivations and environment (especially considering that, according to international best practice, efficiencies must be proven and real rather than mere conjecture).

However, the wording of the Act appears to require the enforcement agency to measure the potential efficiency gains attributable to a conduct even when the investigated party does not claim any such gains, with the obvious drawbacks this entails in terms of procedure, the efficient use of resources and the risk that the final decision will be undermined should some of the efficiencies and benefits be ignored.

Thus, it would be apposite to consider amending the Act to establish the per se rule in respect of hard-core cartels, as well as assessing the appropriateness of a de minimis rule. In the meantime, secondary legislation (such as regulations or guidelines on enforcement) could clarify and specify how to interpret the analysis rule with regard to anticompetitive practices.

3. Prohibited conduct

Article 4 of Act No. 18.159 lists the various prohibited practices. As mentioned, the list places all anticompetitive practices in a single category that combines horizontal practices, vertical agreements and actions usually identified as abuse of dominant position.

Before analysing the various practices listed in the article, the first point worth highlighting is that the list is indicative, not exhaustive. This is common to a number of competition laws, including those of Colombia and the Andean Group.⁵² It has been argued that indicative classification is justified in cases where it is impossible to predict all practices and conduct in which businesses might engage. Faced with a conflict between the legal security of an exhaustive list and the efficacy of a law, the authorities have chosen to safeguard the latter.⁵³

However, in some jurisdictions, this type of open-ended list could run up against the legal definition

principle, whereby no conduct is punishable unless expressly described and defined in a prior law (which also prevents sanctions from being applied by analogy). For this reason, the characterization of conduct is exhaustive in other competition laws around the world.

The validity of this type of formulation thus depends on the local institutions and legal culture. When it comes to penalties, it is always useful to maximize legal security for the persons or entities concerned, regardless of whether this type of open-ended formulation is permitted in the Uruguayan legal system. To this end, lawmakers may choose to describe in as much detail as possible the various prohibited practices, either through amendments or secondary legislation (where feasible).

In addition, some of the practices listed in article 4 relate to both horizontal (between competitors) and vertical (not between competitors) conduct. However, in the latter case, such practices can hardly have anticompetitive effects, except where carried out by a business in a dominant position. Yet, the article does not refer to market power or dominant position, thereby providing a basis for the punishment of vertical conduct in the absence of market power (provided that an anticompetitive effect on the market is proven, in keeping with article 2 of Act No. 18.159).

Of the anticompetitive practices expressly covered in article 4, the following are of particular interest:

(a) To directly or indirectly set or impose purchase or sale prices or other transactional conditions in an abusive manner (art. 4 (a))

As drafted, article 4 (a) of Act No. 18.159 could cover various practices that are usually considered to be independent of each other, such as price fixing between competitors, the imposition of resale prices in a vertical relationship, predatory pricing and other conduct related to prices and conditions of sale.

This general language subsumes under a single category an entire range of punishable practices of varying nature to which differing rules of analysis apply. Neither the Act nor its Regulations clarify or indicate the means of determining and imposing prices that should be understood as being covered by the ban.

Wording that is to some extent similar to that of this paragraph can be found in European Union competition law.⁵⁴ However, the prohibition in the European law refers only to agreements and not

to unilateral conduct. Moreover, the scope of the prohibition has been clarified through regulations, guidance and jurisprudence that also specify the characteristics, rules of analysis and anticompetitive effects of each practice, which are different from each other. It might be useful to consider issuing similar rules and guidance tailored to Uruguayan law.

In the European legislation, the prohibition includes the first two practices mentioned above, i.e. price-setting among competitors (cartel) and resale price-setting among non-competitors. Other price-related practices, such as predatory pricing and loyalty discounts, are analysed as forms of abuse of dominant position rather than as agreements or price fixing.

In the case of Uruguay, the Commission on the Promotion and Defence of Competition seems to have interpreted this paragraph as covering price cartels⁵⁵ and the vertical practice of resale price fixing.⁵⁶ Predatory pricing is also understood as being included in this conduct but not as a form of abuse of dominant position. It is on this basis that businesses have been sanctioned for predatory pricing as a form of abusive pricing rather than a form of abuse of dominant position.⁵⁷

Another salient element of the prohibition is the use of the phrase “in an abusive manner”. A literal interpretation could lead to the conclusion that the practice is prohibited only if the agreed price or tax is “abusive” and not when it is “reasonable”. This interpretation has not been retained by the Commission. However, in order to avoid this interpretation in future (which would be a significant departure from international best practice and from the basic principles of competition), it might be useful to clarify this provision.

In addition, the literal interpretation of paragraph (a) could lead to other, not typically anticompetitive, conduct being considered as banned. For example, the imposition of prices through a bilateral transaction between two businesses is a product of greater negotiation power and is not usually prohibited under competition law.⁵⁸

Another form of “abusive” pricing that could arise from a literal reading of the Act is excessive pricing, which could be considered more as the use of market power than as abuse of that power. Although there are a few precedents internationally for this interpretation, competition authorities are generally reluctant to analyse cases of excessive pricing out of concern that

doing so would turn them into price regulators (not to mention the obvious difficulties in determining whether or not a price is excessive). This is another aspect that would be usefully clarified in the Act.

Another important element to consider is that the description of the conduct does not explicitly include agreements but refers merely to the act of “agreeing”. Most competition laws are more specific and expressly include all types of contract, pact, agreement and other such arrangements, both verbal and written, explicit and tacit. In this way, they seek to ensure that all forms of joint action by two economic agents are covered by the ban. The lack of detail in Uruguayan law results in a broad interpretation of the term “to agree”; in other words, if a minor form of interaction between businesses (such as agreement)⁵⁹ is prohibited, then it stands to reason that direct agreement between businesses should be prohibited.

This interpretation is the one that appears to have been followed by the Commission in practice. However, the cases concluded thus far refer to explicit and direct agreements between economic agents, while the lawfulness of less black-and-white practices, such as tacit agreements or the exchange of information, has yet to be examined.

(b) To limit, restrict or agree in an unjustified manner on the production, distribution or technological development of goods, services or production factors to the detriment of competitors or consumers (art. 4 (b))

Article 4 (b) is practically identical to the wording of article 102 (b) of the Treaty on the Functioning of the European Union, which identifies this practice as a form of abuse of dominant position. Nevertheless, in the particular context of the Act, it is not entirely clear whether it covers horizontal or vertical practices or both.

Consequently, it is possible to subsume under the prohibition one of the forms of hard-core cartel known as “market restriction”, which consists in an agreement between competitors to supply a limited number of goods (a practice not in itself prohibited under the Act). This practice usually also includes the allocation of production quotas among competitors,⁶⁰ conduct that is not explicitly covered in the Act either but could be interpreted as falling under the Act.

Furthermore, the law requires that a limitation be set “in an unjustified manner” and “to the detriment

of competitors”. These phrases could imply that the prohibition also applies to unilateral and abusive restriction of production, which is generally considered as a form of abuse of dominant position rather than as a prohibited agreement.

(c) To unduly block market access to potential entrants (art. 4 (g))

Setting unjustified barriers to entry is a classic abusive conduct, usually punished as a form of abuse of dominant position. Typically, this conduct includes not only creating barriers to access for potential entrants but also impeding the expansion of current competitors. The latter is not explicitly defined in the Act, nor is the exclusion of a competitor from the market. These two practices could be interpreted as being covered, taking into consideration the limitations identified above deriving from the legal definition principle.

The enforcement agency set a precedent in its analysis of a case where a trade union in the taxi sector was considered to have unjustifiably blocked market access to potential entrants. The conduct was determined to constitute abuse of dominant position.⁶¹

(d) The aforementioned practices, where they are carried out by the associations or trade unions of economic agents (art. 4 (j))

Article 4 (j) of the Act does not establish a separate practice; rather, it states that the preceding practices are also prohibited when carried out by business associations.

Trade unions have traditionally been a source of concern in competition law⁶² because in some countries they are often involved in breaches of competition law⁶³ given the ease with which their members can use them as a vehicle for practices that restrict competition.

The most obvious concern is that these associations often group competing businesses and bring them together to deal with common issues, thereby posing a risk of a cartel being established. Moreover, associations can also be a conduit for abuse of dominant position.

Article 4 (j) of the Act, however, would appear to be somewhat ineffective, since it punishes offenders when they use associations as vehicles, which itself is already prohibited. In the absence of this provision, it can be assumed that illegal actions carried out through associations would still be prohibited. In other

legal systems, agreements between members of an association, as well as their anticompetitive practices, are void.⁶⁴

(e) Other anticompetitive conduct

In addition to the practices discussed above, article 4 of Act No. 18.159 addresses the following practices that are usually found in other competition laws: collusive tendering,⁶⁵ market sharing,⁶⁶ denial of goods and services,⁶⁷ discrimination,⁶⁸ conditions⁶⁹ and barriers to the use of essential facilities.⁷⁰

The first of these practices is a form of hard-core cartel, while the others are usually considered as abuse of dominant position.

(f) Conduct that is usually prohibited but is not listed in article 4

Some anticompetitive practices that are typically prohibited in other laws are not included in the list in article 4 of the Act.

In terms of anticompetitive practices, the absence of a ban on the exchange of sensitive information that affects the price or marketing conditions of products is noteworthy. This is generally considered as a form of collusion because it can have the same objective or effect as a price-fixing agreement.

Another missing horizontal practice is the collective refusal to take part in an agreement or organization that would be critical for competition. This practice, while not as common internationally as the preceding one, is considered under various laws as a form of cartel.⁷¹

Regarding vertical conduct, the Act does not mention the various forms of exclusive agreements, such as exclusive distribution, exclusive supply and/or purchase, and single branding agreements.

Instead, the Administrative Court has interpreted “exclusiveness” as comparable to market sharing among competitors. In this connection, it stated:

As a general rule, “exclusiveness” presupposes either a collusive pact between competitors (where they divide areas, clients, products or activities of the horizontal market exclusively among themselves) or between suppliers and distributors (where they allocate themselves various forms of exclusiveness in the vertical market). Exclusiveness prevents one or more agents from manufacturing, purchasing, selling or reselling products or from providing services

that compete with the products and services covered in the contract, from carrying out these activities outside predetermined channels or from marketing competing products and services outside the agreed geographical areas.⁷²

Lastly, the following practices that are usually considered as abuse of dominant position are not expressly listed in article 4: predatory pricing,⁷³ tie-out, elimination of competitors (also known as monopolization), excessive use of intellectual property rights and undue increase of costs for competitors.

In this connection, it is important to recall that the list of practices is merely indicative. It remains nonetheless apposite to seek to clarify the Act by issuing regulations and guidance in order to increase enforcement predictability and legal certainty and security.

4. Abuse of dominant position

As mentioned above, the generic prohibition in article 2 of Act No. 18.159 also covers abuse of dominant position. Dominant position is defined in article 6 as follows: “It is understood that one or several agents enjoy a dominant position in the market when they can have a substantial impact on the relevant variables in the market independently of the conduct of their competitors, purchasers or providers.”⁷⁴

This matches the definition of the term used internationally.⁷⁵ However, the Commission has not always adhered to this technical definition of dominant position. For instance, in one case it stated that the business had an “atypical” position of dominance based on its international economic power even where its position in the market was not significant, thereby equating the economic capacity of a business’s parent company with its power in the local market.⁷⁶

The second paragraph of article 6 defines abuse of dominant position as follows: “Abuse of dominant position is considered to have occurred when the agent(s) in this position act inappropriately with a view to obtaining advantage or causing harm to others which would not have been possible if they were not in a dominant position.”⁷⁷

At the conceptual level, this definition is also in line with the internationally accepted definition. However, in most legal systems the definition is accompanied by a definition of the various practices or a list of examples. In the case of Uruguay, article 6 provides no guidance on how to identify which conduct is included

in the prohibition. Nevertheless, as seen, some of the practices described in article 4 are typical of abuse of dominant position, so the two articles should be read in conjunction with each other.

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

5. Definition of the relevant market

The definition of the relevant market is a key step in the analysis of any competition case. In an analysis of horizontal practices, the market must be defined in order to determine whether or not the agents under investigation are competitors. In the case of vertical practices and abuse of dominant position, the definition of the market is a prior and essential step in determining whether or not an agent has market power. Thus, the effects of a concentration are determined in relation to a specific market that must be defined in advance.

This is even more important in the competition protection system of Uruguay which, as seen, does not apply the *per se* rule to any of the prohibited practices; therefore, the effects on the market are always relevant and, clearly, how the market is defined could affect the outcome of an investigation.

Article 5 of the Act expressly stipulates that the market must be defined in order to assess the impact of the practice under investigation. The analysis should take into account “the existence of substitute products and services, as well as the geographical area covered by the market, thereby defining the relevant area of effective competition”. Thus, the general principle is applied whereby market definition consists of a substitutability analysis that usually has two dimensions, namely the product market and the geographical market,⁷⁸ in addition to the other factors that the enforcement agency might consider.

Article 5 goes on to state that “the enforcement agency is responsible for setting the general criteria for delineating the relevant market”. Decree No. 404/007 (the Regulations) does not provide any additional elements on which to base the delineation but only repeat the general principles contained in the Act. The enforcement agency, however, has issued a decision, intended as a guide, in which it lays down the general criteria for delineating relevant markets.⁷⁹

The decision provides greater detail on the methodology and input that can conceivably be used to delineate a relevant market. It draws particular attention to the preamble of the guide, which stipulates that it is not always necessary to delineate the relevant market in order to reach a decision in cases being analysed; whereas, as mentioned above, the definition of the market is an essential aspect of the assessment of competition cases, especially when the rule of reason is applied.

C. Economic concentrations

As indicated above, the control of concentrations is an essential component of a competition law. There follows an analysis of the characteristics of this control in Uruguay.

1. General

The control of concentrations by competition authorities has been the subject of discussion in the literature,⁸⁰ particularly when it comes to assessing its desirability for relatively small economies and recently established competition authorities.⁸¹ Those who oppose such control generally refer to the necessity and appropriateness of helping local companies compete with the (usually larger) companies of other countries. In addition, it has been said that the authorities’ limited resources should be focused on preventing monopolistic practices rather than intervening in market structure.⁸²

At the international level, however, the majority are in favour of such control, since the competition problems resulting from the acquisition of market power generally affect economies equally, irrespective of their size. Therefore, while the size of the economy could affect the thresholds above which prior notification would be required and possibly the outcome of cases, it does not justify the total elimination of all control.⁸³

In line with this majority position, Uruguayan legislation provides for a concentration control regime, establishing the obligation to notify certain operations and giving the Commission on the Promotion and Defence of Competition the power to authorize some of them. This issue is regulated by articles 7 to 9 of Act No. 18.159.

Control is exercised through the notification of operations that meet certain thresholds before they are conducted. This mechanism is considered more effective than *ex-post* controls, as it means that measures can be taken prior to the conclusion of the

transaction, thus avoiding the difficulties that would be involved in undoing an operation that has already been completed.

2. Definition of concentration

Article 7 of Act No. 18.159 provides that acts of economic concentration can include “transactions involving a change in the structure of control over the participating companies through: company mergers, the acquisition of corporate equities, equity interests or shares, the acquisition of commercial, industrial or civil establishments, the total or partial acquisition of business assets, and any other kind of legal transactions that involve the full or partial transfer of control of economic units or companies”.

This definition is in line with the one used in various legal systems that links economic concentration to the acquisition or transfer of control between previously independent entities.⁸⁴

3. Duty of notification

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

- (a) As a result of the operation, the market share is 50 per cent or more;
- (b) In any of the past three years, the combined annual gross turnover of the parties has been equal to or greater than 750 million UI, which is approximately equivalent to US\$ 78 million.⁸⁵

International best practice recommends setting clear and simple thresholds that are easy to verify and are based on objective and quantifiable data, such as the value of the parties’ sales or assets. Conversely, it is recommended to avoid thresholds that are based on evaluative criteria, such as market share.

The reason for this is that it should be easy for economic agents to verify whether there is a need to notify, without this requiring an investigation based on information to which access is usually limited and an analysis that is open to interpretation (e.g. the market can usually be defined in different ways). The use of objective and easily quantifiable parameters allows the parties to establish with greater ease and certainty when they need to notify a transaction.⁸⁶

The level of the threshold is also relevant. On the one hand, the aim is to avoid overburdening the authority with concentrations that will not generate significant negative effects⁸⁷ and, on the other, to avoid excessively high thresholds, as these will result in a

failure to notify relevant transactions with a potentially significant impact on the market. The sales threshold established under Act No. 18.159 appears high for a relatively small economy, and it is therefore possible that some relevant concentrations might not have to be notified.

In addition, article 8 of the Act establishes that concentrating companies shall be exempt from the duty of notification in the following cases:

- (a) The acquisition of companies in which the buyer already had at least 50 per cent of the shares;
- (b) The acquisition of bonds, debentures, obligations, or any other debt titles of the company, or shares without voting rights;
- (c) The acquisition of a single company by a single foreign company that did not previously own assets or shares of other companies in the country;
- (d) The acquisition of companies, whether they have declared bankruptcy or not, that have not registered any activity in the country in the past year.

Except for case (a), these involve operations that in any case would not have to be notified, as they are not technically concentrations given that they do not involve the transfer of control of two or more economic agents who are market participants that were previously independent of each other.

4. Concentration notification procedure

Article 7 of Act No. 18.159 provides that concentrations that meet the criteria should be notified 10 days before they are due to take place.⁸⁸ It also stipulates that the enforcement agency should regulate the form and content of the notifications required, as well as the corresponding penalties.

On this point, it is not clear what the “corresponding penalties” referred to in that article are. For example, it could mean penalties for failure to provide timely notification, for the conclusion of an unjustified concentration, or for both, but neither of these offences is expressly defined in the Act. It is also noteworthy that the establishment of penalties is addressed in regulations, rather than in the law itself, as is usually the case.

As provided for in the aforementioned article, the procedure for notifying concentrations is regulated by Decree No. 404/007. Article 39 of the Decree specifies when the concentration is considered to

have been concluded for the purpose of calculating the 10-day notification period.⁸⁹ It also provides for the possibility of the interested parties agreeing to ask the Commission to determine when the concentration will actually be implemented. Article 1 of the Commission's decision 50/009 establishes fines for failing to comply with the duty to notify a concentration.

The duty of notification lies with the administrators, directors and representatives of the concentrating companies, who are personally responsible for non-compliance; article 39 of the Regulations establishes a fine of up to 1 per cent of the companies' annual turnover for each offender.

Under the regulations establishing this penalty for failure to notify, the fine is imposed in accordance with article 19 of the Act. This article refers to penalties for administrators and representatives of legal persons. Hence, the fine could be interpreted as being imposed on representatives personally, not on the company they represent. However, the Commission has clarified that, although the fine applies to legal persons that fail to comply with the mandatory notification duty, members of their management and representation bodies could be fined up to 25 per cent of the penalty imposed on the entity that they represent.⁹⁰

In its decision No. 50/009 of 20 November 2009, the Commission set out the penalties for failure to notify concentrations. It established the possibility of sanctioning the failure to notify through a legal warning, publication of the penalty decision in two national newspapers, and a fine of between 100,000 UI⁹¹ and the equivalent of 5 per cent of the offender's annual turnover (taking into account for the calculation the total sales of all parties to the concentration).

It is noteworthy that the fine for failure to notify is not established in the Act, but instead in lower-ranking rules (initially in regulations and then in an administrative decision which raised the fine). While article 7 of the Act authorizes the enforcement agency to regulate the matter, there might be questions as to the establishment of penalties through "delegated regulations", in view of the principle of legal definition of an offence.

Article 40 of Decree No. 404/007 sets out the requirements to be met by the notification,⁹² without prejudice to the additional information the authority may subsequently request under article 43. In addition, the Commission has issued a decision on the form and content of the notification,⁹³ and has also developed

a form to facilitate the submission of information and relevant documents.⁹⁴

Article 40 provides that the companies involved in the transaction have a duty to notify. There is no indication of whether notification by one of the parties discharges the obligation for both.

According to article 43 of the Regulations, the authority may request the available information and documentation within three working days of submission of the application. In addition, it may request information or documentation in addition to that included in the initial list of requirements from the parties within 10 working days of submission of the application. Information may not be requested more than twice, except in exceptional cases.

Upon completion of the notification process, in accordance with article 42 of the Regulations, the Commission has broad powers to periodically request information from the parties to monitor market conditions.⁹⁵ The duration of this prerogative is not specified in the article, and is defined at the discretion of the authority.

Article 42 provides for the possibility of the Commission disagreeing with the notifying parties' definition of the market, in which case a period of five days will be granted to provide information on this other market, as defined by the Commission.

With respect to registrable acts associated with the transaction, the National Register of Legal Persons requires the approval of the enforcement agency in order to definitively register the act.

5. Substantive analysis

Once formal requirements have been completed, a substantive analysis of the concentration is undertaken.

In general, the analysis of concentrations seeks to verify whether a position of power in the market will be acquired or consolidated as a result of the concentration or if the transaction may otherwise have the effect of decreasing, restricting, damaging or preventing free competition and, if so, whether any action should be taken to prevent it.⁹⁶

In the case of Uruguay, however, article 9 of Act No. 18.159 provides that the Commission's authorization is required only "in cases in which the act of economic concentration involves the establishment of a de facto monopoly".⁹⁷

In addition, Decree No. 404/007 states that: “It shall be understood that a de facto monopoly has been created if the process of economic concentration gives rise to the presence of a single company in the relevant market, as defined by the company or by the enforcement agency in the current year or one of the two years prior to submission of the authorization or notification. In the case of a difference between the relevant markets defined by the company and the enforcement agency, the latter’s definition shall prevail.”

In other words, contrary to the international trend, a substantive analysis is conducted only in those cases in which a de facto monopoly is created. This means that, in practice, except in the specific case described above, notification becomes a formal duty, and there is no evaluation of competition.

To date, the authority’s decisions have merely indicated whether or not information was submitted in full, without any substantive analysis,⁹⁸ except for one case in which two companies were penalized for failure to notify.

In such a scenario, the practical usefulness of the notification process would only be for the purposes of collecting information for subsequent monitoring of the market by the authority, as described above.

In cases in which a de facto monopoly is acquired, article 44 of the Regulations deals with matters relating to the efficiency gains that can be considered by the authority, which, in accordance with international best practice, are assessed only if they arise directly from the concentration and cannot be achieved without it.⁹⁹ Furthermore, according to this article, “cost reductions that involve a transfer between two or more agents, such as those derived from the greater bargaining power of the concentrated company as a result of the transaction, may not be invoked as efficiency gains”.

According to article 45 of Decree No. 404/007, the enforcement agency may accept or reject monopolistic concentrations through a reasoned decision.

Under this article, the applicant may, at any time during the authorization procedure, propose to the enforcement agency measures to mitigate the expected impact on the relevant market. Once these proposals have been made, the agency has 10 working days in which to decide to approve the measures and the corresponding authorization for the concentration.

The effects of the monopolistic concentration are suspended until such time as it is approved by the authority. The Commission will inform the Directorate-General for Registries of the acceptance or rejection of the application for the corresponding economic concentration operation.

D. Remedies and sanctions

Sanctions in the area of competition primarily seek to put an end to undesirable conduct and to discourage such conduct in future.¹⁰⁰ In addition, in some cases the remedies might restore conditions of competition in the market.¹⁰¹ Therefore, in addition to fines, there are other remedies and sanctions in the area of competition, such as corrective measures, declaring the invalidity of agreements, and administrative or criminal penalties.

In the case of Uruguay, the range of sanctions available to punish violations of Act No. 18.159 is set out in article 17.¹⁰² Under this article, in the event that an anticompetitive practice is proven to exist, the authority may order the cessation of the practice, and of any effects that might persist. It may also impose one of the following sanctions:

- A warning
- A warning with publication of the decision, at the expense of the offender, in two national newspapers
- A fine of between 100,000 UI¹⁰³ and whichever is higher of 20 million UI,¹⁰⁴ 10 per cent of the offender’s annual turnover, or the equivalent of three times the injury caused by the anticompetitive practice, if quantifiable

The different sanctions are not mutually exclusive, but can be applied concurrently if the authority considers it appropriate.

In determining the sanctions, the criteria to be taken into account by the authority are: the damage caused; the level of involvement of those responsible; intent; whether it is a repeat offence; and the offender’s attitude during the administrative process.

Notably, the Act does not take into account the gravity of the conduct, which is one of the main factors considered in other countries. Hence, in practice there are harsher penalties for conduct that is normally considered less serious, as in the above-mentioned case in which those involved in collusive tendering were punished with a warning, while a practice of predatory pricing was punished with a heavy fine.¹⁰⁵

There is no specific penalty under the competition

law for refusal to cooperate in the procedure, or to produce the documents and evidence requested by the Commission. Under the Regulations, however, this conduct is subject to the same penalty as engaging in the prohibited conduct.

Act No. 18.159 makes no reference to the civil consequences of engaging in prohibited conduct. In other words, it is not specified whether those affected by the conduct may seek redress for the harm suffered. Given that the matter is not covered in the Act, presumably the rules of general civil law are applicable.

In accordance with article 18 of the Act, the authority's decisions must be published on its website, and can contain a detailed description of the cases analysed. Similarly, article 36 of Decree No. 404/007 provides that the enforcement agency must keep a register of sanctioned companies and individuals.

Under article 19 of Act No. 18.159, the authority has the power to impose the same sanctions on the members of the company's management and representative bodies who actively contributed to the practice as on the company itself. Article 37 of Decree No. 404/007 reiterates what is stated in the Act, adding that members of the management and representative bodies are considered to have actively contributed to the prohibited practice provided that the practice was decided upon by the relevant decision-making bodies and it is not on the record that the participant abstained or voted against the measure.

The conduct of a legal entity controlled by another shall also be attributable to the controlling party. Similarly, the responsibilities that may be attributable to members of the management and representation bodies of the controlled company can also be attributed to those carrying out the same functions in the controlling company.

Mention should also be made of "leniency programmes", which are a valuable tool for the detection of prohibited conduct. These programmes are defined as systems of partial or total exoneration from the penalties that would otherwise be applicable to a member of a cartel who reports the cartel to the competition authority.¹⁰⁶

In the case of Uruguay, the Act provides that "the reporting by one of the parties to the agreement or the contribution it makes to obtaining sufficient evidence to sanction the remaining offenders shall be regarded as special mitigating factors".¹⁰⁷

Article 34 of Decree No. 404/007 limits this benefit to

cases of concerted practices between competitors. It also provides that this mitigating circumstance cannot be applied to those companies that have created or initiated the establishment of agreements with other competitors (the "ring leaders"). This article also establishes the formalities that must be completed.¹⁰⁸

The benefit is granted only to the first company to provide information, and the remaining companies involved in the agreement will not benefit unless they report other agreements between competitors about which they have sufficient information.

In addition, although it is not provided for in the Act, article 34 of Decree No. 404/007 does provide for a total exemption from sanctions for companies that provide sufficient information for the dismantling and sanctioning of an agreement among competitors. The power to grant such a total exemption is considered positive in encouraging companies to provide information and be eligible for this benefit.

According to article 35 of Decree No. 404/007, upon receipt of the documentation from the company cooperating in the enforcement of the law, the enforcement agency considers it and issues a decision within 20 working days on the relevance of the plea. If it is considered relevant, the company must provide details of all the proposed information, as agreed.

Once a decision has been made as to the relevance of the plea, the enforcement agency initiates an investigation and, in the event of sanctions, will take account of the previously established mitigating circumstances and exemptions, unless the company that is cooperating with the investigation fails to comply with the requirement to provide information, or falsifies or alters the evidence proposed.

Some of the conditions that normally govern such leniency procedures are lacking, such as the rules that apply if the information comes from a person in their personal capacity or if they are cooperating on behalf of a company; the rules to ensure the cooperation of the economic agent throughout the investigation; and guarantees to ensure that the agent refrains from engaging in the anticompetitive practice.¹⁰⁹

Under article 28 of Act No. 18.159, the statute of limitations in the area of competition is five years. The same period applies both to the punitive action of the State and to private actions taken by those affected seeking compensation for the damage suffered as a result of unlawful conduct.

III. INSTITUTIONAL ASPECTS

A. Organizational structure

The Commission on the Promotion and Defence of Competition is a decentralized body of the Ministry of Economic Affairs and Finance responsible for the implementation of Act No. 18.159.¹¹⁰

Under Uruguayan legislation, decentralization is “the attribution of decision-making powers in one or more areas to a body that is subject to a hierarchy. In other words, the functioning of the hierarchical system is altered (the decentralized body decides rather than the superior hierarchical body) but its structure is not (the decentralized body continues to be subject to the hierarchy).”¹¹¹

B. Ministry of Economic Affairs and Finance

The Ministry of Economic Affairs and Finance is the senior body responsible for conducting national economic, financial, trade and fiscal policy.¹¹² It consists of the following operational units: the Directorate-General of the Secretariat, the Office of the Comptroller-General, the Office of the National Auditor, the National Treasury, the Directorate-General for Taxation, the National Customs Directorate, the National Lotteries Directorate, the National Land Registry Directorate, the Directorate-General for Casinos and the Directorate-General for Trade.

The Commission on the Promotion and Defence of Competition is part of the Directorate-General of the Secretariat and comes under the Ministry of Economic Affairs and Finance. Accordingly, all of its decisions are subject to appeal before the Ministry. To that end, the Ministry has a team of high-level legal advisers who, in addition to competition issues, deal with the other areas of the Ministry’s work.

C. Commission on the Promotion and Defence of Competition

The Commission began its work on 16 March 2009.¹¹³ It is composed of three members appointed by the executive branch, acting in the Council of Ministers. They have a mandate of six years, but may be reappointed. In order to ensure the viability of the system, one new member is appointed every two years.¹¹⁴ In other words, the appointments do not follow the political cycle and the periods do not run concurrently, which means that the whole membership does not change at once. This structure promotes continuity and the sharing of accumulated experience.

The Commission is represented by its president.¹¹⁵ Each member serves as president for two years, on a rotating basis.¹¹⁶

The members of the Commission are full-time civil servants. They work only for the Commission, except for teaching and research activities.¹¹⁷ Members of this body must have a personal and professional background and knowledge of the subject area that will guarantee their independence of judgment, efficiency, objectivity and impartiality in the performance of their duties.¹¹⁸ The legislation does not establish a selection process or public competition of the kind recently established by other competition authorities for the election of their members.¹¹⁹

The members of the Commission can only be dismissed by the President of the Republic, acting in the Council of Ministers, in cases of: (a) negligence or poor performance of their functions; (b) sudden incapacity; (c) prosecution for a crime that carries a prison sentence or a criminal conviction; and (d) commission of acts that affect their reputation or the standing of the Commission.¹²⁰

The Commission adopts its decisions on the cases and issues brought before it as a collegial body in both ordinary and special meetings.¹²¹ Ordinary meetings take place once a week and special meetings must be convened at least 24 hours in advance.¹²² For decisions to be adopted, the vote of at least two of the three members is required. In the event of absences or abstentions, one vote is sufficient to adopt decisions on procedural and operational aspects of the Commission.¹²³

In addition, the Commission has a team of advisers to support it in the performance of its duties, primarily in preparing technical reports to inform its decisions in cases of anticompetitive practices or economic concentrations and competition advocacy.¹²⁴

Internally, the Commission is not divided into departments or sections. It is composed of technical advisers and administrative staff. They are all full-time public officials, appointed under the civil service regime.

1. Responsibilities

Articles 9, 10 and 26 of Act No. 18.159 and article 16 of Decree No. 404/007 set out the functions and powers of the Commission. In general, they can be classified as follows: advocacy and defence of competition, regulation, representation and administrative duties.

With regard to competition advocacy, the Commission has broad powers to promote changes to regulations, issue opinions and recommendations and respond to enquiries, as well as other powers normally associated with such authorities.¹²⁵

In terms of its powers to protect competition, the Commission may: (a) carry out the studies and investigations that it deems appropriate in order to analyse competition in markets; (b) request from public or private natural or legal persons the documentation and cooperation it considers necessary;¹²⁶ (c) consult civil and commercial documents, trade registers, company records and accounting databases in the course of its investigations; (e) conduct proceedings for anticompetitive practices and apply sanctions where appropriate;¹²⁷ and (e) authorize concentrations in cases where a de facto monopoly is formed.

The authority follows the “integrated agency”¹²⁸ model that combines investigative and adjudicating functions. However, in the case of Uruguay, there is no structural division within the agency in the exercise of the two functions.

With regard to its regulatory powers, the authority may: (a) issue general rules and specific instructions; (b) issue instructions on the general criteria for determining the relevant market, as well as on prohibited conduct or the information to be provided by companies that notify or request authorization for a concentration.¹²⁹

The Commission may also interact with other national or international competition bodies and participate in

international forums to discuss or negotiate competition issues.¹³⁰ Finally, the Commission members are responsible for overseeing and managing its office, in terms of both administrative and technical aspects, ensuring that users receive the appropriate attention and that the duties assigned to it by law are carried out properly.¹³¹

2. Resources

Article 11 of Decree No. 404/007 provides for the Ministry of Economic Affairs and Finance to supply the human and material resources needed by the Commission. The Commission does not have budgetary autonomy or the power to authorize expenditure, as it is dependent on the approval of the Directorate-General of the Secretariat.¹³²

The Ministry’s total budget in 2015 was as follows. (see Table 1).¹³³

Of the total budget, the financial resources allocated to the Commission in 2015 were as follows (Table 2).

With regard to human resources, at present, the Commission is composed of one lawyer and two economists. The technical team has quite a small staff and currently consists of seven people: two administrative assistants,¹³⁴ two economists and three lawyers.¹³⁵

According to the interviews conducted with the technical team and the members of the Commission,¹³⁶ the authority has problems with staff turnover. For 2014, the Commission had two fewer staff members:

Table 2. Annual financial resources of the Commission on the Promotion and Defence of Competition, 2015a

	Uruguayan pesos	US dollars
Annual expenditure ^b	2 900 000	96 667
Operating costs	550 000	18 333
Technical studies and market information	993 000	33 100
Competition promotion	400 000	13 333
Official missions (attendance at forums and events abroad, including MERCOSUR)	586 000	19 533
Training	371 000	12 367
Annual nominal salaries	10 477 900	349 243 ^c
Nominal salaries of current staff (five technical staff, two administrators and three commissioners)	9 355 700	311 857
Salaries of the two current vacancies (one economist, one administrative assistant)	1 122 200	37 407
Total	13 377 900	445 910

Source: Commission on the Promotion and Defence of Competition.

a There is no specific allocation for expenditure on office furniture, IT equipment and other line items. Needs in these areas are administered by the Directorate-General of the Secretariat and, if approved, expenditure is charged to the Directorate.

b The authority internally disaggregates the amounts on the basis of estimated costs for each line item. This allows it to better manage its budget.

c Approximately 78.3 per cent of total annual financial resources.

Table 1. Budget of the Ministry of Economic Affairs and Finance, 2015

	Uruguayan pesos	US dollars
Salaries	5 264 025 500	192 609 788
Operating costs	955 896 100	34 976 074
Investments	184 060 500	6 734 742

Source: Commission on the Promotion and Defence of Competition.

Table 3. Economic affairs regulatory authorities: 2015 budget

Regulators	Budgetary resources (US\$)
Regulatory Authority for Communication Services (URSEC)	12 843 029 ^a
Regulatory Authority for Energy and Water Services (URSEA)	4 000 000 ^b

Source: Based on information received from the regulators and found on their websites.

^a Data for 2014 from: https://www.ursec.gub.uy/wps/wcm/connect/ursec/11e6e023-844e-4d9d-8a03-197ac3dfe51e/Ingresos+2010_2014.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=11e6e023-844e-4d9d-8a03-197ac3dfe51e.

^b Information submitted by Marcelo Laborde, Technical Advisory Service, URSEA.

one administrative officer transferred to another unit of the Ministry and one economist resigned.¹³⁷

The resources allocated to the Commission in 2015 not only represented a fairly small percentage of the overall budget of the Ministry of Economic Affairs and Finance but were also significantly lower than those of other regulators in the country:

Similarly, although comparisons between competition authorities have their limitations, by virtue of their institutional design and the context in which they operate, it is striking that the Uruguayan authority is the one with the least financial and human resources within the group of small agencies in the region. Some of them have received negative evaluations because they lack the resources to properly implement competition policy in their countries.¹³⁸ Nevertheless, by 2015 the authority had resolved 24 cases¹³⁹ related to the defence of competition and competition advocacy, and a total of 118.5 cases between its establishment in 2009 and 2015.

Thus, some elements of the institutional design of

the Uruguayan competition authority are conducive to its independence and ultimately constitute an improvement over previous legislation, which gave responsibility for implementing legislation to the Directorate-General for Trade of the Ministry of Economic Affairs and Finance.¹⁴⁰

Moreover, some experts¹⁴¹ believe that in the Uruguayan context, the fact that the Commission on the Promotion and Defence of Competition is part of the Ministry of Economic Affairs and Finance makes it stronger vis à-vis other institutions and economic agents.¹⁴² In this regard, Mr. Bergara stated: "The Ministry of Economic Affairs is a strong and technical institution; the fact that the Commission on the Promotion and Defence of Competition comes under this institutional umbrella gives much more weight to its decisions."¹⁴³

Even if it were to be accepted that the current structure places the authority in a better position than if an autonomous institution had been created with full structural and operational independence, there are a number of elements that could be improved to ensure effective implementation of competition rules. In this regard, it is generally accepted that competition authorities should base their decisions on objective criteria, through neutral and transparent processes, and that a competition policy can be effective only if the decisions of the authority are free from political or discriminatory views and do not reflect the interests of particular groups. This is why competition authorities are separated from the traditional structures of the Government.¹⁴⁴

First, the authority is highly dependent on the Ministry for its budget and administration. As stated above, the Commission has no power to authorize expenditure; it does not have a specific allocation for certain expenditures, which it must obtain from the Directorate-General of the Secretariat; and technical staff report to the Minister of Economic Affairs and Finance.

Secondly, the financial and human resources allocated to it have been insufficient for it to properly carry out its competition defence and advocacy duties. The Commission has been more reactive than proactive in the exercise of its functions. As will be discussed below, because of budgetary constraints, the focus has been on handling complaints and enquiries, with very little room to establish a strategic agenda or initiate ex officio investigations and competition advocacy activities.¹⁴⁵

Table 4. Competition authorities in Latin America: resources and number of cases handled, 2015

Country	Approximate budget (US\$)	Total number of staff	Staff assigned to work on advocacy and defence of competition	Percentage of budget allocated to salaries	Cases handled
Costa Rica ^a	699 706	The Commission on the Promotion of Competition has 10 members and 13 staff members. In addition, they have support staff from the Ministry of Economic Affairs, Industry and Trade.	11 full-time staff and 10 commissioners, who attend weekly meetings	96%	12 investigations into anticompetitive conduct and possible barriers to entry; 23 investigations into concentrations and 5 investigations for failure to notify a concentration; 22 cases of competition advocacy (opinions)
Ecuador ^b	8 589 331	231	83	31.6%	57 investigations into anticompetitive practices; 41 cases of economic concentration; 22 cases of competition advocacy (enquiries and opinions)
El Salvador ^c	2 554 310	52	31	72%	3 investigations into anticompetitive conduct and 5 preliminary proceedings; 5 investigations into economic concentration; 23 cases of competition advocacy (opinions and studies); 32 enquiries from the public
Honduras ^d	1 068 366e	31	16	54%	4 investigations into anticompetitive practices; 6 cases of economic concentration; 4 cases of competition advocacy (enquiries and opinions)
Nicaragua ^f	471 353	15	10	82%	6 investigations into anticompetitive practices; 3 cases of economic concentration; 6 cases of competition advocacy (enquiries and opinions)
Panama ^g	833 894h	44	39	64%	10 investigations into anticompetitive practices; 7 cases of economic concentration; 6 cases of competition advocacy (enquiries and opinions)
Uruguay	445 910	10	8	78%	10 investigations into anticompetitive conduct and 4 preparatory studies; 4 cases of economic concentration; 6 formal enquiries

Source: Based on information supplied by competition authorities in Latin America.

^a Information supplied by Hazel Orozco, Executive Director of the Costa Rica Commission on the Promotion of Competition.

^b Information supplied by Michelle Quintana of the Directorate of International Relations, Office of the Superintendent of Market Power Control of Ecuador.

^c Information supplied by Regina Vargas, Superintendent for Competition Advocacy of the Office of the Superintendent for Competition of El Salvador.

^d Information supplied by Alberto Lozano, Member and President of the Commission on the Protection and Promotion

of Competition of Honduras.

- ^e The competition authority's budget for 2016 increased significantly; the amount allocated was US\$ 1,745,538.
- ^f Information supplied by Haraxa Sandino, head lawyer of the National Institute for the Promotion of Competition of Nicaragua.
- ^g Information supplied by Jovany Morales, Head of the Department of Market Analysis and Research of the Authority for Consumer Protection and Competition of Panama.
- ^h Budget of the National Competition Directorate of the Authority for Consumer Protection and Competition.

Thirdly, although the authority is a decentralized body within the Ministry, its decisions can be appealed to the Minister of Economic Affairs and Finance. This could result in decisions being taken on the basis of political rather than technical criteria.¹⁴⁶ Nevertheless, Pablo Ferreri, Under-Secretary of the Ministry, has stated that “the Ministry supports the Commission, but takes a back seat so as not to influence the resolution of cases”.¹⁴⁷

Lastly, there is a risk that the Ministry could establish policies that are contrary to competition law. In this regard, some experts have pointed out that “State intervention in setting the price of certain goods to control inflation could promote the creation of

cartels”.¹⁴⁸

In view of this, unless the Commission is given additional resources, as well as sufficient technical, administrative and financial autonomy, it will be difficult for the country to have an effective competition policy.

It is now necessary to analyse the administrative procedure to be followed by the Commission when it investigates and, if appropriate, sanctions anticompetitive conduct. In so doing, reference will briefly be made to the principles of international best practice for the investigation of competition cases, and then the most relevant aspects of the procedure followed by the Commission on the Promotion and Defence of Competition will be outlined.

IV. PROCEDURAL ASPECTS

The procedure established by Uruguayan law will be analysed below. This section does not refer to the procedure for the notification and analysis of concentrations, which is discussed above.

A. Punitive administrative proceedings

The Commission's proceedings are conducted by a single agency in charge of both the investigation and the resolution of cases.

In this respect, various options are chosen internationally, the most common of which are: (a) the "dual jurisdiction" model, in which the administrative authority has powers of investigation and brings legal action before the ordinary courts; (b) the "dual agency" model, in which the authority has powers of investigation and initiates enforcement actions before other administrative authorities specializing in competition, in which there is a right to appeal to other specialized bodies or to the courts; and (c) the "integrated agency" model, in which the authority is responsible for both investigation and resolution, and there is a right to appeal to general or specialized appellate bodies.¹⁴⁹

The third option is not above criticism. Some consider it inadvisable to confer the powers to investigate and adjudicate cases on a single agency, in the belief that independence and impartiality during the adjudication phase would not be guaranteed.¹⁵⁰ Others make a case for the appropriateness of this model in countries with limited resources and little experience in the defence of competition, on the understanding that the possibility of turning to the courts to contest the competition authorities' decisions would in any event safeguard the rights of the person or entity.¹⁵¹

To achieve something of a separation between the investigation and adjudication functions in integrated agencies, officials investigating a case should not take part in the ultimate adjudication of the case, thereby differentiating between the body conducting the proceedings and the adjudicating body. Thus, even when they form part of a single institution, decisions would be made more independently.

In Uruguay, as we have seen, budgetary constraints and scarce human resources make this separation difficult.

B. Due process in punitive proceedings

The analysis of any punitive proceedings involves, as

a starting point, an assessment of the principles of due process, as the imposition of any kind of penalty requires, in a State governed by the rule of law, the observance of some basic safeguards.

Due process is defined as the set of minimum legal and procedural conditions and requirements that must be met before a person's rights can be legally impinged upon.¹⁵² Although this principle has various nuances, there is consensus on a fundamental core of rights that must be respected.¹⁵³ These principles may be common to all punitive proceedings, with some variations depending on the scope of application.

In general terms, due process involves the presumption of innocence, the principle of *in dubio pro reo*, the right to be heard by a judge duly appointed by law and certain other rights, such as the right to be duly informed of the charges.

It also includes rights relating specifically to the accused's right to a defence, such as the right to legal counsel, the right to be notified of all documents issued in the proceedings, reasonable time to mount a defence, access to the evidence for the prosecution and the opportunity to contest it, the right to a hearing — preferably before the adjudicating authority — and the right to plead.

In addition, there is a series of principles relating to the final resolution of the case that are also safeguarded as part of the proceedings. The resolution must be reasonable, reasoned and based solely on the evidence presented in the proceedings. Another key aspect of due process is the right to have the decision reviewed by an independent tribunal.

In the area of competition, international best practices accord particular importance to transparency in the proceedings, with special emphasis given to separation between the investigating and the adjudicating authority, and to a hearing providing a reasonable opportunity for a thorough discussion of the case.¹⁵⁴

C. Proceedings before the enforcement agency¹⁵⁵

The procedure followed before the competition authority in Uruguay, analysed in the light of the principles outlined above, is described below.

1. Initial phase

In accordance with article 10 of Act No. 18.159, the Commission is responsible for the investigation,

examination, analysis and final resolution phases of the proceedings for enforcing competition rules.¹⁵⁶ The “integrated agency” approach described above, with no internal separation of the investigation and adjudication functions, is thus taken.

The procedure can be started pursuant to a complaint or an initiative taken *ex officio* by the authority. This is in line with international practice, which recommends giving the authorities broad powers of investigation, without requiring them to depend on the action of an individual to enable enforcement of the Act.¹⁵⁷

Article 12 of the Act, as well as article 21 of the Regulations, grants broad standing to any natural or legal person to submit complaints, which is also in line with international best practice. The complaint must comply with certain minimum formalities, and complainants must identify themselves, except where, for justifiable reasons, it is agreed to keep their identity confidential.

In addition, both the Act¹⁵⁸ and its Regulations¹⁵⁹ authorize the Commission to conduct preliminary investigations as a preparatory measure, for which it has broad powers of investigation, including the power to compel individuals to provide information.

In accordance with international best practice, the authority may also request (with the support of the judicial authorities) on-site investigations, carried out without prior notification, to obtain evidence and documentation that could be relevant to the investigation.¹⁶⁰

Another noteworthy aspect of the preparatory phase is the authority’s explicit power to order, as a preventive or precautionary measure, the cessation of conduct capable of causing serious harm. This measure may be ordered at any time during the proceedings.¹⁶¹ The Commission may also ask the judicial authorities to take other kinds of preventive measure, which are governed by ordinary law, except with respect to injunction bonds, which the Commission is not required to post.¹⁶² If the preventive measure is granted before the trial, the authority has 30 days to initiate the trial.¹⁶³

2. Course of the proceedings

The Act has no further provisions related to the continuation of the proceedings after the initial phase, except for the provision in article 14 on the obligation of all persons to cooperate with the authority and provide all evidence and documentation that is required of

them within 10 days. There is no specific penalty in the Act for failure to comply with this obligation, although the Regulations establish the same penalties as for an anticompetitive practice.

Remarkably, those involved in the conduct being investigated are, by law, presumed guilty if they fail to comply with this obligation.¹⁶⁴ This presumption of guilt is atypical of punitive proceedings, which, for reasons of due process, are usually governed by the presumption of innocence.

This lack of regulation in Act No. 18.159 is made up for by Decree No. 404/007, which contains additional provisions on the conduct of the proceedings. Article 23 of the Decree, for example, gives the party targeted by the complaint 10 working days to respond and to provide all evidence for the defence.

This period would appear to be extremely short, especially given the usual complexity of these cases. This hearing might be insufficient to allow proper exercise of the right to a defence (in accordance with the principles of due process mentioned above). The absence of a reasonable time period is to some extent offset by the additional hearings that are granted throughout the course of the proceedings. However, to mount an adequate defence, submit evidence and lay out the defence arguments, all of which are usually likely to take longer than the period provided for by the Act, the initial period is of fundamental importance.

Once the hearing has been held, the authority must decide within 10 working days whether to continue with the proceedings or, if it is of the view that there are not sufficient grounds to do so, discontinue them. If it decides to continue, a decision on the admissibility of the evidence submitted must be made at the same time.¹⁶⁵

The authority will then process the evidence found admissible, as well as any other evidence it deems appropriate and necessary for the investigation.¹⁶⁶ Once the investigation phase is complete, including the processing of evidence and the economic and legal analysis, the Commission will make a draft final decision available to the parties, who will be given 15 working days to contest the draft and submit additional evidence, which is to be processed in no more than 60 working days, after which the parties will be given another 10 working days to make their final arguments.¹⁶⁷

During the proceedings, the entire case, from

the moment it is initiated to the final decision, is considered confidential. This confidentiality should not affect the parties concerned in any way.¹⁶⁸ In addition, the following information is considered confidential: (a) the identity of the complainants, when so decided by the Commission; (b) the personal data protected by law; (c) the information provided in confidence by the parties or by third parties in pursuance of their legal obligations, as well as the information obtained in inspections of their assets or facts that, if known, would give a competitor an undue advantage. Confidentiality should not compromise the defence of the parties.¹⁶⁹

In accordance with article 26 of the Regulations, the final decision must be issued within 60 working days of the end of the period during which the draft decision is made available to the parties for the submission of their final arguments.¹⁷⁰

Uruguayan law provides for other forms of termination of the proceedings, in addition to the final decision. The Regulations state that the complainant may withdraw the complaint at any time, although they must submit a report stating the reasons for the withdrawal.¹⁷¹ In this case, the authority must decide whether to accept the withdrawal and whether to close the case or continue the investigation *ex officio*.

The proceedings can also be terminated through what is referred to as an undertaking to cease and desist. A request to have such an undertaking taken into consideration is not an acknowledgement of wrongdoing.¹⁷²

Article 16 of the Act provides for the possibility to suspend the proceedings for up to 10 calendar days, to come to an agreement with the alleged offender on a possible undertaking to cease and desist.¹⁷³ This period could be too short, given the complexity and detail such proposals ordinarily involve.

An undertaking implies the cessation or modification of the conduct under investigation, and in accordance with article 16 of the Act it is inappropriate when the illegitimacy of the conduct and the identity of the person responsible for it are clear. Article 28 of the Regulations states that what is warranted in those cases is an acknowledgement of wrongdoing and a reduction of the penalty.

There is a practical difficulty here, in that the authority could find itself rejecting an undertaking to cease and desist because it is clear that an offence has been committed. On account of the presumption of

innocence, however, it is not possible to presume that an offence has been committed until it has been proven at the close of the proceedings. Thus, the rejection of the undertaking on these grounds could constitute a prejudgment and might interfere with the conclusion of the punitive proceedings.

Article 28 of the Regulations states that the proposal must be submitted before the resolution of the proceedings. The disadvantage for the competition authority is that it could carry out the entire investigation of the case and complete the consideration of the evidence only to receive a request from the accused party to submit a cease-and-desist undertaking. In such cases, one of the usual advantages of such an undertaking — the prompt reversal of situations that disrupt the fluidity of markets, thereby avoiding what are usually lengthy, cumbersome and costly proceedings — could be negated.

If, however, the investigation has been carried out and the evidence has been considered, the offending party may be eligible for a reduced penalty but not a full exemption. In the event that the offending party wishes to be fully exempt from the penalty, it must offer to submit a cease-and-desist undertaking before the beginning of the investigation phase.

The decision approving the undertaking must set out at least the obligation to cease the conduct under investigation for a specified period, the penalty in the event of non-compliance and the obligation to submit periodic reports on the alleged offending party's market operations. On these points, the competition authority, remarkably, has broad discretion, in particular in connection with the time frame for the undertaking and the penalties.

The procedure does not provide for a scenario where the competition authority does not fully accept the offending party's proposal but finds that it could be acceptable if amended. It would therefore be useful to have a framework within which the Commission may ask the party under investigation for a counter-offer or amendments, which would increase the likelihood of a successful outcome. The brief period established under the Act and the failure to address the issue in the Regulations would exclude this possibility.

Also noteworthy is article 28 of the Regulations, which states that "the proceedings shall be suspended, provided that the terms of the cease-and-desist undertaking are respected, and they shall be closed at the conclusion of the period defined if all of the

conditions established in the undertaking are fulfilled". This could lead to proceedings that are unfinished and pending for long periods of time.

An unusual aspect of Uruguayan law is the possibility for parties to agree to conciliation.¹⁷⁴ Conciliation, as set out in the Regulations, could be incompatible with the nature of this kind of proceedings, which involve the pursuit of the public interest by the competition authority rather than a possible dispute between parties over property and other transferable rights. In practice, the Commission has interpreted it as the possibility to arrange for the cessation or modification of the conduct (as with the cease-and-desist undertaking). This interpretation, however, is at the discretion of the Commission, and is not stipulated in the law.

A petition for reconsideration of a decision to end the proceedings may be filed for up to 10 days after notification of the decision. In the alternative, and within the same time period, an appeal may be filed with the higher authority, namely the Minister.¹⁷⁵ The final decision to impose a fine has executory force.¹⁷⁶

D. Procedure for enquiries

Article 46 of the Regulations provides for a procedure, not commonly found in competition regulations, that allows individuals to submit enquiries about action they are taking or intend to take, action taken by others, or concentrations.

When the enquiries concern action taken by itself, the party submitting the enquiry will decide, on formulating its request, whether or not the outcome will be binding for the enforcement agency.¹⁷⁷ If not, the party should submit all the evidence it considers relevant, and the response of the enforcement agency should be given within the following 30 working days.

In the event that the outcome is binding, the enforcement agency will have the same powers of investigation it is granted by law for the analysis of cases, and individuals will have a duty to cooperate with the investigation. If the applicant complies fully with the decision issued by the competition authority, the latter will be bound by the findings contained

therein.

Requests for binding reviews of action taken by third parties cannot be made.

This procedure, especially in the case of binding reviews, could divert the resources and work of the authority, which could find itself obliged to first carry out a full investigation and then, if it finds that a given action is in violation of the law, to bring comprehensive punitive proceedings. This risk would be reduced if, for example, the authority could choose whether to issue an opinion and its opinions referred to general criteria and interpretations rather than to specific facts or situations.

E. Judicial review of decisions

Final decisions issued by the Commission may be challenged in court. The Administrative Court, established by article 307 et seq. of the Constitution, has jurisdiction over these cases.

The Court is not specialized in this field; rather, it is a general court for matters of public law that hears petitions for the annulment of final administrative decisions on grounds of legality. In its rulings, the Court may uphold or overturn administrative decisions, but it may not amend or replace them.¹⁷⁸ The Court's rulings apply only to the case in question when the petition concerns a specific administrative decision. If the petition targets widely applicable administrative decisions, the decision has *erga omnes* effects.¹⁷⁹

A distinguishing feature of the Uruguayan system is that nullification of a decision and compensation for damages are not considered in a single action. Instead, "the claimant may opt to request either the nullification of the decision or compensation for the damage caused by it. In the first case, and if the decision is annulled, the claimant may seek compensation before the appropriate court. The claimant may not, however, request nullification if he/she opted first to bring an action for damages, regardless of the content of the respective decision."¹⁸⁰

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

V. COMPETITION LAW ENFORCEMENT

Article 1 of Act No. 18.159 establishes the two key functions of the Uruguayan competition authority: the promotion and the defence of competition. In the following sections, we will analyse the experience of the Commission on the Promotion and Defence of Competition in enforcing the law since the Commission was set up in 2009.

A. Defence of competition

The defence of competition takes two forms: the investigation of anticompetitive practices and the analysis of economic concentrations. From 2009 to 2015, the Commission on the Promotion and Defence of Competition resolved 118.5 cases.¹⁸¹ These covered 65.5 investigations, 23 preparatory studies¹⁸² and 30 cases of economic concentration. On average, 23.6 cases were resolved each year. As shown in table 5, most of the cases brought and resolved stemmed from complaints by economic agents. The authority initiated only one ex officio investigation per year.

Because of budgetary and human resource constraints, the Commission has little leeway for drawing up a research agenda that would allow it to focus its efforts on the cases with the biggest impact on the market and consumers. The International Competition Network has pointed out that strategic planning, which involves prioritizing objectives and actions, is especially important for small agencies with scarce resources if they are to be more effective in enforcing the law.¹⁸³

According to the Commission's figures for 2014, the average duration of investigations into prohibited practices is over one year, given the time needed to

process the evidence and the complexity of this type of case. The average time taken for cases that lead to investigations is 28.3 months.¹⁸⁴ It should be noted that only one case has been resolved by use of the "cease-and-desist" mechanism. Moreover, even though one of the purposes of this mechanism is to expedite a resolution, the case still lasted 33 months.¹⁸⁵ Table 5 gives information on the cases opened and resolved.

Of all the investigations carried out, 15 resulted in the imposition of sanctions by the competition authority for anticompetitive practices. Most of the cases in which the Commission handed down sanctions were related to vertical agreements or abuse of dominant position; a few concerned horizontal agreements. The biggest fine was issued in a case that involved limiting market access and an exclusivity agreement.

As a result of its investigations, the competition authority sanctioned 30 economic agents. Most of these are companies in the private sector. In nine cases, a total of 15 economic agents received a warning about using anticompetitive practices. In the remaining six cases, a total of 15 economic agents were fined.

In relation to the maximum amounts permitted under article 17 of Act No. 18.159, the fines imposed were for the most part relatively low. Ten of the agents were fined 100,000 UI (about US\$ 11,048). Even so, in at least one case the complainant benefited from the leniency programme on grounds of extenuating circumstances. This kind of programme tends to be successful when the penalties imposed are relatively stiff.

The differences in the sanctions imposed in some cases are striking. For example, there are significant

Table 5. Number of cases concerning prohibited practices and concentrations, 2009-2015

	Cases opened							Cases resolved							
	2009	2010	2011	2012	2013	2014	2015	2009	2010	2011	2012	2013	2014	2015	
Investigations	14 ^a	13	14	6	8	6	8	4.5	12	13	9	10	7	10	
Following complaints	13	13	13	5	7	5	8	4.5	12	13	7	9	4	9	
Ex officio	1	0	1	1	1	1	-	0	0	0	2	1	3	1	
Preparatory studies	4	3	4	5	-	3	5	3	1	4	1	5	1	4	
Investigating concentrations	5	1	5	3	7	6	6	3	2	3	3	8	7	4	
Total							126							118.5	

Source: Based on statistics taken from the reports of the Commission on the Promotion and Defence of Competition for 2009-2014.

^a The Commission on the Promotion and Defence of Competition began its work by taking up seven cases from the Directorate-General for Trade, all dealing with complaints of ongoing anticompetitive practices.

Table 6. Cases of anticompetitive practices investigated and sanctioned, 2009-2015

Name/case	Decision	Date	Conduct	Sanction	Agents implicated
2042/2008	18/010	08/04/2010	Obstructing commercial operations of a third party	Warning	Banca de Cubierta Colectiva de Quinielas
Poultry market: alleged efforts to raise prices	20/010	20/04/2010	Non-cooperation	Warning	Poultry business
Laboratorio Fármaco Uruguay SA v. Ciame Ltda and Biocare SRL	19/011	22/03/2011	Non-cooperation	Warning	Three medical-equipment suppliers
Transport and tourism operators in Maldonado	70/011	21/06/2011	Barriers to entry	Warning	Maldonado city council
Biocare SRL and Ciame Ltda v. Laboratorio Fármaco Uruguayo SA and Herix SA	81/011	19/07/2011	Coordinated submission of tenders	Warning	Two laboratories
Laboratorio Fármaco Uruguay SA v. Biocare SRL and Ciame Ltda	86/011	01/08/2011	Tied sales	Warning ^a	Supplier of medical goods and equipment
12/2010	70/012	11/11/2012	Predatory pricing and non-cooperation	Warning	Aviation company
2/2011	72/012	21/11/2012	Price-fixing	Fine of 100,000 UI (approx. US\$ 12,883)	Civil Navigation Association
2070/2008	51/013	10/04/2013	Limiting access and entering into exclusive agreements	Fine of 10 million UI (approx. US\$ 1,378,826)	Drinks company
4/2010	128/013	23/10/2013	Predatory and abusive pricing practices	Fine of 2 million UI (approx. US\$ 254,108)	Tobacco company
9/2013	3/014	16/01/2014	Non-cooperation	Warning	Two transport/food distribution companies
10/2011	10/014	20/02/2014	Agreement on market foreclosure	Fine of 100,000 UI each (approx. US\$ 12,392) ^b	Four medical laboratories and one medical insurer
16/2010	24/014	01/04/2014	Collusion ^c	Three companies fined 100,000 UI (approx. US\$ 12,605); two companies fined 2.6 million UI (approx. US\$ 327,750); one company fined 4 million UI (approx. US\$ 504,231)	Five producers and distributors of strained tomato pulp
18/2010	80/014	19/08/2014	Minimum price-fixing	Three distributors received a warning; one distributor was fined 170,000 UI (approx. US\$ 20,786); and the supermarket was fined 2 million UI (approx. US\$ 244,543)	One supermarket and four frozen-food wholesalers
10/2014	49/015	30/06/2015	Barriers to entry	Fine of 100,000 UI (approx. US\$ 11,625)	Taxi association

Source: Commission on the Promotion and Defence of Competition.

^a Investigation ended by an undertaking to cease and desist.

^b Decision revoked by the Ministry of Economic Affairs and Finance.

^c Investigation instigated by a complainant who benefited from leniency on grounds of extenuating circumstances.

differences in the sanctions imposed for cartels, which are usually considered the most harmful practice in terms of competition.¹⁸⁶ Obviously the sanction imposed depends on a number of factors, as set out in article 17 of Act No. 18.159. However, the differences are striking, and we suggest that guidelines should be drawn up to increase legal certainty and bring greater transparency to the process.¹⁸⁷

Of all the penalties handed down, only one had been revoked by the Ministry of Economic Affairs and Finance as at December 2015. In addition, in the course of an investigation into the Commission, it was determined that the latter had no jurisdiction in the market for lotteries and related bets, as this was considered to be a regulated sector.¹⁸⁸ The Administrative Court, for

its part, revoked a decision of the Commission and upheld the decision of the Ministry of Economic Affairs on the authority's jurisdiction in the case of regulated sectors.¹⁸⁹

Table 6 gives information on cases investigated and those in which sanctions were imposed.

1. Cases related to anticompetitive practices

Four of the most pertinent cases heard by the Commission on the Promotion and Defence of Competition are summarized below.

In view of its experience in enforcing the law on anticompetitive practices, the competition authority

Box 1. Case in the market for tomato-based processed foods^a

In October 2010, Timopel SA filed a complaint against Pancini Industrial del Sauce SA, Barraca Deambrosi SA, Vulcania SA, Gibur SA and Domingo Ghelfa for illegal practices, alleging that these companies had, together with the complainant, entered into various agreements to control the principal variables in the market for tomato-based processed foods.

In November 2010, the Commission on the Promotion and Defence of Competition agreed to the complainant's request for leniency on grounds of extenuating circumstances, as provided for in article 17 of Act No. 18.159 and articles 34 and 35 of Decree No. 404/2007,^b and signed an agreement defining the obligations and conditions to be met by Timopel SA.

Once the investigation had been completed, and on the basis of the technical reports prepared by the team of legal advisers,^c the Commission issued its final decision. To begin with, it defined the market concerned as the market for tomato-based foods processed in Uruguay.

The reports confirmed that: (a) the parties to the agreement, who were supposedly competitors, had access to information on the conditions of sale, taking advantage of the involvement of the printer Visión SA; (b) there was corroborating evidence of compliance with the conditions imposed by the parties to the agreement; (c) there was a "punishment" for anyone who deviated from the agreed or expected conduct.

The companies against whom the complaint was filed put forward a number of arguments to justify their behaviour, including: (a) working together allowed them to get better prices for the cans of strained tomato pulp, thanks to the volume purchased and the savings in freight costs; (b) the tomato market is highly competitive, so they are forced to compete on quality and costs; (c) the purpose of the agreement was to compete against imported products.

These defence arguments were rejected, mainly because this "buyer's club" did not allow them to save on costs, but rather to agree on market share and production quotas. Prices did not change when the companies entered into the agreement and there was no evidence of reduced freight costs.

The variation in prices did not meet expectations for a competitive market. There was no explanation for the sudden changes in price of some lines and not others, or for the simultaneous price cuts made by all the companies.

The volume of sales to the supermarkets studied was relatively stable throughout the period under consideration. There was virtually no increase in sales over the three years analysed. All this, according to the technical reports, revealed that there was little or no competition, which could be explained by the agreement on market share between the companies concerned.

Finally, according to a study on the price variations before and after the alleged agreement, “once the agreement was abandoned, there was a greater fluctuation in prices as a result of a more competitive market”.

In view of this, the Commission ruled that there had been an unlawful agreement in the form of a cartel whose purpose and effect was anticompetitive. It also found that there was no evidence that the arrangement was justified by efficiency gains.

The Commission confirmed that there had been an agreement to collude in setting market variables. It ordered an immediate end to the illegal conduct and fined the companies between 100,000 UI (approx. US\$ 12,605) and 4 million UI (approx. US\$ 504,231). The company that reported the case was exonerated under the leniency programme.

In deciding on the penalties, the competition authority took account of earlier penalties, the companies' cooperation in the investigation, the nature of the conduct observed and its effects on the market, the size of the companies and their role in the anticompetitive agreement.

^a Commission on the Promotion and Defence of Competition decision No. 24/014.

^b Commission on the Promotion and Defence of Competition decision No. 86/010.

^c Technical reports Nos. 63/013 of 21 August 2013, 8/014 of 27 February 2014 and 18/014 of 31 March 2014.

Box 2. Case in the market for manufactured cigarettesa^a

In April 2010, representatives of the Compañía Industrial de Tabacos Monte Paz SA filed a complaint against Abal Hermanos SA and British American Tobacco, Uruguay, for the alleged sale of their products at “prices close to or less than cost, basically charging only for the taxes on the products”.

Once the investigation had been completed, and on the basis of the technical reports,^b the Commission on the Promotion and Defence of Competition issued its final decision. The relevant market was defined as the market for all manufactured cigarettes in Uruguay, whether they were produced domestically or imported. The Commission found that Abal Hermanos SA had been engaging in illegal and abusive pricing practices, characterized as predatory pricing, and that these practices were not justified and brought no efficiency gains or benefits for the consumer.

The Commission said it could not consider the possible illegal practices of British American Tobacco, Uruguay, as the latter was responding to the conduct of Abal Hermanos SA by attempting to match the low prices so as not to lose market share; it could not do so for long and ended up virtually abandoning the market.

The competition authority concluded that Abal Hermanos SA had an “atypical dominant position” on account of its strength at the international level as a subsidiary of the multinational Philip Morris. It also

said that the structure of the market made a predatory pricing policy feasible because of the high barriers to entry.

As for the practice being looked into, the Commission found that Abal Hermanos SA had been selling below total cost since December 2009 and below average variable cost since March 2010 up to December 2010 at the least. Accordingly, the competition authority rejected the argument that it was a promotional exercise, since the price cuts applied to all the company's cigarette brands for at least the whole of 2010.

The Commission rejected the arguments that the company was trying to recover lost market share and increase sales volumes and its claims regarding the tax burden. According to the technical reports, "the price-reduction strategy dating from December 2009 had the opposite-to-intended effect, by deepening losses, so there was no justification for the conduct".

The Commission found that consumers suffered real and potential harm as a result of the displacement of a competitor and the increased restrictions on entry by new competitors.

In view of this, the competition authority ruled that Abal Hermanos SA had practised predatory pricing, and fined it 2 million UI (approx. US\$ 254,108).

In deciding on the penalties, the competition authority took account of the cooperation shown by the company during the investigation, the fact that the company had no history of illegal practices, its turnover and the duration of the practice.

^a Commission on the Promotion and Defence of Competition decision No. 128/013.

^b Technical reports Nos. 8/2010 of 5 August 2010, 76/012 of 27 December 2012, 28/013 of 22 March 2013, 31/013 of 11 April 2013 and 57/013 of 31 July 2013.

Box 3. Case in the market for frozen foods^a

In November 2010, the Commission on the Promotion and Defence of Competition decided to take a preparatory measure in the form of a study of competition conditions in the market for frozen foods, particularly as regards price formation.^b

In October 2011, the Commission instigated, ex officio, an investigation into the possible existence of anticompetitive practices in the wholesale market for frozen foods.^c As a preventive measure, the Commission ordered Graba SA, Maosol SA, CE.ME SA and Greenfrozen SA to end the practice of setting minimum retail prices. It also, as another preventive measure, ordered Macromercado Mayorista SA and Supermercados Disco del Uruguay SA to end the practice of requiring distributors of any of their products to set mandatory minimum retail prices.^d

Once the investigation had been completed, and on the basis of the technical reports,^e the Commission issued its final decision. To begin with, it defined the market concerned as the market for frozen and deep-frozen foods processed in Uruguay, except for cakes, frozen desserts, ice cream and frozen pastries. Despite this, the competition authority identified other markets in which illegal practices were carried out: the market for ice cream and frozen desserts and the market for frozen pastries.

In addition, the Commission found that a number of illegal practices were being carried out in violation of articles 2 and 4 (A) of Act No. 18.159. Specifically, Supermercado Disco del Uruguay SA was repeatedly pressuring Graba SA to require some of its clients to practise a minimum retail price for its products.

Graba SA set mandatory minimum retail prices for the products it distributes. For this purpose, it set up a system to monitor and control their use, as well as to penalize anyone who failed to apply them.

In the case of Maosol SA, the Commission found it was actively involved in implementing a monitoring and control system in order to ensure that its clients complied with the minimum retail prices, under threat of having deliveries cut off.

CE.ME SA admitted that it had asked some clients to adopt a certain pricing level but tried to justify this conduct by claiming it was an exceptional response to specific circumstances.

Greenfrozen SA was presumed to have engaged in illegal practices as it did not attend the hearing or contest the charges.

Finally, the Commission found that there was insufficient evidence that Macromercado Mayorista SA had engaged in illegal practices.

The Commission considered that none of the proven practices could be justified by efficiency gains that could be passed on to consumers.

The Commission ordered Graba SA, Maosol SA, CE.ME SA and Greenfrozen SA to put an end to the practice of setting mandatory minimum retail prices for their clients, and to notify every client that they would no longer be providing the lists in question and that each company was absolutely free to set the price to consumers. It also ordered Supermercados Disco del Uruguay SA to put an end to the practice of requiring distributors of any product for sale to the public to set mandatory minimum prices.

The Commission imposed fines of 2 million UI (approx. US\$ 244,543) on Supermercados Disco del Uruguay SA and 170,000 UI (approx. US\$ 20,786) on Graba SA, and issued warnings to Maosol SA, CE.ME SA and Greenfrozen SA.

In setting the fine, the Commission considered as extenuating factors the fact that the companies investigated had no previous history of engaging in the practices in question, as well as their attitude during the investigation, insofar as they expressly or implicitly admitted that they had engaged in such practices.

In addition, it took into account the extent of the companies' involvement, acknowledging that it would be very difficult for some of them to meet their tax obligations and pay the fines for which they were liable. It further took into account the seriousness of the conduct and the intentions of Supermercados Disco del Uruguay SA and Graba SA.

- ^a Commission on the Promotion and Defence of Competition decision No. 80/014.
- ^b Commission on the Promotion and Defence of Competition decision No. 92/010.
- ^c Commission on the Promotion and Defence of Competition decision No. 118/011.
- ^d Commission on the Promotion and Defence of Competition decision No. 133/013.
- ^e Technical reports Nos. 58/011 of 26 August 2011, 73/013 of 8 October 2013, 78/013 of 5 November 2013, 11/014 of 5 March 2014, 13/014 of 13 March 2014 and 73/013 of 8 October 2013.

Box 4. Case in the market for beer^a

The case arose out of a complaint filed by Osanil SA against Fábricas Nacionales de Cerveza SA for allegedly engaging in seven anticompetitive practices: (a) refusing to offer products of the Heineken brand for retail; (b) limiting display space in supermarkets; (c) distorting and restricting the repositioning of Heineken products in supermarkets; (d) exclusion from refrigerators in supermarkets; (e) distorting the distribution chain for Heineken products by withdrawing bottles/cans; (f) distorting the distribution of Heineken products; and (f) abuse of dominant position by engaging in the specific practices that are the subject of the complaint.

In August 2009, the Commission on the Promotion and Defence of Competition decided to exclude the distortion of the distribution chain caused by withdrawing bottles/cans from the list of practices under consideration, as this would be a criminal offence and, as such, a matter for the criminal justice system.^b

Once the investigation had been completed, and on the basis of the technical reports,^c the Commission issued its final decision. To begin with, it defined the market concerned as the market for beers in general throughout the country. The competition authority found that Fábricas Nacionales de Cerveza had a dominant position in the market, in that it was responsible for 97-98 per cent of domestic production of beer.

As regards the practices that are the subject of the complaint, the Commission drew the following conclusions.

The investigation into various retailers, supermarkets and other economic agents revealed no restrictions on the display space for Heineken beer in supermarkets; no distortions or limitations on repositioning that brand's products in supermarkets; and no practices that would distort the distribution of Heineken products.

As for exclusion from refrigerated space, the Commission considered that the allocation of end-of-aisle spots and refrigerated displays is subject to payment and is therefore indicative of the presence of a market. It pointed out that the Commission's aim is not to eliminate existing markets but to promote free competition in them so as to guarantee access on an equal footing for all suppliers to distribution channels. In addition, it pointed out that so-called end-of-aisle spots cannot be considered as critical necessities for the sale and distribution of products.

As regards the offer of Heineken products in the retail trade, the investigation revealed that Fábricas Nacionales de Cerveza was offering retailers discounts for limiting the sale or even display of its competitors' products.

As regards the anticompetitive effects of such conduct, the competition authority said that, although it was not possible to quantify the harm caused, restricting competition in the only subsector of the relevant market in which more than one company was active — namely, the market for imported beers — had negative effects not only for consumers in that subsector but also for the functioning of the market as a whole. Furthermore, it pointed out that the falling share of Heineken and the growth of Stella Artois took place at the same time as the illegal practice was going on. The Commission considered that the practice could not be justified by efficiency gains or on any other grounds.

The Commission on the Promotion and Defence of Competition ordered Fábricas Nacionales de Cerveza SA to put an immediate end to the practice of limiting access for Heineken beer to retailers, which it had been doing by offering retailers discounts for not selling that brand of beer. The Commission found this practice to be a violation of articles 2 (2) and 4 (A) of Act No. 18.159. Consequently, it fined Fábricas Nacionales de Cerveza SA 10 million UI (approx. US\$ 1,378,826) for the anticompetitive conduct noted in paragraph 5.

In deciding on the penalty, the competition authority took account of the clearly deliberate nature of the conduct, the fact that the company was a reoffender,^d and the company's reluctance to cooperate in the investigation into its discount policy.^e

^a Commission on the Promotion and Defence of Competition decision No. 51/013.

^b Commission on the Promotion and Defence of Competition decision No. 25/009.

^c Technical reports Nos. 9/010 of 23 September 2010, 88/011 of 3 November 2011, 98/011 of 13 December 2011, 49/012 of 6 September 2012, 55/012 of 28 September 2012, 66/012 of 1 November 2012, 73/012 of 14 December 2012 and 12/013 of 22 February 2013.

^d Fábricas Nacionales de Cerveza was sanctioned for engaging in anticompetitive practices by the Directorate-General for Trade in the latter's decision No. 61/008 of 2 July 2008.

^e The accused company did cooperate with the investigation, for example by providing the figures on discounts granted to Montevideo retailers, but did not provide clear or sufficient information on its discount policy.

has clearly demonstrated its ability to successfully carry out investigations that end in the imposition of corrective measures and fines on the economic agents concerned. However, a few specific changes could be made which would help the Commission to improve its decision-making, working and investigative methods, as well as its case management.

First, the Commission's decisions are based on various technical reports that address the points set out in Act No. 18.159 and that are typically analysed in competition-related matters. However, the Commission's final decisions are so cursory that it is difficult to follow the reasoning in a given case. The decisions of competition authorities usually set out all the legal and economic arguments that led the authority to take a particular decision.¹⁹⁰

This is especially important for newly established competition authorities, as it ensures their reasoning is transparent and helps create a competition culture.

Leandro Zipitria, an economist and competition specialist, commented as follows: "The decisions and technical reports of the Commission on the Promotion and Defence of Competition do not appear to have a clear structure that is followed in all cases. Moreover, some of them lack an adequate technical basis. This is because the decisions are not self-contained and therefore certain basic concepts such as the relevant market, dominant position and anticompetitive effects are not immediately apparent and need closer analysis. In short, decisions should not only reflect the Commission's position on the subject, but also promote awareness of competition issues by actors

who know little about them."¹⁹¹

Second, according to interviews with the team of advisers,¹⁹² there is no standard working method for dealing with cases; nor are there standardized procedures for carrying out investigations or producing technical reports. Some advisers even said there is little internal exchange of experiences and there are few technical meetings at which to analyse the legal and economic aspects usually raised by this type of case.¹⁹³ They also said it was necessary to better equip the team with the skills needed to investigate and analyse the anticompetitive practices related to the cases.¹⁹⁴

Nor is there a database that would allow better monitoring of the cases at different stages of the investigation. Such monitoring currently relies on an Excel sheet that contains only minimum information on the case.

It is vital for a new competition authority to have a proper knowledge management system that preserves institutional memory, especially in developing countries, which often have problems recruiting and retaining qualified personnel for budgetary reasons.¹⁹⁵

Knowledge management includes in-house training for new and inexperienced public servants,¹⁹⁶ properly documented records of the training received by staff, databases containing the relevant information, and internal reports, guidelines and manuals. Competition authorities should be building up their competence and producing lines of reasoning that can be shared and used in the future. In this way they can build their human and institutional capacity to effectively apply

competition law, and thereby provide legal certainty for the parties concerned.

Finally, there is no systematic monitoring of developments in the market after the imposition of sanctions; such monitoring could help identify and publicize the positive effects for the consumer.

2. Cases related to concentrations

The competition authority has done little work on concentrations, for the reasons noted earlier in the analysis of the relevant regulations. It has taken only one decision in this respect, sanctioning two economic agents for failing to give due notification of a concentration, although it has noted compliance with reporting requirements in other cases.¹⁹⁷

Of the 33 cases reported up to 2015, none required the authorization of the Commission under article 9 of Act No. 18.159, as no de facto monopoly had been formed.¹⁹⁸ Once it has been established whether or not the requirements of article 9 have been met, the Commission's decisions are limited to noting whether the information presented by companies complies with the requirements established in article 40 of Decree No. 404/007. If it does, it is taken that the formation of an economic concentration has been notified.

As pointed out by several members of the team of advisers, the reports of concentrations are recorded on an Excel sheet, but the information received is not analysed.¹⁹⁹ Some experts believe that the information required by the authority is excessive, given that the analysis is limited to its taking note of the transaction and change in the market.²⁰⁰

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

3. Competition advocacy

For the purposes of this report, competition advocacy refers to all the Commission's activities to promote a competitive environment, mainly through its relations with other government bodies or else by raising public awareness of the benefits of competition.²⁰¹

A substantial part of the Commission's work is to encourage other public bodies to adopt regulatory measures that stimulate competition, or to refrain from adopting measures that might harm it. It is also the Commission's job to promote a culture of competition between different sectors of society, such

as public institutions, the private sector and consumer associations.²⁰²

4. Legal powers

Act No. 18.159 gives the Commission the power to act as an advocate of competition. Article 26 states that the Commission may: (a) advise the executive branch on the promotion of competition and competition policy;²⁰³ (b) issue non-binding recommendations to the executive branch, the legislature, the judiciary, local authorities and public bodies and organizations regarding laws, regulations, municipal ordinances and other administrative acts or studies conducted by any of these bodies; (c) issue non-binding recommendations of a general or sector-specific nature on the practicalities of market competition.

Article 26 also states that the Commission may issue opinions or respond to enquiries from any individual or public or private legal person regarding specific measures they are taking or intend to take, or that others are taking.²⁰⁴ The Commission may also issue general standards and specific instructions that could contribute to meeting the goals of the competition law.²⁰⁵

5. Competition advocacy activities

The Commission's competition advocacy activities have basically focused on two areas: dealing with enquiries and publicizing competition legislation. Most of its activities in the field of competition advocacy are prompted by requests from various organizations or individuals or by a mention in a case file.²⁰⁶

From 2009 to 2015, the Commission handled 90 enquiries, of which 53 were informal²⁰⁷ and 37 formal.²⁰⁸ Of these, 14 were submitted by public regulatory bodies and 23 by individuals. On average, the Commission dealt with 18 enquiries a year.

According to the Commission's last report,²⁰⁹ formal enquiries were dealt with within the 30-day deadline established by law and informal enquiries were dealt with upon receipt.

The Commission has no system for monitoring the effects of its competition advocacy activities on the market, consumers, economic agents or institutions. Nor does it evaluate or quantify the potential or actual benefits of its actions. Nevertheless, some enquiries have led to complaints or investigations.²¹⁰

6. Relevant enquiries

Below are brief descriptions of some enquiries

Table 7. Enquiries handled, 2009-2015

	2009	2010	2011	2012	2013	2014	2015	2009	2010	2011	2012	2013	2014	2015
Enquiries	22	24	19	13	4	2	7	22	22	20	13	5	2	6
Regulatory and public bodies	2	4	4	2	1	1	-	2	2	5	2	2	1	-
Individuals	2	6	1	4	3	1	7	2	6	1	4	3	1	6
Informal	18	14	14	7	-	-	-	18	14	14	7	-	-	-
Total							91							90

Source: Annual reports of the Commission on the Promotion and Defence of Competition for 2009-2014.

Box 5. Study on public procurement rules^a

On 14 October 2014, the Commission decided to undertake a study on public procurement rules and, more specifically, article 33 (C) 1 of the Consolidated Text of the Accounting and Financial Administration Act, which lists the exceptional cases in which the State can enter into a contract directly or using a computerized procedure in the interests of good administrative practice.

When the study got under way, the Act had already been mentioned in the file on an investigation as grounds for awarding directly a contract that the complainant believed should have been the subject of a competitive process.

On the basis of technical report No. 15/015 of 12 March 2015, the Commission issued a non-binding recommendation to various public offices, urging them to use the procedure as a last resort and only in exceptional cases, and to give preference to competitive procedures that offer the advantages of free competition and a choice between multiple offers.

^a Commission on the Promotion and Defence of Competition decision No. 21/015.

Box 6. Enquiry about authorizations issued by the Ministry of Transport and Public Works — tests for drivers^a

In July 2015 the Biochemical Research Centre submitted an enquiry to the competition authority. It pointed out that there were a number of companies competing in the market that were “accredited” by the Ministry of Transport and Public Works and displayed a certificate to that effect in their tenders for various jobs. According to the Centre, this accreditation was not the result of a regulated and transparent procedure that was open to anyone. The office of the secretary of State denied handing out the certificates, saying it was not in a position to authorize or inspect medical centres.

On the basis of technical report No. 76/015 of 17 September 2015, the Commission concluded that the accreditation situation was not as described, and consequently that there was no explicit restriction on competition, which would have been an obstacle to one or more competitors wishing to provide the services in question. However, it found that the confusion created in the market did indeed have consequences that amounted to a restriction of competition.

Accordingly, the Commission issued a non-binding recommendation to the Ministry of Transport and Public Works, urging it to regulate access under a regime of free competition for all companies that met the technical requirements. This would enable them to offer a proper service of psychological and technical tests for professional drivers, granting ministerial authorization to this effect on an equal footing for all, and issuing the certificate in due course. Pursuant to this opinion, the Ministry granted accreditation to the Biochemical Research Centre.

^a Commission on the Promotion and Defence of Competition decision No. 77/015.

Box 7. Study on professional services^a

The competition authority commissioned a preliminary study on the rules governing collegiate or professional bodies in Uruguay,^b with the aim of promoting competition in this sector.

Once the investigation had been completed, and on the basis of the technical reports,^c the Commission concluded that the various collegiate or professional bodies have scales of fees that encourage or oblige their members, and even non-members, to set the fees for their professional services in line with guidelines drawn up by those bodies.

In the Commission's view, these fee scales, insofar as there is an expectation that they must be applied and they set fixed or minimum prices for services, amount to a recommendation designed to restrict, distort or prevent competition, as defined in articles 2 and 4 (A) and (J) of Act No. 18.159.

In defence of the fee scales, the collegiate bodies and associations argue that they are provided for by law and so are not subject to Act No. 18.159. They also say that professionals benefit from having such scales as they establish a payment for their work that is not arbitrary or subject to competition. They also claim that the fee scales avoid unfair competition and act as a reference point for charging for professional services; and that, moreover, if the fee scales were not actually used by a majority of professionals there would be no need to revoke them.

The Commission rejected all these arguments and instructed the collegiate and professional bodies investigated^d to abolish, within 90 days, the professional fee scales agreed by each association, as well as any internal rules governing their existence and use by members, and to confirm to the Commission that they had complied with these instructions. Exceptionally, the Commission authorized the Uruguay Notaries' Association to continue using and adjusting the official fee scale for the sole purpose of calculating contributions to the Social Security Notarial Fund.

The Commission also ordered that the abolition of the fee scales be publicized and decided to pursue the preliminary study of competition conditions in other markets for professional services.

The case was taken to the Administrative Court, which overturned the decision of the Commission on the Promotion and Defence of Competition.^e The court's main argument was that the Commission had not demonstrated that the imposition of prices for professional services was abusive or harmed the market. Without such evidence, according to the court, it is impossible to say that competition in the market is distorted or that consumers are harmed.

As regards the analysis requirement set out in the competition law, the court had this to say: "In summary, given that domestic legislation is not concerned with the existence of anticompetitive practices per se, but rather with practices that have the effect or purpose of distorting competition in the market concerned, it goes without saying that it is the responsibility of the enforcement agency, in this case the Commission on the Promotion and Defence of Competition, to duly prove the existence of the practice, conduct or recommendation in the terms required by law. In the judgment of the court, no such situation has been proven, and so the contested act is considered null and void."^f

^a Commission on the Promotion and Defence of Competition decision No. 49/011.

^b Commission on the Promotion and Defence of Competition decision No. 54/009.

^c The decision is based on technical reports Nos. 16/010 of 5 November 2010, 4/011 of 9 February 2011, 5/011 of 2 March 2011 and 7/011 of 10 March 2011.

^d The following collegiate and professional bodies were involved in the investigation: the Uruguay Bar Association, The Uruguay Notaries' Association and the Uruguay Association of Accountants, Administrators and Economists.

^e Administrative Court judgment No. 659/014. See also the Court's judgments Nos. 458/014 and 400/014.

^f Administrative Court judgment No. 458/014.

Box 8. Complaint submitted by Tekellmar SA and Isleña SRL against the National Directorate of Hydrography^a

In May 2013, Tekellmar SA and Isleña SRL filed a complaint against the National Directorate of Hydrography of the Ministry of Transport and Public Works, for allegedly engaging in the illegal practice of discrimination in the collection of mooring fees, by exempting a number of vessels from payment of such fees while systematically collecting them for vessels belonging to the complainants, even though the same rules applied to all the vessels.

Once the investigation had been completed, and on the basis of the technical reports prepared by the team of legal advisers,^b the Commission defined the relevant market as the market for the transfer of persons, merchandise and materials to boats in the Delta Zone, the loading buoy for oil products, cruise ships, and any other commercial activity performed by shipping in the port of Punta del Este.

The Commission ruled that there was unequal treatment in the collection of fees, and that this affected competition in the market, in violation of article 4 C of Act No. 18.159.^c

However, the Commission decided to issue a non-binding recommendation rather than any sanction, as another ministry was involved.

^a Commission on the Promotion and Defence of Competition decision No. 110/013 of 17 September 2013.

^b Technical report No. 62/013 of 21 August 2013.

^c Article 4 (C) prohibits the application of “unjustifiable and unequal conditions to third parties, thereby placing them at a serious disadvantage in relation to the competition”.

related to anticompetitive practices, as well as a competition-based analysis of laws, decrees and other administrative acts.

7. Dissemination and training

The competition authority has organized a series of courses,²¹¹ workshops and seminars to publicize and offer training in the principles of competition. These activities have been aimed at various actors such as business people, public servants, regulators, lawyers, consultants and academics, sometimes with support from other competition authorities²¹² or international organizations.²¹³

In some cases, these activities have been coordinated directly with the private sector. In 2009, the competition authority signed and implemented several cooperation agreements with business associations²¹⁴ with a view to promoting and defending competition in markets. Under these agreements, presentations were organized to publicize the rules and procedures for the defence of competition²¹⁵ and a first information leaflet was published and distributed by the business associations and the authority itself.

In 2010, business people were surveyed to see how much they knew about the legislation. The results revealed that only one in eight business people were

even aware of the existence of Act No. 18.159 and the Commission on the Promotion and Defence of Competition.²¹⁶ If the survey were to be held again now, it is very likely that the results would be far better, several years after the entry into force of the Act. It emerged from meetings with various chambers of commerce, consultants and specialized lawyers that, even though the sample was not scientifically selected, the majority of them clearly understood the scope of the law.²¹⁷

8. Communication

The Commission on the Promotion and Defence of Competition undertakes no proactive or planned communication activities, and has no formally defined communications plan. However, it does respond to queries on procedures under way and to information requests from the news media.²¹⁸

The issues of most interest to the media are those related to complaints and investigations into anticompetitive practices, and the structure and workings of the Commission itself.²¹⁹ The media interest since 2010 has considerably boosted the publicity given to the Commission's work.²²⁰

In general, there is good media coverage of the important cases brought before the Commission,²²¹

and in some cases it has been quite positive. For example, the *Búsqueda* weekly magazine said on 30 August that: “There is widespread support in the private sector for the work of the Commission, whose impartiality and professionalism in dealing with cases are particularly appreciated, according to research done by *Búsqueda*.”²²²

The Commission has a website²²³ that gives information on legislation and on the institution itself, as well as basic technical information and the texts of decisions and reports on various matters brought before it. The website is regularly updated.

9. Relations with other institutions

Under article 26 (l) of Act No. 18.159, the Commission is required to maintain relations with other national bodies. To do this, the Commission has held meetings with the other bodies that implement competition law.

In 2009, the Commission held meetings with the regulatory bodies. This gave rise to the initiative to organize workshops attended by all the regulatory bodies. The idea was to coordinate the work on specific issues, exchange ideas and agree on general policies.²²⁴

Monthly meetings were organized with the Central Bank of Uruguay, the Regulatory Authority for Energy and Water Services (URSEA), the Regulatory Authority for Communication Services (URSEC) and the Commission on the Promotion and Defence of Competition. The following topics were discussed: a general guide to methodology, criteria for identifying the relevant market, and economic concentrations. These technical workshops continued in 2010, but not all the outcomes on these topics have been finalized.

All in all, it must be recognized that the Commission has made major efforts in the areas of consultation and dissemination. However, just as in its defence of competition, the Commission has been in reactive rather than proactive mode in its advocacy activities. Because of the constraints mentioned earlier, the Commission has very little room to manoeuvre in terms of setting a strategic agenda in this area.

For example, the advocacy activities could be focused on a limited number of cases selected on the basis of: the likelihood of a recommendation being adopted; the potential and actual impact of the policy; the other authority’s openness to receiving an evaluation of the competition; the extent to which the market has been liberalized; and the value added of a successful

evaluation of competition as compared with that of other promotional activities or as a complement to the introduction of competition.²²⁵

The potential impact of these activities depends not only on the extent and nature of any possible restrictions on competition, but also on the importance of a given sector to the domestic economy (as measured, for example, by its contribution to gross domestic product (GDP), its relationship with other economic sectors, its importance to investment, productivity and innovation, or improvements in distribution or business processes as a result of competition-friendly reforms in the sector); or its importance to consumers (as measured, for example, by the proportion of consumer spending that goes on the products or services in question, the fact that the goods or services are purchased by the Government, or the likelihood that pro-competition reform will improve the quality of life of vulnerable consumers).²²⁶

Other advocacy activities that have had a major impact in some countries include the promotion of voluntary compliance programmes for companies and voluntary codes of conduct for business associations. This enables the competition authority to broaden the scope of its work and introduce incentives to comply with the law.

It is vital to step up these efforts to promote a competitive environment, mainly through the competition authority’s relations with other governmental bodies, and to raise public awareness of the benefits of competition. As pointed out by the Organization for Economic Cooperation and Development (OECD), the competition authority’s guidance is essential when a market economy is at the stage of being established and consolidated. The authority plays a very important role in explaining the scope of competition law²²⁷ and the benefits it brings.²²⁸

Daniel Hargain argues along the same lines: “In my opinion, it would be advisable for the Commission to make use of its powers under article 26 of Act No. 18.159 to hand down some general rules and give specific instructions that would help meet the objectives of the law; and to issue non-binding recommendations addressed to the branches of government and public bodies and to the different sectors of private activity. There are many practices on which there is no clarity as to whether or not they are anticompetitive, and if it were to study them and issue an opinion on them, the Commission would

considerably improve the competition culture in the country.”²²⁹

The public sector in Uruguay has a strong presence in the economy, either as a direct participant or as a regulator. The Commission should therefore play a central role in advising public institutions and

evaluating regulations that might restrict competition. It is also important to set up training programmes for the judiciary, especially at the Administrative Court, which reviews the decisions of the enforcement agency, and for those social actors to which the competition authority is accountable.

VI. REGULATED SECTORS

One of the strategic aspects of an effective competition policy is the relationship between the competition authority and sectoral regulators. Regulated sectors tend to have a significant impact on a country's economy and consumers, and yet it is not unusual for some to be excluded from the scope of competition law.

This aspect is relevant to both advocacy and enforcement. The promotion of competition in regulated sectors can take place at two levels. First, the competition authority can attempt to have a say in the rules that govern the operations of a sectoral regulator, especially by ensuring that competition concerns are taken into account when the regulatory system is being set up or reformed. Second, advocacy can take place at the enforcement level,²³⁰ particularly when the sectoral bodies have some degree of power over the enforcement of competition principles in their sector.

Regarding the enforcement of pro-competition rules, it is essential to be clear on the way in which the two agencies coordinate investigations. For example, in some countries, the competition authority has the power to enforce competition rules in regulated sectors, after prior consultation with the regulator; in other countries, this power lies with the regulatory body, after prior consultation with the competition authority. Other laws provide for a mixed system in which the competition authority is responsible for investigating anticompetitive conduct while the sectoral regulator monitors concentrations.

A. Enforcement of competition rules in regulated sectors in Uruguay

In Uruguay, lawmakers chose to grant broad powers to the regulatory bodies to enforce competition law. Article 27 of the Defence of Competition in Trade Act stipulates that in all sectors subject to the “oversight or supervision of specialized regulatory bodies, ... the protection and promotion of competition is the responsibility of those bodies”.²³¹ This power is exclusive and does not apply to sectoral regulatory bodies, which can, if they deem it appropriate, request non-binding advice from the Commission.

This power also extends to markets that might be related to a regulated market, either horizontally or vertically, insofar as the relationship may affect the competitive conditions in the regulated market.

However, in order to determine whether it does affect conditions in a given market, an investigation needs to be carried out ahead of time by the sectoral regulator. Thus, in the event of actions that affect more than one market, only one of the markets involved need belong to a regulated sector for the Commission to be excluded from examining the case.

The appositeness of setting up a single authority to enforce competition law in all markets is, in theory, up for debate. However, the discussion is justified and makes more sense when the alternatives to the competition agency have clear mandates and robust substantive rules, paired with dissuasive penalties. The dilemma facing Uruguay is whether or not the transfer of competition cases to such authorities substantively helps combat anticompetitive conduct in the various sectors.

The position taken by the Uruguayan lawmakers has not gone uncriticized. For example, some authors have described the legal provisions as “worrying” and likely to lead to legal uncertainty and inconsistency in the enforcement of competition principles.²³² Another disadvantage raised by local experts is that “the enforcement of competition law is not a priority for regulatory bodies, which are focused on ensuring that the economic agents operating in the sector in which they exercise oversight are effective and financially sound, even if this is detrimental to competition and efficiency. Moreover, the regulatory bodies take into account the short-term consequences their decisions may have in terms of the maintenance or loss of jobs in regulated businesses, prioritizing this aspect over considerations of the benefits to the economy as a whole and to consumers.”²³³

The situation addressed by these criticisms is made worse when, as happens in practice, the law is interpreted broadly. For example, in a case dealing with sports bets, the Ministry of Economic Affairs and Finance, against the advice of the Commission, ruled that the activity had to be authorized by the National Lotteries Directorate, which is responsible for enforcing the law that is relevant to its mandate and is therefore the competent body to examine complaints of anticompetitive conduct.²³⁴ This decision was upheld by the Administrative Court.²³⁵

This broad interpretation of the concept of the “regulated sector” could lead to the inclusion of a range of activities within the ambit of article 27 of the Act, considerably reducing the Commission's scope

of action. This could lead to potential inconsistencies in the opinions and interpretations of the various authorities and uncertainty among businesses regarding how their activities are regulated, and could leave the enforcement of competition law to authorities that have other regulatory priorities. All this further hinders the competition authority's ability to promote compliance with the Act and to fulfil its mandate.

B. Principal regulated sectors

The following paragraphs deal with how the competition policy has been enforced in the principal regulated sectors.

These sectors have a number of common features. For instance, in all cases, there is an institution designed to exercise the typical powers of a sectoral regulator but for which the issue of competition is not a priority. In addition, in all cases, the market consists of both public and private players. Lastly, from an institutional standpoint, the regulators are not much more independent than the competition authority itself because, with the exception of the Office of the Superintendent of Financial Services, they are decentralized bodies that report to the executive branch, which not only hears appeals against their decisions but can also take over the role of the regulator, in addition to appointing and removing its members.

The lack of meaningful sanctions in cases in which the regulator confirms that anticompetitive practices have occurred is also striking.

1. Banking and financial sector

The oversight of banking activities is governed by the Charter of the Central Bank of Uruguay (Act No. 16.696), pursuant to which the Central Bank is responsible, through the Office of the Superintendent of Financial Services, for the regulation and supervision of the entities that make up the financial system, irrespective of their legal nature and of whether or not they have legal personality.²³⁶

The supervised entities include banks, non-bank financial institutions (e.g. financial companies, financial intermediary cooperatives, currency exchanges and credit managers), pension fund managers, insurance companies, mutual funds, and stock market firms (e.g. stock exchanges, stock brokers, investment fund managers and fiduciaries).²³⁷

The duties and powers of the Office of the Superintendent include the imposition of sanctions

in the shape of statements of fact, warnings and fines of up to 10 per cent of a bank's minimum legal liability, on entities that breach the laws and decrees governing their activities or the general rules or specific instructions relevant to them.²³⁸ In addition, the Office of the Superintendent can recommend to the board of the Central Bank that it apply harsh financial sanctions or other measures, such as intervention, the suspension of activities or the revocation of an authorization or licence to operate.²³⁹

In terms of competition, the Office of the Superintendent has initiated actions in relation to mergers and acquisitions in the sector both ex officio and in response to complaints. Thus far, six actions have been undertaken ex officio and two following complaints.

The ex officio actions found nothing untoward about the concentrations being investigated. The complaints both related to credit card services. In the first, the complainant, the Pirlápolis Association of Hoteliers, alleged that there was a cartel, but the Office of the Superintendent concluded that there was no indication of collusion in the setting of charges. In the second, which was initiated following a complaint by a business called Lumary, the subject was an alleged abuse of dominant position; it was found that Lumary had not been harmed by the reported conduct and the case was terminated. In both cases, the complainants' appeal at the administrative level was dismissed.²⁴⁰

2. Energy and water

The Regulatory Authority for Energy and Water Services (URSEA) was established pursuant to Act No. 17.598 as a decentralized body of the executive branch, without prejudice to the latter's power to adjudicate related matters. URSEA regulates activities in the areas of electricity, natural gas, drinking water, waste water, fossil fuels, agrofuels and steam generators.

Its functions include defining technical standards, setting rates, ensuring quality control, processing complaints and reports, and imposing sanctions. It also has the authority to protect the rights of the consumers and users of relevant services and to arbitrate disputes between operators in the sector.

Thus far, URSEA has processed two competition cases, both related to the investigation of alleged anticompetitive practices. In the most serious case,²⁴¹ involving the market for liquefied petroleum gas, URSEA examined an agreement between various

businesses in the sector which contained a number of potentially anticompetitive clauses. Among other steps, URSEA requested the businesses concerned to modify “the negotiable provisions of the agreement that produce barriers to competition, such as the clause on not competing with each other” and to inform it of their efforts in that regard.²⁴²

Two notifications have been received regarding economic concentrations, but no investigation has been initiated in either case.

3. Telecommunications and electricity

The regulatory body for telecommunications is the Regulatory Authority for Communication Services (URSEC), a decentralized body of the executive branch set up pursuant to Act No. 17.296 and headed by a three-member board appointed, and if necessary removed, by the President of the Republic.²⁴³

It is responsible for the technical regulation, supervision and oversight of telecommunications activities, as well as postal services.²⁴⁴ It is also responsible for granting authorizations to operate, monitoring compliance with technical standards, managing the radio spectrum,

issuing and ensuring compliance with technical regulations, receiving and processing complaints from users, imposing sanctions and carrying out other tasks related to its broad regulatory and oversight powers.²⁴⁵

The sanctions that URSEC can impose include the issuance of statements of fact and warnings, confiscation of the instruments used to commit the infraction, fines, suspension of activities and revocation of the authorization or concession.²⁴⁶

Thus far, URSEC has processed 30 competition cases, all in relation to anticompetitive practices. It has not received any requests for analysis of a concentration.

Of the cases resolved, case No. 2009/1/1537 stands out: ANTEL (the State telecommunications company) was prohibited from repeating a particular commercial offer as it did not allow consumers to order each of the services separately on the same financial conditions. In case No. 2011/1/888, it was found that the reported actions (in connection with an ANTEL special offer) did not cause any actual harm, but their suspension was nonetheless ordered to avoid any possibility of doing so.²⁴⁷

VII. INTERNATIONAL COOPERATION MECHANISMS

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

A. Participation of the Commission on the Promotion and Defence of Competition in MERCOSUR

The most important instruments the Commission can draw on to ban practices and concentrations with cross-border effects are: the Agreement on the Defence of Competition in MERCOSUR,²⁴⁸ supplemented by Decision No. 15/06, adopting the cooperation agreement between the competition authorities of MERCOSUR member States on the control of economic concentrations of regional scope;²⁴⁹ and Decision No. 04/04 adopting the memorandum of cooperation between the competition authorities of MERCOSUR member States on the enforcement of national competition laws.²⁵⁰

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

Consultation can take place when proceedings in connection with an anticompetitive practice or economic concentration that occurs under the jurisdiction of one State party have an impact on the interests of another State party, or when natural or legal persons located in the jurisdiction of a State party engage in anticompetitive practices or economic concentrations that substantially or adversely affect the interests of another State party.²⁵¹

The notification system comes into play when an action: “(a) is relevant to the enforcement or implementation efforts of another Party; (b) is likely to have an impact on the relevant interests of another Party; (c) relates to a restriction of competition likely to have a direct and substantial impact in the territory of another Party; or (d) relates to anticompetitive practices or economic concentrations occurring chiefly in the territory of another Party”.²⁵²

The competition authorities of the States parties can also coordinate their enforcement activities in specific cases, subject to the competition laws in force in the jurisdiction concerned.²⁵³ Aspects that can be coordinated include: obtaining additional information; keeping down costs for the competition authorities and economic agents; and harmonizing the applicable time frames under the various competition laws. The States parties should do their utmost to resolve problems arising from any discrepancies.

The Agreement also provides for a technical cooperation and information exchange mechanism that involves sharing knowledge and information, the training of officials, the participation of staff as lecturers and consultants in events on competition-related issues, and staff exchanges.²⁵⁴

The members of the Commission on the Promotion and Defence of Competition regularly attend the meetings of the MERCOSUR Technical Committee on the Defence of Competition (Technical Committee No. 5) to advance the incorporation into domestic legislation of common rules and the sharing of practical experience that might be useful to the various countries. Perhaps one of the most important meetings they attended was on the negotiations between MERCOSUR and the European Union regarding a possible free trade agreement.²⁵⁵

It should be noted that, while current MERCOSUR regulations encompass a number of instruments relevant to the prohibition of practices and concentrations with cross-border effects, the instruments have not yet been invoked in any specific cases.

B. Relations with other competition authorities and participation in competition networks

The Commission also takes part in other competition forums that promote cooperation and technical assistance.

Specifically, it regularly attends the Latin American Competition Forum, organized by the Inter-American Development Bank and the Organization for Economic Cooperation and Development (OECD); the Ibero-American Competition Forum, held by the National Markets and Competition Commission; the Regional Trade and Competition Forum, organized by the Latin American Economic System and UNCTAD; and the distance-learning course on competition policy

run by the Inter-American Development Bank.²⁵⁶ In addition, the Commission has been a beneficiary of UNCTAD's Competition and Consumer Protection for Latin America (COMPAL) programme since 2012 and it joined the board of the Regional Competition Centre for Latin America in December 2015.

The Commission has also established relations with other competition authorities, including the Spanish National Markets and Competition Commission, through its regular participation in meetings at the

Ibero-American School of Government and Public Policy, and the authorities of Brazil and Mexico, through staff internship programmes.²⁵⁷

Without a doubt, relationships that promote the sharing of experience between competition authorities are invaluable for enhancing the technical capacities of any authority, institution and other economic agent involved in the enforcement of competition law. This is particularly true of new agencies that are in the process of training their staff.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

It is obvious from the above that the Commission on the Promotion and Defence of Competition has made considerable efforts despite its scarce resources and the limitations of Uruguayan legislation. Still, it is difficult for a small new agency, with few personnel and little autonomy, to achieve the objectives of Act No. 18.159.

Notwithstanding the noteworthy efforts being made, improvements could be made in a number of areas, at both the regulatory and the institutional level, in order to create a more robust system for the protection and promotion of competition that will ultimately enhance consumer welfare and the competitiveness of the national economy.

From a legal perspective, Act No. 18.159 and its regulations reflect the generally accepted principles of competition law and are a substantial improvement over previous legislation. However, a number of improvements would be worth analysing with a view to enhancing legal certainty, clarity and predictability and enforcing the law more effectively.

At the institutional level, the Commission could be strengthened by endowing it with sufficient resources and increasing its autonomy. The Commission itself could make adjustments to its internal organization that would also lead to the more effective fulfilment of its mandate.

The following recommendations are aimed at improving various aspects of the promotion and protection of competition in the market.

B. Recommendations

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

Substantive aspects of the law

Scope

Although Uruguay's competition law is in line with international best practice in that it has a broad scope, both substantively and geographically, other regulations and interpretations allow a large number of exceptions to be made. Accordingly, it is recommended that the necessary regulatory amendments should be made to restrict this possibility.

Doing so would make it possible to improve the enforcement of competition policy across the various sectors of the economy and thereby reap benefits for a larger number of consumers. It would also increase legal certainty by clarifying which areas are subject to the law and which are excluded.

Regulation of anticompetitive practices

The rules on prohibited practices are one of the areas where there is the greatest opportunity for improvement. The various amendments proposed below are all designed to enhance technical precision, increase legal certainty, promote consistency in analysis and facilitate the work of the Commission:

- (a) Categorize the various prohibited practices according to their characteristics, nature and gravity;
- (b) Establish the per se rule of analysis with regard to the so-called hard-core cartels, which are internationally recognized as particularly serious infringements of competition law;
- (c) Consider adopting a de minimis rule so that minor cases of prohibited practices are exempt from sanctions, especially if the preceding recommendation on the per se rule is accepted;
- (d) Share the burden of proof in proceedings where the rule of reason is being applied such that the Commission, as the prosecuting body, is responsible for demonstrating the occurrence of a practice and its anticompetitive effects, while the party under investigation is responsible for demonstrating pro-competition effects and efficiency gains;
- (e) Draw up a list of prohibited practices, including those that are internationally recognized as anticompetitive, so that all prohibited practices are explicitly defined. If the country's legal system allows, the possibility of defining some such practices via regulations should be considered in order to make the law more flexible and adaptable. The generic prohibition should be maintained; however, criteria and parameters should be adopted to ensure that its enforcement is not entirely at the discretion of the Commission;
- (f) Clarify how competition rules apply to the actions of associations and trade union organizations;
- (g) Consider publishing manuals or guides on the interpretation of the Act, with a focus on the interpretation of prohibited conduct, the imposition of sanctions, the definition of markets and the assessment of power within them.

Some of these recommendations, if retained, will require changes to the law. Others, however, can be implemented by means of lower-ranking rules, such as regulations, guides and manuals. How the recommendations are implemented will depend on the specificities of the country's legal order.

Regulation of concentrations

The following regulatory changes are recommended with regard to the control of concentrations:

- (a) Establish notification thresholds based solely on objective, easily verifiable indicators, such as the value of the parties' sales or assets. Thresholds that require assessment or analysis in order to be verified, such as market share, should be avoided;
- (b) Assess whether the level of an established threshold is appropriate for the size of the local economy. The point is to find a balance between, on the one hand, setting the threshold too low and thus overburdening the Commission with analyses of relatively unimportant transactions and, on the other, setting it too high and thus overlooking sizeable transactions with significant effects on the market;
- (c) Change the rules on the substantive analysis of concentrations so that the Commission can intervene in cases where a concentration may have anticompetitive effects, such as the establishment or consolidation of market power, and can facilitate coordination. This would replace the current rule whereby the Commission can act only when a de facto monopoly may be created;
- (d) Establish a more detailed procedure for proposing and imposing dialogue-friendly solutions in concentration cases and for proposing more appropriate remedies to compensate for or prevent the predictable anticompetitive effects of a transaction;
- (e) Publish guides or manuals on the analysis of concentrations to clarify the criteria being followed for the parties concerned.

As with the recommendations above, some of these recommendations will require changes to the law while others can be implemented by means of lower-ranking rules.

Institutional aspects

The recommendations below are designed to build the institutional capacity of the competition authority.

Give the Commission on the Promotion and

Defence of Competition greater autonomy and independence

The Commission is currently highly dependent on the Ministry of Economic Affairs and Finance for technical, budgetary and administrative matters. It is especially noteworthy that the Commission's decisions can be appealed before the Ministry.

In future, this could cause decisions to be taken for political rather than technical reasons. Therefore, it is recommended that the institutional design of the enforcement agency be modified to give it greater decision-making independence and autonomy, either under the Ministry or as a completely autonomous entity.

Significantly increase the budget of the competition authority

One of the Commission's greatest weaknesses is the limited financial and human resources at its disposal to fulfil its advocacy and protection functions.

Its history has shown that it has tended to be more reactive than proactive because of its scarce resources. The focus has been on processing complaints and enquiries, and it has very little room to develop a strategic agenda, initiate investigations ex officio and engage in advocacy.

Accordingly, the Commission's human and financial resources should be significantly increased. The budget of other sectoral regulators in Uruguay could be used as a reference, as well as the resources available to some of the small authorities in the region.

Improve the Commission's knowledge management

Good knowledge management is fundamental for a competition authority in order to build a database for future reference. In this connection, the Commission should keep records of the training provided to staff, improve the databases on ongoing and resolved cases, issue internal bulletins, and hold meetings between the technical team and the members of the Commission to share experiences and views on cases.

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

Insofar as its resources permitted, the Commission has invested in the training of its staff to achieve the desired level of competence. However, this effort

should be continued in order to further enhance their skills.

It would be particularly useful to deepen the team's knowledge in the following areas: investigation techniques in cases of anticompetitive practices; inspection techniques; analysis of legal and economic criteria in competition cases (what constitutes an anticompetitive practice, the relevant market, dominance and anticompetitive effects). To this end, forging alliances with other, more experienced competition authorities could be a great help. Therefore, the Commission should actively participate in the regional training activities under UNCTAD's COMPAL programme.

Enforcement of competition law

The following recommendations relate to the defence of competition and are designed to strengthen the institution and ensure the effectiveness of the legal enforcement mechanisms.

Replace the general investigative procedure with one that is better suited to the complexities of this type of case

Investigations into anticompetitive practices are usually highly complex. Therefore, for economic agents to adequately exercise their right to a defence, there needs to be a procedure in place that takes these complexities into account. Similarly, for the competition authority to effectively carry out investigations, there needs to be a procedural framework tailored to this type of case. The procedure should be adapted to the requirements of the investigation of this type of conduct, as suggested by international best practice.

Set out all the grounds for administrative action in the text of the final decision

The competition authority bases its final decisions on a series of technical reports prepared by an advisory team. However, the text of the final decision is fairly terse, which in some cases makes it difficult to follow the reasoning behind the body's decision. The decisions do not stand alone; therefore, all the legal and economic grounds for the decision should be set out in the decision itself, in order to make its interpretation transparent and foster a culture of competition.

Devise internal procedures and manuals for the investigation and analysis of anticompetitive practices and economic concentrations

One of the challenges for new competition authorities is to set up the necessary institutional system to continue developing skills and lines of reasoning that could be shared and used in future. To do this, procedures and manuals should be prepared with a view to establishing a common methodology for dealing with competition cases.

Prepare guidelines on the application of sanctions

The competition authority's enforcement record reveals significant discrepancies in the amount of the fines imposed in similar cases, leading some experts to affirm that the reasons for the imposition of a penalty are not clear in the Commission's decisions. Although some criteria are laid down in Act No. 18.159, the Commission should formulate guidelines, as other authorities have done, in order to provide greater legal certainty for economic agents.

Improve the regulations on, and promote the use of, undertakings to cease and desist

One of the best tools at the Commission's disposal is the cease-and-desist undertaking. However, current regulations are not designed to ensure that cases are resolved more rapidly under this procedure than under the ordinary one. Accordingly, improvements should be made to the regulations regarding deadlines for the application of this procedure and the deals that can be offered to the economic agents under investigation. In addition, the Commission could be more proactive in promoting the use of this procedure so that it can manage complaints and investigations more efficiently.

Promote and regulate leniency programmes

So-called leniency programmes are one of the main tools competition authorities have to detect and prosecute prohibited conduct. Uruguayan rules on the protection of competition provide for such programmes, which, broadly speaking, adhere to generally accepted principles in this domain.

Nevertheless, some perfunctory but key improvements could be suggested to ensure that these programmes are more effective.

Competition advocacy

Enforcement of the law should always go hand in hand with effective advocacy. The following recommendations are intended to make advocacy more effective:

Within available resources, pursue and intensify

competition advocacy efforts

The Commission's considerable efforts, mainly in handling enquiries and carrying out dissemination and training activities, should be acknowledged. These efforts should be continued in order to foster a culture of competition in the country.

Insofar as resources allow, action in this area should be stepped up. For example, the Commission could issue general standards and instructions that would contribute to achieving the objectives of Act No. 18.159, set a strategic agenda for possible opinions and future studies, and sign agreements with other public institutions.

Train the judiciary in legal and economic analysis in the field of competition

As in many other countries in the region, the judges who hear competition cases are not specialized in this field and hear other types of administrative cases. Moreover, in Latin America, this topic is relatively new to many schools of law and economics. Therefore, it is important to hold dissemination and training events for the judiciary, especially members of the Administrative Court, with a view to providing them with more theoretical and practical tools for the analysis of anticompetitive practices and concentrations.

Carry out market studies

Market studies are a tool widely used by competition authorities for various purposes. Among other things, they can help identify structural or conduct-related failings in the market. They can also be used to evaluate the effectiveness of pro-competition policies and compliance with the measures ordered by the competition authority.

The Commission does not currently carry out such studies, largely because of the aforementioned budgetary constraints. This tool should be introduced and the requisite institutional capacity established to enable periodic studies to be conducted in various markets, depending on the institution's priorities.

Promote prevention programmes

For young agencies with scarce resources, promotional activities are of fundamental importance. Therefore, it would be advisable to set up prevention programmes and activities as a means of avoiding anticompetitive conduct. The purposes of Act No. 18.159 could be widely promoted with less effort and at lower cost than that of punitive proceedings.

The Commission could dedicate itself to promoting the establishment of voluntary compliance programmes and corporate competition policies, which, when correctly rolled out, are a valuable preventive tool. It could encourage the introduction of such programmes not only directly, through training and promotional activities, but also indirectly, by considering their adoption and implementation as a mitigating factor in investigations.

These functions can be paired with training activities for the business sector in order to foster a culture of compliance with competition rules.

Regulated sectors

A key challenge in the promotion of effective competition policies is to encourage the cross-cutting implementation of competition rules in all sectors of the economy. This necessarily implies forging good relations with other entities responsible for enforcing competition rules and with sectoral regulators.

Define the remit of regulatory bodies

Act No. 18.159 gives sectoral regulatory bodies the authority to enforce competition law in their sector. To this end, it contains a very broad definition of what a regulated sector is. This definition has, in turn, been broadly interpreted by those who enforce the law (sometimes against the better judgment of the Commission). As a result, the Commission's power is greatly diminished and there is no certainty about whether a given activity is regulated by it or not.

Thought should be given to changing the law so as to establish a single entity for the enforcement of competition law and thereby promote and protect the principles of competition in a more uniform and effective manner. A model that has been successful in other countries is one where the competition authority has the power to enforce competition law in regulated sectors after consultation with the regulator.

Better coordination with the Commission on the Promotion and Defence of Competition

It can be assumed that, by virtue of their nature, the various sectoral regulators pursue different objectives to those of the competition authority. Consequently, while they are responsible for enforcing competition rules, the Commission should maintain a close relationship with them that covers training activities, the joint development of manuals and, generally speaking, any efforts to unify criteria and promote best practices in the enforcement of the principles of

competition as set out in Act No. 18.159.

Involvement in regional cooperation

One key objective for strengthening competition agencies at this time is for them to contribute to and take lessons from international discussions and efforts

to build consensus on the design and implementation of competition policy. Accordingly, the Commission should continue to take part in relevant international forums. In particular, it should play an active role in training and discussion activities at the regional level under UNCTAD's COMPAL programme.

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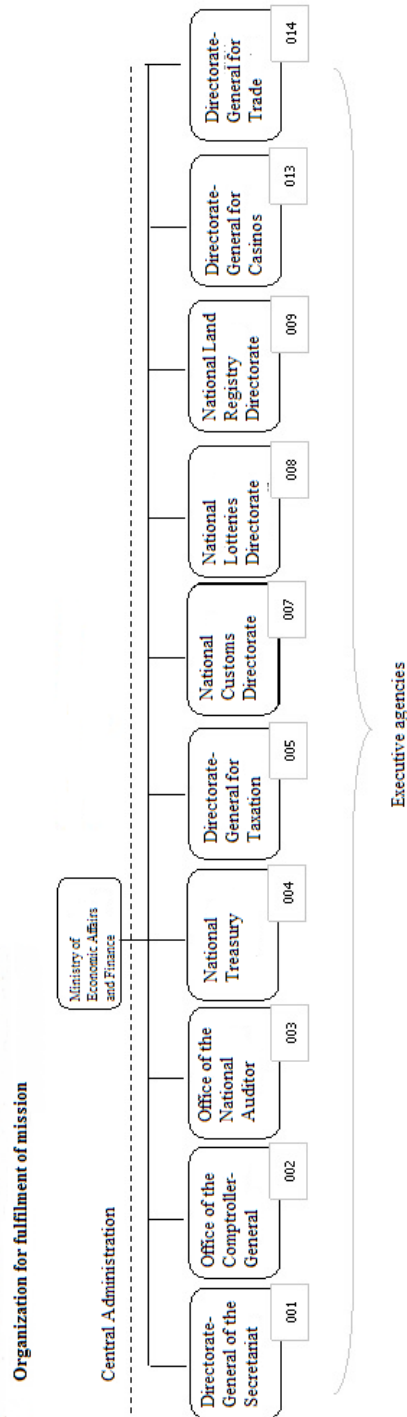
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- Alfredo Asti, Vice-President, Uruguay Group, Latin American Parliament
- Guzmán Barreiro, President, Commission on Economic Affairs and Investment, Uruguay Chamber of Industry
- Mario Bergara, President, Central Bank of Uruguay
- Adrián Cabrera, General Manager, Uruguay Association of Grocers, Publicans, Supermarket Owners/Managers and Related Businesses (CAMBADU)
- Washington Corallo, President, Uruguay Chamber of Industry
- José Pedro Derrégibus, President, Uruguay Chamber of Telecommunications
- Silvia Emaldi, Manager, Corporate Services, National Administration of Electricity Producers and Distributors
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Luciano Real, Adviser, Uruguay Chamber of Telecommunications
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Martin Thomasset, Lawyer, Commission on the Promotion and Defence of Competition
Fabián Tiscornia, Economics Editor, *El País* newspaper
Andrés Tolosa, President, ANTEL
Leandro Zipitria, Economist specializing in competition, University of the Republic

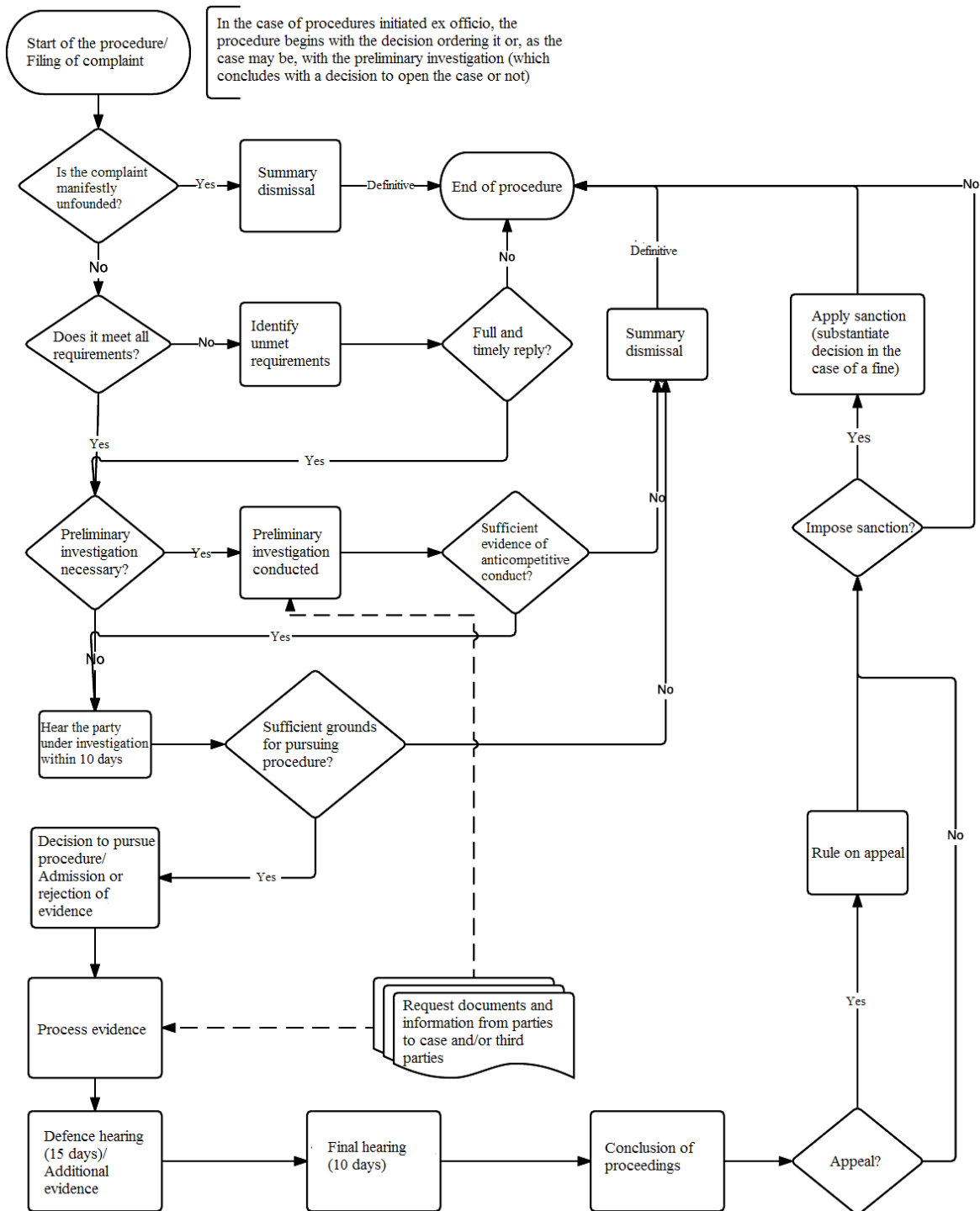
ANNEX 1.

Organigram of the Ministry of Economic Affairs and Finance



ANNEX 2.

Administrative procedure flow chart



Source: Prepared by the author

Notes

- 1 This section is largely based on the excellent country profiles prepared by the Bertelsmann Foundation for its Bertelsmann Transformation Index (BTI): unless otherwise indicated, the source for this section is BTI 2014: Uruguay Country Report.
 - 2 National Statistics Institute, Demographic indicators.
 - 3 Including the amendments of 26 November 1989, 26 November 1994, 8 December 1996 and 31 October 2004.
 - 4 José Pedro Barrán, Red Académica Uruguay, cited in: United Nations Development Programme (UNDP), Uruguay en breve.
 - 5 World Bank, Uruguay: Panorama general.
 - 6 World Trade Organization, 2006, *Trade Policy Review: Uruguay* (WT/TPR/S/163), chap. I: Economic environment.
 - 7 Ibid.
 - 8 World Bank, Uruguay: Panorama general.
 - 9 Ibid.
 - 10 Ibid.
 - 11 United Nations Development Programme (UNDP), 2015, Human Development Report 2015: Work for human development: Briefing note for countries on the 2015 Human Development Report, pp. 3-4.
 - 12 The Heritage Foundation, 2015, Puntos destacados del Índice 2015 de Libertad Económica: Fomentando oportunidad económica y prosperidad, pp. 3-4.
 - 13 World Bank, Uruguay: Panorama general.
 - 14 In addition to this provision, article 32 of the Constitution safeguards the right to private property as follows: “The right to own property is inviolable, but is subject to laws enacted in the general interest. No one may be deprived of his or her property rights except in cases of public necessity or utility established by law, and the National Treasury shall always pay just compensation in advance. Whenever expropriation is ordered for reasons of public necessity or utility, the property owners shall be compensated for any loss or damage incurred on account of the length of the process, regardless of whether the expropriation is actually carried out or not, including those incurred because of variations in the value of the currency.”
 - 15 D. Hargain, 2001, Análisis de la legislación de defensa de la competencia, p. D 107 et seq.
 - 16 Interview with Mario Bergara, President of the Central Bank of Uruguay. Montevideo, 17 December 2015.
 - 17 Ibid.
 - 18 Between approximately US\$ 55 and 2,215 as at December 2015.
 - 19 S. Milnitsky, 2015, La promoción y la defensa de la competencia, p. 251.
 - 20 C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, p. 42.
 - 21 Ibid., p. 41.
 - 22 S. Milnitsky, 2015, La promoción y la defensa de la competencia, p. 251.
 - 23 Interview with Mario Bergara, President of the Central Bank of Uruguay. Montevideo, 17 December 2015.
 - 24 C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, p. 52.
 - 25 Preamble of Bill No. 18.159, cited in S. Milnitsky, La promoción y la defensa de la competencia, p. 251.
 - 26 Presentation by Mario Bergara during the reading of Bill No. 18.159, cited by C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, p. 50.
 - 27 UNCTAD, 2000, Model Law on Competition, p. 11.
 - 28 See J.B. Kirkwood and R.H. Lande, 2008, The fundamental goal of antitrust: Protecting consumers, not increasing efficiency, p. 191 et seq.
 - 29 Commission on the Promotion and Defence of Competition decision No. 64/013, p. 4.
 - 30 C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, pp. 56-61.
 - 31 UNCTAD, 2000, Model Law on Competition, p. 13.
 - 32 Commission on the Promotion and Defence of Competition decision No. 70/011, p. 2.
 - 33 UNCTAD, 2000, Model Law on Competition, p. 14.
 - 34 C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, p. 68.
 - 35 See Decree No. 404/007, art. 3.
 - 36 Other Latin American countries whose laws use a similar classification include Peru, Paraguay and Ecuador.
 - 37 UNCTAD, 2000, Model Law on Competition, p. 17.
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- 38 Article 2 of the Defence of Competition Act of Argentina is similarly worded. However, this Act does establish differences between horizontal and vertical practices.
- 39 Interview with Alejandro Alterwain, a lawyer specialized in competition law. Montevideo, 16 December 2015.
- 40 In this connection, see decision No. 128/013 of the Commission on the Promotion and Defence of Competition, in which a fine was imposed for predatory pricing, and decision No. 81/011, in which a warning was issued for collusive tendering.
- 41 International Competition Network, 2005, *Building Blocks for Effective Anti-Cartel Regimes: Defining Hard Core Cartel Conduct — Effective Institutions — Effective Penalties*, p. 14.
- 42 See OECD Glossary of Statistical Terms.
- 43 OECD, 2000, *Reports: Hard Core Cartels — 2000*, p. 11.
- 44 D. Gerardin and C.M. Da Silva Pereira Neto, 2012, For a rigorous “effects-based” analysis of vertical restraints adopted by dominant firms: An analysis of the EU and Brazilian competition law, p. 8.
- 45 The unusualness of this type of analysis rule is reflected in the fact that the UNCTAD Model Law on Competition refers to only one law (that of the Russian Federation) that does not apply the per se rule to any type of prohibited agreement and describes it as a special feature of the Russian law (without prejudice to the existence of another law not included in the study). UNCTAD, 2000, Model Law on Competition, p. 18.
- 46 Interview with Daniel Hargain. Montevideo, 16 December 2015.
- 47 A common reference to this type of rule can be found in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (de minimis).
- 48 UNCTAD, 2000, Model Law on Competition, pp. 11-12.
- 49 Article 3 of Decree No. 404/007 indicates that agents under investigation can claim and demonstrate efficiency gains without prejudice to the obligations of the Commission on the Promotion and Defence of Competition set forth in Act No. 18.159. The Regulations stipulate that “the agents under investigation for alleged anticompetitive practices may present evidence to the enforcement agency regarding both efficiency gains and any benefit for the consumers established in Article 2 of Act No. 18.159, without prejudice to ex officio action.”
- 50 Commission on the Promotion and Defence of Competition decision No. 128/013, pp. 3 and 4.
- 51 A. Elbittar and M. Salinger, 2013, White paper on vertical restraints, p. 52.
- 52 UNCTAD, 2000, Model Law on Competition, p. 17.
- 53 C. Fernández-Lerga Garralda, 1994, *Derecho de la competencia: Comunidad Europea y España*, p. 114.
- 54 See article 101 of the Treaty on the Functioning of the European Union.
- 55 See Commission on the Promotion and Defence of Competition decision No. 24/014.
- 56 Commission on the Promotion and Defence of Competition decision No. 80/014.
- 57 Commission on the Promotion and Defence of Competition decision No. 128/013.
- 58 Purchasing power is not entirely irrelevant in competition law. For example, it is usually something to consider when determining the power structure in the market. Furthermore, abuse of purchasing power could lead to certain vertical anticompetitive practices. However, the exercise of purchasing power in an individual negotiation does not constitute price fixing.
- 59 Based on the criteria mentioned in the jurisprudence of the Court of Justice of the European Union, concerted practice is “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them”. See Judgment of 14 July 1972: *Imperial Chemical Industries Ltd. v Commission of the European Communities* (Case 48/69).
- 60 UNCTAD, 2000, Model Law on Competition, p. 17.
- 61 Commission on the Promotion and Defence of Competition decision No. 49/015, pp. 2-3.
- 62 See OECD, 2007, Potential pro-competitive and anticompetitive aspects of trade/business associations.
- 63 ABA Section of Antitrust Law, 2010, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors*, p. 187.
- 64 One such example can be found in the European Union, specifically in article 101 of the Treaty on the Functioning of the European Union.
- 65 Act No. 18.159, art. 4 (e): “Agree to enter or abstain from public or private tenders or bidding processes.”
- 66 Ibid., art. 4 (h): “Unduly establish zones or activities where one or more economic agents operate exclusively and in which others refrain from operating.”
- 67 Ibid., art. 4 (i): “Unduly deny the sale of goods or services.”
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- 68 Ibid., art. 4 (c): “Unduly apply different conditions to third parties for equivalent services, thereby placing them at a considerable disadvantage in relation to competitors.”
- 69 Ibid., art. 4 (d): “Make contracts subject to complementary or supplementary obligations which, by their nature or for commercial purposes, do not bear any relation to the purpose of the contracts.”
- 70 Ibid., art. 4 (f): “Block access of competitors to infrastructure essential for the production, distribution or marketing of goods, services or productive factors.”
- 71 UNCTAD, 2000, Model Law on Competition, p. 18.
- 72 Administrative Court judgment No. 187/013.
- 73 This conduct has been interpreted as a form of abusive pricing under article 4 (a) of Act No. 18.159.
- 74 See Decree No. 404/007, art. 7.
- 75 For example, the UNCTAD Model Law on Competition defines the concept as “a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services” (p. 6).
- 76 The Commission stated that: “In this case, Abal Hermanos SA has an atypical dominant position — which stems from its strength at the international level because of its status as an affiliate of the multinational corporation Philip Morris International and not from its specific participation in the local market — giving it the financial capacity to withstand for an extended period of time a strategy of setting prices below the variable average cost, thereby driving out almost immediately one of its competitors to a single department of the country and increasing its market share through conduct engaged in independently of the conduct of the other market agents.” Commission on the Promotion and Defence of Competition decision No. 128/013, pp. 3-4.
- 77 See Decree No. 404/007, art. 7.
- 78 For example, paragraph 2 (l) (c) of the UNCTAD Model Law on Competition defines the relevant market as “the line of commerce in which competition has been restrained and the geographic area involved, defined to include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount”.
- 79 Commission on the Promotion and Defence of Competition decision No. 2/009.
- 80 A summary of this discussion can be found in UNCTAD, 2000, Model Law on Competition, p. 28.
- 81 This issue is currently under discussion in Peru, which is considering introducing such control by the local authority.
- 82 See OECD, 2003, Competition policy and small economies, p. 2.
- 83 See International Competition Network, 2009, Competition law in small economies, pp. 30-31.
- 84 In this respect, see the definition contained in article 3 of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).
- 85 According to the Uruguayan National Institute of Statistics, an indexed unit (UI) is “a unit of value that adjusts according to the level of inflation as measured by the consumer price index”. Available at: <http://ine.gub.uy/ui-unidad-indexada>.
- 86 International Competition Network, 2002, *Prácticas recomendables para procedimientos de notificación de concentraciones*, p. 4.
- 87 Ibid., p. 1.
- 88 Article 39 of Decree No. 404/007 clarifies that the notification period is “at least” 10 days before the conclusion of the operation.
- 89 In this regard, the following rules are established: (a) in the case of a company merger, in relation to both formation and incorporation, it shall be understood that the concentration has been concluded when the final contract between the parties has been signed; (b) in the case of acquisition of corporate equities or shares, it shall be understood that the concentration has been concluded when notification is made to the share register or, failing that, when they are effectively transferred or the contract of sale is concluded; (c) in the case of equity interests, it shall be understood that the concentration has been concluded when the membership interests have been transferred; (d) in the case of acquisition of commercial or industrial establishments, full or partial acquisition of company assets, excluding corporate equities, shares or equity interests, the concentration shall be understood to have taken place when the final legal instrument of sale has been signed.
- 90 Commission on the Promotion and Defence of Competition decision No. 50/009, art. 4.
- 91 Approximately US\$ 10,400.
- 92 Under the regulations, liable companies must provide notification in writing, with a signature certified by a notary public, and submit “the following information in three hard copies and one electronic copy:
1. Registered business name, trade name, registered address and activities of the companies involved.
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2. List of shareholders or owners of more than 5 per cent of the share capital and an outline of the ownership or control structure that will result from the operation.
 3. Name of the administrators, directors or representatives, as well as the general managers of the companies that are concentrating or merging.
 4. List of products (goods or services) sold by the companies and details of their characteristics, as well as a forecast of the products that the new company will keep or plans to develop.
 5. Volume and value of sales of products of the companies involved in the last three years.
 6. Names of companies in the market with substitute products that could replace those produced by the companies that are concentrating or merging.
 7. Brief description of the markets for the products of the notifying companies, with details of total annual sales volume per product and market share of each.
 8. Name, telephone number and e-mail address of the contact persons who have prepared reports.
 9. The information must be accompanied by any evidence available to the applicants. In addition, if the information is based on estimates, this must be made clear, and the methodology used for making the estimates must be given."
- 93 Commission on the Promotion and Defence of Competition decision No. 3/009.
- 94 Commission on the Promotion and Defence of Competition decision No. 39/010.
- 95 The information requested may include, in addition to any other information considered reasonable by the authority, details of the sale of goods or services, prices, contracts with suppliers or distributors, operating capacity and production facilities, and advertising expenditure.
- 96 Regional Competition Centre for Latin America, 2014, Remedios (condicionamientos) para las concentraciones: Principios y enfoques generales, p. 1.
- 97 See Decree No. 404/007, art. 10.
- 98 Interview with Alejandro Alterwain, lawyer specializing in competition law. Montevideo, 16 December 2015.
- 99 According to this article, in particular: "Efficiency gains shall be considered to be savings for the company that enable it to produce the same quantity of goods and services at a lower cost, or a greater quantity of goods and services at the same cost, the reduction of costs derived from the joint production of two or more goods or services, savings on administrative costs derived from redesigning the company's production activity, the reduction of production or marketing costs derived from the rationalization of the use of the infrastructure or distribution network, among other things."
- 100 See J.M. Connor, 2006, Effectiveness of antitrust sanctions on modern international cartels, p. 198.
- 101 See OECD, 2008, Remedies and sanctions for abuse of market dominance, Policy brief, p. 1.
- 102 See also Decree No. 404/007, art. 33.
- 103 Approximately US\$ 10,400.
- 104 Approximately US\$ 2,084,356.
- 105 See decisions No. 81/011 and No. 128/013 of the Commission on the Promotion and Defence of Competition, respectively.
- 106 The terms "leniency", "immunity" and "amnesty" are used in many jurisdictions, but their definitions vary. In the case of the United States programme, the terms "amnesty" and "leniency" are used interchangeably to refer to full immunity from criminal conviction and fines for anticompetitive behaviour. In the European Union, the term "leniency" is used to refer to any reduction of up to 100 per cent in fines. See International Competition Network, 2009, *Anti-Cartel Enforcement Manual*, chap. 2 (Drafting and implementing an effective leniency policy), p. 2.
- 107 See Decree No. 404/007, art. 33.
- 108 Article 34 provides as follows:
 To this end, they must submit to the enforcement agency a note, with the signature certified by a notary public of their duly empowered representatives or proxies, claiming the immunity provided for in the last paragraph of article 17 of the Act to which these regulations apply, attaching, at least, the following information:
- (a) Type of agreement in which it is participating or participated.
 - (b) Number of companies involved.
 - (c) Whether the identities of the representatives who participated on behalf of the companies involved are known.
 - (d) Period covered by the agreement.
 - (e) Details of the evidence available: meeting records, e-mails, etc.
- The information submitted must not contain the identities of those involved until the enforcement agency
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- has decided on the feasibility of exonerating them from responsibility.
- 109 See OECD, 2002, *Fighting hard core cartels: harm, effective sanctions and leniency programmes*, pp. 7-10.
- 110 Act No. 18.159, art. 21.
- 111 Presentation by Juan Manuel Mercant, specialist in competition law, on the institutional challenges faced by the Commission. Presented at the “Competition Day” event organized by the Commission in September 2014.
- 112 *Source*: website of the Ministry of Economic Affairs and Finance. Available at: <https://www.mef.gub.uy/10556/1/mef/mision-y-vision.html>.
- 113 See Commission’s 2009 annual report, p. 2.
- 114 Act No. 18.159, art. 22, and Decree No. 404/007, art. 12.
- 115 According to article 6 of the General Operating Regulations of the Commission on the Promotion and Defence of Competition (Commission decision 1/009), the institution is formally represented by its president or, failing that, by a member of the Commission who has been assigned a particular task.
- 116 Act No. 18.159, art. 22, and Decree No. 404/007, art. 13.
- 117 If at the time of their appointment they hold other public posts, they shall be suspended from those as of their assumption of the new post and for the duration of their tenure as members of the Commission, in accordance with article 21 of Act No. 17.930 of 19 December 2005.
- 118 Decree No. 404/007, art. 12.
- 119 This is the case with the appointment system of the competition authorities in Chile and Mexico for example.
- 120 Act No. 18.159, art. 24.
- 121 General Operating Regulations of the Commission, art. 1.
- 122 *Ibid.*, art. 2.
- 123 *Ibid.*, art. 3.
- 124 *Ibid.*, art. 4.
- 125 This subject is analysed in greater detail in chapter V, section 5.
- 126 The data and information obtained in the course of an investigation can only be used for the purposes provided for in Act No. 18.159.
- 127 On this point, it is important to note that the Commission can apply precautionary measures, establish undertakings to cease and desist and conciliation agreements with the alleged offender, and lessen the sanctions if they cooperate in ceasing the concerted practices.
- 128 See UNCTAD, 2000, *Model Law on Competition*, p. 3.
- 129 Decree No. 404/007, art. 16.
- 130 According to article 16 (l) of Decree No. 404/007, this power must be exercised in coordination with the competent State bodies in cases of negotiation.
- 131 General Operating Regulations of the Commission, art. 5.
- 132 Interview with Adriana Riccardi and Javier Gomensoro, president and member of the Commission, respectively. Montevideo, 14 December 2015.
- 133 Throughout this document, an exchange rate of 27.33 Uruguayan pesos per dollar has been used to calculate the equivalent values in US dollars.
- 134 Currently, one of the administrators is also an economist, which means he does administrative tasks as well as tasks related to his profession, although he does not officially hold the post of economist.
- 135 Information provided by the Commission on the Promotion and Defence of Competition.
- 136 Interviews with the technical team and the members of the Commission were held in Montevideo from 14 to 18 December 2015.
- 137 According to information provided by the Commission, a request has been made to fill both posts, and the relevant arrangements are being made to that end.
- 138 This is the case for the Commission on the Promotion of Competition of Costa Rica and the National Institute for the Promotion of Competition of Nicaragua. In this regard, see OECD, 2014, *Competition law and policy in Costa Rica: A peer review*; and UNCTAD, 2013, *Voluntary Peer Review of Competition Law and Policy: Nicaragua*.
- 139 The term “cases” includes all cases, investigations and studies related to possible limits on competition in specific markets. In this regard, see the annual reports of the Commission on the Promotion and Defence of Competition.
- 140 Concerning the importance of the independence of competition authorities, see UNCTAD, 2008, *Independence and accountability of competition authorities*, pp. 3-4.
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- 141 Along the same lines, consultant Leandro Zipitria, an economist specializing in competition, had this to say: "It is good for the independence of the Commission on the Promotion and Defence of Competition that it falls under the umbrella of the Ministry of Economic Affairs and Finance." Interview conducted in Montevideo, 17 December 2015.
- 142 The OECD has examined the possible consequences of implementing competition policy, depending on the institutional design of the authority: "There are two aspects to independence, structural and operational aspects. An agency that is set up as a separate entity, not part of a ministry and responsible directly to the parliament or legislature for its budget, is structurally independent. All else being equal, it will enjoy relative freedom in carrying out its enforcement and advocacy functions. At the same time, however, structural independence can have ambiguous effects on competition advocacy. An agency that is entirely independent of other parts of government may lack good access to the decision makers in the executive and legislative branches. It might not have the influence in government circles that it would have if it were part of a powerful ministry. It might even suffer from lack of information about activities in other parts of government that would benefit from its input. In any case, there are many countries in which the competition agency is not structurally independent, but experience has shown that an aggressive, competent agency can acquire a significant degree of independence regardless of its place within the structure of government." J. Clark, 2005, *Competition advocacy: Challenges for developing countries*, pp. 1-2.
- 143 Interview with Mario Bergara, President of the Central Bank of Uruguay. Montevideo, 17 December 2015.
- 144 UNCTAD, 2008, *Independence and accountability of competition authorities*, pp. 3-4.
- 145 In this regard, the OECD has examined the importance of authorities having sufficient resources to carry out activities for the defence and advocacy of competition. J. Clark, 2005, *Competition advocacy: Challenges for developing countries*, p. 2.
- 146 On this subject, Juan Manuel Mercant has the following to say: "Consequently, all comments and opinions of the authorities or public representatives (concerning what the Commission should investigate and/or decide) should be very cautious and measured and ideally should not be expressed in the first place. The authorities must resist the temptation to use regulations for the protection of competition to implement public policies other than those related to the defence of competition. Consequently, this is not the appropriate instrument to control prices and profit margins, control monetary policy (inflation) or restrict valid concentrations. Nor is it a legal framework for protecting individual or sectoral interests, but rather general interests and especially those of consumers. We are not saying that this has happened but simply that it is a potential risk to be taken into account in the circumstances. Bear in mind, particularly, that this tendency has been seen in other jurisdictions with harmful results. In other words, it is important to give precedence to technical analyses that are conceptually sound and to avoid political pressures." Presentation on the institutional challenges facing the Commission on the Promotion and Defence of Competition. Presented at the "Competition Day" event organized by the Commission in September 2014.
- 147 Interview with Pablo Ferreri. Montevideo, 18 December 2015.
- 148 Interview with Alejandro Alterwain, lawyer specializing in competition law. Montevideo, 16 December 2015.
- 149 UNCTAD, 2000, *Model Law on Competition*, p. 3
- 150 P.-J. Gordon, *The case for maintaining a single competition agency for investigation and adjudication of anti-trust cases*, Jamaica Fair Trading Commission, pp. 16-17.
- 151 *Ibid.*, p. 11.
- 152 Due process, as Linares notes, has two aspects: the procedural aspect and the substantive aspect. In its procedural aspect, due process "is a set of traditional rules and procedures that the bodies responsible for making and enforcing laws must respect when, pursuant to the legislation that governs the activity of those bodies (the Constitution, laws and regulations), they regulate the conduct of individuals and restrict their civil liberties (physical liberty, freedom of speech, freedom of movement, right of ownership, etc.)". In its substantive aspect, on the other hand, due process is "a judicial standard, norm or model for determining which actions taken by the bodies responsible for making and enforcing laws (administrative and judicial) in the exercise of the discretion they are granted by the Constitution are fundamentally sound; that is, to what extent they can restrict the freedom of the individual". J.F. Linares, 1989, *Razonabilidad de las leyes, el debido proceso como garantía innominada en la Constitución Argentina*, pp. 25-26.
- 153 See article 5 of the European Convention on Human Rights.
- 154 See OECD, 2012, *Procedural Fairness and Transparency*; C.A. Varney, 2009, *Procedural fairness*; J. Almunia, 2010, *Due process and competition enforcement*.
- 155 In addition to the provisions of Act No. 18.159 and its Regulations, the proceedings, pursuant to article 29 of the Act, are further regulated by Decree No. 500/991 of 25 September 1991, which contains rules generally applicable to proceedings conducted by administrative authorities.
- 156 Article 18 of Decree No. 404/007 is drafted in similar terms.
- 157 Act No. 18.159, art. 10, and Decree No. 404/007, art. 18.
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- 158 Act No. 18.159, art. 11.
- 159 Decree No. 404/007, art. 19.
- 160 Act No. 18.159, art. 11, and Decree No. 404/007, art. 19.
- 161 Act No. 18.159, art. 13, and Decree No. 404/007, art. 27.
- 162 Decree No. 404/007, art. 30.
- 163 Act No. 18.159, art. 15.
- 164 This legal provision is consistent with article 29 of Decree No. 404/007.
- 165 Decree No. 404/007, art. 24.
- 166 *Ibid.*, art. 25.
- 167 *Ibid.*, art. 26.
- 168 Pursuant to article 1 (E) of Ministerial Decision No. 8398 of 21 May 2013, adopted by the Ministry of Economic Affairs and Finance.
- 169 *Ibid.*
- 170 Decree No. 404/007, art. 26.
- 171 *Ibid.*, art. 22.
- 172 *Ibid.*, art. 28.
- 173 See, likewise, Decree No. 404/007, art. 31.
- 174 *Ibid.*, art. 32.
- 175 Constitution, art. 317, and Decree No. 500/1991, art. 142.
- 176 Decree No. 404/007, art. 38.
- 177 The Regulations state that the outcome of the enquiry shall or shall not be binding “for the enforcement agency”, which is an atypical wording, since it would be the very parties subject to regulation that decide whether or not the outcome of the procedure would be binding on the competition authority.
- 178 Constitution, art. 310.
- 179 *Ibid.*, art. 311.
- 180 *Ibid.*, art. 312.
- 181 The term “cases” covers all cases, investigations and studies related to any possible restriction on competition in specific markets. See annual reports of the Commission on the Promotion and Defence of Competition.
- 182 Preparatory studies can be the precursor of an ex officio investigation or can provide input for competition promotion activities. See annual reports of the Commission on the Promotion and Defence of Competition.
- 183 International Competition Network, 2010, *Agency Effectiveness: Competition Agency Practice Manual*, chap. 2, Strategic planning, p. 6.
- 184 Commission on the Promotion and Defence of Competition, Annual report 2014.
- 185 Because the use of a cease-and-desist undertaking was requested after the case had been investigated and the evidence processed. This is why the penalty was reduced but not lifted.
- 186 International Competition Network, 2005, *Building Blocks for Effective Anti-Cartel Regimes: Defining Hard Core Cartel Conduct — Effective Institutions — Effective Penalties*, p. 1.
- 187 Daniel Hargain has similarly argued: “There have been significant differences in the sanctions imposed by decision of the competition authority in similar cases or situations. There is a need for greater rigour in the application of the policies and guidelines on sanctions set out in article 17 of Act No. 18.159.” Likewise, Alejandro Alterwain has stated: “The technical justification for imposing sanctions is not set out in some decisions. There is no clarity on the weight given to the criteria established in the law.” Interviews held in Montevideo, 16 December 2015.
- 188 See Ministry of Economic Affairs and Finance decisions of 25 September 2014 (2011/05/001/0150) and 24 July 2012 (2011/05/008/415-2).
- 189 See “Study on professional services” in section V.6 below.
- 190 See, for example, the decisions of the competition authorities in Spain, Chile, Mexico or El Salvador.
- 191 Interview held in Montevideo, 17 December 2015.
- 192 Conducted in Montevideo from 14 to 18 December 2015.
- 193 In this connection, Leandro Zipitria had this to say: “There is a need to establish a working method, standardize procedures and draw up internal guidelines to ensure that decisions are better supported and more predictable.” Similarly, according to Luciana Macedo, a member of the Commission on the Promotion and Defence of Competition: “The reports are rather hit and miss — some are strong, some are weak.” Interview held in Montevideo, 18 December 2015.
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- 194 It should be noted that the Commission recently organized a 40-hour course/workshop on techniques for the investigation and analysis of cases of anticompetitive practices, which was attended by all technical staff.
- 195 UNCTAD, 2012, Knowledge and human-resource management for effective enforcement of competition law.
- 196 As regards team training, while operating within the constraints of material and human resources, the Commission has managed to ensure that officials have access to most of the programmes that could help meet the goals of Act No. 18.159. Ever since it was set up, the Commission has been in contact with the UNCTAD COMPAL programme, which provides technical assistance and training in several countries in the region. Its officials have regularly attended courses, seminars and workshops, as well as work experience programmes in agencies in Latin America.
- 197 In decision No. 40/009 of 27 October 2009, warnings were handed out to two economic agents (Servicio Médico Integral and IMPASA) for failing to provide due notification of a concentration.
- 198 It was not possible, on the basis of the Commission's decisions and the reports posted on its website, to determine how the concentrations brought to its attention had affected the structure of the market. It was therefore impossible to assess the competition analysis done by the agency.
- 199 Interviews with the team of advisers were conducted in Montevideo from 14 to 18 December.
- 200 Interview with Alejandro Alterwain, a lawyer specializing in competition law, who said: "The competition authority's list of requirements for giving notification of an economic concentration is excessive, given that the information is only used to take note of the transaction and change in the market." Interview held in Montevideo, 16 December 2015.
- 201 International Competition Network, 2002, Advocacy and competition policy, p. i.
- 202 *Ibid.*, p. ii.
- 203 Article 16 E of Decree No. 404/007 clarifies that the advice given to the executive is non-binding, and that the executive may propose legal and regulatory amendments as it sees fit.
- 204 The consultation procedure has been discussed earlier in this report.
- 205 Article 16 of Decree No. 404/007 adds one additional function to those established by law: "(J) Issue instructions on the general criteria for identifying the relevant market, and also on conduct prohibited by competition rules and information to be submitted by companies notifying or seeking authorization for a concentration."
- 206 See the Commission's reports for 2009-2014.
- 207 Informal enquiries generally deal with concerns raised orally, in person or by telephone, and are answered on the spot.
- 208 Formal enquiries are submitted in writing: the person making the enquiry gives information on a present or planned action of their own or of a third party, and asks the Commission if the action might constitute a restriction on competition.
- 209 Commission on the Promotion and Defence of Competition, Annual report 2014, p. 10.
- 210 See reports of the Commission for 2009-2014.
- 211 For example, an introductory course on competition law and the economy was held at the centre for advanced and refresher courses for graduates of the Faculty of Economics and Administration of the University of the Republic, and was attended by 12 university professionals. The course on the industrial economy for students studying for an economics degree at the same faculty included practical work on the conditions for competition in markets. Lastly, on 5 November 2012, Javier Gomensoro gave a class for law students at the University of Montevideo on the principles and fundamental rules of free competition, with practical examples drawn from cases that had been investigated.
- 212 The Commission organized a "Seminar on strategies for investigating collusive practices" on 6 July 2010. The chair of the Spanish competition authority, Luis Berenguer, was a guest at the seminar, which was also attended by several local experts. In all, some 30 people attended the event.
- 213 Some of the most relevant activities were: (a) "Competition Day", celebrated on 11 November 2015; (b) the Latin American Competition Forum, organized by the Organization for Economic Cooperation and Development (OECD), the Inter-American Development Bank and the Commission on the Promotion and Defence of Competition, which was held on 16 and 17 September 2014 (the first Competition Day activities being held on the morning of 16 September); (c) the Ibero-American Competition Forum, held on 18 September 2014, with representatives of the competition authorities from the region, Spain and Portugal in attendance; (d) a national workshop on industrial property and competition policy, organized jointly with the National Directorate of Industrial Property (Ministry of Industry, Energy and Mining) and the World Intellectual Property Organization (WIPO), which was held on 12 and 13 May 2011 (see the Commission's annual reports for 2011, 2014 and 2015).
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- 214 The following cooperation agreements were signed by the Commission on the Promotion and Defence of Competition: Agreement with the Mercantile Chamber of National Products, signed on 23 June 2009 in Montevideo; Agreement with the Trade Defence League, signed on 25 June 2009 in Montevideo; Agreement with the Uruguay Chamber of Industry, signed on 4 August 2009 in Montevideo; and Agreement with the Stock Exchange, signed on 20 October 2009 in Montevideo.
- 215 An example would be the promotional activities of the Uruguay Chamber of Industry, involving many business people and the then-president of the Commission, Javier Gomensoro.
- 216 Commission on the Promotion and Defence of Competition, Annual report 2010.
- 217 Between 14 and 18 December 2015 interviews were held with members of various associations and chambers of commerce, including the Uruguay Chamber of Industry, the Uruguay Chamber of Telecommunications and the Uruguay Union of Exporters.
- 218 See the reports of the Commission on the Promotion and Defence of Competition for 2009-2015.
- 219 Ibid.
- 220 In 2010, for example, the Commission was mentioned in 30 reports in three national newspapers and on several Internet sites. It also appeared on a number of radio and television programmes. In 2011, the Commission was mentioned in 75 reports in the print editions of four national newspapers. In 2012 it was mentioned in 34 reports in the print editions of three national newspapers.
- 221 The list of press articles can be found in chapter IX below.
- 222 Cited in S. Milnitsky, *La promoción y la defensa de la competencia*, p. 254.
- 223 <http://competition.mef.gub.uy/>.
- 224 Commission on the Promotion and Defence of Competition, Annual report 2009.
- 225 International Competition Network, 2014, Recommended practices on competition assessment, p. 5.
- 226 Ibid., p. 5.
- 227 J. Clark, 2005, Competition advocacy: Challenges for developing countries.
- 228 Some successful examples of competition advocacy, in which the benefit to the market has been assessed, can be found on the website of the World Bank, at: <http://www.worldbank.org/en/events/2014/11/26/2014-competition-advocacy-contest>.
- 229 Interview with Daniel Hargain, Montevideo, 16 December 2015.
- 230 International Competition Network, 2002, Advocacy and competition policy, p. ix.
- 231 The full text of article 27, on regulated sectors, reads as follows:
In sectors subject to the control and oversight of specialized regulatory bodies, such as the Central Bank of Uruguay, the Regulatory Authority for Energy and Water Services and the Regulatory Authority for Communication Services, the protection and promotion of competition shall be the responsibility of said bodies.
The ambit of the bodies shall include activities that take place in markets that are vertically or horizontally related to controlled and regulated markets insofar as they have an impact on the competitive conditions of the markets that are within their respective regulatory scope.
In fulfilment of this mission, the regulatory bodies shall comply with all the provisions of this Act and, where appropriate, seek non-binding advice from the Commission on the Protection and Defence of Competition.
- 232 C. Martínez Blanco, 2007, *Manual básico de derecho de la competencia*, p. 326.
- 233 Interview with Daniel Hargain.
- 234 Ministry of Economic Affairs and Finance, decision of 24 July 2012 (2011/05/008/415-2), p. 2.
- 235 Administrative Court judgment No. 411/2014 of 30 September 2014.
- 236 Act No. 16.696, art. 38.
- 237 See: www.bcu.gub.uy/Servicios-Financieros-SSF/Paginas/Instituciones-supervisadas.aspx.
- 238 Act No. 16.696, art. 38 (k).
- 239 Ibid., art. 38 (l).
- 240 Information provided by Juan Cantera, Superintendent of Financial Services, Central Bank of Uruguay.
- 241 URSEA decision No. 30/015, confirmed by decision No. 071/015.
- 242 Information provided by Marcelo Laborde, Technical Advisory Service, URSEA.
- 243 Act No. 17.296, arts. 75 and 76.
- 244 Under article 73 of Act No. 17.296, communication activities are understood as “any transmission or reception of signs, signals, written material, images, sounds or information of any nature via cable, radio frequencies, optical media and other electromagnetic systems, as well as activities related to the receipt,
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- processing, transport and distribution of correspondence by postal workers”.
- 245 Act No. 17.296, art. 86.
- 246 Ibid., art. 89.
- 247 Information provided by Luis González, Manager, URSEC Postal Services.
- 248 Act No. 19.173 of 4 December 2013.
- 249 Decree No. 383/008 of 11 August 2008.
- 250 Decree No. 386/005 of 7 October 2005.
- 251 MERCOSUR Agreement on the Defence of Competition, chap. III.
- 252 Ibid., chap. VI.
- 253 Ibid., chap. IV.
- 254 Ibid., chap. V.
- 255 See the reports of the Commission on the Promotion and Defence of Competition for 2009 to 2014.
- 256 Ibid.
- 257 Ibid.
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