THE PATH TOWARDS A MORE EFFICIENT ANTITRUST ENFORCEMENT IN ARGENTINA

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I. INTRODUCTION

The Argentine Antitrust Commission (the "Commission") has recently taken two significant steps towards updating the entire antitrust system in Argentina.

First, it has remitted a draft bill for the enactment of a new Antitrust Law (the "Bill") to the Argentine Congress, after a consultation process which took place over the last half of last year. The Bill is a necessary step towards remodeling the Argentine antitrust enforcement, addressing several long-time issues which have either been ignored or not sufficient covered by past Administrations.

Second, it has recently circulated for comments a white paper on its new Merger Control Guidelines, which had not been updated since 2001. In particular, these Guidelines follow a new trend by the Antitrust Commission which seeks to have a more professional and efficient approach for merger review in Argentina.

II. INSTITUTIONAL REORGANIZATION

In 1999, the currently in force Antitrust Law set out the creation of the National Tribunal for the Defense of Competition (the "Antitrust Tribunal") within the scope of the Ministry of Economy, which would be the ultimate antitrust regulator in Argentina. However, the Antitrust Tribunal was never created by the Executive Power, which led to the Argentine Supreme Court setting out a double tier for the enforcement of the Antitrust Law until the Antitrust Tribunal was to be created. This double tier structure followed the settings of the prior antitrust regulations, by means of which the regulator that had been created by the former antitrust regulations, that is, the Commission, performed a technical review on the mergers and investigations and issued a recommendation to the Secretary of Domestic Trade of the Ministry of Economy (the "Secretary of Trade"), the latter being the body that ultimately decided upon antitrust matters (among other issues, such as domestic economy matters).

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Pursuant to the Bill, this system will now change in favor of a new Antitrust Authority, which will be composed of four divisions, namely: (i) the Antitrust Tribunal; (ii) the Anticompetitive Conducts' Secretariat; and (iii) the Merger Control Secretariat.

Regarding the Antitrust Tribunal, this authority will be comprised of five members, appointed by the Executive Power after a pre-selection carried out by a qualified jury from the Ministry of Production, the National Treasury Procurer and members of the Legislative Branch. The roster of the new authority will have to include at least two economists and two attorneys. This Tribunal will be in charge of imposing the sanctions established in the Bill, resolving preliminary defenses, deciding on the approval of mergers and carrying out market investigations that may be deemed pertinent. In addition to this, this Tribunal will impose the fees that individuals and/or companies will have to pay at the moment of notifying mergers. This decision-taking role is the one that is currently being held by the Secretary of Trade.

The current functions of the Commission will be taken over by two bodies. The Anticompetitive Conducts' Secretariat will be created with the main purpose of receiving and processing investigations on anticompetitive conducts in order to give the Antitrust Tribunal recommendations regarding the sanctions that would have to be applied. For its part, the Merger Control Secretariat will have as its main objective receiving and processing the advisory opinion and merger dockets that are filed before the Authority. Furthermore, it will have the authority to decide on the approval of those mergers that qualify for a fast-track review process, the requirements of which will be determined by the Antitrust Tribunal.

Finally, the fostering of the Competition Secretariat seems to be the most novel inclusion in this scheme, entailing a branch of the Antitrust Authority with a wide range of faculties, such as the possibility of intervening in merger control cases, defending or appealing decisions issued by the Antitrust Tribunal, or requesting the initiation of investigations before the Antitrust Tribunal. This Secretariat, which would have a standing similar to that of a Prosecutor's Office, would operate within the framework of the Secretary of Trade and would be appointed by the latter's hierarchical authority, namely the Ministry of Industry. While the Antitrust Authority would no longer depend upon the Secretary of Trade, there would still be an influence from said body, with a free agent being able to intervene in antitrust matters.

This is an important step towards an overhauling of the entire system, having specific divisions with clearly allocated responsibilities and tasks. It remains to be seen the extent of the separation between this Antitrust Authority and the Secretary of Trade and, in particular, the degree of independence that the Antitrust Authority will have as regards the Executive Power.

III. CARTEL DEVELOPMENTS: HARD CORE CARTELS AND LENIENCY PROGRAM

One of the most serious shortcomings as regards the enforcement of antitrust in Argentina has been the severe disadvantage that cartel prosecution has had when compared to the activity on both unilateral actions as well as merger reviews. Due to several factors, including a rampaging inflationary context which placed unilateral pricing matters as a priority for the enforcers as well as a diminishing value for the Argentine Peso which triggered an increase in merger control notifications, the Commission did not have sufficient resources to uncover and effectively prosecute cartels. In fact, the most relevant cartel investigations that the Commission has undertaken date back to 2005 with the *Cement* and *Liquid Oxygen* cases.

Under the current Antitrust Law, there are no *per se* anticompetitive conducts, since it is stated that actual or potential harm to the general economic interest must be determined in order to consider the conduct as anticompetitive. The Bill contains the same rule, yet it includes a provision stating that certain conducts will be presumed as harmful to the general economic interest, namely: (i) price fixing; (ii) the setting of production or commercialization quotas or the restriction of said activities with the same intention; (iii) market, client or supply allocation; and (iv) bid rigging. The Bill sets out that these conducts will be deemed as anticompetitive and thus, will be considered as null.

In order to gather evidence for an effective prosecution of cartels, the Bill includes a leniency program (the "Program"), setting out two different scenarios for infringing parties, namely an exemption one and a reduction one, both based on a "race-to-the-door" structure.

Pursuant to the Bill, infringing parties must comply with the following requirements in order to obtain an exemption of the sanctions set out by the Antitrust Law: (i) to be the first party, among the participants of the conduct, that provides the Antitrust Authority with information and evidence, either in the event that the authority has not initiated an investigation or if it has initiated an investigation, but has not been able to gather sufficient evidence; (ii) must immediately cease the performance of the infringing conduct, unless the Antitrust Authority deems otherwise in order to preserve the investigation; (iii) must collaborate until the end of the investigation; and (iv) must not destroy, forge or hide evidence of the anticompetitive conduct, nor make public the fact that it has filed for the Program, unless such communication is to other antitrust regulator.

Those parties that would not be the first ones to apply for the Program could request a reduction of the sanctions, if they are able to meet the remaining requirements and provide the Antitrust Authority with useful information for the investigation. The Bill sets out that the reduction could range from 20 percent to 80 percent of the sanction. The reduction ratios are to be determined by the Antitrust Authority by taking into account the chronological order of the filing.

The Bill also includes a "leniency plus" provision, by means of which those parties that would not be able to request an exemption regarding an anticompetitive conduct, but that could provide information on a second instance of anticompetitive conduct, can obtain an exemption on the latter, while a one third reduction in the former. Additionally, the Bill specifically sets out that there cannot be a joint enforcement by two parties of the Program, the sole exception being if a company and its directors or other members of its staff request the enforcement of the program.

IV. GREATER FINES FOR ANTICOMPETITIVE CONDUCT AND A FOCUS ON DAMAGES

The most important shortcoming of the current Antitrust Law is that all its amounts have been set in Argentine Pesos, a currency which in the last 17 years since its enactment has undergone several devaluations as well as inflationary processes. As such, the fines for anticompetitive conducts which used to range from USD $10,000 to $150,000,000 are now equal to $580 and $8,800,000, respectively. This led to a devaluation of the deterrence effect of these fines, given that the benefits incurred by the anticompetitive conduct could greatly surpass these amounts.

The Bill no longer has a fine set out in Argentine Pesos and now states that infringing parties can be fined as follows: (i) 30 percent of the volume of business of the products or services involved in the anticompetitive conduct over the last year, multiplied by the number of years over which the conduct took place; (ii) 30 percent of the local volume of business of the infringing group over the last fiscal year; or (iii) twice the amount of the economic benefit obtained by the anticompetitive conduct; the deciding factor being the highest fine possible under these items.

In the event that the fine could not be determined by using these factors, then a fine of up to 200,000,000 Indexable Units (which are created by the Bill) can be imposed. The amount of Indexable Units is expected to be set out following the valuation of the U.S. Dollar and, as such, this fine would have a maximum amount of $200,000,000.

This increase in fines is complemented by a welcome change as regards its payment. The Bill eliminates the *solve et repete* system which had been incorporated to the Antitrust Law by a 2014 amendment, which entailed that fines had to be paid in order to have access to a judicial appeal. As such, fines will only have to be paid upon confirmation from the Courts, as was the case with the original drafting of the Antitrust Law.

One of the most important changes of the Bill is a new chapter devoted to damages, which includes several changes to the current system.

The Bill now sets out that once a resolution is issued by the Antitrust Authority, the damages follow on litigation will be carried out by means of an executive summary proceeding (namely, the most rapid of all proceedings in Argentine procedural law) and that the Court will base its decision on the Antitrust Authority's decision. In addition to said damages, the Bill also sets out that a civil fine in favor of the injured party may also be granted, depending on the gravity and circumstances of the

case. When more than one person or company has carried out the action, they will all be jointly liable to the payment of the damages or fines.

Furthermore, a specific provision regulates the scenario posed as regards leniency applicants, in the sense that it sets out that they "may be exempted or their liability reduced" as regards damages and fines as set out in that specific chapter. It remains to be seen whether such language will be clarified prior to its enactment, but it could be interpreted that the exemption or reduction would depend on the degree of the overall type of leniency immunity granted to the company. The same Section sets out an exemption to said rule, for the following cases: (i) as regards its direct or indirect buyers or suppliers; and (ii) any other injured parties only when the full reparation of the damages of the conduct could not be obtained from the other conspiring companies in the same conduct.

V. MERGER CONTROL DEVELOPMENTS: CHANGES BY THE BILL AND NEW GUIDELINES

One of the most important modifications introduced by the Bill is the creation of a new merger control system, which: (i) greatly increases the amounts for both the notification threshold and the *de minimis* exemption; (ii) seeks to reduce review timeframes; and (iii) sets out a suspensive system, as opposed to the current one.

The notification threshold, which used to amount to $200,000,000 now equals approximately $11,700,000. This had led to a downpour of non-material mergers having to be filed for clearance, the majority of which would not have fallen under the merger control regime should the original intention of the legislator be followed. The Bill modifies the notification threshold, using Indexable Units which would be continuously updated. Pursuant the Bill, the new threshold would be met if the acquiring group and target should surpass a combined turnover of 150,000,000 Indexable Units, which as of today would amount to approximately $150,000,000, thus increasing the threshold to an amount closer to the one that had originally been envisaged.

The same updating takes places as regards the *de minimis* exemption, which would now be applicable if: (i) local amount of the transaction and local amount of the assets being transferred do not each surpass 20,000,000 Indexable Units (approximately $20,000,000); and (ii) if the previous condition is met, the acquiring group or target must not have carried out transactions in the same relevant market for 20,000,000 Indexable Units (approximately $20,000,000) in the last 12 months or 60,000,000 Housing Units (approximately $60,000,000) in the last 36 months.

The Bill also sets up a suspensive regime in which the parties would not be able to close the transaction prior to its approval. This is the most relevant departure that the Bill has as regards the current system, in which parties can close the transaction and file for notification up to one week afterwards. The Bill now sets out fines for gun-jumping, which had hitherto never existed in Argentine merger control proceedings. However, it must be noted that pursuant to its provisional settings, the Bill sets out that the suspensive regime will become effective as of one year after the enactment of the law, so as to provide sufficient time for the Antitrust Authority to clear its abundant workload on merger control cases.

Further to this suspensive system, the Bill defines a review timeframe of 45 working days plus an additional 120 working days-term. The current Antitrust Law also had a 45 working days review timeframe which over the passing of time was ignored, reaching average review timeframes of several years even in non-material transactions.

Prior to the takeover by the new Administration, average review timeframes were approximately 30 months. The following chart shows the reduction in review terms undertaken since 2016.

Statistics	2016 (all)	2016 (Filed after December 2015)	2017 (January-June)	2017 (January-June) (Filed after December 2016)
Average delay (months)	23,16	8,38	27, 31	7,15

Source: Internal estimations based on resolutions published on www.cndc.gov.ar

Upon the takeover of the new Administration, there has been a speeding up of proceedings, most notably when comparing new cases against "legacy" cases which may have been under study for several years.
This increase in the effectiveness of the review would be further fostered by the new suspensive system, which would preclude the Antitrust Authority from delaying the issuance of a resolution.

In that regard, the Bill sets out that the Antitrust Authority may set up a fast-track system for those transactions which would not raise competition concerns. The current Commission is using an informal fast track system as of today, focusing its attention on cases that truly warrant a more detailed review, as opposed to the past practice of analyzing all transactions in depth.

Additionally, the Bill also sets out a mechanism for third parties to file their comments on the merger, which are non-binding for the Antitrust Authority nor is there an obligation for the Antitrust Authority to comment on them. This is a major departure from the current Antitrust Law, given that it currently does not allow for third parties to participate in any manner in the process, unless being summoned as witnesses. It is expected that this process will also help enrich the analysis carried out in merger control reviews.

The Commission has been working on updating its merger control review processes, in order to further the type of economic analysis carried out. The Commission has recently unveiled a white paper for comments on its new Merger Control Guidelines, which had not been updated since 2001. These new Guidelines provide a much need reference for practitioners in their day-to-day interactions with the Commission, of which the following matters can be highlighted.

First, the Guidelines clearly set out that those transactions with a combined market share of 20 percent will be considered as non-problematic, which triggers the application of the fast-track procedure. Unlike past practice, this indicates that these transactions will be cleared in a rapid manner and will not be subject to intensive review by the Commission.

This approach is further complemented with clear rules on the usage of the Herfindhal-Hirschmann Index ("HHI"), which used to be referenced but with no specific rules. Pursuant the Guidelines, those transactions that have a post-transaction HHI below 2000 will be considered as non-relevant, while those that surpass such amount yet the delta between the prior and post scenarios is below 150 points will be considered as non-problematic as well. Furthermore, it is stated that if the post-transaction market shares are lower than 30% percent and if: (i) the post-transaction HHI is less than 3000; or (ii) have a delta of less than 250 points, then the transaction will also be deemed as non-relevant.

Second, the Guidelines now provide for a more fulsome approach as regards the techniques used by the Commission. They now incorporate the notion of Upward Pricing Pressure as a method in order to determine possible unilateral actions post-transaction as well as including a specific review on coordinated effects. Other factors that are now included as relevant comprise the competition from imported products, countervailing buyer power, the creation of a portfolio effect and the failing firm approach to a transaction.

Finally, the Guidelines also provide a commentary on the possible review of ancillary restraints, following the current practice by the new Administration of not setting out specific terms for their duration, but rather to analyze them on a case-by-case basis. Although this approach would seem to be a bit more extensive than the one under the previous Administration, it remains to be seen whether the Commission will include a clear set of rules for parties to appraise the type of review that may eventually be carried out.

In short, the Guidelines provide clearer rules for parties interested in carrying out a merger control notification in Argentina, which will allow them to fully assess the type of review that they will be subject to as well as have a better estimate regarding the proposed timeline.

VI. CLOSING REMARKS

The enforcement of antitrust rules in Argentina has shown severe shortcomings over the last years, triggered by several factors, such as a distortion of the reasons for the use of antitrust, the rapidly increasing amount of merger control cases and the corresponding decrease of resources allocated to the effective prosecution of cartels as well as the lack of a consensus on basic issues such as the enforcing agency for the antitrust rules.

This Bill seeks to address the majority of the problems raised over the last decade, by setting an independent authority, increasing the interest and tools necessary for cartel prosecution, increasing fines, implementing a leniency program, fostering private litigation and alleviating the burden of the current excessively bureaucratic process in merger control proceedings. This effort is complemented by measures such as the Merger Control Guidelines, which provide a much needed guidance to analyze and enforce antitrust rules in Argentina.

It is still early to determine the extent to which these efforts will impact the enforcement of antitrust in Argentina, but the current scenario shows a much more proactive approach than what has been observed over the last decade.