Argentine Antitrust Legislation

Overview of Relevant Rules and Regulations

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Delving into Argentina's antitrust legislation, this article concentrates on the determination of anti-competitive practices and the new Merger Regulation.

Argentina's antitrust legislation is contained in Law No 25,156 (the 'Act') which was enacted on 25 August 1999.[1] Although similar in many respects, the Act repeals, in its entirety, the preceding antitrust legislation which was regulated under Law No 22,262 and had been in force since August 1980.[2] The Act sets forth two principal areas of reform to Law No 22,262 which are addressed in this article. First, the Act provides clearer guidance in determining whether a particular commercial practice is anti-competitive and therefore in violation of the Act. Secondly, the Act provides for a new regulation to govern mergers and other business concentrations.[3] Other areas of reform, which are not addressed in this article, include a more comprehensive sanctioning scheme providing for fines of up to 150 million pesos and forced break-ups.

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Prohibited acts and conduct

Like its predecessor (Law No 22,262), Article 1 of the Act broadly prohibits '(all) acts or conduct related to the production or to the exchange of goods or services that limit, restrict or distort competition or market access or that constitute abuse of a dominant market position in a way that may cause harm to the general economic interest . . .'.[4] There are two basic elements to this prohibition. First, the act or conduct in question must be anti-competitive, either by restricting a market function or by abusing a dominant market position. Secondly, such anti-competitive activity must adversely affect the general economic interest.[5]

Anti-competitive practices

Anti-competitive activity under Article 1 of the Act is any practice that either (1) 'limits, restricts or distorts competition' or (2) 'abuses a dominant market position'.[6]

Collusive practices

The notion of 'limiting, restricting or distorting competition' concerns agreements or concerted

practices that are designed to restrict competition and exclude competitors. Through such collusive practices, firms may indirectly restrain competition by exerting market power that they would not otherwise have were they to act unilaterally. Under Article 1, 'agreements' or 'concerted practices' need not be formal or written. Rather, informal understandings or implicit cooperation, which may be inferred from conduct, may be sufficient evidence of an agreement or concerted practice. Article 1 applies to both horizontal agreements among competitors and vertical agreements among entities at different levels in the distribution chain.[7]
Article 2 of the Act sets out a non-exhaustive list of collusive practices that are prohibited under the Act to the extent they fall within the scope of Article 1. These include, among others, collusive practices designed to:

(1) directly or indirectly fix the prices of goods or services;
(2) directly or indirectly limit production, processing, distribution or purchase of goods or services;
(3) divide territories, customers, or supply sources among competitors;
(4) directly or indirectly limit the bidding process;
(5) directly or indirectly limit technical development or investment in the production of goods or services; and
(6) directly or indirectly hinder market access of one or more competitors.

Abuse of a dominant market position

The notion of 'abusing a dominant market position', on the other hand, focuses primarily on single firms and restrictions on competition resulting from their unilateral exercise of market power. The key issue here, therefore, is under what circumstances will a firm be deemed to occupy a dominant position in a market so as to be able to restrain competition unilaterally? Article 4 states that 'a person enjoys a dominant position in a market when, for a determined type of good or service, such person is the only seller or buyer in a national or foreign market, or if such person is not the only buyer or seller, such person is not subject to any substantial competition or, due to the degree of vertical or horizontal integration, is in a position to affect the economic viability of a competitor or market participant'.

Article 5 of the Act provides an illustrative list of factors to consider in determining whether a firm occupies a dominant market position. These factors include:

(1) the elasticity of demand and supply of the related product or service[8];
(2) the barriers to entry that affect the ability of other firms to enter the market; and
(3) the firm's ability to affect demand or supply of a given market unilaterally and the ability of competitors to counteract such influence.

General economic interest

As mentioned above, the anti-competitive conduct will violate Article 1 only if it adversely affects (or has the potential to adversely affect) the 'general economic interest'.[9] Therefore, conduct that is deemed anti-competitive, either by restricting a market function or by abusing a dominant market position, does not automatically violate the Act, unless such conduct adversely affects the market in question.[10] The rationale for this approach is that many agreements or practices, although anti-competitive in nature, have pro-competitive effects or legitimate business justifications. For example, when entering into a joint venture agreement, the parties often agree not to compete with the joint venture during its life. Such restriction, although anti-competitive, is indispensable to the success of the joint venture and, therefore, has a legitimate business justification. Likewise, there are many distribution or franchise agreements which divide territories but nonetheless have pro-competitive effects. In determining whether the anti-competitive practice benefits or adversely affects the general economic interest, courts look at its effect on consumer and producer surplus. Because the 'general economic interest' is deemed to be maximised when consumer and producer surplus are at their highest levels, any anti-competitive act that potentially reduces such surplus is deemed to have an adverse impact on the general economic interest and, therefore, to violate the Act.

Merger regulation

The regulations relating to the merger and consolidation of companies are set forth in Articles 6 to 16 of the Act (the 'Merger Regulation'). Article 7 of the Act prohibits business concentrations created with the purpose, or which have the effect, of restricting or otherwise distorting competition in a way that may adversely affect the general economic interest. The Merger Regulation does not prohibit business concentrations *per se*. Rather, just as under

Article 1, the Merger Regulation only prohibits those business concentrations which may adversely affect the general economic interest.[11]

Business concentrations

Article 6 defines a 'business concentration' as a transaction which transfers the control of one or more companies through:

(1) a merger;
(2) the transfer of a going concern;
(3) the acquisition of title to, or any other rights in connection with, shares, equity certificates or convertible debt instruments of a company that gives the acquirer control of or a dominant influence over a company; or
(4) any other agreement or act that transfers to one person or a group of persons the assets of the company, or grants such person(s) a prevailing influence in the adoption of ordinary or extraordinary managerial decisions.

Article 8 requires notification to the Tribunal Nacional de Defensa de la Competencia (the 'Antitrust Tribunal'), a new entity created under the Act,[12] and government approval of all business concentrations if the combined aggregate business volume of all the 'firms concerned' in the transaction exceeds 200 million pesos at the national level.[13] For the purposes of the Merger Regulation, 'business volume' means the total revenue of each of the firms concerned from product or service sales for the latest fiscal period immediately succeeding the contemplated transaction net of (1) sales discounts and (2) value added and other related taxes. 'Firms concerned' means:

(1) the relevant company;
(2) the purchaser;
(3) person(s) directly or indirectly controlling the purchaser;
(4) person(s) directly or indirectly controlled by the purchaser;
(5) person(s) directly or indirectly controlled by the person(s) directly or indirectly controlling the purchaser; and
(6) person(s) directly or indirectly jointly controlled by two or more persons described above.

The Merger Regulation defines 'control' as:

(1) one (controlling) person who holds more than 50 per cent of the equity of another (controlled) person;
(2) the power of one (controlling) person to exercise more than 50 per cent of the voting rights of another (controlled) person;
(3) the ability of one (controlling) person to appoint more than 50 per cent of the members of the board of directors of another (controlled) person; or
(4) the right of the (controlling) person to direct the activities of another (controlled) person.

Any business concentration between two parties outside Argentina meeting the above-mentioned thresholds may be subject to the Merger Regulation, if the business concentration meets the above-mentioned thresholds and involves entities holding, whether directly or indirectly, assets in Argentina.[14]

Article 10 of the Act provides that certain transactions are exempt from mandatory notification requirements even though they fall within the above-mentioned threshold. These transactions include:

(1) acquisition of a company in which the buyer previously held over 50 per cent of the capital stock;
(2) acquisition of debt or equity instruments which do not entitle the holder thereof to any voting rights;
(3) acquisition of an Argentine company by a foreign company which previously held no assets or capital stock in another Argentine company (first landing);
(4) acquisition of liquidated companies that have not engaged in business activities in Argentina during the previous year; and
(5) transactions otherwise within the meaning of 'business concentration' under Article 6 of the Act giving rise to the notice requirement, if the total transaction amount (or value of assets located in Argentina that are merged, acquired, transferred, or controlled in such transaction) do not exceed 20 million pesos; unless the parties had entered into transactions that, in the aggregate, exceeded 20 million pesos in the 12 months preceding the transaction or 60 million pesos in the 36 months preceding the transaction, in each case with respect to the 'same market'.[15]

Notification and review

In accordance with Article 8, parties engaged in 'business concentrations' that fall within the above-mentioned threshold must notify the Antitrust Tribunal prior to or within one week of consummation of the transaction.[16] Article 8 of the Act provides that all business concentrations subject to mandatory notification are without binding effect

vis-à-vis third parties until expressly or implicitly approved by the Antitrust Tribunal in accordance with the provisions of the Merger Regulation.[17] Article 9 of the Act provides that failure to duly notify the Antitrust Tribunal could result in fines of up to one million pesos per day as of the mandatory notification date, over and above any other potential fines for violation of the Merger Regulation.[18]

The procedural rules applicable to pre-merger notifications are set forth in Resolution No 40/2001 of the Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor.[19] The resolution provides that each of the firms concerned in the business concentration must file information with the Antitrust Tribunal in three stages on specially designed forms.

In addition to the period of one week established by the Merger Regulation for the notification of business concentrations, parties may request an advisory opinion from the Antitrust Tribunal in which the parties participating in a business concentration should describe the transaction and request an advisory opinion with respect to the need for mandatory prior notification. If, in the opinion of the Antitrust Tribunal, the transaction is exempt from mandatory prior notification or if the transaction does not have any effects in the Argentine market, notification of the transaction does not need to be given and, as a consequence, Forms F-1, F-2 and F-3 (which are described below) do not need to be filed with the relevant authorities. This advisory opinion is especially useful in the case of foreign companies, as the request for an advisory opinion would allow companies to know in advance if they will be required to prepare and file with the Antitrust Tribunal all the forms and supporting documents relative to the business concentration.

The notification procedure begins with the filing of the Form F-1 (Stage 1). The information to be included in the F-1 form includes, among other information:

(1) the name and domicile of the firm concerned and its respective representatives;
(2) a description of the activities of the firm concerned and the markets in which it operates;
(3) a copy of the charter documents and financial statements of the firm concerned;
(4) a description of the transaction and copies of the definitive transaction documents; and
(5) a description of the effects of the transaction, including the business volume involved and the types of services, products and markets affected.

Within 15 days of the filing of Form F-1, the Antitrust Tribunal may either approve the transaction or may request that the parties submit additional information related to the transaction on Form F-2 (Stage 2). The purpose of Form F-2 is to define with greater precision the market in which the transaction will take place and the effect such concentration will have on competition in the market. Within 35 days of the filing of Form F-2, the Antitrust Tribunal may either approve the transaction or may request that the parties submit additional information related to the transaction on Form F-3 (Stage 3).[20]

On receipt of all pertinent information, the Antitrust Tribunal will, within 45 days, decide to approve the business concentration, to approve it subject to conditions, or to oppose the transaction. At its own discretion, the Antitrust Tribunal may extend the waiting period by 30 business days where deemed proper. If the Antitrust Tribunal does not render a decision within the above-mentioned waiting period and assuming that the parties have supplied all requested information, the transaction is deemed approved and the parties can consummate the transaction without waiting for the final decision.

In the event that the Antitrust Tribunal considers the information filed in conjunction with Forms F-1 and F-2 to be insufficient and requires the presentation of Form F-3 (a 'tailor-made' form, personalised for each particular case), it will be a burdensome task for the company to gather together all the requested information. In addition, if the company is required to file Form F-3, it will have to wait for a significant period of time before receiving approval of the transaction from the Antitrust Tribunal. More specifically, the Antitrust Tribunal's approval would be a period of 105 days from the day the first form was filed and, as mentioned above, the Antitrust Tribunal may extend the period for an additional 30 days.

Furthermore, all documents to be filed with the Antitrust Tribunal that are drafted in a language other than Spanish, should be accompanied by corresponding translations by public translators licensed in Argentina. However, the Antitrust Tribunal can waive this requirement on request if, in its opinion, the version in the original language or a 'free' translation thereof would fulfil the information requirements. Public instruments that are executed abroad need to be duly legalised and apostilled.[21] ■

Notes

1 The Act was published in the *Boletín Oficial* (*Official Gazette*) on 16 September 1999.

2 Law No 22,262 was enacted on 1 August 1980 and published in the *Boletín Oficial* (*Official Gazette*) on 6 August 1980.

3 Although Argentina's previous antitrust legislation did not expressly regulate mergers and other business concentrations, such transactions were indirectly regulated in the event they had anti-competitive effects. In light of the approval of the new Act, foreign companies should be aware of the applicable Argentine legislation, in particular for the following reasons: (1) the incorporation of a chapter dedicated entirely to the regulation of business concentrations, including business concentrations occurring abroad as long as they have effects in Argentina (a scenario not previously regulated); (2) the obligation to give prior notice of mergers and acquisitions to the relevant authority with respect to those acts expressly mentioned in the Act; and (3) the application of exorbitant fines in the case of breach of the provisions of the Act.

4 Both Article 1 of the Act and of Law No 22,262 were purposely drafted broadly because legislators recognised that there are a limitless variety of anti-competitive practices and that it would, therefore, be preferable to have a broad description of prohibited conduct so as to ensure that the application of the Act would not be restricted to narrow textual interpretations.

5 Companies participating in anti-competitive activities will be subject, in accordance with the provisions of the Act, to sanctions such as the requirement to suspend the activities prohibited by law and, in some cases, the requirement to eliminate the effects of the anti-competitive activities and the application of fines of up to 150 million pesos. These fines are assessed in accordance with (1) the loss incurred by those people affected by the prohibited activity and (2) the benefit obtained by all participants in such prohibited activity. For example, in March 1999, the antitrust authority imposed a fine of 109 million pesos on the petroleum company YPF for abusing its dominant market position with respect to the sale of liquid gas, thereby adversely affecting consumers.

6 Like the antitrust legislation of the European Union and the United States, the Act seeks to prohibit anti-competitive activity relating to both collusive and monopolistic practices that restrict competition.

7 Vertical agreements have been subject to much debate in Argentina. Before the implementation of Law No 22,262, restrictions on the resale prices of brand-named and patented items were not prohibited. As a result, a large portion of price restrictions went unchecked. Law No 22,262 and the Act abandoned this permissive stance on vertical price agreements but, in doing so, they failed to establish clear guidelines. Currently, there are two views with respect to the legality of vertical price restrictions under the Act. Certain scholars believe that the absence of any specific exceptions for vertical pricing, which are common under other antitrust legislation, indicate the legislators' intent to regulate such practice strictly. Other commentators believe that the Act was designed to prohibit vertical pricing through anti-competitive practices or collusive agreements, not to preclude price uniformity resulting from general market forces. Further, those who have adopted a restrictive view recognise that resale price restrictions are frequently designed to ensure minimum margins for distributors, who would not distribute the items without such minimum. This is particularly true when a company is trying to enter a market dominated by large firms.

8 Elasticity of demand is the degree to which consumers will increase their purchases of one product in response to price increases or reductions in quality of a like product. Elasticity of supply, on the other hand, relates to a supplier's ability to produce alternative products when demand changes.

9 Just as under Law No 22,262, the anti-competitive act need not in fact harm the general economic interest; rather, a showing of a probability of harm is sufficient so long as such probability is not illusory or remote. One judicial opinion declared that 'it is sufficient if the act or conduct in question have the potential to harm the general economic interest; it is not necessary that the act or conduct in question in fact harm or will harm the general economic interest for the act or conduct to be anti-competitive . . .', Cámara Nacional de Apelaciones en lo Penal Económico, Sala III, in *Re Arenera Puerto Nuevo SA y otros*, 31 May 1988.

10 This standard of analysis is similar to the 'rule of reason' used under section 1 of the Sherman Act in determining whether an anti-competitive activity adversely affects trade.

11 See discussion on 'General economic interest'. Further, Resolution No 164/01 of the Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor issued on 30 November 2001 provides additional guidelines for the antitrust authority engaged in determining whether a particular business concentration may adversely affect the general economic interest.

12 Pending appointment of the members of the Antitrust Tribunal, the Comisión Nacional de Defensa de la Competencia (CNDC), the existing antitrust commission created under Law No 22,262, will oversee the enforcement of the Act.

13 Decree No 396/2001 issued on 5 April 2001 modified the Act to eliminate consideration of a party's international business volume in determining the need to seek governmental approval of a transaction.

14 The CNDC has issued certain opinions in which, although it did not prohibit business concentrations carried out abroad, it conditioned such transactions on the realisation of certain acts. For example, in the case *Carrefour/Promodes* (a horizontal concentration between international supermarket chains, which closely resembled a foreign transaction), the CNDC approved the operation provided that the business concentration did not expand to the City of Rosario, and that there was an eventual sale of the supermarkets in the future (April 2000). In the case *Beauty Care/Revlon* (joint venture with a foreign company that did not have previous operations in Argentina), the CNDC approved the transaction, but conditioned such approval on the modification of the 'non-compete clause' of the relevant joint venture agreement to allow competition with imported products (June 2000).

15 The Act was modified to include this clause (v) pursuant to Decree No 396/2001 issued on 5 April 2001.

16 Pursuant to a release, the CNDC established that the one-week period for notification commences when any of the following events occur: (1) in the event of a merger, the consummation of the definitive merger agreement (Law No 19,550, section 83); (2) in the event of a bulk transfer, the consummation of the asset transfer agreement subsequent to the publication of notices required by Law No 11,867 and expiration of the applicable opposition period (Law No 11,867, section 7); and (3) in the event of a stock purchase, the registration of the share transfer in the share registry (Law No 19,550, section 215).

17 The legal framework for the mandatory notification resembles in large part the US regulation which was introduced by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and was incorporated as section 7-A of the Clayton Act of 1914. The determining criteria of the US notification requirement are based on the concept of 'market power' which focuses on (1) the effects of the concentration on future prices and the relevant levels of market supply rather than the effects on the rest of the competitors and (2) the competitive advantage of the relevant company. Likewise, the Argentine legal framework follows in certain respects the provisions of article 2.3 of Regulation No 4064/89 of the European Union. The EU regulation is based on business concentrations that constitute a significant obstacle to effective competition 'by the creation or reinforcement of a dominant position' in the common market or in a substantial part of the market. The Argentine law, with some nuances, adopts the concept of 'market power' as a standard of evaluation. This standard considers a business concentration as unacceptable when the companies involved in the transaction are in a position that allows them to restrict the offer of goods or services in the relevant market and to increase their prices.

18 To date, there have been no fines imposed for violation of the mandatory notification requirement.

19 Resolution No 40/2001 of the Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor was published in the *Boletín Oficial* (*Official Gazette*) on 26 February 2001.

20 The Antitrust Tribunal's request for additional information is limited to one per stage and automatically stays the proceeding until the request is fulfilled.

21 In accordance with Resolution of the Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor No 40, published in the *Official Gazette* on 26 February 2001.