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Reports on the Implementation of the Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and of the Informal Working Group on Cross-border Cartels

The Leniency Programme in Argentina

Contribution

The National Commission for Competition Defense

Argentina

THE LENIENCY PROGRAMME IN ARGENTINA

Introduction

After a couple of previous attempts starting in 1909, the first Argentine Antitrust Act was enacted in 1923. It was a criminal law that sanctioned as a crime *'(...) any agreement, pact, ... merger of capitals tending to establish or sustain a monopoly, or to profit from it, in one or more branches of production in land, river or maritime traffic, or in domestic or foreign trade, or in one or more localities or in the whole national territory'*. Its inspiration was the *Sherman Act* passed in 1890 in the United States. The same conception and origin had its modification in 1946 with Act No. 12.906, only that it was issued with the objective of a more rigorous treatment of anti-competitive conducts, including prison sentences for the directors and/or managers of the intervening firms. Both regulations were poorly enforced.

In 1980, Act No. 22.262 was passed, within the framework of a process of economic liberalisation and based on European regulations, while maintaining its criminal nature. It enshrined the 'General Economic Interest' as a protected legal interest and created an administrative ruling body (the National Commission for the Defence of Competition – CNDC, *for its acronym is Spanish*).

Act No. 25.156 of 1999 replaced the previous regulation, incorporating the structural control of the market through a system of evaluation of mergers and acquisitions and creating an 'self-governing body' for enforcement.

The last law enacted is the current Act No. 27.442 for the Defence of Competition (LDC, *for its acronym is Spanish*) of 2018, which creates the National Competition Authority and the judicial review before the Specialised Court for the Defence of Competition in the City of Buenos Aires.

One of the most important novelties has been the incorporation of the leniency regime in Sections 60 and 61 of the LDC, which provides for the exemption and/or reduction of penalties for those who collaborate with the competition authority in the detection and investigation of collusive agreements.

The Need of a Leniency Programme in Argentina

The CNDC has imposed heavy fines on uncovered cartels. The most important were those of cement, liquid oxygen, associations of medical professionals, anaesthetists, sandboxes and those of entertainment venues in one of the main tourist cities in Argentina.[1]

[1] - National Commission for the Defence of Competition, 8-07-2005; Opinion Nº 510, Conduct 697. OXÍGENO LÍQUIDO
- National Commission for the Defence of Competition, 25-07-2005; Opinion Nº 513; Conduct 506. CEMENTO PORTLAND
- National Commission for the Defence of Competition, 18-03-2022; Opinion Nº 26154360; Conduct 1637. HARINA

In some of them, testimonies that could be called "proto-leniency" —i.e. given in the context of an investigative process and without the current regime being in place— were of central relevance. The prosecution, investigation and subsequent punishment were marked by the participation of individuals involved in the commission of the conduct in question.

Most probably, the biggest sanctioned case was initiated by a 'private' statement that was made public by a well-known journalist. In this case, the 'confessor' —the key to the investigation of the case— was not investigated or sanctioned, but the company in which he worked was. In another case, the cartel participant that made the complaint was not sanctioned on the basis of the cooperation provided to the CNDC, even though he was found responsible for the concerted practices investigated.

The Leniency Programme, which includes the granting of total or partial amnesties to the corresponding sanctions, is limited to cartel participants that voluntarily provide evidence that allows the detection and prosecution of those practices that are absolutely restrictive of competition.

Beneficiaries may be both human and legal persons. In order to be eligible for the benefit, they must apply before being charged, i.e. before being notified as the person allegedly responsible for the conduct under investigation.

The aforementioned Sections 60 and 61 of the LDC were regulated by Decree 480/2018, which determined the procedure for the application, processing, obtaining or rejection of the leniency application and granting or rejection of the benefit.

The procedure consists of four steps. In the first stage, which is the 'application for a marker', the applicant must communicate its interest in the leniency benefit and can enquire about the programme. In the second stage, the applicant must formally submit a leniency application, providing all information, documentation and evidence in its possession. In the third stage, the applicant's application is evaluated and, if necessary, a 'conditional benefit' is granted, subject to compliance with the established 'duty to cooperate'. And, finally, in the fourth stage, after evaluation of the information and evidence provided by the applicant and compliance with his or her duty to collaborate and cooperate, the definitive benefit is granted. In this regulatory decree, the implementing authority was ordered to establish the procedure for its application.

Recently, in compliance with this mandate and by means of Resolution 98/2024 of 24th May, the Secretariat of Industry and Commerce approved the *Regulation for the implementation of the Leniency Programme*. The CNDC gathered opinions and experiences from other competition authorities, and, prior to its issuance, a draft

- National Commission for Defence of Competition, 23-09-2022; Opinion Nº 101462437; Conduct 1670. BOLICHES DE BARILOCHE

regulation was submitted to the public for consultation, having received many comments and suggestions from national and foreign institutions and experts.

Regulation for the Implementation of the Leniency Programme

The Regulation for the Implementation of the Leniency Programme is based on two basic principles: 1) **Confidentiality** on the part of those who must receive and process the application to the programme and, 2) **Cooperation** of the benefit applicant.

The Regulation also creates the 'Leniency Unit' (UC, *for its acronym in Spanish*), which is specialised and independent from the National Directorate of Anticompetitive Conducts —which investigates concerted conducts, among other anticompetitive practices—, the National Directorate of Economic Concentrations and the Commissioners.

The UC is empowered to carry out the processing of the first three phases of the process: 1) the application and delivery of a marker; 2) the request for leniency and the receipt, processing and evaluation of information and, 3) the granting or rejection of the Conditional Benefit of Exoneration from or Reduction of Sanction.

Prior to the first phase, it is provided that the applicant may enquire on the Availability of Markers. Such enquiries are anonymous and may be made in hypothetical terms, indicating the market in which the conduct would have occurred.

To enter the first stage of the Leniency Programme, the interested party must submit the marker application, which will determine the order of priority in which it will be assessed. The application shall contain minimum identification information, a description of the disclosed practice and the relevant market affected, and its approximate temporal extension. The applicant shall receive a record of the day and time when the application was made.

The UC will assess the marker application in the chronological order in which it was submitted. If there is a previous application in the same market and practice, no subsequent application will be evaluated until a decision has been taken. In case of rejection, the applicant will have a period of three days to withdraw the information and documentation provided or it will be destroyed by the CNDC, and the turn will pass to the next one submitted.

Once declared admissible, the UC will issue the marker certificate, with the date and time of the marker and the order of priority. In that act, the applicant will be notified of the date of the coordination hearing —to be held within 10 days of the issuance of the marker certificate— where the leniency application must be submitted.

The second stage begins at the coordination hearing. The leniency application must be made in writing and must contain: a) the identification of the applicant, b) the identification of the other participants involved in the disclosed practice, c) the role of

each of the participants in the disclosed practice (including that of the applicant itself), d) the affected market, the products or services reached by the practice, its geographic scope and duration, e) where applicable, the identification of other players active in the affected market who were not involved in the practice, f) a detailed description of the facts and the practice disclosed, including its purpose or motivation, activities and operation, and, g) a description of its impact in Argentina and relevant information on leniency applications filed in other jurisdictions.

In addition, the applicant must sign an affidavit stating its willingness to join the Leniency Programme and its understanding of its obligations regarding its cooperation with the competition authority, the truthfulness of the information and documentation it submits, and the maintenance of the confidentiality of the process.

Once the leniency application has been accepted, the applicant will have 60 days (extendable to a further 30 days) from the coordination hearing to submit documentation and information.

At the end of the aforementioned period, following the UC's opinion, the CNDC shall evaluate and analyse the documentation and information provided by the applicant within a period of no more than 20 days (extendable for additional 20 days). Once this period has expired and, if applicable, the CNDC will grant the Conditional Benefit of Exoneration from or Reduction of Sanction ('Conditional Benefit'), which will be subject to the applicant's duty to collaborate until the sanction of the practice and the definitive granting of the benefit.

The Conditional Benefit granted shall be formalised by the execution of a document between the applicant and the CNDC, which shall contain: 1) the chronological order in which the marker application was received; 2) the exemption or percentage reduction of the sanction; 3) the acknowledgement by the applicant of his participation in the revealed practice; 4) the subjection of the benefit to the compliance of the duty of cooperation throughout the investigation and; 5) the waiver of confidentiality of the essential elements of proof that could not have been replicated.

Once the conditional benefit has been granted, the proceedings shall be sent to the National Directorate of Anticompetitive Conducts of the CNDC for the investigation of the concerted practice, when additional information from the applicant may be requested.

When issuing a resolution imposing fines or penalties, the enforcement authority shall decide whether to grant or reject the applicant's Definitive Benefit of Exoneration from or Reduction of Penalties, following the UC's opinion on compliance with the established duty of collaboration, as well as on the veracity of the information and the confidentiality of the procedure.

Final Remarks

The *Regulation for the Implementation of the Leniency Programme* seeks to provide precise information and predictability in its procedure, two essential factors to induce applicants willing to cooperate with the competition authority. The objective is that this tool, with concrete incentives, becomes an effective and successful method for the detection, prosecution and sanctioning of concerted practices.