

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Argentina

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After a stagnant 2020, mainly due to the COVID-19 pandemic, the antitrust law enforcement in Argentina started to recover its rhythm. Different developments took place, and the news started early in the year with the approval in the Senate of a bill that, if approved by the House of Deputies, would imply drastic changes in the current legal regime. The Antitrust Authority participated in high profile cases both in conducting investigations as well as in mergers. For the first time in a long time, the Antitrust Authority issued an injunction and imposed a significant fine in unilateral conduct cases.

Regulatory developments

Bill approved in the Senate

The Senate of Argentina approved on February 4, 2021, a draft bill (the “Bill”) to amend the Argentine Antitrust Law of 2018 (the “Antitrust Law”).

The Bill introduces several changes to the Antitrust Law, most importantly:

- ***Ex ante merger control*** – The reduction of the suspension term for the pre-merger control regime to enter into force. The Antitrust Law had suspended the *ex ante* regime until one year after the establishment of the National Antitrust Authority. The Bill now establishes that the *ex ante* regime will start 90 business days after the approved Bill is published in the Official Gazette. Therefore, if the House of Deputies approves the Bill in the upcoming weeks, the *ex ante* regime will start in mid-July 2021 approximately, and no transaction subject to mandatory antitrust approval would be able to close after mid-July 2021 without prior clearance from the Argentine Antitrust Authority (the “Antitrust Authority”).
- ***Elimination of leniency programme and settlements*** – The Bill completely revokes the leniency programme established in the Antitrust Law and the possibility for the parties of an investigation to negotiate settlements with the Antitrust Authority. The leniency programme was introduced in 2018 though there are no known cases of any leniency application. The settlement procedure for conduct cases was introduced in the 1980 reform and has been used in various cases, including in the *Prisma* case of 2017 regarding electronic payment systems.
- ***The politicization of the National Antitrust Authority*** – The Bill introduces several changes in

order to allow greater political influence in antitrust cases. These changes include, among others, a flexibilization in the appointment process of the members of the National Antitrust Authority; the relocation of the National Antitrust Authority under the administrative influence of the Secretary of Domestic Trade; and the prohibition to appoint lawyers or economists with prior antitrust experience in the private sector during the past 3 years.

Other relevant changes introduced by the Bill include:

- Elimination of the tacit approval and the fast-track mechanism in merger control cases.
- Creation of a Secretariat of Market Investigations and Competition Advocacy
- Elimination of the consultation process for cases of agreements among competitors.
- Elimination of the confidentiality of the conduct investigation procedures.

The Bill was sent to the Chamber of Deputies for its consideration but has not reported any advancement in its treatment as of January 2022.

Anticompetitive conducts

Fine imposed on Cervecería y Maltería Quilmes for exclusionary abuse of dominant position

In August 2021, the Antitrust Authority sanctioned Cervecería y Maltería Quilmes (“Quilmes”) – an AB Inbev subsidiary-, for an abuse of its dominant position in the national beer market. The investigation began in 2016 as a result of the claims filed by two competitors.

Pursuant to the Antitrust Authority, Quilmes abused its dominant position through the following practices: (i) exclusive sale of beers and other Quilmes products at on-premise points of sale (i.e., bars, restaurants, etc.) in exchange for money contracts, advertising, furniture and discounts on the portfolio of products marketed (i.e., beers, waters, flavoured waters, isotonic waters, sodas, energizers, etc.); (ii) demands for exclusive and preferential shelf space and leading positions in off-premise channels that exceed their market share (supermarkets, shelf-service stores and department stores), in exchange for discounts and promotions; (iii) exclusivity in the use of refrigerators in the on-premise and off-premise segments.

In addition to the \$AR150 million fine, the maximum amount permitted by Law 25.156 which was modified in 2018, the Antitrust Authority established corrective measures to prevent the sanctioned conducts from recurring. Among them, Quilmes may not implement any type of formal or informal commercial agreement with the points of sale –both on-premise and off-premise–, with the purpose or effect of generating vertical restrictions on the commercialization channels.

Likewise, the Antitrust Authority provided that Quilmes must maintain a marketing strategy for its beer brands independently from the rest of the beverages it distributes. Therefore, it will not be able to establish cross discounts between different products nor make the sale of one product subject to the purchase of another. Moreover, the Antitrust Authority established that the advertising and exclusive promotion agreements of its beer brands must have a maximum duration of three years, with the possibility of early withdrawal after the first year and without automatic renewals, must not prohibit the sale of competing products, or orders of preference in the supply of products, and will allow the inclusion of competitors’ products in the menus.

Injunction against Facebook and WhatsApp

The Antitrust Authority issued an injunction in May 2021 ordering Facebook to suspend the implementation of the new WhatsApp Terms of Service and Privacy Policies, announced for May 15, 2021, on the grounds that it would incur in an abuse of dominant position.

According to the Antitrust Authority, WhatsApp's new Privacy Policies could violate the Antitrust Law. For the duration of the injunction, the Antitrust Authority will investigate the use that Facebook will give to the data obtained from WhatsApp users and which, it is presumed, could be used for commercial purposes.

Pursuant to the Antitrust Authority, since WhatsApp has a penetration that exceeds 76% of cell phones in Argentina and the other messaging applications have low penetration, the user cannot replace WhatsApp without losing this means of communication with many of their contacts. This generates a strong asymmetry in the bargaining power between the user and WhatsApp, so they will be mostly forced to accept the new Terms of Service, thus enabling WhatsApp to collect excessive personal data and share personal information inappropriately with other applications of the group, such as Facebook and Instagram.

Merger cases

Divestment ordered in Brink's-Maco merger

In August 2021, the Antitrust Authority conditioned the approval of Maco Transportadora de Caudales by The Brink's Company. The Antitrust Authority argued that the transaction could entail a collusive strategy and, in that sense, would modify the conditions of the transportation and cash processing market since the transaction reduced the number of market players from three to two, and this would make it easier to obtain information on the commercial strategy of its competitors.

The divestments ordered by the Antitrust Authority were the following:

- That Brink's divest 41 active transport trucks to a local or potential local competitor registered in the National Agency for Controlled Materials, but other than Prosegur, the main player in the market.
- To relocate 20 transport trucks operating in the Metropolitan Area of Buenos Aires to other areas of Argentina where Prosegur provides its services in the transportation and cash processing market.
- Behavioural measures in order to show the evolution of the market, monitor the existing supply and maintain competitiveness and the presence of competitive prices.

In this regard, the parties must report to the Antitrust Authority every six months:

1. The status of compliance with divestment commitments; and
2. The documentation necessary for the Antitrust Authority to verify the traceability of the transport trucks circulating in Buenos Aires and Mar del Plata in order to compare the number of transport

trucks circulating in the areas where the divestment and/or relocation commitments must be fulfilled.

Divestment ordered in Mirgor-Brighstar merger

The Antitrust Authority conditioned in December 2021 the approval of the acquisition of Brighstar Argentina by Mirgor to certain conditions, given the concerns expressed about the reduction from three to two of the relevant companies in the cell phone production and commercialization market, where Mirgor was already the leading manufacturer of cell phones in Argentina.

The obligations imposed by the Antitrust Authority to Mirgor are: (i) to sell the cell phones to carriers and retailers under non-discriminatory market conditions in relation to the retailer GMRA; (ii) not to subject or condition the sale of the cell phones to the acquisition of other products; (iii) not to unreasonably deny the sale of the products; (iv) not to reduce margins in the retail marketing segment as a result of the increase in wholesale prices; (v) to guarantee the maintenance and development of the human and productive resources incorporated as a result of the operation; (vi) report the monthly wholesale prices charged by Mirgor to the mobile phones marketers; (vii) report the monthly retail prices charged by GMRA; (viii) inform, if new contracts with national and/or international brands are to be made; (ix) carry out a program of integrity in antitrust matters to be presented within ninety days, involving all Mirgor's management personnel, including the managers appointed in other companies at its request; and (x) make public to its clients and the general public the conditions imposed. For the obligations conduct described in (i), (ii), (iii) and (iv) above, Mirgor may choose to comply with the obligations contained therein or to be replaced by the divestiture of all retail assets, including Mirgor's cell phones.

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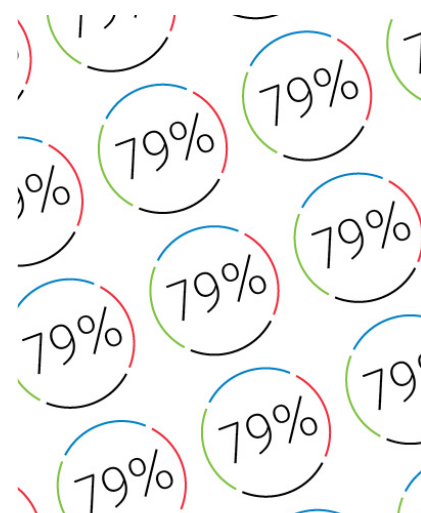
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