

ARGENTINA: ONE STEP FORWARD IN ANTITRUST ENFORCEMENT

On May 23, 2018, the Law No. 27,442 of Defense of Competition (**New Competition Act**) entered into force. This new law significantly amends Argentina's prior competition act and brings Argentina in line with the international standards in this practice and with the competition regimes of its neighbors in Latin America.¹

Below we are briefly presenting the most relevant modifications of the New Competition Act:

1) National Competition Authority & Specialized Court

The New Competition Act creates the National Competition Authority (**Authority**), which will be a decentralized and independent body formed by (i) the Defense of Competition Tribunal, (ii) the Secretariat of Instruction of Anticompetitive Behaviors and (iii) the Secretariat of Economic Concentrations.

Moreover, the New Competition Act provides for the creation of a specialized chamber within the Federal Court of Appeals in civil and commercial matters. This will be the judicial body reviewing the decisions adopted by the Defense of Competition Tribunal.

2) Merger Control

The New Competition Act introduces a pre-merger control regime (*i.e.*, the consummation of the reportable transaction is prohibited pending the clearance of the Authority) and thus abandons the current post-closing obligation.²

This change entails that the parties will be subject to fines for gun jumping practices (*i.e.*, the adoption of any measure that prematurely implements the transaction prior to authorization). They will be subject to a daily fine of up to

¹ Since 2011, most of the countries in the region have revised their antitrust legislation and have issued guidelines with the intent of improving effectiveness and predictability: Brazil (2012), Mexico (2014), Chile (2017) and Argentina (2018).

² The pre-merger control regime shall enter into force one year after the Authority is effectively established.

0.1% of the offender's (economic group) consolidated domestic turnover or, if the former method is not viable, up to AR\$ 15 million (approx. US\$ 625,000) per day.

The New Competition Act also raises the notification thresholds. So, the notification is required to concentrations which total turnover of acquiring group and target exceeds AR\$ 2,000 million (approx. US\$ 83 million) in Argentina. The *minimis* threshold has also been increased and concentrations would be exempted from notification if the total local assets of the target and the domestic portion of the transaction would each not exceed AR\$ 400 million (approx. US\$ 16 million).

Another goal of the New Competition Act is to shorten the review periods of the Authority. Accordingly, the Authority must issue a decision within 45 business days from the filing of the completed notification. In a case where the transaction has the potential to restrict competition, the term can be extended for up to an additional 120 business days.³

Additionally, the New Competition Act establishes the obligation of paying a filing fee for reportable transactions which range between AR\$ 100,000 and AR\$ 400,000 (approx. US\$ 4,300 and US\$ 18,000).

3) Anticompetitive Conducts and the Increase of Fines

The New Competition Act introduces a presumption of illegality for certain behaviors that are considered as "practices that absolutely restrict competition." This includes agreements between competitors relating to price fixing, output fixing, allocation of customers or territories, and bid-rigging. This new presumption will liberate the Authority from the burdensome task of proving the anticompetitive effects, whereas under the prior regime, all agreements, even hard-core cartels, were analyzed under a rule of reason.

As for fines, the New Competition Act establishes that the offenders can be fined based on whichever results are the higher of the following two methods: (i) up to 30% of the turnover of the product to which the infringement relates during the last fiscal year multiplied by the number of years of infringement, which cannot exceed 30% of the consolidated turnover achieved by the offenders' economic group in Argentina during the last fiscal year; or (ii) up to double the economic benefit reported by the anticompetitive conduct. If the fines cannot be established under any of the mentioned methods, the fines for each offender cannot exceed AR\$ 4.000 million (approx. US\$ 174 million).

4) Leniency Program

The New Competition Act creates the first leniency program in Argentina. In summary, the program's main features are as follows:

- The program allows any individual or company participating in any "practice absolutely restricting competition" (e.g., cartel) to appear before the Authority, submit information on said cartel, and receive immunity from, or a reduction of, the fines set forth in the law.

³ It should be noted that the New Competition Act provides several mechanisms to stop the clock (e.g., information requests). Therefore, it is very likely that in practice, these periods are extended.

- In order to qualify for leniency, the individual or company must: (i) be the first one among the parties involved in the cartel to apply for leniency and provide evidence, (ii) cease the anti-competitive practice immediately, (iii) cooperate with the Authority, (iv) refrain from destroying evidence related to the anti-competitive practice, and (v) refrain from disclosing its intention to qualify for the benefit.
- If the applicant was not the first person to apply for the benefit, they may be eligible for a reduction of between 50% and 20% of the fine if they provide further evidence to the investigation.
- The New Competition Act establishes that a person who fails to qualify for the leniency program during the investigation phase but discloses and recognizes a second cartel in another market may benefit from a 30% reduction of the sanction or fine that would otherwise be applicable for its involvement in the first cartel (*i.e.*, "leniency plus").

5) Private Enforcement Regime

The New Competition Act introduces three substantial modifications in the area of private damage actions. First, it confers *res judicata* effects to the (non-appealable) decisions issued by the Authority in relation to the facts and the legal qualifications; second, it establishes a statutory joint and several liability of all of the parties involved in the anticompetitive conduct for the damages caused (with some exception for the leniency applicant); and third, from the language in article 65 of the New Competition Act, it can be concluded that both direct and indirect purchasers have standing to sue for damages and thus the passing-on defense would be available for cartelists (*i.e.*, the action of an overcharged direct purchaser who passes the allegedly extra price to those who buy from it as indirect purchasers).

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