

ANTITRUST LAW

ON 9 MAY 2018, THE FEDERAL LEGISLATURE SANCTIONED A NEW ANTITRUST LAW (**NO. 27,442**), SETTING FORTH SUBSTANTIAL CHANGES TO THE PREVIOUS REGIME.

THE MAIN ASPECTS OF THE NEW LAW ARE ADDRESSED BELOW.

GENERAL PROVISIONS

The law prohibits any act or conduct which distorts or negatively influences market conditions, as well as economic concentrations aimed at restricting or distorting – or which may restrict or distort – competition, which may result in detriment to the general economic interest.

Unlike the previous regime, the new law distinguishes between: (i) “restrictive practices”, which consist in individual acts that may restrict competition; and (ii) “absolutely restrictive practices”, consisting in agreements between competitors. The substantial difference lies in that the latter leads to a presumption of damage to the general economic interest.

NEW ENFORCEMENT AUTHORITY AND APPEALS COURT

The law creates a new Antitrust Authority (Autoridad Nacional de la Competencia) as a decentralized agency within the Executive Branch and abrogates any form of jurisdiction granted to other agencies or governmental bodies on Antitrust matters.

The new Antitrust Authority shall create the following agencies within its own sphere: (i) the Antitrust Tribunal; (ii) the Secretariat of Anticompetitive Behavior Investigations; and (iii) the Economic Concentrations Secretariat.

The Antitrust Tribunal shall have five members, and their appointment must be approved by the Senate.

The Secretariat Anticompetitive Behavior Investigations, under the direction of the Secretary of Anticompetitive Behavior Investigations, shall be in charge of receiving and filing complaints for infringements to the Antitrust Law, deciding whether to proceed with the investigation, proposing allegations and sanctions, and providing opinions on remedies filed against decisions of the Antitrust Tribunal. For such purpose, the Secretariat shall be invested with broad evidentiary powers, and may request any injunction it deems necessary.

On another note, the law further adds a new “Specialized Antitrust Division” to the framework of the Federal Civil and Commercial Court of Appeals, which shall review decisions of the Antitrust Tribunal.

MOBILE UNITS

Instead of dealing with peso-denominated amounts, the Antitrust Law establishes an adjustable unit of account named “Mobile Unit”, with the intention of keeping an updated value for measuring amounts and calculating fines, and thus countering the effects of inflation and peso devaluation.

The law sets the initial value of mobile units at twenty (20) pesos, which shall be automatically adjusted on the last business day of each year, in accordance with the variation of the consumer price index (índice de precios al consumidor, or IPC) published by the National Institute of Statistics and Census (Instituto Nacional de Estadística y Censos, or INDEC), which shall be made available in the Antitrust Authority’s website.

M & A

New Regime

An important change introduced by the new law lies in the timing on which the mergers and acquisitions are audited. The old regime established an ex-post control –i.e. transactions where reviewed after closing– while the new law establishes and ex-ante control –i.e. transactions are now reviewed prior to closing.

In particular, the Antitrust Law requires that transactions in which the “aggregate business volume” of all companies involved therein in Argentina is higher than 100,000,000 mobile units be approved by the Antitrust Authority before closing. The “aggregate business volume” means the amounts resulting from the commercial activity and direct subsidies received by the companies involved in the transaction during the last financial year, corresponding to their ordinary business, and calculated on an after-tax basis. The authorization granted by the Antitrust Authority must be obtained for the transaction to enter into force between the parties and be effective vis-à-vis third parties. Failure to request and obtain such authorization and its rejection by the Antitrust Authority shall deem the transaction void, without prejudice to any sanction that may be applicable in case of rejection.

The Antitrust Tribunal shall make the request for approval public, for interested parties to submit their objections. Within 120 days since the request was made public, the Antitrust Tribunal must decide whether to: (i) approve the transaction; (ii) approve the transaction subject to certain condition; or (iii) reject the transaction. Failure to issue a decision within

such term shall be deemed as unconditional authorization from the Antitrust Tribunal.

Transactions closed prior to obtaining the Antitrust Tribunal's authorization shall make the companies involved subject to fines, regardless of the Tribunal's decision regarding the transaction. If the Tribunal finds that the it was a prohibited transaction under the Antitrust Law, the companies will have to divest the acquired assets.

The transactions subject to review and approval are the ones listed below:

- Mergers;
- Bulk transfer of assets including transfers of ongoing concerns;
- The purchase or acquisition of any interest in (i) stock, (ii) equity participations, or (iii) debt instruments convertible into stock or equity participations that provide the right to influence upon the decisions of the issuer thereof, when, in either case, the purchaser of the same obtains through the acquisition of such securities or equity interests, the "control" of, or a "substantial influence" on the issuer. The law does not contain any specific definition of "substantial influence". However, recent rulings of the Antitrust Commission have concluded that the right to appoint a certain number of directors, or the right to appoint key officers and/or the existence of supermajorities are relevant factors for deciding in a particular case whether the buyer of a non-controlling interest in a company nevertheless acquires a "substantial influence" therein;
- Other transactions which entail a "de-facto" transfer or a dominant influence upon the decisions of the company in question.

During the first year since the Antitrust Authority is established, notice of any of the transactions subject to prior review and approval may be filed with the Antitrust Authority (i) prior to their consummation or (ii) within "one week" after closing.

Companies involved in a potential transaction may submit their situation to the advisory opinion of the Antitrust Tribunal, which shall determine whether the proposed transaction should be submitted for authorization.

Main differences with the previous regime

Significant changes were introduced with regards to the prior regime. Even though transactions were only considered valid amongst the parties and vis-à-vis third parties upon review and approval by the Antitrust Authority –just as the new regime– such approval could be obtained after closing.

The only real obligation of the parties was to notify the Antitrust Authority either before closing or, within a week after closing had occurred. Failure to notify the Antitrust Authority was penalized with fines.

Although, the failure to obtain the required prior approval and denial of the approval after closing did not entail the imposition of penalties insofar the filing with the Authority had been made within the specified deadlines, by consummating the transaction without such approval, the parties assumed the risk that the approval could be denied or conditioned, thus resulting in a need to divest totally or partially the acquired assets.

SANCTIONS AND OBLIGATION TO PROVIDE REPARATIONS

The law provides a varied list of sanctions, including:

- Fines applicable and calculated in accordance with the origin and circumstances of infringement.
- Ceasing of actions or behaviors that entail prohibited agreements or an abuse of dominant position.
- The Antitrust Authority may file a petition with a competent judge to dissolve, liquidate, seize or restrain infringing companies.
- Up to 5 years of suspension from the National Register of State Providers (Registro Nacional de Proveedores del Estado); the suspension may increase up to 8 years if the infraction occurred in the context of a public bidding.

The law further allows third parties affected by the anticompetitive behavior to claim damages from the sanctioned party.

LENIENCY PROGRAMME

The law sets forth a Leniency Programme which grants certain benefits to companies adhering to it, so long as they are able to provide enough evidence to sanction members of a reported cartel.

In particular, subject to the fulfillment of certain requirements, the law provides: (i) an exemption from penalties to the first member of a cartel that provides enough evidence to identify and sanction such cartel; (ii) a 20% to 50% reduction in fines for other members of the cartel that provide further evidence.

TRANSITIONAL PERIOD

The Secretariat of Commerce the Ministry of Production shall maintain all powers and attributes granted to it by the previous law and will continue to hear ongoing cases until the new Antitrust Authority is established. Once the new Antitrust Authority has been established, all cases will resume procedure under its jurisdiction.

CONTACTS

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