

# Argentina

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## Legislation and jurisdiction

### 1 What is the relevant legislation and who enforces it?

The relevant legislation is Law 25.156 and its ruling Decree N° 89/2001.

In addition, Resolution 40/2001 of the Defence of Competition and of the consumer secretary contains the guide for the Notification of Economic Concentration Transactions; Resolution 164/2001 of the same secretary establishes the merger guidelines and Resolution 26/2006 of the technical coordination secretary establishes the procedure for the application of consultative opinions.

The authority responsible for the application of the legislation is the Comisión Nacional de Defensa de la Competencia (Comisión), which is fulfilling this role until the Tribunal Nacional de Defensa de la Competencia (Tribunal) is formed. Around 60 people work for the Comisión. Its resources come from the government.

The Comisión was established in 1981 and it only dealt with conducts until 1999 when the approval of mergers and acquisitions was required.

It must be mentioned that there is an ongoing discussion as to who has the authority to apply the law.

The old law No. 22.262 established a system by which the Comisión, after conducting an investigation into the alleged anti-competitive behaviour, issued a recommendation to the secretary of state in the area of the Ministry of Economy (the name of the secretariat has changed a few times over the years). The secretary of state has almost always followed that recommendation.

Law 25.156 replaced the Comisión with the Tribunal, but there is an ongoing discussion regarding the change of the authority responsible for enforcing the law.

One Chamber of the Court of Appeals has decided that, since the Tribunal is an independent entity and that the Comisión is taking its place until the same is constituted, the Comisión is the Tribunal and as such, it is the Comisión that resolves matters and not the secretary of state.

However, the other two Chambers of the Court of Appeals of the City of Buenos Aires seem not to follow this criterion. The problem is that for the first Chamber, the resolution of the secretary of state was null, with which there is some uncertainty with respect to what will happen in the future. In the decided case since there was no resolution issued within the established time, then the acquisition was tacitly approved.

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### 2 What is the substantive law on cartels in the jurisdiction?

The antitrust law is the substantive law, however it contains no

definition of a cartel. Several types of conduct, considered restrictions of competition, are listed in article 2 of the law and include not only vertical but also horizontal arrangements. Among them are price fixing, market allocation, boycotts, tying clauses, discriminatory conduct, etc. There are no per se illegalities. To be illegal, the conduct must have the possibility of causing damage to the public economic interest. In some cases this concept has been associated with the correct performance of the market, in others the effects theory has been applied. The law is both civil and criminal.

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### 3 Are there any industry specific offences/defences?

No, there are not.

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### 4 Does the law apply to individuals or corporations or both?

The law applies to both. Moreover, the law establishes in article 47 that:

“juridical persons are responsible for the behaviour of individual persons who acted in their name, with the support or for the benefit of the juridical person, even if the act that is the basis of the process would be ineffective”.

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### 5 Does the regime extend to conduct that takes place outside the jurisdiction?

Yes, in theory it does, though there have been no cases.

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### 6 Are there any current proposals for change to the regime?

There are two projects worth mentioning:

- One draft proposes that the Under-Secretariat for Consumer Defence act as the ‘competition prosecutor’ (Fiscal de la Competencia) to defend the interests of consumers. As such, the Under-Secretariat would be able to make the pertinent complaint to start procedures and would be notified of all the complaints filed by any person, physical or juridical, public or private. In the event of a public procedure, it would be notified of the relevant facts and the grounds for the procedure. With regard to the approval of mergers, it would be informed of the filings of the corporations involved; be free to review the documents included in the presentation; and be authorised to file a formal opinion regarding the merger that would be expressly taken into consideration by the authority applying the law at the time a decision is issued. It would be able to require preventative measures according to article 35; would verify compliance with decisions issued by the Tribunal Nacional de Defensa de la Competencia or the applica-

ble Chambers of Appeals in the cases covered by this law; and may require the collaboration of national, provincial or municipal authorities to comply with such duties.

- The other draft proposes to modify article 1 of the law, substituting the concept of 'the general economic interest' for 'the economic interest of consumers or of the general economic interest'. It is hard to explain what changes to the application of the law this modification would mean. What can be said is that there is no reason to make changes like this to a concept that has been successfully applied for 25 years.

## Investigation

### 7 What are the typical steps in an investigation?

The law establishes that proceedings may commence following a complaint filed by any public or private person, or on the initiative of the Comisión. If the Comisión decides that the complaint is pertinent it will notify the same to the person who is the subject of the complaint. If the proceedings were started by the Comisión, it will notify the facts and fundamentals. In both cases, the notified person has 10 days to supply 'explanations'. If its explanations are considered satisfactory, the proceedings will be closed. The decision to consider the complaint not pertinent can be appealed at the Federal Civil and Commercial Court of Appeals.

If the explanations offered are not considered satisfactory, the Comisión will start the so-called instruction stage. During this stage, the Comisión may produce evidence to prove the existence of an illegal act within 180 days. When the instruction stage is completed, the Comisión may either close the proceedings or press charges. The charges must be substantiated and must outline details of the suspect conduct.

The charges will be notified to the accused person, who has 15 days to file a discharge and to offer to produce evidence. The Comisión may prohibit the production of evidence that it considers irrelevant and this decision cannot be appealed. If the accused is found guilty, however, in his appeal to the Court of Appeals he can ask for the prohibited evidence to be produced and the Court will make a decision as to its admissibility.

Evidence accepted by the Comisión must be produced within 90 days. It may include the filing of documents, the use of witnesses and expert opinions, gathering information from third parties, etc.

When the evidence period is concluded, the accused has six days to file a writ of allegation regarding the merits of the evidence produced. The Comisión then has 60 days to issue a decision. The decision can be appealed at the Federal Civil and Commercial Court of Appeals (but should be filed at the Comisión) within 15 days of notification of the decision.

It must be noted that the Comisión may require certain conditions to be fulfilled or order the cessation or suspension of the prohibited behavior. Whenever serious damage to fair competition is possible, the Comisión may order remedies which, depending on the circumstances, might be more appropriate to prevent such damage. This decision may be appealed with restorable effects, according to the dispositions of articles 52 and 53. In the same sense, by public process or at the request of the parties, the suspension, amendment or revocation of the remedies can be decided on the basis of new circumstances or circumstances which were not known at the time of their resolution.

Moreover, until a decision is issued by the Comisión the party presumed responsible may undertake the immediate or gradual cessation of the acts under investigation or the modification of

certain aspect of the subject-matter. Such undertaking is subject to the approval of the Comisión and may lead to the suspension of the proceedings. After the lapse of a term of three years of the compliance with the undertakings given to the Comisión, the case shall be filed.

### 8 What investigative powers do the authorities have?

The authorities have broad powers. Article 24 of the law authorises the Comisión to:

- hold hearings with the parties suspected of breaching the competition legislation, entities which made a complaint, persons who were damaged by the action, witnesses and experts, and to receive declarations and order deeds; for this purpose it is entitled to request police assistance;
- perform the necessary expert's reports on the books, documents and other items that may be necessary for the investigation, to control the stock and verify the origin and cost of raw materials or other goods; and
- enter business premises, which must be inspected with either the agreement of the tenants or by a judicial order requested by the Comisión to the competent judge, who must issue a decision within 24 hours.

A witness may choose to remain silent and his testimony can be used against him, as it would be in other procedures. An employee's testimony can be used against his or her employer. Computer records and other documents can be seized with a court order.

## International cooperation

### 9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Resolution 100/2004 issued by the secretary of technical coordination incorporates into the Argentine legislation the 'Understanding regarding Cooperation between Authorities of the Member Parties of the MERCOSUR for the Application of their National Competition Laws'.

This 'understanding' obliges the member parties of MERCOSUR, currently Argentina, Brazil, Paraguay and Uruguay, to notify the other parties of acts that intend:

- to fix, agree or manipulate either directly or indirectly the sale or purchase price at which goods or services are offered or demanded in the market, as well as to reveal information with the same purpose or effect;
- to establish an obligation to produce, process, distribute, acquire or commercialise only a restricted or limited quantity of goods, or to render a restricted or limited number, volume or frequency of services;
- to produce a horizontal distribution of areas, markets, clients and sources of supply;
- to agree or coordinate actions in biddings or tenders;
- to agree the limitation or control of technical development or investments directed towards the production or marketing of goods and services; or
- to prevent, inhibit or bar third parties from entering or remaining in the market or to exclude them from such market.

Moreover, it is understood that the parties are aware that it is in their common interest to cooperate to identify anti-competitive practices and, for the application of their legislation on competition, to share information that facilitates its effective application.

and promotes the better understanding of the politics and activities of the parties in the application of the legislation on competition, as long as it is consistent with their laws and interests, and within reasonable available resources.

- 10** How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

There have been no cases of the kind. In any case, no foreign investigation could or should affect the Argentine investigation.

#### Adjudication

- 11** How is a cartel matter adjudicated?

The law establishes that the only body competent to investigate and determine the violation of the antitrust laws is the Comisión (until the Tribunal Nacional de la Competencia comes into being).

- 12** What is the appeal process, if any?

Decisions of the Comisión can be appealed to the Federal Civil and Commercial Chamber of Appeals.

- 13** With which party is the onus of proof?

The onus of the proof lies with the party who makes the allegation. The Comisión must prove that a violation of the law occurred and that the accused was responsible for it.

#### Sanctions

- 14** What criminal sanctions are there for cartel activity? Are there maximum/minimum fines/sanctions?

See question 15.

- 15** What civil or administrative sanctions are there for cartel activity?

Article 46 of the law establishes that violations of the law will be punished with a fine: “those who perform acts forbidden in chapters I and II and in article 13 of chapter III, shall be punished with a fine of between 10,000 and 150 million pesos that shall be calculated on the basis of: (i) the loss incurred by all the persons affected by the forbidden activity; (ii) the profit obtained by all the persons involved in the forbidden activity; (iii) the value of the assets involved of the persons mentioned in paragraph 2 above at the time the violation was committed. In case of repetition of the offence, the fine shall be doubled.”

Moreover, in case of abuse of a dominant position (such as can be the case with a cartel) the Comisión may ask the court to dissolve, liquidate, deconcentrate or divide the violator.

- 16** Are private damage claims or class actions possible?

Article 51 of the law establishes that: “The individual or juridical persons damaged by the forbidden activities according to this law, may seek legal remedies requesting damages according to the common law dispositions, at the competent courts”.

Thus, any damaged person has standing to sue. There is no provision for class actions in Argentina, nor are there any punitive damages.

- 17** What recent fines or other penalties are noteworthy? What is the history of fines? What is the number of times fines have been levied? What is the maximum fine possible and on what basis are fines calculated?

Two cases which occurred in 2005 are worth mentioning. In a case in which cement companies were accused of fixing prices, allocating markets and of exchanging information, the fine was equivalent to US\$100 million. Previously, medicinal oxygen companies were accused of allocating markets and fixing prices and the fine imposed was of an equivalent to \$26 million. In both cases, the parties have filed an appeal at the courts.

#### Sentencing

- 18** Do sentencing guidelines exist?

There are no sentencing guidelines.

- 19** Are sentencing guidelines binding on the adjudicator?

See question 18.

#### Leniency/immunity programmes

- 20** Is there a leniency/immunity programme?

There is no leniency/immunity programme.

- 21** What are the basic elements of a leniency/immunity programme, if one exists?

Not applicable.

- 22** What is the importance of being ‘first-in’ to cooperate?

Not applicable.

- 23** What is the importance of going second? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

Not applicable.

- 24** What is the best time to approach the authorities when seeking leniency/immunity?

Not applicable.

- 25** What confidentiality is afforded to the leniency/immunity applicant and any other cooperating party?

Not applicable.

- 26** What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

Not applicable.

- 27** What is the effect of leniency/immunity granted to corporate defendant on employees of the defendant?

Not applicable.

- 28** What guarantee of leniency/immunity exists if a party cooperates?

Not applicable.

29 What are the practical steps in dealing with the enforcement agency?

Not applicable.

30 Are there any ongoing or proposed leniency/immunity policy assessments or policy reviews?

Not applicable.

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#### Defending a case

31 Can counsel represent employees under investigation as well as the corporation? Do individuals involved require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Yes, they can represent both at the same time. It is a matter to be discussed with the client. The moment a possible conflict of interests arises, the lawyer should abandon the representation of one or, in some cases, both of the parties.

32 Can counsel represent multiple corporate defendants?

Yes.

33 Can a corporation pay the legal costs of and/or penalties imposed on its employees?

Yes.

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#### Getting the fine down

34 What is the optimal way in which to get the fine down?

There is no way to 'negotiate' down a fine. The only way to obtain a reduction is through an appeal at the courts.

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