URUGUAY:

Uruguay's Competition Law Reform introduced a new premerger control regime

Uruguayan Law No. 18.159 on the Promotion and Defense of Competition (hereinafter, the "**Law**") has been recently amended, through the enactment of Law No. 19.833 last year (hereinafter, the "**Reform**").

The Reform sets forth significant changes that align Uruguayan Competition Law with international standards, and this initiative is framed within the recommendations issued by United Nations on its Uruguay report published on October, 2016, which resulted from Uruguay undergoing a "*Voluntary Peer Review of Competition Law and Policy*", within the framework of the United Nations Conference on Trade and Development ("**UNCTAD**"). The Reform deploys some (though clearly not all) recommendations issued by UNCTAD.

Through the Reform, among other relevant amendments in Competition Law, Uruguay introduces a new and unified premerger control regime of prior authorization for certain economic concentrations. Until now, obtaining such prior authorization was reserved exclusively for cases where the concentration resulted in a *de facto* monopoly, whilst in the remaining scenarios a mere prior notification was required. This is to say, any and all economic concentration transactions exceeding certain thresholds shall now require to be previously filed requesting authorization.

On April, 2020, following a six-month transition period after the entry into force of the Reform, the new prior authorization regime entered into force.

Concentrations are defined, to summarize, as those operations that entail a change in a company's structure of control.

With regards to existing conditions or thresholds in order to ascertain whether a concentration requires to be authorized, the Reform removes the criteria of market share in the relevant market, removal which was one of the Report's recommendations and follows some sort of global trend to eliminate this type of evaluative criteria. Indeed, the removal of this criterion enables to fast and easily ascertain whether a transaction requires to be authorized or not, provided a relevant market analysis is not required.

Under the Reform, the applicable threshold (now the only one) is the one relative to exceeding a billing volume between all participants of the transaction on Uruguayan territory amounting in any of the last three fiscal years. Following the suggestions of the Report, such amount has been reduced from 750,000,000 IU (seven hundred and fifty million indexed units) to 600,000,000 IU (six hundred million indexed units). Such amount is approximately equivalent to the following figures expressed in U.S. dollars: year 2017: US$ 76,000,000; year 2018: US$ 76,100,000; and year 2019: US$ 71,500,000.

On this regard, we believe that diverting from the Report's suggestion would have been advisable, given that seizing relevant transactions due to their significance (or rather due to billing volumes of participants) appears to be reasonable, and amounts now provided for do not move in that direction.

It is also worth noting that such billing threshold (both under the Law and the Reform) is global and does not make any difference whatsoever depending on participants, nor additionally requires that each party to the concentration reaches certain billing level. As a consequence of the Reform, for instance, any company individually billing more than 600,000,000 IU in Uruguay shall notify each of their concentrations, even should such concentrations hold little or no relevance in any particular case.

Therefore, during our appearance before Parliament in our capacity as guests for the purposes of discussing the Reform we suggested: (a) to include a double requirement, namely, that billing volume of companies engaged in any transaction be at least 600,000,000 IU but, further, that billing of each of at least two of the participants reaches certain minimum threshold; and (b) to include an exception stating that even should the abovementioned double threshold be complied with, authorization request is not required should the value of the transaction or assets fails to exceed certain amount out of the total amount. Unfortunately, this suggestion was not included.

The possible exceptions to the requirement of prior authorization by the enforcement body have undergone very little changes and remain almost the same as prior to the Reform, with the difference that this was formerly only applicable to notifications. These exceptions are: (a) the acquisition of companies in which the buyer already held at least 50% (fifty percent) of the shares; (b) the acquisition of bonds, debentures, obligations, any other debt security of a company, or shares without the right to vote; (c) the acquisition of a single company by a single foreign company that does not previously hold assets or shares of other companies in the country ("first landing"); and (d) the acquisition of companies declared to be in bankruptcy, provided that only one bid has been submitted in the bidding process.

Upon request for prior authorization with respect to a concentration, the enforcement body may: (a) explicitly or tacitly authorize it; (b) subject the concentration to certain conditions; or (c) deny authorization.

It is further stated that such concentration may not be implemented until explicit or tacit authorization has been obtained; the latter shall occur when 60 calendar days have elapsed since the authorization request and the enforcement body has not been issued. This implies a reduction in the 90-day-term previously set forth regarding such concentrations resulting in *de facto* monopolies. Even though this term reduction is beneficial for companies, a thorough review of potential anti-competitive effects and efficiency profits of an economic concentration in complex cases may be challenging for enforcement body.

With regards to terms so as to file the authorization request, such term is not set forth under the Reform, but the authorization request shall obviously be filed with at least 60 calendar days in advance to potential closure, as this is the term for enforcement body to resolve.

Moreover, the Reform further fails to set forth since when would authorization requests be accepted. Namely, does execution of a document stating intent to enter into negotiations suffice (for

example, a "Memorandum of understanding")? Should the execution of a final and binding agreement be awaited? The above may result in significant consequences in practice and may impact closing calendars, which is clearly not advisable.

A very significant aspect that must be thoroughly analyzed refers to the consequence of breaching the obligation to request authorization in any concentration act requiring request thereof or, even upon request, failing to obtain such authorization at the time in which the rule so provides for ("*completion of act*" or "*taking control*").

Unfortunately, the Reform does not set forth any legal consequences whatsoever stemming from such abovementioned hypotheses. Therefore, upon lack of any explicit provision, interpreting what those consequences imply for the business (which, evidently, could be highly significant) becomes crucial.

Surely this could trigger the enforcement of administrative penalties (and fines) due to violation of rules, according to the general scheme set forth in Sections 17 *et. seq.* of the Law that remains unchanged, namely: (a) warning; (b) warning with publication in two newspapers of national circulation of the resolution ordering punishment, at offender's expense; (c) fine within any thresholds provided for under Section 17 of the Law; and (d) possibility of enforcing penalties to legal entities' administrators, directors and representatives, and to supervisory companies and their respective administrators, directors and representatives, as set forth in Decree No. 404/007.

However, in addition to such penalties, the legal standing of such agreement between the parties entered into and enforced without having obtained any authorization whatsoever remains unclear, regarding whether such agreement is valid, void, ineffective or any other alternative. It is our understanding that there are elements prompting that the transaction will be valid but ineffective; however this is – as pointed out – an unclear issue.

On July, 2020, the Executive Power issued the new regulatory decree of the Law (hereinafter the "**Decree**"), that was pending following the Reform.

The Decree provides valuable answers and guidelines for many of the questions that rose at the time of enactment of the Reform, and also modifies procedural aspects, namely:

- With respect to the competitive analysis of the concentration by the enforcement body, the consideration of the relevant market, the degree of concentration, external competition, barriers to entry, the effect on upstream and downstream competition and efficiency gains are listed as factors to be taken into account.
- With respect to the timing of presentation of the authorization request, it is clarified that the request for authorization must be made prior to the implementation of the concentration (depending on the type of concentration in question) and if it is subject to the fulfillment of certain conditions precedent or acts involving the *de facto* taking of control or substantial influence, it must be made prior to the occurrence of such situations.
- With regard to the deadlines and phases for analysis: (a) the period of analysis of 60 calendar days available to the enforcement body to make a decision shall start from the date on which the request for authorization was correctly and completely filed and shall be

interrupted where there are requests for information; and (b) two phases were introduced into the process for the assessment of concentrations, namely:

  - A first phase which cannot extend beyond the first 20 calendar days, reserved for those concentrations which, due to their impact, in the opinion of the enforcement body, do not constitute a substantial decrease in competition, with a presumption that concentrations do not constitute a substantial decrease in competition when the value of the concentration or the value of the assets located in Uruguay to be absorbed, acquired, transferred or controlled does not exceed an amount equivalent to 5% of the 600,000,000 IU threshold; and
  - A second phase (within the remaining 40 calendar days) for those concentrations which, in the opinion of the enforcement body, could adversely affect the conditions of competition in the relevant market(s) under consideration. In this second phase, the enforcement body may request additional information from the parties or third parties and will issue a public notice of the concentration for the purpose of allowing third parties to make representations regarding possible changes or impacts on the conditions of competition in the affected markets.

- Since the Reform provides that the enforcement body may accept, reject or condition the operations, these possible conditions are regulated as follows: (a) the conditions shall be proportionate to the immediate or potential effects which may harm competition and arise as a result of the concentration under consideration; (b) both the parties and the implementing body may suggest such conditions unilaterally; (c) a specific process is established in which the enforcement body may request the parties to submit proposals for mitigation measures; (d) the conditions may be structural or behavioral; and (e) failure by the parties to accept the conditions or the compliance program and their time frames, as set by the enforcement body, will result in the refusal of the authorization.
- With respect to the efficiency gains that may be claimed by the parties: these may only be taken into account if they arise directly from the concentration and cannot be achieved without it, and must be transferable to the consumer. The Decree lists possible efficiency gains, as well as those that will not be acceptable, and are all aligned with international parameters.
- With regard to the suspensive effect of the new prior authorization regime, the Decree clarifies that concentrations may not be implemented until a decision on authorization is issued or tacit authorization has been given due to the expiry of the time limit. Concentrations resulting from legal acts carried out abroad must be notified before they produce legal or material effects in Uruguayan territory. In the event of a rejection, the Decree clarifies that the concentration may not be implemented, or else judicial and administrative measures will be taken to declare the act without legal effect.

In spite of the solutions provided under the Decree, there are still pending guidelines which we consider relevant and unfortunately have not been issued as of today. For such purposes, any criteria used in main global jurisdictions where prior control of concentrations was adopted may be resorted to. As a preview, in the one hand, potential anti-competitive effects of concentration are assessed (including but not limited to competitive intensity future reduction in any market with less stakeholders, or otherwise competitors' exclusion, marginalization or removal). On the other hand, potential efficiencies are quantified (including but not limited to scale economies in production costs arising from a merger or acquisition, which may be portrayed in lower consumer sale prices).

Pursuant to the net result of this benchmarking study, enforcement body will authorize (with or without conditions) or otherwise prohibit such concentration.

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