

Uruguay

Takeover Guide

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PRE-MERGER CONTROL APPROVAL UNDER THE URUGUAYAN ANTITRUST ACT

Introduction

On 20 September 2019, Uruguay's executive branch promulgated Act No 19.833 (the 'Reform') modifying Act No 18.159 on the promotion and defence of competition (the 'Competition Law'). The Reform took effect on 12 April 2020.

The Reform introduced, among other changes, pre-merger control (prior authorisation) for certain economic concentrations, and modified the previous threshold. Prior to the Reform, obtaining prior authorisation was only required for concentrations resulting in a de facto monopoly.

Currently, prior authorisation is required from the enforcement body with respect to any act of economic concentration when the gross annual turnover in the Uruguayan territory of all the participants in the operation, in any of the last three financial years, is equal to or greater than Unidades Indexadas (UI or indexed units) 600m. This amount should be calculated based on exchange rate at the date of notification and is currently approximately equivalent to US\$70m.

'Economic concentrations' are generally considered as operations that modify the relationship among agents that operate in the market and that affect, or may affect, the ownership of firms that operate in a certain market sector, certain assets, the number of firms, independence of their administrators and so on, and that may modify or affect the market structure. For this reason, economic concentrations have been the subject of regulation in most of the jurisdictions with competition and, more precisely, antitrust laws.

On 3 November 2021, an amendment of section 27 of the Competition Law was approved. This modification (which entered into force on 1 January 2022) introduced some changes to the competition legal framework.

It mainly removed one of the main uncertainties as to the competence of the enforcement body by granting it competence over all antitrust matters (conduct), with the exception of the authorisation of economic concentrations in sectors regulated by the Central Bank of Uruguay (CBU), the Regulatory Unit for Energy and Water Services (Unidad Reguladora de Servicios de Energía y Agua or URSEA) and the Regulatory Unit for Communications Services (Unidad Reguladora de Servicios de Comunicaciones or URSEC), where these entities remain as the competent ones, together with their capacities as the regulators of these markets.

With regard to the investigation, analysis and sanctioning of prohibited practices, Act No 19.996 also amends Article 10 of the Competition Law and grants competence to the enforcement body, which may act ex officio or upon complaint. In these cases, the enforcement body must notify the CBU, URSEA or URSEC when the practices refer to the market whose regulation and control is expressly assigned to them.

The enforcement body under this guide means the Commission for the Promotion and Defence of Competition or any regulated organism, as mentioned above.

ANALYSIS OF THE COMPETITION LAW

Definition of 'economic concentrations'

Under section 7 of the Competition Law, prior authorisation is required from the enforcement body in the case of any act of economic concentration that exceeds certain thresholds (and are defined as 'covered transactions' for the purposes of this guide).

The second paragraph of the same section provides that 'for the purpose of interpreting this article, those operations that imply a modification in the control structure through: mergers of companies, acquisition of shares, quotas or participations, acquisition of business as an ongoing concern, total or partial

acquisition of corporate assets, and any other type of legally valid agreements which imply transferring the control of all or part of the economic units or enterprises, shall be considered potential acts of economic concentration’.

Transactions regulated under section 7 can include:

- mergers: all types of companies’ mergers regulated in Uruguayan Companies’ Law No 16.060 are covered;
- acquisition of shares, quotas or social participations: this also addresses the case of the transfer of control of companies as a consequence of the transfer of such assets;
- the acquisition of commercial, industrial or civil establishments: transfer of businesses as ongoing concerns or business units will qualify. However, it is not clear, nor can it be inferred from the legislative records, what was meant by ‘civil establishments’;
- total or partial acquisition of assets: since the Antitrust Act does not specify what type of asset acquisitions shall be considered included, acquisitions that imply a transfer of control of the productive units should be covered by the Antitrust Act; the word ‘assets’ could include any type of asset (tangible or intangible); and
- any other type of transaction that imposes a transfer of control of total or part of an economic unit or companies: this is a residual category by which any other form of transaction and/or agreement that results in a transfer of control would be included.

AUTHORISATION

Transactions that require prior authorisation

Prior to the Reform, the regime established that acts of economic concentration had to be notified to the enforcement body and only some specific concentrations required real prior authorisation. Currently there is a unified prior control scheme: prior authorisation is required with respect to any act of economic concentration that surpasses certain thresholds.

Under section 7 of the Competition Law, prior authorisation is required from the enforcement body with respect to any act of economic concentration when the gross annual turnover in the Uruguayan territory of all the participants in the operation, in any of the last three financial years, is equal to or greater than UI 600m. This amount should be calculated based on the exchange rate at the date of notification and was approximately equivalent to US\$70m as of January 2022.

Please note that when calculating the threshold, participants include not only the parties but all entities in the party’s corporate family that invoice in the Uruguayan market, including the seller.

For transactions subject to authorisation, closing must be suspended until they are approved.

Exceptions to the obligation to require prior authorisation

Section 8 of the Antitrust Act establishes that the obligation to require prior authorisation provided by section 7 is not required in the following cases:

- the acquisition of companies in which the buyer is the holder of at least 50 per cent of the shares of the target; the idea behind this exception is that, in this case, there is no real transfer of control;
- the acquisition of bonds, debentures, securities, any other debt instruments issued by the company or the acquisition of shares with no voting rights;

- the acquisition of a sole company on behalf of a foreign company that did not previously possess assets or shares in other Uruguayan companies; this is a very common exception in other jurisdictions, and would exempt first investments ('first landing' in the country), thus avoiding time-consuming processes that could discourage the investment; and
- The takeover of companies declared in bankruptcy, provided that the bidding process has been submitted by only one bidder.

Regarding purely foreign-to-foreign transactions, if they imply a change of control (even indirectly) and have an effect in Uruguay (directly or indirectly), they will be caught by the Competition Law. This is also consistent with section 3 of the Competition Law that provides that transactions or activities that occur abroad are covered by the Competition Law, provided they produce effects within the national territory.

Consequences of non-compliance

The Competition Law provides the following sanctions for failure to notify:

- a warning with or without the publication of the sanctioning resolution in two national newspapers (all costs charged to the breaching party); and
- a fine between a minimum of UI 100,000 (approximately US\$11,600) and a maximum consisting of the higher of the following values:
 - UI 20m (approximately US\$2.3m);
 - the equivalent to ten per cent of the offender's annual turnover; or
 - the equivalent to three times the damage caused by the anti-competitive practice, if determinable.

Article 39 of Decree No 404/007 establishes that the authorised representatives (eg, members of the board) shall be held liable for non-compliance with the notification requirement.

Where authorisation is required and the transaction is carried out without having requested it or having requested it but without having obtained it, the transaction will not have effect. There is no precedent for such sanction and the law continues to be very vague on the subject.

The law does not regulate the possibility of applying criminal sanctions to those who do not comply with this obligation.

What the enforcement body could do upon a request for authorisation

Upon a request for prior authorisation with respect to a concentration, the enforcement body may:

- expressly or tacitly authorise it;
- subject the concentration to certain conditions, or;
- deny authorisation.

The Commission must inform the parties whether the request for authorisation was made in a correct and complete manner within ten working days, and the parties shall have ten working days to remedy these comments. Upon the expiry of this period without the parties curing the comments, the request for authorisation is deemed not to have been made and the parties may not resubmit a new request for authorisation before a further ten days.

If the Commission does not issue an opinion in 60 calendar days upon the request for authorisation, clearance is automatically granted.

A 'fast track' 20-calendar-day Phase 1 process exists for transactions that do not present competition issues. There is a (rebuttable) presumption that a transaction should go to Phase 1 when the value of the undertaking or assets acquired in the Uruguayan territory is below five per cent of the UI 6,000m threshold (the equivalent amount in USD varies depending upon the exchange rate).

These legal terms for analysis and phases are not applicable to the regulated entities when they act as the enforcement body for the purpose of a concentration.