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THE APPLICATION OF THE DEFENSE OF COMPETITION ACT TO FOREIGN-TO-FOREIGN MERGERS — RECENT DEVELOPMENTS.

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1. INTRODUCTION

A. The Defense of Competition Act

The Defense of Competition Act (Law 25.156 — hereinafter DCA) requires merging parties to obtain clearance from the enforcement authority (the National Commission for the Defense of Competition — hereinafter NCDC) if a transaction results in the transfer of control of: (i) an entity or business located in Argentina; or, (ii) an entity or business the economic activities of which may produce effects in Argentina. Clearance is required for all such transactions meeting the statutory thresholds and for which an exemption is not available[1].

The application of the DCA (and its merger notification provisions) to foreign-to-foreign transactions in which the parties economic activities produce effects in Argentina only through export sales has been the subject of much uncertainty. Certain recent consultative opinions issued by the NCDC, and described below, help to clarify but do not completely resolve this issue.

B. Merger Notification Thresholds and Exemptions

Section 8 of the DCA requires that a transaction be notifies when one entity or business acquires control of another, if the parties sales (including entities controlled by or controlling the parties) exceed Pesos 200 million in Argentina or Pesos 2.5 billion worldwide[2]. The latter part of this test, based only on the parties worldwide sales, clearly has the potential to subject many international transactions to the DCA s merger notification provisions, even if these parties have limited activities on the Argentine market.

Section 10 of the DCA exempts the following transactions from the DCA s compulsory notice requirement:

(a) Acquisitions of companies in which the purchaser already owns more than fifty percent of the shares;

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[1] Fines for non-compliance with the DCA (including failure to file a timely merger notification) can be up to Pesos one million per day. See Section 46(d) of the DCA. According to the Argentine Convertibility Law 23.928, there is parity between the Peso and the US Dollar (1 Peso = US$1).

[2] For purposes of the DCA, it is understood that the parties sales are to be determinated by reference to the sale of products and the provision of services carried out by the companies involved in the transaction for the last fiscal year, after the deduction of sale discounts, value added tax and other taxes directly related to the business. Section 8 of the DCA.

(b) Acquisitions of companies bonds, debentures, non-voting stock or debt instruments;

(c) The acquisition of a single company by a foreign company which does not have assets or shares in other companies in Argentina; and

(d) The acquisition of liquidated companies, which have not carried out business in Argentina during the previous year.

Section 10 (c) of the DCA, which is designed to be applied in connection with the acquisition of Argentine-located assets or corporations, has been the attention of some international focus. The rationale for this exemption is that a transaction involving the acquisition of an Argentine venture by a foreign company with no participation on the Argentine market should not produce a negative effect on Argentine competition[3]. Accordingly, the exemption is technically not available with respect to foreign-to-foreign export only transactions because the foreign company is not acquiring an Argentine venture.

2. THE APPLICABILITY OF THE DCA TO TRANSACTIONS ENTERED INTO BETWEEN FOREIGN ENTITIES.

A. Foreign transactions and local effects

According to Section 3 of the DCA, the statute applies to foreign transactions provided that they produce or are likely to produce effects within the Argentine territory. Although the DCA does not provide guidance as to precisely when a transaction will have effects in Argentina, the matter has been examined by the NCDC in a number of consultative opinions.

(i) Consultative Opinion # 4[4]

Consultative Opinion # 4 addressed the effects issue and may be considered to offer general guidance on the subject. In this opinion, the NCDC determined that (provided the statutory thresholds are met) a concentration will fall within the DCA, regardless of the place where it occurs, if the concentration will cause (or is likely to cause) effects in the Argentine market. However, point No. 5 of the opinion defines an exception to this rule.

According to this exception, foreign-to-foreign transactions will not be subject to Argentine antitrust scrutiny if the parties participation in the Argentine market could be considered insignificant . Participation is considered significant when the parties to the transaction conduct business

[3] The NCDC suggested, in Consultative Opinion # 4, that the Section 10 (c) exemption of the DCA would be applicable when the foreign company does not have any prior participation of any kind in the country . That is, the NCDC suggested that the exemption will only apply when a foreign company has no prior activity of any kind in the country.

[4] Consultative Opinion # 4 was issued on November 15, 1999.

in Argentina on a regular basis and have local subsidiaries, branches[5] commercial offices or representatives through which their corporate interests are pursued in Argentina. Conversely, as subsequent consultative opinions have indicated, parties to foreign-to-foreign transactions will be considered to have an insignificant participation on the Argentine market if their exports to Argentina are limited.

B. Exports as effects producers

A problem not addressed in Consultative Opinion # 4 — and still to be determined definitively — concerns when transactions between foreign entities with merely export sales to Argentina will be considered to produce effects in Argentina. To date, the NCDC considered the circumstances under which such economic concentrations may be subject to the DCA in Consultative Opinions # 42, # 44, # 52 and # 68[6].

For example, in these opinions, the NCDC determined that mere exports to Argentina will produce effects in the country provided the exports are habitual and substantial . To determine whether export activity is habitual , the NCDC will examine whether the parties exported product to Argentina for the past three years. The substantial nature of the export activities has been determined by the NCDC on a case-by-case basis, to date, and the NCDC has not yet established a fixed parameter (e.g., a specific market share threshold) for such an examination. Instead, when considering the extent of parties export activities in Argentina, the NCDC ordinarily requests the parties to provide their sales for the last three years broken down by customs code and product category as well as their sales as a percentage of all imports into Argentina within each customs code or product category. The NCDC is, however, willing to consider sales and shares broken down by product markets defined using antitrust principles, if, for example, the data for customs code categories is unavailable.

In the case analyzed in Consultative Opinion # 42, for example, the NCDC determined that the parties share of imports for the product at issue, which was found to be in excess of 30% (based on the total volume of the products imported into Argentina and the FOB value of the same) for the past three years, was considered sufficient to warrant notification of the transaction[7]. A similar conclusion was reached in Consultative Opinion # 44 were the target s exports to Argentina represented share in excess of 15%[8]. At the other extreme, Opinion # 52 reached the conclusion that a transaction involving a target with imports into Argentina of less than 1% of all imports of the products concerned, would not have an effect in Argentina. In this instance, the acquirer was found to export products into

[5] Pursuant to Section 118 of the Business Corporation Law, when a foreign company does business in Argentina on a regular basis, it must open a local branch or permanent representation.
[6] Consultative Opinion # 42 was issued on May 3, 2000; Consultative Opinion # 44 was issued on May 23, 2000; Consultative Opinion # 52 was issued on July 10, 2000; Consultative Opinion # 68 was issued on October 6, 2000 (the author acted for the parties involved in the transaction which was the subject of Consultative Opinion # 68.)
[7] See Consultative Opinion # 42, issued on May 3, 2000.
[8] See Consultative Opinion # 44, issued on May 23, 2000.

Argentina that did not overlap with those of the target and the NCDC based its decision on the target s *de minims* exports into Argentina[9].

Most recently, in Consultative Opinion # 68, the NCDC resolved that the transaction under review would not generate effects that could be considered substantial given the minimal horizontal overlaps between the parties and the fact that, where competitive overlaps existed, the parties combined market share for the product concerned in Argentina was considered to be less than 14%.

While helpful indications of the NCDC s approach to foreign-to-foreign transactions, these consultative opinions appear to be based on differing criteria and do not provide a complete picture of the NCDC s policy on this issue.

3. CONCLUSION

Section 3 of the DCA, establishes that regardless of the place where an economic concentration occurs, the concentration will be subject to scrutiny pursuant to the DCA, provided that the thresholds found in the statute are met and the transaction produces or is likely to produce effects in the Argentine territory.

Accordingly, for foreign transactions, a key issue to determine is whether the transaction produces or is likely to produce effects in Argentina.

It seems clear that when a transaction entered into abroad is intended to produce effects in Argentina (i.e., when the merger involves the transfer of control of assets or entities located in the country), the transaction will be subject to approval by the competition authorities, provided that the statutory thresholds are met. The same conclusion can be reached when the parties involved in the transaction do business in Argentina on a regular basis and have local affiliated companies or representatives.

It is much more difficult to determine whether approval is required by the competition authorities when the parties are active in Argentina only by means of exports accomplished without the intervention of any local representative. In such instances, approval by the competition authorities will be determined by means of the habitual and substantial test.

If the parties to the transaction had exports to Argentina for the prior three years, their activities will be considered habitual and the foreign companies will be deemed to have participated in the Argentine market.

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[9] It is unclear whether the NCDC will look only to the parties overlapping products to consider whether the parties activities are substantial. In both Consultative Opinions # 42 and # 68, the NCDC considered the market share of the involved products (defined in the Section 2 of the F1 merger notification form as the products concerned by vertical or horizontal integration caused by the transaction). On the other hand, in Consultative Opinions # 44 and # 52, the NCDC only considered the target s activities in the Argentine market, although the NCDC was informed that the supplier exported products to Argentina that did not have any overlap with the target s products.

Determining the substantial nature of the test appears to be more complex, given the differing criterion on which the NCDC has relied. Thus, if the parties have a combined market share below 14%, the transaction may well be considered not to have a substantial effect in the Argentine market. However, it is unclear if this would remain the case if the percentage of imports into Argentina attributable to either both merger parties or the target exceeded that figure.

Whereas the import and market share values provided above may be used as indications of instances in which the DCA may apply to foreign-to-foreign transactions, it is important to emphasize that the NCDC may adopt different thresholds in future situations given that consultative opinions are provided on a case-by-case basis. Therefore, until a general regulation on this subject is issued, when foreign parties to a transaction have habitual exports to Argentina, they are strongly advised to seek a consultative opinion from the NCDC to determine whether their transaction will require review pursuant to the DCA.