

Guyer&Regules

Special Report

Competition Law

New regulatory decree
implements changes to
Uruguayan Competition Law
on pre-merger control.

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On July 15, 2020, the Executive Power issued and then published on its website the new regulatory decree (hereinafter the "**Decree**") of the Law for the Promotion and Defense of Competition No. 18,159 (hereinafter the "**Law**") that was pending following amendments made to it by Law No. 19,833 (hereinafter the "**Reform**").

As we reported at the time, the Reform introduced in our legal system a prior authorization regime for certain economic concentrations and the "per se" prohibition of certain agreements between competitors.

The Decree regulates the new regime of prior authorization of economic concentrations, providing valuable answers and guidelines for many of the questions generated at the time of enactment of the Reform, and also modifies procedural aspects, both in terms of concentrations and anticompetitive practices. These issues are analyzed below.

Prior authorization of economic concentrations

The following is a summary of the issues or aspects that we consider most relevant in the Decree.

1. With respect to the **turnover threshold in the national territory** for the purposes of prior authorization (600,000,000 Indexed Units, approximately USD 63,7 million to date), it is provided that for its calculation (a) the turnover values, including taxes, of the participants to the concentration, as well as the entities controlled by them, those who control them, and the entities under the control of those who control the participants shall be added up; and (b) the value of the IU corresponding to the business day prior to the date of the request for authorization and, if applicable, the interbank exchange rate of the business day prior to the date of the request for authorization shall be considered.
2. With respect to the **competitive analysis of the concentration** by the enforcement body, the consideration of the relevant market, the degree of concentration, external competition, barriers to entry, the effect on upstream and downstream competition and efficiency gains are listed as factors to be taken into account.
3. With respect to **the timing of presentation of the authorization request**, it is clarified that the request for authorization must be made prior to the implementation of the concentration (depending on the type of concentration in question) and if it is subject to the fulfillment of certain conditions precedent or acts involving the de facto taking of control or substantial influence, it must be made prior to the occurrence of such situations.
4. With regard to the **deadlines and phases** for analysis: **(a)** the statutory period of analysis of 60 calendar days available to the enforcement body to make a decision on the request for authorization shall start from the date on which the request for authorization was correctly and completely filed and shall be interrupted where there are requests for information; **(b)** the enforcement body must inform the parties whether the request for authorization was made in a correct and complete manner within 10 working days, and the parties shall have 10 working days to remedy these comments - upon expiry of this period without curing those comments, the request for authorization is deemed not to have been made and the parties may not resubmit a new request for authorization before a further 10 working days have elapsed; and **(c)** two phases were introduced into the process for the assessment of concentrations, namely

(i) there will be a **first phase** which cannot extend beyond the first 20 calendar days, reserved for those concentrations which, due to their impact, in the opinion of the enforcement body, do not constitute a substantial decrease in competition, with a presumption that concentrations do not constitute a substantial decrease in competition when the value of the concentration or the value of the assets located in Uruguay to be absorbed, acquired, transferred or controlled does not exceed an amount equivalent to 5% of the 600,000,000 Indexed Units threshold; and

(ii) a **second phase** (within the remaining 40 calendar days) for those concentrations which, in the opinion of the enforcement body, could adversely affect the conditions of competition in the relevant market(s) under consideration. In this second phase, the enforcement body may request additional information from the parties or third parties and will issue a public notice of the concentration for the purpose of allowing third parties to make representations regarding possible changes or impacts on the conditions of competition in the affected markets.

5. Since the Reform provides that the enforcement body may accept, reject or “condition” the operations of economic concentrations, these **possible conditions are regulated** as follows: **(a)** the conditions shall be proportionate to the immediate or potential effects which may harm competition and arise as a result of the concentration under consideration; **(b)** both the parties and the implementing body may suggest such conditions unilaterally; **(c)** a specific process is established in which the enforcement body may request the parties to submit proposals for mitigation measures. The parties will have 15 working days to respond and the enforcement body 15 working days to evaluate them; **(d)** the conditions may be structural (e.g., sale of assets or business) or behavioral (e.g., commitment not to engage in a certain practice); and **(e)** failure by the parties to accept the conditions or the compliance program and their time frames, as set by the enforcement body, will result in the refusal of the authorization.

6. With respect to the **efficiency gains** that may be claimed by the parties: these may only be taken into account if they arise directly from the concentration and cannot be achieved without it, and must be transferable to the consumer. The Decree lists possible efficiency gains, as well as those that will not be acceptable, and are all aligned with international parameters.

7. With regard to the **suspensive effect** of the new prior authorization regime, the Decree clarifies that concentrations may not be implemented until a decision on authorization is issued or tacit authorization has been given due to the expiry of the time limit. Concentrations resulting from legal acts carried out abroad must be notified before they produce legal or material effects in Uruguayan territory. In the event of a rejection, the Decree clarifies that the concentration may not be implemented, or else judicial and administrative measures will be taken to declare the act without legal effect.

Other important aspects of the Decree

The Decree reflects the existence, after the Reform, of anti-competitive practices that are “per se” prohibited (hard core cartels). In addition, some relevant procedural reforms are introduced in the framework of the investigation and sanctioning procedure of potentially anti-competitive practices. In particular:

It is specified that prior to issuing a decision on the relevance of a complaint, the enforcement body may request, before the Judiciary, the implementation of confidential evidentiary measures without notice to the possible investigated parties or third parties.

The time limit for the initial hearing of alleged offenders in the context of investigations and complaints is extended from 10 to 15 working days.

It provides that the enforcement body may also grant a right to be heard, beyond the alleged offenders, to other persons who are also alleged to have violated the provisions of the Law or who may be affected by the investigation.

It is specified with respect to the commitments (to cease anti-competitive practices) proceedings that: **(a)** the sanction to be imposed in the event of non-compliance with the commitment undertakings, which must be included as a clause in the commitments, must be consistent with that which would apply had the conduct under investigation been proven; **(b)** the investigation shall only continue in the event that the commitments do not cover all the persons under investigation, in which case it shall continue with respect to those who have not entered into such commitments; **(c)** if the unlawfulness of the conduct and the identity of the person who carried it out is amply demonstrated in the progress of the investigation, the commitments must include recognition of the illegality of the conduct and establish a penalty.

It is specified with respect to the sanctions regime that: **(a)** the sanctions may be applied independently or jointly according to the circumstances of the case, but the double sanctioning of the same non-compliance event must be avoided; **(b)** the sanctions may also be applied in the cases of non-compliance with the provisions established for prior authorization of economic concentrations; and **(c)** with respect to the value of the final resolution imposing a fine as an enforcement title, it is clarified that the provisions of Article 91 of the Uruguayan Tax Code on enforcement action for the collection of tax credits apply.