

Pre-Merger Notification Guide

URUGUAY
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1. Is there a regulatory regime applicable to mergers and similar transactions?

Yes.

The Uruguayan Government enacted in August 2007, law number 18.159 named "Trade Freedom and Free Competition Preservation Act" ("Libertad de Comercio y Preservación de la Libre Competencia") (the "Antitrust Act") which included, for the first time in Uruguay, a kind of pre-merger control approval in certain specific cases (economic concentrations). The Antitrust Act was regulated by Decree Nº 404/2007 (the "Decree") and Resolutions No. 3/009, 50/009 and 39/010 of the Commission for the Promotion and Protection of Competition "Comisión de Promoción y Defensa de la Competencia") (the "Resolutions").

2. Identify Applicable National Regulatory Agency/Agencies.

The Commission for the Promotion and Protection of Competition (the "Commission") – a non-concentrated entity of the Ministry of Economy and Finance (Executive Power) – was appointed as the competent authority. On February 19, 2009 the Executive Branch designated the three members of the Commission. Furthermore, Section 27 of the Antitrust Act provides that in some sectors of the economy which are regulated by special entities (such as financial institutions, energy, telecommunications, etc.) the competent authority to apply the Antitrust Act will be each relevant regulator (for example, the Central Bank of Uruguay in the case

of financial institutions and the Telecommunications Agency (URSEC) in the case of telecommunications entities).

3. Is there a supranational regulatory agency (e. g., the European Commission) that has, or may have exclusive competence? If so, indicate.

No.

4. Are there pre-merger filing requirements; if so, where are they published?

Section 7 of the Antitrust Act establishes that any act of economic concentration (as defined under Section 7 of the Antitrust Act), when certain thresholds are exceeded, (defined as "**Covered Transactions**" for the purposes of this guide) must be notified.

4.1 Covered Transactions: Some of the acts that would qualify for Covered Transactions include the following:

- mergers – all types of companies' mergers regulated in Uruguayan Companies' Law N° 16.060 are covered;
- acquisition of shares, quotas or social participations;
- the acquisition of commercial, industrial or civil establishments – transfer of businesses as ongoing concerns or business units will qualify;
- total or partial acquisition of assets which imply a transfer/change of control of the productive units;
- any other type of transaction that imposes a transfer/change of control of all or part of an economic unit or company – this is a residual category by which any other form of transaction and/or agreement that results in a transfer/change of control would be included.

4.2 Thresholds: Notification filings are mandatory – whichever type of concentration – when one of the following thresholds are exceeded:

- When as a result of the transaction, one of the parties results with 50% or more of the market share.
- When the gross annual revenue of the parties in Uruguay within the last three accounting years was equal to or more than 750.000.000 Indexed Units (considering an average of the value of the Indexed Unit in the relevant periods).

4.3 Notification: Whenever a Covered Transaction takes place and provided that the thresholds mentioned above are exceeded, the relevant companies must notify to the Commission ten days prior to the completion of the transaction (change of control)..

It will be crucial to determine the moment when the change of control (which triggers the obligation to notify) is effectively achieved. This would depend on the type of Covered Transaction.

The purpose of this notification is to give the Commission (that cannot reject or object the transaction) information about the occurrence of a Covered Transaction so that the competent agency is aware of such “economic concentration” and consequently gains knowledge about sectors of the economy in which it could be more likely that anticompetitive practices or abuse of a dominant positions take place.

4.4 Authorization: In cases where the economic concentration operation results in a “de facto monopoly”, the prior authorization of the Commission is required. A “de facto monopoly” is deemed to have been created when as a result of the transaction there is only one enterprise left in the relevant market.

4.5 Publication: The requirements are established in the Antitrust Act, the Decree and the Resolutions, all of them available in the website of the Commission: http://www.mef.gub.uy/competencia.php.

5. What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)

The transactions caught by the national rules are the Covered Transactions as described above.

Besides, Section 8 of the Antitrust Act establishes that the obligation to notify provided by Section 7 is not required in the following cases:

- the acquisition of companies in which the buyer held at least 50% of the shares of the target. The idea behind this exception is that in this case, there is no real change of control.
- the acquisition of bonds, debentures and securities or any other debt instruments issued by the company, or the acquisition of shares with no voting rights. The acquisition of these instruments does not imply a change of control.
- the acquisition of a sole company by 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.
- the acquisition of companies, whether or not declared bankrupt, with no activities in the country in the last year. This is normally included with the objective of facilitating the purchase of companies with no activity or that are in distress, and to avoid liquidation or other similar procedures of the company.

6. Is there a "size of transaction" threshold?

No. However the thresholds stated in 4.2 above are applicable.

7. Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?

Yes. Please see our comments included under 4.2.

8. Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

No.

9. Is the filing voluntary or mandatory? What are the penalties for non-compliance?

Filing is mandatory.

Section 39 of the Decree provides that the authorized representatives will be held responsible / liable for non compliance with the obligation to notify. Sanctions could be of up to 1% of the total turnover of the relevant entities obliged to notify for each one of the authorized representatives. The fine imposed to the representantives cannot exceed 25% of the sanction applicable to the legal person it represents.

In addition, in Resolution 50/009 the Commission has approved additional sanctions to be applied to the relevant company: (i) a warning and publication of the resolution in two national newspapers (all costs in charge of the breaching party); and (ii) a fine between 100.000 Indexed Units (approximately USD 10.500) and the equivalent to 5% of the total annual turnover of the relevant entities that failed to comply with their obligation to notify.

In addition, in order to review the effects of a failure to request authorization in the case of a “de facto monopoly” case, it is relevant to analyze the nature of the act of prior authorization to determine if it constitutes a validity requirement or, instead, an effectiveness condition of the operation.

Section 9 simply establishes that “in the cases in which the economic concentration act implies the formation of a “de facto monopoly”, the process must be authorized by the competition authority” without stating the consequences of a non-compliance or omission. Given the lack of an express legal provision in the Antitrust Act declaring null and void those eligible transactions where the prior request seeking authorization was not filed, there are enough reasons to conclude that such authorization is not a validity requirement. Indeed, our current statutes provide that unless the law clearly states a nullity effect resulting from a non compliance, validity is never at stake. Consequently, the fact that Section 9 does not establish such consequence (nullity), it implies, that the parties may choose to validly close a transaction in the absence of prior authorization for such operation.

If the Commission concludes that the entity resulting from such concentration operation (which failed to request authorization to the Commission) qualifies as a “de facto monopoly”, the two following scenarios are feasible:

(i) if the concentration operation that was not notified is finally approved when the Commission became aware of its terms and conditions, it is anticipated that the Commission would most probably conclude that the relevant parties failed to comply with the Antitrust Act and may impose a fine (but without further consequences);

(ii) if, on the contrary, the Commission rejects the concentration operation, it is likely: (i) that penalties could be applied under the Antitrust Act resulting from the violation; (ii) that said penalties could be higher if the monopolistic company resulting from the concentration were to operate as a de facto monopoly after closing, with adverse effects on consumers and/or users or competitors; and (iii) that the Commission orders the company to cease to operate as a unified decision-making unit.

10. Time in which a filing must be made.

The Antitrust Act requires the relevant companies to notify to Commission – ten days prior to the completion of the transaction (change of control) that qualifies as a Covered Transaction (as defined above). The moment on which the change of control (which triggers the obligation to notify) is effectively achieved would depend on the type of Covered Transaction.

11. Form and Content of Initial Filing.

Section 40 of the Decree regulates the content of the note to be addressed to the Commission and provides that such notification should include the following information/documentation: (i) trade Name, fantasy name, address, and main business of the companies involved; (ii) list of the shareholders with a participation higher than 5%, and a description of the property structure of the company after the deal; (iii) name of the administrators, directors, representatives, and managers; (iv) list of the products (or services) commercialized by the companies; (v) volume and value of the sales of the product (or services) during the last three years; (vi) identification of the companies with product or services which could substitute those offered by the parties; (vii) brief description of the markets of the products (or services) of the parties; and (viii) name, phone, e-mail of the contact persons who have made the report. If the information given to the Commission is estimated, such circumstance has to be clarified. In Resolutions No. 3/009 and 39/010 the Commission has approved a form to simplify the filing of the required information. The form is available at the Commission's web site.

12. Are filing fees required?

No.

13. Is There An Automatic Waiting Period? If so, specify.

Not in the case of notification. In the event of a "de facto monopoly" if the Commission does not issue an opinion within the term of 90 (ninety) days as of the corresponding request for authorization, the transactions shall be deemed authorized.

14. Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?

Under the cases of notification no further actions is expected from the Commission (unless it considers that the economic concentration is creating a "de facto monopoly"). In such later case (monopoly cases), the Commission has a 90 (ninety) days period to react. It cannot be shortened by parties. In fact, the Commission may extend such period by requesting (but only up to two times) additional information and documentation.

15. What is the substantive test for clearance?

The analysis of the cases shall incorporate, among other factors, the consideration of the relevant market, the external competition and the efficiency gains.

16. What are the common Post-Filing Procedures: Requests for further information, etc?

Upon notification to the Commission, the Commission issues a resolution which is published in the Commission's website. In practice, the Commission has requested the parties to inform once the transaction is completed.

In addition, the Commission may also require periodical information to the companies involved in order to follow-up the conditions of the market in the cases deemed convenient. The Commission may request business information like: sales, prices, agreement with suppliers and distributors, installed capacity, etc.

17. Describe the sanctions for not filing or filing and incorrect/incomplete notification.

Regarding sanctions for not filing or for incorrect or incomplete filings please see our answer to question 9.

18. Describe the procedures if the agency wants to challenge the transaction?

If the Commission understands that the act of economic concentration implies the conformation of a de facto monopoly (the only case in which it may block/reject the transaction) it should notify the parties about such decision. It is important to mention that as an administrative decision the parties may file an administrative claim ("*recursos administrativos*") requesting the same authority to reconsider the decision and if confirmed submit it to the final decision of the Executive Power. If such decision is finally sustained (which may be tacit through the lapse of a certain period of time) such administrative decision could be judicially challenged by filing a claim before the administrative court ("*Tribunal de lo Contencioso Administrativo*").

19. Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?

Please see our comments to question 9.

20. Describe, briefly, your assessment of the regulatory agency's current attitudes/activities.

Since its creation on February 19, 2009, the Commission has issued eight resolutions concerning pre-merger notifications. This represents a small percentage of the approximately 40 cases that the Commision receives per year. None of those cases involved a “de facto monopoly”.

21. Other Important Information:

There is an exchange of information agreement with Brazil, Paraguay and Uruguay. The member countries of MERCOSUR signed a Defense of Competition Agreement in which each State undertakes, through its compentent working bodies, to promote the cooperation and exchange of information between States regarding the Defense of Competition.