CPI Columns
Latin America

April 2021

First Steps of the New Merger Control Regime in Uruguay

By Alejandro Alterwain | Ferrere Abogados

Edited By María Fernanda Viecens & Esteban Manuel Greco

First Steps of the New Merger Control Regime in Uruguay

By Alejandro Alterwain[1]

A new merger control regime entered into force in Uruguay on April 12, 2020. This article describes its main features and enforcement trends. Special attention is devoted to the first merger approved with conditions under the new regime.

I. Features of the New Merger Control Regime

A. The Main Regulatory Change: Suspensory Effects

Under the old merger control regime (enacted by Law 18,159 in 2007), antitrust filings with the National Competition Authority[2] did not have suspensory effects. In practice, they just kept the government updated on some of the main deals affecting the local market.

Exceptionally, transactions required authorization when they created a *de facto* monopoly -equal to 100 percent of the relevant market. This exception to the general rule remained unenforced, with no authorization requests for *de facto* monopolies throughout most of Law 18,159's 13 years of legal validity. However, in March 2020 – just one month before the new regime entered into force – the Commission applied the *de facto* monopoly rule for the first time in deciding that a planned acquisition of the country's leading supermarket chain (Grupo Disco) by Goldman Sachs, already the main stockholder of another supermarket chain (Tienda Inglesa), would create several *de facto* monopolies and, therefore, the deal required authorization.[3] The parties to that transaction later abandoned their merger plan.

The new regime was introduced by Law 19,833, enacted in September 2019, which amended Law 18,159 and was later complemented by Executive Decree Nº 194/020. More recently, on December 15, 2020 the Competition Commission published its guidelines on economic analysis applicable to merger control (hereinafter the "Merger Control Guidelines").

The main change introduced by the new regime is that antitrust filings now always have suspensory effects. Apart from economic sanctions applicable to gun-jumping situations (described below), the new regulations prohibit the closing of covered transactions without the NCA's prior explicit or tacit authorization.[4] This rule also means, in our opinion, that unauthorized transactions are invalid and ineffective under contract law rules.

B. Single Filing Threshold and Exceptions

The new regulations set forth a single filing threshold, repealing the market share threshold applicable under the old regulations.[5]

Under the new regulations, parties to an "economic concentration act" shall request prior authorization from the antitrust authority when the parties' combined gross turnover "in Uruguayan territory" in any of the last 3 fiscal years equaled or exceeded 600 million indexed units (currently, some USD $65 million).

This threshold is practically equal to that stipulated under Law 18,159, with the only

---

[1] Alejandro Alterwain is a legal counsel and head of the Competition Law practice group at Ferrere Abogados in Montevideo, Uruguay.
[2] Uruguay has several competition authorities. The main agency is the Uruguayan Competition Commission ("Comisión de Promoción y Defensa de la Competencia"), a Ministry of Economy unit. Economic regulators, such as the Telecommunications regulator (URSEC), the Water and Energy regulator (URSEA) and the Central Bank (BCU), have exclusive antitrust jurisdiction in their areas of control and in horizontally or vertically related areas. Therefore, we will use the "NCA" or the "Authority" to speak of any these agencies, and to the "Commission" to specifically refer to the Competition Commission.
[3] Decision 51/020 dated March 30, 2020.
[4] Section 9 par. 5 of Law 18,159 as amended by Law 19,833.
[5] Section 7 of Law 18,159 included a market share threshold which triggered the duty to file when, as a consequence of the transaction, the buyer acquired 50 percent or more of the relevant market.

difference being that under said law the financial threshold was higher (750 million indexed units).

Calculating the turnover requires summing up the parties' and their economic groups' invoiced amounts in Uruguayan territory, including taxes. There is no definition for what should be understood as turnover "in Uruguayan territory," so said expression could be construed as both turnover invoiced in Uruguay or sourced in Uruguay.

"Economic concentration acts" are defined as transactions that modify the control structure of the target company. Unfortunately, once again there are no guidelines on how "control" should be assessed. This means that there are many kinds of transactions, such as joint-ventures, licensing of IP rights, etc., which are open to discussion – with very limited legal grounds – as to when they entail a change of control.

Law 19,833 maintained, with minor adjustments, the exceptions to the filing duty previously available under Law 18,159, such as the "first-landing" exception (the acquisition of a single company by a foreign company with no previous assets or shares in Uruguayan companies), the acquisition of companies in which the buyer already held at least 50 percent of the shares, and a very limited type of failing firm defense, the only exception amended by the new regulation.[6]

C. Filing Deadline

The authorization request must be filed prior to the execution of the transaction. However, if – as is usually the case – the closing is subject to the fulfillment of a condition precedent or to acts which involve the acquisition of control (or that have a significant influence on the adoption of administrative decisions for the target company), the authorization application must be filed prior to such situations.

D. The 60-day Term Rule

Once the parties file the authorization request, the antitrust authority has 60 calendar days to decide. The Authority's silence during the 60-day term is understood as tacit approval.

During the 60-day term the NCA can authorize the transaction, subject the authorization to remedies, or reject it.

In practice, however, this 60-day term rule does not mean that the procedure will necessarily last 60 days.

Firstly, because the 60-day term is counted from the date the authority receives a "complete and correct" submission, meaning that the authority may have a longer term to decide, as it can challenge the filing on a formal basis by requesting clarifications or further information in order to consider the submission as "complete and correct."

The NCA has 10 business days as of the application date to decide on said matter and to challenge the submission on formal grounds.

Secondly, the actual duration of the procedure may be longer as the Commission has construed that when conditioning the transaction to remedies the 60-day term applies only to the decision of whether the NCA will subject the transaction to remedies, but it can then negotiate the remedies without a fixed deadline.[7]

E. The Regulations Set a Two-phase Evaluation Procedure

First phase proceedings shall not exceed 20 (twenty) calendar days – again, once the NCA accepts that the parties have submitted "complete and correct" information. First phase cases shall pertain to merger transactions which do not represent a material impact on competition. Such a low-impact situation is legally presumed to be based on the value of the transaction or of the assets located in Uruguay and related to the transaction.

If the authority's judgment is that the transaction may have a negative effect on the relevant market/s in question, the agency can go on to a second phase for deeper analysis. In second

[6] Section 8 of Law 18,159 as amended by Law 19,833.
[7] Commission Decisions 264/020 dated December 11, 2020 and 52/021 dated March 16, 2021.

phase cases the authority opens the procedure to public consultation, where it can receive third parties' statements as to the potential economic impact of the transaction. The NCA can use the full legal term (60 days) to decide second phase cases.

Up to now there have only been two second phase precedents, explained in further detail below: one case related to the air transport industry (the *Iberia/Air Europa* merger) and one case still pending related to the acquisition of a pharmacy by a drugstore chain.

F. Substantive Rule: Lessening of Competition with Consumer Welfare as a Guide

The main rule of thumb is that transactions subject to antitrust authorization shall not *"have the effect or object of restricting, limiting, hampering, distorting or impeding current or future competition in the relevant market."*[8]

Among other factors, under Law 19,833 the Authority must consider in its analysis *"the relevant market, foreign competition and efficiencies."*[9] Efficiency gains, particularly, must be passed on to the consumer to be considered by the NCA.[10] Nevertheless, there are no specific references to consumer welfare in the new merger control regulations.

That does not mean, however, that the merger control regime is not consumer welfare-oriented, at least in our opinion. In fact, the aim of Uruguayan antitrust regulations, including merger control, is the fostering of consumer welfare, as stipulated in Section 1 of Law 18,159.

The Merger Control Guidelines do require the examination of consumer welfare impact. In fact, although they first refer to consumer welfare as a kind of by-product of competition,[11] they then require evaluation of specific consumer harm in the context of vertical mergers (vertical foreclosure)[12] or market power leverage in conglomerate transactions.[13]

G. When Can the NCA Subject the Authorization to Remedies?

The NCA is entitled to subject the authorization to either structural or behavioral commitments by the parties if those remedies are *"directly and specifically related to preventing the creation or strengthening of a dominant position."*[14]

Merger Control Guidelines note that remedies must be aimed at offsetting the anticompetitive effects of a transaction, but they also alert that they should not be aimed at remedying previous market failures.

Remedies must comply with the following four conditions: they must be (1) *proportionate* to the kind of anticompetitive effect they aim to prevent, (2) *adequate* and *appropriate* to address the anticompetitive effects of the transaction, (3) *effective*, meaning that the parties must be capable of implementing the remedies and the NCA must be capable of monitoring and enforcing them, and (4) they must treat the anticompetitive effects *efficiently and in a timely manner*.

H. Gun Jumping

The new regulations prohibit the closing of economic transactions without prior authorization (transactions without such authorization "do not produce legal effects" according to the regulations[15]) and stipulate penalties if (1) the parties fail to request authorization in due time, (2) the parties fail to

[8] Section 9 of Law 18,159, as amended by Law 19,833.
[9] Section 9 of Law 18,159, as amended by Law 19,833.
[10] Section 43 of Decree 404/007, as amended by Decree 194/020.
[11] Competition Commission guidelines on economic analysis applicable to merger control, p.5. It states that *"the economic analysis of economic concentration transactions must consider how the transaction affects competition over time. It is understood that a transaction that materially lessens competition over time diminishes competition benefits, causing an adverse effect on consumers"* (author's translation).
[12] Competition Commission guidelines on economic analysis applicable to merger control, p.22.
[13] Competition Commission guidelines on economic analysis applicable to merger control, p. 24.
[14] Section 45 of Decree 404/007 as amended by Decree 194/020.
[15] Section 44 par. 4 of Decree 404/007 as amended by Decree 194/020.

comply with the remedies as approved by the NCA, or (3) despite rejection by the NCA, the parties still close the transaction.[16]

Penalties include fines, ranging from a minimum amount of 100,000 IU (one hundred thousand indexed units, currently close to USD 12,000) and a maximum amount consisting of the highest out of the following values: (1) 20,000,000 IU (twenty million indexed units, currently close to USD 2 million), (2) the equivalent of 10 percent of the infringer's annual turnover, or (3) the equivalent of three times the harm caused by the unauthorized merger, if determinable.[17]

In those scenarios, the NCA can fine the infringing parties, their directors, and their controlling companies and directors.[18] There are still no precedents of penalties ordered by an NCA due to gun-jumping situations.

II. Enforcement Trends: First Case with Conditions

Over one year of enforcement, some 13 transactions have been cleared in phase 1 and two cases sent to phase 2:[19] the *Iberia/Air Europa* merger and the pharmacy acquisition. Only the former has been decided to date.

In the *Iberia* case, referred to the planned acquisition of Globalia (Air Europa) the by IAG Group (Iberia), the Commission sent the deal to phase 2 based on several factors: the complexity of the air transport industry, the current market fragility related to the coronavirus pandemic, and the horizontal overlap caused by the transaction for some flights.[20]

On March 16, 2021, the Commission cleared the transaction subject to remedies negotiated with the parties. As mentioned in the NCA's decision, the main remedies are (1) the execution of Special Prorate Agreements (SPA) with potential entrants to the market, (2) their right to use Iberia's frequent flyer program, and (3) certain capacity commitments (minimum number of flights and seats), all monitored by an independent trustee. Said commitment will only be enforceable if the transaction is finally closed by the parties.[21]

The pharmacy case is still pending. During public consultation the Commission indicated that the decision to enter the second phase was based on the fact that the transaction would involve the merger of 2 of the 7 pharmacies located in the city of Durazno, while recognizing a lack of knowledge of how that market actually works.[22]

III. Final Thoughts

Is it time to assess the new regime? Well, it is probably too soon, but already there is some food for thought.

First, the scant number of cases taken up by the NCAs may have confirmed something quite foreseeable: having a high financial threshold in a small economy (with no market share threshold) will lead to filing for a very limited number of cases. Quite probably, many anticompetitive mergers will bypass local antitrust regulations just because they do not trigger the financial threshold.

Also, as the precedents mentioned have shown, the Uruguayan Commission will not hesitate to use all its powers and (limited) resources to control sensitive deals impacting Uruguayan markets. However, it seems that those limited resources will be employed mainly for the examination of local transactions, with foreign-to-foreign deals being the exception.

[16] Section 44 par. 5 of Decree 404/007 as amended by Decree 194/020.
[17] Section 17 of Law 18,159.
[18] Section 19 of Law 18,159.
[19] Source: Commission website. There may be unpublished decisions from other NCAs.
[20] Commission Decision Nº 224/020 (October 13, 2020).
[21] Commission Decision Nº 52/021 (March 16, 2021).
[22] https://www.gub.uy/ministerio-economia-finanzas/comunicacion/noticias/fase-2-asunto-no602020-coboe-sa-lombardi-1-srl-concentracion-economica.

Finally, there are still more open questions than answers: how will the Uruguayan NCAs assess dynamic efficiencies, digital markets, and non-economic considerations; how will they construe the phrase “change of control,” which is key for deciding whether a transaction is covered by the regulations; and how will they apply the exceptions to the filing duty? The NCA’s responses to these and other crucial questions are still to be heard. A lot remains to be done of course, but we have already seen the first steps. And that’s good news.