

Competition - Argentina

Overview (May 2011)

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Legislation

In September 1999 the Argentine Congress modified the antitrust regime by means of Law 25,156 and Decree 1019/99 (the Antitrust Law), which became effective on September 28 1999. The Antitrust Law was modified and amended by means of Decrees 89/2001 and 396/2001. The procedure before the National Tribunal for the Defence of Competition is governed by Resolutions 40/2001 and 164/2001 issued by the secretary for the defence of competition and consumers and Resolution 26/2006 issued by the secretary of technical coordination of the Ministry of Economy.

Scope

The law prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify or distort competition, or if they constitute an abuse of a dominant position, and provided that in either case they cause or may cause harm to the general economic interest. Such behaviour or conduct is not unlawful as such; nor must it cause actual damage - it is sufficient that the conduct is likely to cause harm to the general economic interest.

The law applies to:

- all individuals and entities which carry out business activities within Argentina; and
- all individuals and entities which carry out business activities abroad to the extent that their acts, activities or agreements may affect the Argentine market.

Enforcing agency

The law provides for the creation of a National Tribunal for the Defence of Competition (the Antitrust Tribunal) as the enforcing agency. The tribunal is to operate as an independent agency within the Ministry of Economy and Production.

As the Antitrust Tribunal is yet to be set up, this position is currently filled by the National Commission for the Defence of Competition by advising the secretary of domestic trade of the Ministry of Economy and Production, who issues the final resolution.

Among others, the tribunal is vested with the following powers:

- to approve or reject economic concentrations;
- to study and analyse market conditions and request information and documents from individuals, national, provincial or municipal authorities, and consumer associations;
- to hold hearings with the participation of parties that have filed complaints, injured parties, witnesses and experts;

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- to impose the penalties provided for in the law;
- to promote settlements and compromises;
- to issue opinions regarding competition with respect to laws, regulations, communications and administrative acts (such opinions are not binding);
- to encourage and file claims with the courts; and
- to request the competent judge to grant interim measures (ie, injunctions), which must be acted on within 24 hours.

The tribunal can begin investigations, whether at its sole discretion or at the request of any party or entity. As a preventive measure at any stage of the process, it may impose certain conditions and issue cease and desist orders. The tribunal's decisions to impose sanctions and cease and desist orders, and the rejection or conditional approval of economic concentrations, are subject to judicial review.

Prohibited practices under Antitrust Law

The law establishes a series of acts which are considered restrictive practices if the requirement of harm to the general economic interest is met. This list, which is not exhaustive, includes:

- price fixing;
- practices that restrict or control technical development or the production of goods and services;
- practices that establish minimum quantities or the horizontal allocation of zones, markets, customers or sources of supply;
- agreement or coordination of bids in public biddings;
- the exclusion or obstruction of one or more competitors from entering a market::
- conditions that tie the sale of goods to the purchase of other goods or to the use of a service and conditions that tie the provision of a service to the use of another service or the purchase of goods;
- conditions that tie a purchase or sale to an undertaking not to use, purchase, sell or supply goods or services produced, processed, distributed or commercially exploited by third parties;
- unwarranted refusal to fulfil purchase or sale orders of goods or services submitted in existing market conditions;
- the imposition of discriminatory conditions for the purchase or sale of goods or services not based on existing commercial practices;
- the suspension of the provision of a dominant monopolistic service in the market to a provider of public services or services which are of public interest; and
- predatory pricing.

Dominant position

For the purposes of the law, the term 'dominant position' includes situations where one or more persons are the only supplier or purchaser of a specific product or service within the Argentine market, or in one or more parts of the world. A dominant position may also arise if any person is not the only supplier or purchaser in a given market, but is not subject to substantial competition or, through a vertical or horizontal agreement, is put in a position that may harm the economic viability of a competitor in a specific market.

Merger control

Certain transactions are deemed to be economic concentrations when they result in the assumption of control of one or more companies by means of any of the following acts:

- merger;
- transfer of business;
- acquisition of shares or equity interests, any interest thereto, convertible debt securities or securities that grant the acquirer control of, or a substantial influence over, the issuer; and
- any other agreement or act through which assets of a company are transferred to a person or economic group, or which gives decision-making control over the ordinary or extraordinary management decisions of a company.

These economic concentrations require the tribunal's approval if the aggregate volume of business of the companies involved in the transaction exceeds AR\$200 million. The 'volume of business' is defined as the combined gross sales of products or services of the target and the buyer during the preceding fiscal year arising from their ordinary businesses, net of discount sales, value-added tax and other taxes directly related to the volume of business.

Economic concentrations which fall within this definition must be notified to the tribunal for clearance. This mandatory notice must be delivered before or within one week of the first to occur of:

- the date that any transfer effectively occurs; or
- publication of any cash tender or exchange offer.

If the parties do not comply with this requirement, they will be subject to a fine of up to AR\$1 million for each day that they fail to comply.

On submission of the notice, the tribunal has 45 business days in which to decide whether to:

- unconditionally approve the transaction;
- approve the transaction but impose conditions; or
- reject the transaction.

If the tribunal does not issue a decision within 45 business days of filing of the application and relevant documents, the transaction shall be considered as tacitly approved. In the case of economic concentrations between companies that perform activities in regulated markets, the tribunal will obtain an opinion on the economic concentration from the relevant regulatory agency. However, this request for an opinion will not extend or suspend the term for approval.

The tribunal's authority to impose special conditions and to control these types of transaction before they are executed is a significant departure from the post-execution control system under the former antitrust legislation.

The transaction has no effects with regard to the parties involved or any third parties until it has been approved by the tribunal, whether expressly or tacitly.

Foreign-to-foreign transactions

Transactions that take place outside of Argentina which involve a direct or indirect change of control by means of any of the acts mentioned above are also subject to the law. The tribunal has indicated that such foreign-to-foreign transactions must be notified if both parties have business in Argentina, either through a corporate presence or through sales effected in Argentina. In the case of sales into Argentina, the tribunal has also indicated that the effects of the transaction in the local market must be substantial to trigger the notification obligation.

Exempt transactions

The following transactions are exempt from the notification requirement:

- the acquisition of companies in which the purchaser already holds more than 50% of the shares;
- the acquisition of bonds, debentures, non-voting shares or debt securities;
- the acquisition of only one company by only one foreign company that has no assets or shares of other companies in Argentina;
- the acquisition of wound-up and liquidated companies (which performed no activities in Argentina during the preceding calendar year);
- the acquisition of companies, if the total local assets of the acquired company and the local amount of the transaction does not exceed AR\$20 million, provided that the exemption would not apply if any of the involved companies were involved in economic concentrations in the same relevant market for an aggregate of AR\$20 million in the last 12 months or AR\$60 million for the last 36 months;
- gratuitous transfers of goods to the Argentine state, provinces, municipalities and the city of Buenos Aires; and
- the transfer of goods among mandatory heirs, by acts among living persons or by cause of death.

Mandatory notification

Notifications must be made on Forms F-1 and F-2. Depending on the size of the economic concentration, parties are advised to file Forms F-1 and F-2 simultaneously. In view of the scope and complexity of the forms, and the short time allowed for filing, parties are advised to focus on the notification requirements at an early stage in the planning and implementation process for a merger or acquisition. Should the tribunal deem that the information filed is insufficient to analyse the competitive effects of the transaction, it may request additional information through a tailor-made Form F-3.

While some of the information to be provided is relatively simple to obtain, other information may be difficult and time consuming to obtain. This is particularly true of the detailed information that parties must furnish to identify the products involved and the relevant markets.

Information for which confidential treatment is requested should be labelled 'confidential'.

If a party considers that the tribunal will not need certain information to assess the transaction, it can ask the tribunal to waive the requirement to provide it. Parties may also wish to approach the tribunal at an early stage, on a confidential and informal basis, to seek agreement to reduce the amount of information to be provided in Forms F-1 and F-2.

Request of advisory opinion

In the event of serious doubts about whether the economic transaction must be notified, the parties may approach the Antitrust Commission and request an advisory opinion on the specific case. Under Resolution 26/2006, the commission must consider the questions and issue an opinion within 10 working days of the request; the secretary of domestic trade then has five working days to issue the final advisory opinion containing the opinion on the obligation to perform the notification. The request for an advisory opinion suspends the deadlines for filings and the result of the final advisory appeal may be appealed.

Filing fees

The law provides that the notification procedure is subject to a fee. However, no fees are currently levied.

Market investigations

Section 24 of Law 25,156 establishes that the tribunal may begin market investigations when considered pertinent, at its sole discretion. The investigations can also be ordered by the secretary of domestic trade of the Ministry of Economy and Production or at the request of any other public officer.

During the market investigation, the tribunal is empowered to request information, documents and samples from any third party, public authorities or associations for the defence of consumers, at its sole discretion. It may also order hearings with the supposed owners and witnesses. Law 25,156 establishes fines of up to AR\$500 for parties that do not comply with the tribunal's requirements.

The purpose of the investigations is to clarify and determine the existence of an anti-competitive act by a party that participates in any market. If there is evidence that may point to an anti-competitive act, the tribunal will start a separate proceeding and require explanations from the party. After the party has provided its explanations, the tribunal must decide whether to continue or to terminate the investigation if the explanations are accepted.

If the tribunal is unable to determine the existence of an anti-competitive act, it will terminate the market investigation with no further consequences. It may also suggest actions to facilitate competition.

Cartel prosecutions

According to the interpretation of the tribunal, the existence of cartels is defined by the presence of competitors of the same relevant market that make arrangements in order to fix prices or production quotas, or to distribute market shares, with the sole purpose of restricting competition.

Prominent cases

During 2005, the tribunal imposed two relevant penalties for cartel activities in the cement and liquid oxygen markets. These two investigations evidenced the interest of the tribunal and the government in prosecuting cartel activities.

In the liquid oxygen market, the tribunal concluded that its participants performed a cartel through which they fixed prices, distributed markets and concerted terms and conditions in public biddings. Such conduct was deemed contrary to the law since it damaged the general economic interest. A fine of AR\$70.3 million was imposed on July 15 2005.

In the cement market, the tribunal also concluded an investigation that started in 1999 and involved the period from 1981 until 1999. According to the tribunal, the participants in this market created a cartel to arrange market quotas and fix prices and also shared competitive sensitive information. It also concluded that such conduct was contrary to the general economic interest. The decision, adopted on July 25 2005, imposed a fine on five companies and their trade association for a total amount of AR\$309 million.

Leniency programme

The tribunal has recently unveiled its preliminary bill for an amendment to incorporate a leniency programme with the purpose of identifying cartels in Argentina. The bill sets out two different scenarios for infringing parties in cartel cases - namely, an exemption scenario and a reduction scenario, both based on a 'race-to-the-door' structure. The leniency programme, under its current drafting, would be applicable only to the

sanctions that are set out in the law. In addition, should a requesting party obtain the enforcement of the leniency programme and be granted a total exemption from the applicable fines, it would still be liable before any third party that may have been damaged by the anti-competitive conduct.

The bill also includes a 'leniency plus' provision, by means of which those parties that are unable to request an exemption from allegations of anti-competitive conduct, but could provide information on a second anti-competitive conduct, can obtain an exemption from the latter and a 30% reduction in the former.

Preliminary diligence

Although not specifically contemplated by the law or its regulatory decrees, preliminary diligence is increasingly used to establish whether an economic transaction with effect in Argentina should have been notified according to Section 8 of the law.

Preliminary diligence can be initiated at the sole discretion of the tribunal or by means of a complaint made by a person or entity regarding a specific transaction

If the transaction is not denounced by a third party, the tribunal may use any source of information at its disposal (eg, newspapers, specialised magazines or the Internet) to pinpoint economic transactions performed both in Argentina and abroad that should have been notified according to Section 8 of the law.

Since preliminary diligence does not have a stipulated due process, it will be carried out on the basis of requests for information from the parties involved in the economic transaction in question, issued by the tribunal. To this end, the parties involved (on notification by the tribunal) should present themselves before the tribunal and join the proceedings.

Following the conclusions reached on the basis of the investigation, the tribunal may:

- consider that the parties involved in the economic transaction were under no obligation to notify the tribunal as set out in Section 8 of the law; or
- urge the parties involved to notify the economic transaction under investigation (a fine may also be imposed for failure to notify the transaction, which can be up to AR\$1 million a day, counted from the closing date until the date on which the transaction is finally notified).

Administrative and private antitrust litigation

The law contains specific rules related to the concept of private antitrust enforcement. Furthermore, the law sets forth rules enabling the investigation of possible anti-competitive actions, whether on the party's request or the tribunal's initiative.

Despite a lack of previous experience in private claims based on the provisions related to the defence of competition, Argentine judges have recently been more active with regard to the enforcement of the provisions set forth by the law. A number of parties have filed different kinds of claim in order to apply the provisions set forth by the law or to obtain the suspension of investigations carried out by the tribunal. There has been a gradual but constant increase in the number of claims related to the defence of competition issues in Argentina.

Pursuant to the provisions set forth by the law, those that have suffered damages due to actions that limit, restrict, distort or impede competition and that result in damages to the general economic interest are entitled to file two actions: one relating to an administrative action to be filed with the tribunal and the other to a complaint for damages with any competent court.

Furthermore, the use of *amparo* proceedings has been observed as a tool to obtain suspension of the economic control analysis carried out by the tribunal, or suspension of the fulfilment of certain provisions stated by the tribunal upon the approval of certain transactions. The action for relief used as a protection from actions or anti-competitive acts is specifically stated in the provisions set forth in Section 43 of the Constitution.

Complaint filed with the tribunal

Any person, whether private or public, is entitled to file a complaint with the tribunal submitting a specific description of the complaint's purpose, the facts that support the complaint and a summary of the applicable law.

Accusations may be automatically dismissed if the tribunal concludes that the alleged infringement does not fall within the legal description of restrictive practices. Otherwise, the accusation must be notified to the alleged infringer, which must submit explanations and comments and provide appropriate evidence within 15 business days.

If the explanations are regarded as conclusive, the accusation may be dismissed. Otherwise, the tribunal must continue the investigation. During the investigation period,

the alleged infringer is entitled to produce evidence.

Up until the issue of the tribunal's decision, the alleged infringer may propose an 'agreement' entailing the immediate or gradual cessation of the actions which originated the accusation. If the proposal is accepted, the investigation is automatically suspended and the tribunal must supervise compliance with the terms of the agreement.

In the absence of an agreement proposal, the dismissal thereof or non-compliance therewith, and upon completion of the investigation, the tribunal may impose the following:

- cease and desist orders;
- fines ranging from AR\$10,000 to AR\$150 million, depending on the losses suffered by all aggrieved parties, the benefits arising from the illegal conduct or activity and the value of the assets involved. These fines may be doubled if it is a second or recurrent infringement; and
- compliance with conditions aimed to neutralise distortive effects of competition, including a request to the competent judicial court to decide dissolution, liquidation, de-concentration or spin-off of infringing companies.

The tribunal's orders may be appealed before the Court of Appeals when a fine, a cease and desist order or the dismissal of a claim filed by the plaintiff is decided.

Private complaints for damages

Section 51 of the law states that any person that has suffered damages arising from anti-competitive practices forbidden by the law shall be entitled to file a complaint for damages with any competent court. The plaintiff must request or produce evidence indicating that the defendant has carried out an anti-competitive conduct, and that it has also harmed the general economic interest.

Even if the law does not state the possibility of requesting damages, damages can be requested pursuant to the provisions set forth in Section 1109 of the Civil Code, which states that any person that has suffered damages is entitled to receive compensation for such damages. Such actions are ruled by the Civil and Commercial Proceedings Code and must be filed before the competent courts within the jurisdiction of the defendant's domicile.

The code distinguishes between non-contractual (tort) liability and contractual liability. The rules on causation are common to both types of liability. In principle, the aggrieved party cannot choose between the two systems, but must apply the system applicable to the specific situation. Under Argentine civil liability rules, a claim for damages caused by anti-competitive behaviour must be prepared under the rules of non-contractual liability (torts).

The basic rule is that any party that causes damages intentionally or due to negligence is liable to the damaged party. This rule requires evidence of wilful intent or negligence on the part of the party charged with the liability.

The code does not provide for different levels of negligence (eg, slight or gross), but establishes a general standard defining 'negligence' as "the omission of the diligence required by the nature of the obligation and which was due given persons, time and place involved". It also provides that the greater the duty to act prudently and in full knowledge of the facts, the greater the responsibility arising from the potential consequences of the conduct.

A complaint for damages can be filed without the tribunal's previous involvement.

A recent ruling issued by the National Commercial Court shows that decisions in private antitrust litigation cases in Argentina are now being issued. In 1999 an investigation against local petroleum company Yacimientos Petroliferos Fiscales (YPF) was initiated due to increases in the price of liquid petroleum gas, an essential source of energy for many residences in Argentina. The tribunal imposed a fine on YPF that was upheld by the Supreme Court.

A new private claim case was initiated by Auto Gas SA, a company that claimed that it had been affected by YPF's anti-competitive conduct. The claimant requested a sum of AR\$117,113 in damages. Finally, the judge ordered YPF to pay Auto Gas AR\$13,094,457 in damages.

Amparo proceedings

A remedy that has recently been used in private litigation has been the *amparo* proceeding set out in Section 43 of the Constitution. This action is aimed at protecting against any kind of discrimination arising from anti-competitive behaviour. Such actions have been used to impede or suspend investigations or analysis of transactions by the tribunal.

The *amparo* proceeding is a special and quick legal measure for the plaintiff to request legal protection from an alleged violation of its constitutional rights.

The judge may grant the *amparo* if the following requirements are fulfilled:

- There is evidence of an act or omission that causes or may cause a violation of the plaintiff's constitutional rights;
- The act or omission is unlawful;
- There is a lack of other legal or administrative remedies to protect the plaintiff's rights; and
- Its use may cause irreparable damage to the plaintiff in case such administrative or legal remedies are not available.

The action may be filed by any person, the ombudsman or the Association for Protection of Consumers.

Penalties

The tribunal may impose:

- fines of up to AR\$150 million on those engaged in any prohibited activities; and
- fines of up to AR\$1 million per day on those that violate the obligation to notify the tribunal of an economic concentration, or that disobey cease and desist orders issued by the tribunal.

The tribunal can also request a judicial order to liquidate or partition companies, or to divest businesses in cases of infringement of the law. Directors, managers, administrators, statutory supervisors, attorneys in fact and legal representatives of such entities may be held jointly and severally liable together with the infringing entity.

Statute of limitations

The law establishes that the term of the statute of limitations for the proceedings initiated upon infringement of the law is five years.

For further information on this topic please contact [Alfredo M O'Farrell](#) or [Miguel del Pino](#) at [Marval O'Farrell & Mairal](#) by telephone (+54 11 4310 0100), fax (+54 11 4310 0200) or email (amof@marval.com.ar or mp@marval.com.ar). The [Marval O'Farrell & Mairal](#) website can be accessed at www.marval.com.ar.

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