Argentina
New Antitrust Law

By Marcelo den Toom & Gabriela Castillo Areco, M. & M. Bomchil

The Argentina antitrust framework has recently gone through a systemic renewal with Law 27,442 (the “Law”), which entered into effect on May 24th along with its implementing regulation, Decree 480/2018 (the “Decree”). This welcomed new legislation introduced changes at many levels including the enforcement authority and judicial review, the investigation of anticompetitive practices, the merger control regime and private enforcement.

New Agency and Specialized Court

The Law established the creation of a new independent agency, the Autoridad Nacional de Competencia (National Competition Authority or “ANAC”). Members of the ANAC will be appointed through a public merit-based selection process and their appointments must be ratified by the Senate. The ANAC will be the sole authority entrusted with the enforcement of the Law, unlike the current situation where a technical agency, the Comisión Nacional de Defensa de la Competencia or “CNDC”, issues a non-binding report to the Secretary of Trade, who enforces the law. However, the Law has replicated a similar bifurcated analysis but within the ANAC, as it divides it into three sub-agencies or departments: the Tribunal de Defensa de la Competencia (“Antitrust Tribunal”), the Secretaría de Instrucción de Conductas Anticompetitivas (the “Anticompetitive Conducts Trial Secretariat”) and the Secretaría de Concentraciones Económicas (the “Economic Concentrations Secretariat”). The Antitrust Tribunal is the adjudicatory agency, while the other Secretariats are in charge of pursuing the conducts and merger cases and recommending courses of action to the Antitrust Tribunal.

Until the effective establishment of the ANAC, the current dual-agency system will remain in force.

Appeals made in the city of Buenos Aires will be heard by a specialized competition law chamber within the Federal Civil and Commercial Court, which was one of the courts that reviewed decisions from the CNDC and Secretariat of Trade under the former regime.
**Anticompetitive Practices**

One of the major changes implemented by the Law is the creation of a leniency program for cartel practices, granting (i) immunity to the first applicant; (ii) a 50 to 20 percent fine reduction to other applicants; and (iii) a “leniency plus” reduction of one third in the sanction applied in the first conduct. The leniency application will be admitted even if an investigation is in progress, insofar as the relevant party has still not been served with a formal accusation. The Decree provides for the creation of a marker registration system. Informal communications may be made by an applicant before applying for a marker. Further regulations are expected so as to provide more certainty on this important area. Also, collusive practices have been considered by the New Law as *per se* illegal, thus making clear what the new enforcement priorities will be.

At the time the former competition law was passed in 1999, maximum fines amounted to ARS 150 million, the same amount in U.S. dollars. By the time the Law was passed, such cap amounted to only USD 7.9 million (in Argentina, the devaluation of the Peso against the U.S. Dollar in an extended period generally serves as an indication of the inflation during the same period). To recover and maintain the deterrent ability of fines they were increased to up to the higher of (i) 30 percent of the turnover of the business associated with the infringement in the last fiscal year, multiplied by the number of years of the infringement (with a cap of 30 percent of the total Argentine consolidated turnover of the infringing parties in the last fiscal year); or (ii) double the amount of the economic benefit caused by the infringement. If the foregoing criteria cannot be applied, fines will be imposed by the Tribunal with a cap of 200 million *Unidades Móviles*, a coefficient to be updated by an inflation index on a yearly basis that was initially set at ARS 20, so that the new cap on fines for anticompetitive conducts in case the other criteria cannot be set would amount to ARS 4 billion or approximately USD 142 million. As with the old regime, fines may even be doubled in the case of repeat offenders.

Sanctions under the Law also include a bar on contracting with the Public Administration for up to eight years, especially targeted to bid rigging practices.

**Merger Control Regime**

Before the passing of the former competition law in 1999, there was no merger control analysis in Argentina. Given the effect of inflation on the fixed turnover thresholds of such law, most mergers ended up subject to mandatory notification, and the resulting case overflow extended the terms of review to an average of more than 2.5 years by the end of 2015, which coupled with a notification deadline which was in practice post-closing made merger review largely ineffective. The Law increases the turnover thresholds to 100 million *Unidades Móviles* or currently around USD 71.4, increasing the thresholds that applied to the de minimis exemption to notification as well.

Most importantly, the Law shifts to a pre-closing system, which will be implemented one year after the creation of the ANAC. Companies infringing the suspensory obligation will be subject to a daily fine of up to 0.1 percent of its group consolidated turnover in Argentina and, in case the foregoing criteria cannot be applied, a daily fine in an amount of up to 750,000 *Unidades Móviles* or currently around USD 53,500. In addition, even though the administrative file opened upon filing the merger notification will only be accessible by the merging parties, the existence of the filing will be publicized so as to allow any third party to raise objections, although the agency will not be required to consider them.
Private Enforcement

The Law facilitates private enforcement of antitrust violations. A private damages action can be initiated before a judge without the need for a final decision from the ANAC; however, in case the action is initiated after the agency issues a final decision on a given conduct and that is non-appealable, the judge will be bound by the administrative decision as to the existence of the infringement. Also, in such case the Law provides for an expedited process.

In addition, in an attempt to avoid private enforcement from deterring leniency applications, the Law contemplates that parties that benefitted from leniency will extend such benefit (immunity or fine reduction) to their civil liability, with the exception of liability stemming from (i) claims by defendants’ purchasers or their direct and indirect suppliers; and (ii) cases where defendants could not obtain complete redress of their claim by parties not benefitted by leniency applications.

Comment

The Law and Decree represent a significant leap forward in Argentinean antitrust practice. The increase in fines, classification of collusive practices as per se illegal and adoption of a leniency program put the focus on the hardcore areas of antitrust, sidelined by the former regime due to the flood of irrelevant merger cases. The creation of a new, independent agency is a long-awaited promise, as the former competition law also created a new agency, that was never formed and all references to it ultimately deleted. The change of the merger control system from post- to pre-closing is a necessity, and the ANAC should be able to deliver decisions in a timely fashion to avoid undue interferences in deal making. The facilitation of private enforcement is in the right direction, but unlikely to produce a significant growth in this almost non-existent area, unless the timing of the enforcement of conduct cases by the new agency is significantly improved.