

## New Argentinean Competition Law

The National Congress approved on May 9, 2018, a bill to overhaul the competition law 25,156, and today the Executive Power issued Decree Nr. 451/2018 to enact the new competition law Nr. 27,442.

Among other relevant changes, the new law provides for:

### **1. An independent national competition authority.**

- a. The new authority will be decentralized and independent. It shall be composed of a competition tribunal and two secretariats: the secretariat of investigation of anticompetitive conducts and the secretariat of merger control.
- b. The members of the new authority will be appointed by the Executive Power, after a competitive public examination before a panel with representatives of the law and economic national academics, the national ministry of production and the general attorney of the National Treasury (*Procurador del Tesoro*).
- c. Once its members are appointed by the Executive Power, it shall also require the Senate's approval. Members may nonetheless be appointed by the Executive Power on a provisional-basis.
- d. Until then, the Secretariat of Trade, supported by the Antitrust Commission (*Comisión Nacional de Defensa de la Competencia*), will continue to act as interim authority.

### **2. Shift of burden of proof for collusion.**

- a. Agreement or coordination between competitors regarding (i) price, (ii) output restriction, (iii) market or clientele allocation, or (iv) bid-rigging, shall be deemed against the general economic interest.
- b. Any such agreement shall be deemed void and null.

### **3. Creation of leniency program.**

- a. This new tool is available only in connection with agreements among competitors regarding (i) price, (ii) volume, (iii) market or clientele allocation, and (iv) bid-rigging.
- b. Full exemption from fines is available to the first applicant only. It requires that the applicant (i) provides proof that, at the discretion of the new authority, is sufficient to prove the anticompetitive practice; (ii) cease participating in the cartel; (iii) fully cooperate with the competition authority; (iv) does not destroy or conceal evidence; and (v) does not make public its participation in the leniency programme. Also, clemency applicants will be exempted from penalties provided under sections 300 and 309 of the criminal code (i.e., prison, fines and disqualification) and from any prison sentences that may otherwise be applicable as a result of the anticompetitive practice.
- c. Subsequent applicants may benefit with a fine reduction (between 20% and 50%), to the extent that they contribute conviction elements additional to

those already under the possession of the competition authority and comply with the other conditions contemplated for full exemption. To determine the extent of the reduction, said authority will consider the chronological order in which the request was submitted.

- d. Moreover, in certain cases, liability for damages may be either exempted or reduced under the leniency program.
- e. *Leniency plus*. Supplementary reductions -up to 1/3 of the sanction applicable to the initial investigation- in case of reporting a separate violation covered by leniency scope, for which the first applicant may also obtain full exemption.

#### **4. Adjustment to fine amounts and calculation.**

- a. Fines for anticompetitive practices are capped by reference to (i) 30% of the business volume in Argentina associated with the products or services involved in the unlawful act, multiplied by the number of years of the infringement (with a subsequent cap of 30% of the aggregate turnover in Argentina of the economic group associated with the anticompetitive practice); or (ii) double of the economic benefit obtained through the prohibited activity. If the calculation of such amounts is not possible, the fine may go up to 200.000.000 UVIs (approximately, U.S. 158,102,766).
- b. Fines for late notification are capped by reference to the 0.1% per day of the business volume in Argentina of the economic group associated with the anticompetitive practice. If that calculation is not possible, fines shall be set up to 750,000 UVIs (approximately U.S. 592,885) per day.
- c. Controlling shareholders may also be held jointly and severally liable to the extent their actions or failure to perform their control, supervision or oversight duties, have contributed to, encouraged, or allowed the breach.

#### **5. Damages and civil fines.**

- a. Private antitrust enforcement of damages is made easier and it becomes subject to expedited summary proceeding.
- b. Decisions of the competition authority concerning violations of competition law are *res judicata* for damage claims.
- c. Private parties may also request a civil fine for their benefit, as an additional incentive mechanism to foster private actions.

#### **6. Shift to pre-merger system.**

- a. Current system of post-closing merger control is replaced with a pre-merger control system. The pre-merger system will become in effect once a year has elapsed since the new authority is set up. Until then, the current post-merger system will continue to apply.
- b. Merger-control related thresholds have been increased, for their values were established in late 1999 without modification throughout these years. The new thresholds already apply.

- c. The new combined turnover threshold is of 100,000,000 UVI's (approximately U.S. 79,051,383).
- d. Transactions are exempted from notification when both the amount of the operation and the value of the assets do not exceed 20,000,000 UVI's (approximately U.S. 15,810,276).
- e. First landing exemption is clarified by including an express reference to exports to Argentina by purchaser group not being significant, habitual and frequent.

**7. Consultation system for horizontal agreements.**

- a. The competition authority may authorize agreements submitted for consultation, to the extent they do not harm the general economic interest.
- b. This is a new tool aimed to clarify if certain business practices may fall within the category of price fixing, restriction of output, market or clientele allocation, or bid-rigging, as agreed or coordinated among competitors.

**8. Restriction to be board member/key executive officer of competitors.**

Serving office as director (or as key executive officer) in two or more competitors, may be deemed an anticompetitive practice. Although this practice may be illegal to the extent there is damage to the general economic interest, it is a clear indication that sitting simultaneously in the board of competitors will raise concerns by the competition authority.

**9. Creation of new courts of appeals in competition matters.**

A specialized division within the existing Federal Court of Appeals in Civil and Commercial Matters is set up, to review decisions and administrative sanctions issued by the national competition authority. This would settle an endless debate as to the competent court for competition matters in the city of Buenos Aires.

For any concerns or questions, please contact:

Estanislao H. Olmos  
[Estanislao.Olmos@bfmyl.com](mailto:Estanislao.Olmos@bfmyl.com)

Evangelina G. González Soldo  
[Evangelina.Gonzalez.Soldo@bfmyl.com](mailto:Evangelina.Gonzalez.Soldo@bfmyl.com)