Argentina's New Competition Law: The modernisation of the Argentinian competition law regime

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On 15 May 2018, the President of Argentina enacted a new competition law[2] which entails a major overhaul of the competition law regime in Argentina. The bill that led to the enactment of Law No. 27,442 (the "New Competition Law") was introduced by the governing party and has received the feedback and comments from a wide range of sectors and stakeholders, including the Argentinian competition authority, intergovernmental institutions (such as the OECD and the World Bank), the International Bar Association,[3] and the American Bar Association.[4]

The New Competition Law will enter into force 8 calendar days after its publication, i.e. 23 May 2018. Subsequently, the Executive Power has 60 business days to regulate the New Competition Law as from its publication.

The New Competition Law represents a sizeable amendment of Argentina's prior competition law enacted in 1999,[5] and the underlying rationale is to bring Argentina in line with the international best practices in the matter. In broad terms, the New Competition Law can be viewed as an attempt to modernize Argentina's out-of-date and archaic competition law regime.

The New Competition Law envisages substantial modifications, which can be grouped into the following five broad categories: (1) the adoption of a *ex-ante* or pre-merger control regime with higher notification thresholds and shorter review periods; (2) the adoption of a presumption of illegality for hard-core cartels and an increase in fines; (3) the introduction of the country's first ever national leniency programme; (4) certain modifications to foster private damages actions in the country, in particular follow-on claims; and (5) certain institutional modifications, notably, the creation of a new, more independent competition authority and the creation of a new specialized court to review appeals on competition law matters. These modifications are briefly commented and discussed below.

1. Merger control

1.1. Implementation of a pre-merger control regime. Gun-jumping.

The New Competition Law provides for the implementation of a pre-merger control regime pursuant to which the consummation[6] of a reportable transaction is prohibited pending the clearance of the Argentinian competition authority. The newly added feature is not the mandatory nature of the notification, but the fact that the parties bear a suspensory or standstill obligation, and thus cannot proceed with the closing of the deal until obtaining antitrust clearance.

According to the New Competition Law, the pre-merger control regime shall enter into force one year as from the time the new Argentinian competition authority is effectively established.[7]

Wisely, the New Competition Law foresees a transition period for the pre-merger control regime to be implemented, hence providing the new Argentinean competition authority with a reasonable amount of time to streamline processes and make all necessary adjustments for the smooth transition to an *ex ante* regime. Therefore, the current post-closing regime shall continue to be in effect under the New Competition Law and will only be abandoned one

year after the creation of the new Argentinian competition authority. It is not precisely determined in the New Competition Law the timing for the creation of the new Argentinian competition authority, however, in an optimistic scenario, the pre-merger system could become operative in late 2019.

Pursuant to the current post-closing regime, the parties are *de facto* allowed to proceed with the consummation of a reportable transaction and notify up to 1 week thereafter.

Merger control regimes which allow the consummation of a transaction pending antitrust clearance pose a myriad of problems, particularly, for the competition agency and the parties to the transaction.[8]

From a competition authority's perspective, the main problem derives from the inability to intervene *ex-ante* to protect competition and thus prevent any anticompetitive effects from occurring. In this regard, competition agencies operating post-closing regimes face the challenge of "unscrambling the eggs" in relation to problematic transactions, and device remedies to restore the competitive conditions in the affected markets.

From the parties' perspective the main shortcoming posed by post-closing regimes is the prolonged uncertainty to which they are exposed since the competition agency retains throughout the entire review processes the power to unwind an already consummated transaction. In many opportunities, the Argentinian competition authority has ordered, even several years after closing, a purchaser to divest certain acquired businesses and/or assets. An additional downside of this type of regimes is that once closing has occurred neither the competition authority nor the parties regard the adoption of a decision a top priority, which makes the merger's review to endure for a long time.

The above factors coupled with many others,[9] have contributed to the Argentinian competition authority to take, not long ago, an average of more than two years to clear non-problematic transactions, and in some mergers posing competition concerns, even take up to five or six years to issue a decision.

The adoption of a pre-merger control regime will necessarily bring about a change in the way mergers and acquisitions are currently carried out in Argentina, in particular, in relation to the planning of the businesses' integration and exchange of confidential information between the merging parties prior to clearance.

Once the pre-merger control regime is adopted, the merging parties will be prohibited from implementing (or taking any actions in furtherance of implementing) the transaction until the Argentinian competition authority issues its clearance. Pursuant to article 9 of the New Competition Law, reportable economic concentrations must be notified prior to their consummation or the materialization of the acquisition of control, whichever happens first. Additionally, reportable economic concentrations shall not have effects, neither between the parties not vis-à-vis third parties until clearance is issued. This entails, most importantly, that the parties will be subject to a suspensory or standstill obligation under which they must wait for the Argentinian competition authority's clearance and refrain from adopting any measure which prematurely, directly or indirectly, partially or totally, implements the transaction prior to said authorisation (commonly known as "gun-jumping practices").[10] Put differently, until antitrust clearance is awarded,[11] the merging parties must remain independent

undertakings and unilaterally determine their commercial behaviour in the market, irrespective of whether they are competitors or not.

The gun-jumping practices most commonly targeted by competition authorities globally include *inter-alia*: (i) sharing of commercially sensitive information between the merging parties which is unrelated to legitimate due diligence or business planning; [12] (ii) consolidating the merging parties' businesses or assets; (iii) undertaking joint sales or marketing activities on behalf of the merging parties; and (iv) interfering with or influencing the commercial policy of the target company.

At present, gun-jumping practices are not sanctioned in Argentina and merging parties (with the aid of their legal and financial advisors) lawfully consummate transactions before receiving antitrust clearance. However, as from the time the *ex-ante* merger control regime enters into force, businessmen and their advisors doing business in Argentina will have to adapt to the new legal landscape by adopting gun-jumping safeguard mechanisms, such as the implementation of clean teams to limit the exchange of information prior to clearance. Generally, clean teams are an effective tool to control and limit the flow of competitively sensitive information to be exchanged between the merging parties both in terms of the subject-matter (i.e. only that information which is absolutely necessary to allow legitimate business planning prior to closing) and the individuals involved (i.e. members of the merging parties that are not engaged in the day-to-day management of the business and their external advisors).

The New Competition Law sanctions post-closing notifications and gun-jumping practices with a daily fine of up to 0.1% of the offender's economic group consolidated domestic turnover or, if the former figure cannot be calculated, with up to AR$15 million (approximately US$625,000) a day.[13] It is worth clarifying that even in the context of a transaction, exchanges of commercially sensitive information between competitors which are unrelated to legitimate due diligence or business planning will be assessed and sanctioned under the general framework of anticompetitive conducts (which is explained below in section 2).

Antitrust authorities around the world are vigilant in respect of gun-jumping practices and the merging parties can be heavily fined if they engage in impermissible activities prior to closing.[14] With the adoption of a pre-merger control regime in all likelihood Argentina's competition authority will also closely scrutinize any evidence of gun-jumping practices between the merging parties.

1.2. Increase in the notification thresholds.

The notification thresholds are materially raised under the New Competition Law so that mandatory notification is required only in connection with those transactions which considering the relevance of (i) the combined domestic turnover of the purchaser and the target, and (ii) the target's domestic value (or the value of the domestic portion of the transaction) are worth being reviewed by the Argentinian competition authority as they could potentially have an effect on competition.

Under the prior regime, notification thresholds were expressed in local currency, which as a consequence of the currency depreciation experienced in Argentina during last 15 years, triggered the filing of innumerable transactions with no impact whatsoever on competition. Under the soon-to-be superseded regime, an acquisition of domestic assets worth a dismal AR$20 million (approximately US$830,000) by a purchaser (which together with the target) had a domestic turnover of AR$200 million (approximately US$8.3 million) required a mandatory notification.[15] The notification of irrelevant transactions has strangled the Argentinian competition authority's already limited resources, thus preventing it from focusing on what should matter the most to any competition agency: cartels.[16] The increase of the notification thresholds under the New Competition Law will reduce the stream of notifications, and hopefully allow the Argentinian competition authority to abandon its reactive enforcement role and progress to a more proactive role in pursuing cartels.

Under the New Competition Law, the combined domestic turnover threshold of purchaser and target has increased to AR$2,000 million (approximately US$83.3 million) whereas the asset value (or the value of the domestic portion of the transaction) threshold has been raised to AR$400 million (approximately US$16.6 million).[17] The changes envisaged in the New Competition Law will arguably reduce the number of notifications but ensure that reportable transactions are worth reviewing as they could actually have a bearing on competition. Moreover, such change will allow the Argentinian competition authority to free human and financial resources to focus on tackling cartels and implementing the leniency system also envisaged in the New Competition Law.

Additionally, the New Competition Law provides for the establishment of filing fees for reportable transactions,[18] which shall range between approximately AR$100,000 and AR$400,000 (approximately between US$4,200 and US$17,000). Further details of filing fees (e.g. which parties will be subject to the payment of fees, and timing of payment) shall be determined by the Executive Power.

With regard to the qualitative criteria used to determine which type of transactions amount to a reportable economic concentration, the New Competition Law, rightly in my view, does not envisage any relevant modifications as Argentina has a well-established case law modelled upon the European Union Merger Regulation's concepts of acquisition of control and decisive influence. Nonetheless, the regime lacks clarity in relation to whether certain collaboration agreements (e.g. certain types of non-full function joint ventures) should be considered as reportable economic concentrations, and therefore additional clarification would be recommendable in the form of guidelines to be issued by the Argentinian competition authority in the near future.

1.3. Reduction in the review period for reportable transactions.

One further aim of the New Competition Law is to shorten the review period of Argentina's ill-famed merger control regime.

The New Competition Law foresees that the Argentinian competition authority must issue a decision within 45 business days from the notification of a transaction provided that such notification is complete and accurate. In the case of transactions that have the capability of affecting the general economic interest,[19] the preceding term can be extended for up to an

additional 120 business days. Therefore, the New Competition Law provides a timeframe of slightly more than 8 months for the Argentinian competition authority to review potentially problematic mergers.[20]

The above terms are nonetheless subject to the very important caveat that, according to the New Competition Law, the Argentinian competition authority has the power, whilst reviewing transactions, to issue requests for information to the merging or third parties and/or request them to provide additional information, all of which could suspend the review period's clock. In light of this, the 8-month maximum term stipulated in the New Competition Law could be suspended on multiple occasions[21] and the review could extend well beyond such term.

A similar procedure to stop the clock was envisaged in the prior merger regime whereby the review period only started running once the Argentinian competition authority deemed, at its sole discretion, that the notification was complete and accurate. Invariably, the Argentinian competition authority considered that all notifications were incomplete, and hence that the clock never started running. The clock would start running only once the authority had finished its analysis and had no further queries in relation to the transaction under review. This mechanism of stopping the clock dented the reputation of the country's merger control system, which is viewed as one of protracted and discretionary reviews.

The new members of the Argentinian competition authority, which took office with the new government in December 2015, have substantially reduced the timing of merger review; however, today's average approval timing still far exceeds international standards.[22]

The implementation of a pre-merger control system will logically pose various challenges to the Argentinian competition authority, in particular, as regards to the timing of the review. The success will largely depend on the competence of the members of the Argentinian competition authority and on their swift, fair, predictable, and non-discretionary application of the powers established in the New Competition Law.

By way of helpful precedent, Brazil and Chile adopted a pre-merger control regime in 2012 and 2017, respectively,[23] and given the substantial similarities between these countries and Argentina, it would be advisable for the latter to assess the experience accumulated in these neighbouring jurisdictions. In particular, it would be helpful for Argentina to study how the competition authorities of Brazil and Chile dealt with the transition to an *ex ante* merger control regime so as to avoid as many setbacks as possible when navigating the same waters.

For instance, before Brazil adopted its pre-merger control regime, the hiring of 200 additional staff members was authorised to reinforce the competition authority's workforce.[24] The rationale was to equip Brazil's competition authority with the human resources necessary to address the new challenge of having to analyse and clear transactions in shorter timeframes. By the same token, Argentina needs to cautiously bear in mind the workload that moving to a pre-closing merger control regime will entail and make the necessary arrangements to tackle such concerns beforehand (also considering that significant resources will be needed to deal with the introduction of the leniency programme created by the New Competition Law).

Once the pre-merger system comes into effect, if the Argentinian competition authority fails to clear transactions within the legal deadlines envisaged in the New Competition Law, this

will result in global deals being delayed. If that is the case, the merging parties will explore traditional alternative solutions to circumvent these inconveniences, for instance, deferring closing in Argentina or implementing a carve-out of the Argentine assets. However, none of these solutions will enhance the reputation of Argentina's merger control system nor be devoid of legal uncertainty for the merging parties.

All in all, it is most welcome for all stakeholders alike (i.e. the Argentinian competition authority, prospective merging parties -be it national or foreign investors-, consumers in the potentially affected markets, and the society at large) that Argentina abandons its slow, inefficient, and discretionary post-closing merger control regime and moves to a pre-merger control regime which prevents in a timely fashion economic concentrations that could lead to a distortion of competition while providing legal certainty to the merging parties.

2. Anticompetitive conducts

2.1. Introduction of a presumption of illegality for hard-core cartels.

Under the prior regime, all anticompetitive conducts, even hard-core cartels, were analysed under an all-encompassing rule of reason, and the Argentinian competition authority thus only had the burden of proving (i) the existence of an agreement or concerted practice; (ii) that the alleged offenders possessed market power in the relevant market; (iii) that the agreement or concerted practice distorted competition in the relevant market; and (iv) that such distortion of competition had the capability of affecting the general economic interest. Therefore, under the previous regime, even if the Argentinian competition authority obtained smoking-gun evidence of a cartel, it still had to embark into a probe of the anticompetitive effects of such conduct. On the contrary, the anticompetitive effects of cartels are legally presumed in most jurisdictions around the world.[25]

The New Competition Law conveniently foresees the novel introduction of a presumption of illegality for certain anticompetitive conducts identified by article 2 as "practices absolutely restrictive of competition", which include agreements between competitors relating to price fixing, output fixing, allocation of customers or territories, and bid-rigging.[26] Such legal presumption shall relieve the Argentinian competition authority from the burdensome task of proving that certain types of agreements between competitors have anticompetitive effects, being limited, notably, to prove that the agreement or concerted practice materialised and that the alleged offenders are liable for such conduct.[27]

The extent of the legal presumption is not clearly established in the New Competition Law, which merely sets out that certain agreements between competitors will be considered "practices absolutely restrictive of competition" and “presumed to affect the general economic interest”.[28]

The two most widespread systems to analyse horizontal agreements are those adopted in the U.S. (i.e., the *per se* illegality standard) and in the European Union (i.e. the infringement by object notion). Under the U.S. system, certain conducts determined by the courts are illegal *per se*, and if the competition authorities prove that such conduct took place, then the parties are not allowed to present any justifications to their actions. A different approach is taken under European Union law, where certain conducts are considered object restrictions of

competition under article 101(1) TFEU and thus it is not necessary for the European Commission (and the Member State's national competition authorities) to prove that such conducts produced adverse effects on competition, but nonetheless the parties are allowed to submit a justification under article 101(3) TFEU.

The New Competition Law does not provide any further insights as to the scope of the newly created legal presumption, in particular, whether the Argentinian system will lean closer to that in the U.S. or in the European Union. It is expected that the Executive Power's regulation of the New Competition Law will shed some light in relation to the workings of the new legal presumption, however, at the end of the day, it will be the courts which shall determine what Congress meant with the introduction of this legal presumption.

Despite the lack of guidance in the legal statute, it could nonetheless be argued that the New Competition Law's stance is closer to the European Union's approach and that the legal presumption of illegality is a rebuttable one. At least two arguments support this assertion.

Firstly, *juris et de jure* or irrebuttable presumptions are exceptional in Argentinean law, and generally a law specifies when a presumption cannot be rebutted (for instance, stating that the presumption does not admit evidence to the contrary). Nothing in the wording of article 2 of the New Competition Law indicates that the presumption created therein is irrebuttable, therefore, it may be concluded that the alleged offenders are allowed to provide evidence and justifications to rebut the presumption that their behaviour is anticompetitive and affects the general economic interest. Essentially, the legal presumption contained in article 2 of the New Competition Law would operate as a burden-shifting mechanism whereby the Argentinian competition authority is discharged by law from proving that the cartel under prosecution had anticompetitive effects. Such anticompetitive effects are legally presumed and the burden of proof shifts to the alleged offenders which are given the chance to demonstrate that the agreement at hand had no anticompetitive effects. It is needless to say that the likelihood of successfully alleging that a cartel has no negative effects on competition, and thus revert the legal presumption would be very scant.

Secondly and most importantly, article 29 of the New Competition Law (explained in more detail below) states that the Argentinian competition authority may authorise certain horizontal agreements which, despite falling under article 2 of the New Competition Law and thus being presumed to be anticompetitive, do not affect the general economic interest. Therefore, it could be argued that not all horizontal agreements falling under article 2 of the New Competition Law necessarily and invariably affect the general economic interest, and thus the parties may provide a justification for their horizontal agreements. Put differently, article 29 would exclude a reading of the presumption in article 2 as being irrebuttable or creating a *per se* offense. For instance, the alleged offenders may argue that their agreement although *prima facie* anticompetitive, on balance, had a neutral or even positive effect on competition, and thus caused no detriment to the general economic interest. Under this provision could fall certain collaboration agreements between competitors which although restricting competition to some extent, enable larger and more comprehensive pro-competitive effects (for instance, joint ventures between competitors for the launch of a new innovative product, which could entail some necessary elements that restriction of competition).

On the other hand, there are also arguments in favour of considering that the legal presumption of article 2 of the New Competition Law creates a *per se* offence, and thus

contains an irrebuttable presumption. Firstly, the presumption applies only in connection with "practices absolutely restrictive of competition", therefore, the very wording may suggest that these practices invariably and under no exception affect competition. Secondly, the Mexican legislation provides a similar wording (i.e. so-called "absolute monopolist practices")[29] and it is interpreted as a *per se* offense.

As stated above, irrespective of how the Argentinian competition authority will construe the legal presumption of article 2, this issue will most likely be something to be clarified by the courts.

2.2. Anticompetitive conducts for which no illegality is presumed

All other anticompetitive conducts that do not fall under the limited category of "practices absolutely restrictive of competition" of article 2 of the New Competition Law, shall be analysed pursuant to the rules of the previous system (i.e. a rule of reason), which obliges the Argentinian competition authority to prove that the challenged conduct had anticompetitive effects as well as the capability of affecting the general economic interest.

In this regard, the New Competition Law expressly refrains from presuming the anticompetitive effects of certain conducts listed in article 3, which shall all be analysed under the rule of reason, most importantly, resale price maintenance and "arrangements to limit or control technical development or investments".[30]

In connection with resale price maintenance, it is worth noting that such conduct constitutes an object restriction of competition under European Union competition law, whereas it is analysed pursuant to the rule of reason under U.S. antitrust law. The New Competition Law seems to have sided with the more lenient approach to assess resale price maintenance adopted in the U.S. since the *Leegin* decision in 2007[31] and the Argentinian competition authority shall therefore have the burden of demonstrating the anticompetitive effects of any such agreements.

Potentially open to more criticism is the New Competition Law's stance not to presume the anticompetitive effects of arrangements to limit technical developments. Under this category could fall the commonly known as "pay-for-delay" agreements or reverse payment patent settlements, which restrict or delay generic entry in a pharmaceutical market in exchange for benefits transferred from the originator (i.e. the owner of patent which is generally close to expire) to the generic producer. Under European Union competition law such agreements are treated as object restrictions of competition[32] whilst under U.S. antitrust law they are analysed under the rule of reason.[33] The New Competition Law again has sided with the more lenient, less interventionist approach adopted in the U.S., therefore, the Argentinian competition authority will have to prove anticompetitive effects if it desires to challenge "pay-for-delay" agreements or any other agreement that limits or controls technical developments or investments even between competitors.[34]

A further modification introduced by the New Competition Law is that the Argentinian competition authority may issue "permits" to enter into horizontal agreements that fall under article 2 of the New Competition Law (i.e. practices categorised as "absolutely restrictive of competition"), but which according to its reasonable discretion would not affect the general

economic interest.[35] The wording of the New Competition Law suggests that such permit system would be voluntary and to be used by the parties to a horizontal agreement which although being *prima facie* anticompetitive could nonetheless be exempted from the application of article 2 because in the overall does not affect the general economic interest. For example, one may think of cases where the efficiencies or pro-competitive effects of the arrangement outweigh the anticompetitive effects, or where there exists an objective justification for entering into such arrangements. The New Competition Law limits the scope of the agreements for which the parties may seek guidance from the Argentinian competition authority since the permit system would only be available for agreements between competitors falling under article 2, but not for agreements or conducts that fall under article 3 of the New Competition Law.

The New Competition Law refrains from providing further insights into the workings of the permit system. For instance, it does not establish whether the permit should be obtained before or after executing the agreement, however the term "permit" suggests that it should be granted before entering into the agreement. No deadline for the notification of the agreements is established. More fundamentally, the question whether such a system would entail (i) individual or collective/block permissions (or both); and (ii) express or tacit permissions; remains unanswered in the text of the New Competition Law.

The New Competition Law features a new addition to the roster of anticompetitive conducts: inter-locking directors, which is described as the "simultaneous participation of an individual in relevant executive positions or holding a director position in two or more competing companies".[36] Although such a conduct was already illegal under the prior regime as long as it entailed the sharing of confidential information between competitors with the aim of fixing prices, quotas or other conditions of competition, the New Competition Law reinforces such prohibition by expressly including it in the non-exhaustive list of anticompetitive conducts. With the enactment of the New Competition Law companies and individuals potentially falling under the scope of the new inter-locking directors prohibition, should seek legal advice as to whether they hold a "relevant executive position", and secondly and most importantly, whether the companies for which they hold such positions could be deemed to be competitors. Additionally, if these two conditions are met, it should then be analysed whether such conduct could amount to a distortion of competition which has the capability of affecting the general economic interest. As with all practices that do not fall under the "absolutely restrictive of competition" category, the burden of proof of showing that the conducts distort competition and affect the general economic interest rests with the Argentinian competition authority.

These changes are most welcome as they bring -within the art of the possible- Argentina in line with the best international practices regarding anticompetitive conducts and, particularly, cartels. However, the exchange of information between competitors regarding future prices or quantities should had been clearly included within the catalogue of conducts for which the illegality is presumed by law.[37] More often than not, the only evidence of a cartel that a competition agency is able to gather is some sort of partial and incomplete information exchange between competitors rather than detailed and complete evidence as to the formation and operation of a cartel. Under European Union competition law, exchanges of information between competitors relating to future prices and quantities are treated as object restrictions of competition with no need to prove anticompetitive effects.[38] The adoption of such stance in the New Competition Law would have been recommendable, and

would not have resulted in any undue lessening of the defence rights of the parties, as they would have had the opportunity to rebut the presumption and demonstrate that those information exchanges had no anticompetitive effects.

2.3. Increased fines for anticompetitive conducts.

Larger and more deterrent fines for anticompetitive conducts are also envisaged in the New Competition Law, which entails the abandonment of the prior regime's fixed-amount cap on fines (previously set at AR$150 million, approximately US$6.25 million).

According to the New Competition Law, fines for anticompetitive conducts shall be calculated using whichever results the higher of the following two alternative methods: (i) up to 30% of the turnover of the product to which the infringement relates during the last fiscal year multiplied by the number of years of infringement. This amount cannot exceed 30% of the consolidated turnover achieved by the offender's economic group in Argentina during the last fiscal year; or (ii) twice the economic benefit deriving from the infringement. If fines cannot be established by using the methods (i) or (ii) above, then fines for each offender cannot exceed the amount of AR$4,000 million (approximately US$167 million).[39]

Fines shall be doubled in case of recidivism for offenders which have been sanctioned for anticompetitive conducts in the previous 10 years.

The increase in the maximum fines foreseen in the New Competition Law is praiseworthy because it constitutes a crucial pillar to both deter and sanction anticompetitive conducts, which under the prior regime was not achieved and firms unquestionably considered cartelising as highly beneficial.

Despite this positive legal modification, the intended deterrent effect and the effectiveness of whole sanctioning regime could be undermined by the fact that obstructions of investigations (notably, interfering with or not submitting to dawn raids) is fined under the New Competition Law with the negligible amount of approximately AR$10,000 (approximately US$420) per day.[40] Therefore, a firm which is being raided by the Argentinian competition authority may conveniently decide not to cooperate with the inspection, considering that the potential benefits (stemming from, for instance, destroying or concealing all or most of the incriminating evidence) may largely exceed the costs (i.e. daily fines of up to US$420).[41] To avoid firms from circumventing the law in such a way, the competition laws of other jurisdictions severely sanction firms that refuse to submit to inspections. For example, European Union law[42] establishes fines of up 1% of the total turnover of an undertaking which refused to submit to an investigation, and further foresees the possibility of applying periodic penalty payments[43] (of up to 5% of the undertaking's average daily turnover) to compel a reluctant firm to submit to an inspection. It would have been advisable that the New Competition Law addressed the commented loophole by increasing the fines for refusing to cooperate with an inspection conducted by the Argentinian competition authority.[44]

3. Introduction of a leniency programme

The New Competition Law created the first ever leniency programme in Argentina. Unlike the introduction of a pre-merger control regime which conveniently envisages a transition period, the leniency programme does not and shall become effective as from the date on which the New Competition Law enters into force. Therefore, it is expected that, simultaneously with the entry into force of the New Competition Law or shortly thereafter, the Executive Power will issue a decree specifically regulating how the leniency programme will operate.

The internal features of the leniency programme envisaged by the New Competition Law are, for the most part, standard and resemble those in place in other jurisdictions.[45]

The leniency programme's main features are as follows:

• Leniency shall be available only in connection with the practices categorised as "absolutely restrictive of competition" under article 2 of the New Competition Law, which as explained in section 2.1 above has a similar scope to the OECD's concept of cartels.

• Leniency shall be available to both companies and individuals involved in a cartel.[46]

• The first applicant to blow the whistle and furnish evidence that allows the Argentinian competition authority to determine the existence of the conduct shall obtain civil[47] and criminal immunity,[48] provided that the Argentinian competition authority has not already commenced an investigation or possess sufficient evidence to prove the cartel.[49]

• Provided that they furnish additional evidence of the cartel, second-in applicants may obtain reductions, based on the chronological order of the applications, ranging between 50% and 20% of the fines to which they may otherwise be subject as well as criminal immunity.

• The common requisites to benefit from leniency, irrespective of being the first applicant or not, are to: (i) immediately cease the participation in the cartel, unless otherwise instructed by the Argentinian competition authority to avoid tipping-offs; (ii) fully, continuously and diligently cooperate with the Argentinian competition authority throughout the whole procedure; (iii) not to destroy or conceal evidence relating to the cartel; and (iv) not have made public the decision to apply for leniency (except for other competition authorities).

• Leniency applications shall be admitted up until the moment the Argentinian competition authority presses formal charges against the involved individuals and/or companies (similar to the issuance of a statement of objections under European Union competition law).

• The Argentinian competition authority shall set up a marker system whereby an applicant's position in the leniency queue is protected for a given time which allows the gathering of the necessary evidence to prepare a valid application.

• The identity of all leniency applicants (successful or not) shall be kept confidential by the Argentinian competition authority, and courts are legally prevented from ordering the disclosure of any type of evidence (i.e. "statements, acknowledgments,

information and/or any type of evidence") provided in the framework of a leniency application.

• Those applicants which fail to qualify for immunity for the first cartel being reported, may nonetheless report a second and discrete cartel for which they will be granted immunity plus an additional one-third (1/3) fine reduction in relation to the first cartel.

As seen from the features set out above, the leniency programme created by the New Competition Law is, by and large, mainstream. Its success will hence depend on whether the Argentinian competition authority can achieve (and if so, in what time) the cornerstones of any successful leniency programme which are (i) threat of severe sanctions; (ii) fear of detection; and (iii) transparency, predictability and certainty in enforcement policies.[50]

For the time being, none of these three pillars are present in the Argentinian competition regime. Fines so far have been low and non-deterrent as explained in section 2.3 above. Cartelists have no fear of detection since the Argentinian competition authority rarely prosecutes cartels, and the use of dawn raids has been extremely limited in the past. Some steps have been taken to increase transparency and predictability since the new administration took office in December 2015, but this cornerstone is the most difficult to attain as it cannot be achieved overnight.[51]

Although the conditions prior to the enactment of the leniency programme were far from optimal, the New Competition Law rightly seeks to address most of these shortcomings as it substantially increases fines for cartels, and buttresses transparency by creating a new, more independent competition authority (explained in more detail in section 5). On the other hand, fear of detection will only be achieved once the Argentinian competition authority starts using its dawn raid powers to uncover cartels, and once detected, heavily sanctioning cartelists.

4. Reinforcement of the private enforcement regime.

The prior competition law allowed the victims of anticompetitive practices to seek redress in courts.[52] However, in the almost 20 years of life of such provision, there was only one known case in which a court awarded a private party damages derived from an anticompetitive conduct.[53]

The New Competition Law introduces substantial modifications in the arena of private damages actions, in particular, those based on a previous infringement decision from the Argentinian competition authority (known as "follow-on" actions). Most importantly, the New Competition Law confers *res judicata* effects to the decisions issued by the Argentinian competition authority vis-à-vis the courts in relation to the facts and to the legal characterization of the anticompetitive conduct, once such decisions become final and non-appealable. Therefore, it is expected that the novel binding effect on courts of prior antitrust infringement decisions will foster follow-on actions by cartels' victims in Argentina.

The New Competition Law does not foresee a limit as to which parties are entitled to seek redress, hence, it would be reasonable to conclude that both direct and indirect purchasers have standing to sue for damages as long as it is proved in court that they have suffered a

loss as a consequence of an anticompetitive conduct previously sanctioned by the Argentinian competition authority. This conclusion is supported by the language in article 65 of the New Competition Law which refers to "indirect purchasers".

The pass-on defence issue is not addressed by the New Competition Law. However, if indirect purchasers have standing to sue for damages, it would reasonable (and likewise fair) for a pass-on defence to be available to cartelists. More generally, according to the general principles of Argentinian law, such type of defence would be allowed as it is not expressly prohibited by law.[54] Additionally, pursuant to the general principles of compensation under Argentinian law,[55] unjust enrichment is prohibited and grants an action to seek the restitution of the unjust benefits that may have been obtained by a party. By analogy, it could be argued that a cartelist being sued by a direct purchaser whom has partially or fully passed on the overcharge to the subsequent purchasers, could allege that the plaintiff would unjustly enrich if the amount of the passed-on overcharge was not taken into consideration when assessing the quantum of damages to be awarded. On this issue, the New Competition Law largely follows the approach taken under European Union competition law, which -unlike U.S. federal antitrust law- allows the pass-on defence.[56]

As to the quantum of the compensation, the New Competition Law establishes that it shall be calculated by the competent court taking into consideration "the seriousness of the offense and other circumstances of the case",[57] which in my mind, it is not the correct approach since the leading criteria to quantify the compensation should be the harm that the anticompetitive conduct caused to a particular victim. If the seriousness of the offense is the primary criterion used by courts to assess damages, this could lead to over-deterrent and unfair solutions,[58] and for instance materialise in the award of large compensations to victims which suffered only limited damages. The very name of the action (*Reparación de daños y perjuicios* in Spanish)[59] conveys that the main goal of such an action is to obtain compensation for the damages inflicted by an anticompetitive conduct, therefore, it is logical to argue that the judge should mainly ponder the quantum of the damages (rather than the seriousness of the offense) to calculate the compensation.

The shortcoming identified above, seems nonetheless to be (unpurposely) circumvented by the same New Competition Law, which somewhere else provides that the general civil rules shall also be applicable to competition law damages actions.[60] Such rules provide that compensation ought to be full, consist in the restitution of the victim's position to that existent prior to the infringement[61] and comprise the actual loss (i.e. *dannum emergens*), the gain of which that person has been deprived (i.e. loss of profit or *lucrum cessants),* the loss of opportunity[62] and interest.

The New Competition Law additionally foresees the joint and several liability of all the parties involved in an anticompetitive conduct, though parties may subsequently initiate contribution actions among them.[63]

A similar provision to that of the EU Damages Directive[64] is adopted in the New Competition Law which provides that a successful leniency applicant shall only be joint and severally liable for the harm caused to: (i) its own direct and indirect suppliers or purchasers; and (ii) other victims of the conduct, only when obtaining full compensation from the other responsible parties proves to be impossible.[65]

Finally, the New Competition Law establishes that follow-on damages actions shall be subject to an expedited (rather than to the ordinary) proceeding established in the Civil and Commercial Procedural Code.[66] The legislator's intention of having an abridged proceeding is commendable, though it should be born in mind that antitrust damages actions (either stand-alone or follow-on) normally entail an evidence-intensive, costly and protracted litigation and several years may elapse until courts reach a decision.[67] In particular, the production of substantial economic evidence as well as the intervention of economic experts to calculate the overcharge (and the pass on, if legally accepted as a defence) is crucial in this type of cases. Hence, the limited scope of an abridged proceeding would hardly be suitable to address the complex issues that often arise in the framework of antitrust damages actions.

The modifications to the private enforcement regime are a move in the right direction, however, as in most jurisdictions, the surge of private damages actions will principally depend on and nourish from the public enforcement carried out by the competition authority.

5. Institutional modifications

5.1. Creation of a new competition authority.

Last, but not least important, the New Competition Law foresees relevant modifications in relation to the enforcement authority of the Argentinian competition law. Today, and until the new National Competition Authority is effectively established, competition law enforcement in Argentina bears a strong political influence as decisions are made by the Secretary of Trade,[68] which is appointed and removed at the President's exclusive will.

The goal of the modifications is to provide, within the realm of possibility, more independence to the competition enforcement authority.

To that end, the New Competition Law removes all decision-making powers (and hopefully political influence) from the Secretary of Trade[69] and provides for the creation of a new competition authority, the National Competition Authority, which shall encompass (i) the Defence of Competition Tribunal; (ii) the Anticompetitive Conducts Secretariat; and (iii) Economic Concentrations Secretariat.

The Defence of Competition Tribunal shall be composed by 5 members and decide in all matters relating to the New Competition Law. On the other hand, the Anticompetitive Conducts Secretariat shall investigate and prosecute all matters related to anticompetitive conducts before the Defence of Competition Tribunal, whilst the Economic Concentrations Secretariat will be in charge of conducting the preliminary assessment of economic concentrations under the merger control regime and issuing opinions for the Defence of Competition Tribunal to adjudicate in such cases. Despite all three bodies belonging to and being part of the National Competition Authority, they shall possess technical autonomy since the goal is to decentralize the prosecution and adjudication functions both for the sake of specialization and independence.

The members of the National Competition Authority shall be pre-selected by the Executive Power by means of a contest and qualifications public assessment. Thereafter, the selected candidates shall be confirmed by the Senate.

5.2. Creation of a new specialized court in competition law matters.

Additionally, on another front, the New Competition Law provides for the creation of a specialized division within the Federal Court of Appeals in Civil and Commercial matters, which shall hear the appeals to the decisions adopted by the Defence of Competition Tribunal. Such modification not only provides certainty by ending a long-standing dispute as to the competent court to review appeals on antitrust matters, but also buttresses the whole competition regime as it will ensure that specialized judges with a competition law background, and solely devoted to such legal matters, will review the appeals on antitrust matters.[70] It is also worth mentioning that the envisaged specialized court in competition law matters will not deal with damages actions, which shall be commenced before the "competent judge".[71] This is unfortunate as damages actions shall be decided by non-specialized judges, though understandable as the newly created specialized court in competition law matters would be expected to have plenty of work hearing appeals to the decisions of the Defence of Competition Tribunal, let alone adjudicating damages actions.

6. Concluding remarks.

The New Competition Law represents a substantial overhaul of the Argentinian competition regime and brings Argentina's legislation in line with the best international practices in the field. It could be branded as an attempt to modernize a regime that has not received any substantial update in almost 20 years, which is unquestionably a long period, especially for a fast-changing and ever-evolving field such as competition law.

Additionally, the enactment of the New Competition Law manifests Congress' and the Executive Power's support to an independent, efficient and depoliticised enforcement of competition law. Therefore, once the new Argentinian competition authority is set up, the success of most of the legal modifications foreseen in the New Competition Law will depend on the capability, commitment and proactive stance of the newly-created enforcer.

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[2] The Spanish text of the New Competition Law is available at: https://www.boletinoficial.gob.ar/#!DetalleNorma/183602/20180515 (accessed on 15 May 2018).

[3] The International Bar Association issued comments to the bill in September 2016, which are available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=AB4576E8-D750-4DED-AE82-387F599F6A44 (accessed on 1 March 2018).

[4] The American Bar Association issued its comments to the bill in October 2016, which can be found at: https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20161014_comments_salsil_argentine.authcheckdam.pdf (accessed on 1 March 2018).

[5] Argentinian Law 25,156 of 1999, which shall be repealed upon the entry into force of the New Competition Law.

[6] Throughout this paper, the term "consummation" will be used interchangeably with terms such as "closing" and "completion", all referring to the final step of a contract whereby title (or other relevant right) over a business or asset is transferred from one party to another.

[7] Article 84 of the New Competition Law. As from the enactment of the New Competition Law, the Executive Power has a maximum of 60 working days to regulate the New Competition Law. Thirty working days as of the issuance of the regulation of the New Competition Law, the Executive Power shall publicly open the preselection process of the members of the new Argentinian competition authority. Institutional modifications stemming from the enactment of the New Competition Law are addressed in further detail in section 5.1 below.

[8] Most jurisdictions that have a merger policy in place have opted for an *ex ante* regime, and the number of countries which still have post-closing regimes has been reducing in the past. For example, Brazil ousted its post-closing regime and replaced it with a pre-merger control regime pursuant to Law 12,529/11, which came into force on 29 May 2012. In this regard, the International Competition Network advocates for the adoption of pre-merger control regimes since "merger policy works *ex ante*" and "even where structural remedies are available *ex post*, there can be high economic costs of disentangling a transaction where the merged entity has subsequently been found to harm competition"; see ICN Merger Working Group: Analytical Framework Sub-group, "The Analytical Framework for Merger Control", p. 4, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf (accessed on 4 March 2018).

[9] Notably, the Argentinian competition authority has used, until recently, merger control policy for purposes that are not strictly related to the traditional goals of competition law, such as curbing inflation by adopting remedies obliging the merging parties not to raise prices for a given period.

[10] According to article 9, paragraph 3 of the New Competition Law, the consummation of an acquisition of control without the prior authorization of the Argentinian competition authority shall be void and subject to a fine. It is reasonable to argue however, that such provision is not strictly limited to the consummation of the transaction *per se*, but that it is likewise applicable to any act or behaviour of the parties which partially implements the transaction (for instance, exercising any sort of factual or legal influence over the commercial activity of the target before clearance).

[11] Theoretically, the gun-jumping provisions apply until the moment of the consummation of the transaction, though naturally the risk of an antitrust agency enforcing them after granting its approval to the transaction, drastically diminish.

[12] The exchange of certain confidential information (both commercially and non-commercially sensitive) between the merging parties constitutes a normal and legitimate business conduct, which is essential to the effective planning and implementation of any deal. However, even in the context of a transaction, the exchange of commercially sensitive information unrelated to legitimate due diligence or business planning between competitors will generally be assessed under the general competition law framework, which regards such type of behaviour as an independent and stand-alone infringement of competition law.

[13] Article 55, paragraph d) of the New Competition Law. All the values expressed in US$ in this paper have been converted using the exchange rate valid at the time of writing of US$1=AR$24.

[14] For instance, in late 2016 the French competition authority imposed a fine worth EUR80 million to telecom operator Altice for implementing a transaction prior to clearance. According to Altice its actions "were performed in good faith, in the midst of legal uncertainty". See Altice's press release at: http://altice.net/sites/default/files/pdf/20161108_PR_Altice_SFR_ADLC.pdf (accessed on 15 March 2018).

[15] When Argentina's prior competition Law 25,156 was passed in 1999, these thresholds were equivalent to US$20 million and US$200 million, respectively. Hence, as of today, these thresholds have lost more than 20 times their value.

[16] This situation, albeit different, resembles when European Commission, prior to the enactment of Council Regulation 1/2003, was overloaded with the notification of agreements to determine whether an individual exemption under today's article 101(3) TFEU was applicable, preventing it from focusing on curbing the most serious competition law infringements.

[17] To avoid the effects of the (sadly recurrent) depreciation of the Argentinian currency on the notification thresholds, the New Competition Law rightly provides for their automatic update on a yearly basis. The notification thresholds (and the amount of certain fixed-amount fines) set out in the New Competition Law are nominated in so-called Flexible or Movable Units, which shall follow the fluctuations of the consumer's price index published by the National Statistics Office of Argentina. In this regard, the Argentinian competition authority shall publish the updated notification thresholds at the beginning of each year (taking into consideration the value of the Flexible Unit on the last day of each year), which shall remain in force for the remainder of the new calendar year.

[18] Article 33 of the New Competition Law.

[19] Under the prior Argentinian competition law, the substantive test to assess both anticompetitive conducts and mergers was the existence of harm to the "general economic interest". Although not legally defined, courts have interpreted that such term is tantamount to "consumer surplus". Such test is maintained in the New Competition Law. For a comment on the concept of general economic interest, see Julián Peña and Federico Rossi, Argentina's chapter in Julián Peña and Marcelo Calliari (eds), *Competition Law in Latin America: A practical guide* (Kluwer Law International, 2016), p. 163.

[20] Following international best practices, the New Competition Law foresees that the Argentinian competition authority shall implement a fast-track mechanism to deal with transactions which do not pose competition concerns.

[21] Unfortunately, the New Competition Law does not establish a limit to the number of suspensions to the review period that the Argentinian competition authority can decide (nor in relation to the term of any such suspensions). Although not ideal as to the form, it would nonetheless be advisable that the Argentinian competition authority issues secondary regulations establishing clear limits to its powers to request information from the merging and/or third parties, and how this shall affect the timing of review.

[22] "By the end of 2015 the average time of analysis for mergers and acquisitions was 3.2 years, which was further reduced to 1.8 years by the end of 2016. At present, the average period for the analysis of new merger and acquisition files is six months ". See Greco, Quesada and Volujewicz, "Argentina: Competition Authority" (Global Competition Review, 18 September 2017)". Available at http://globalcompetitionreview.com/chapter/1147408/argentina-competition-authority (accessed on 5 March 2018).

[23] Brazil moved from a post-closing merger control regime under Law 8,884/94 to a pre-merger control system under Law 12,529/11. Chile shifted from a voluntary merger regime to a mandatory pre-merger control regime enacted by Law 20,945/16, which came into effect on 1 June 2017.

[24] Article 121, Brazilian Law 12,529/11.

[25] This heavy burden of proof on the authority's shoulders, together with the scarce use of dawn raids, and the fact the prior government fostered *de facto* agreements between competitors, are some of the factors explaining the low cartel enforcement achieved by the Argentinian competition authority under the previous regime.

[26] The scope of the concept of “practices absolutely restrictive of competition” is similar to the OECD's definition of cartels, according to which cartels are "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive

arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce". See OECD, "Recommendation of the Council concerning effective action against hard core cartels" (1998) 2.

[27] Despite the novel introduction of a presumption of illegality for cartels, the task of the Argentinian competition authority shall not be solely limited to prove the existence of the cartel and the involvement of the offenders, but it may also require in certain cases, to define and quantify the relevant market to enable and justify the calculation of fines and facilitate follow-on private damages actions.

[28] Article 2 of the New Competition Law.

[29] Mexico's Economic Competition Federal Law, article 53.

[30] Article 3, paragraph (c) of the New Competition Law.

[31] U.S. Supreme Court, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[32] The EU Commission's characterisation of "pay-for-delay" agreements as restrictions of competition by object has been upheld by the EU General Court in the *Lundbeck* decision in September 2016 (case T-472/13 Lundbeck v. Commission). This decision has been appealed to the EU Court of Justice.

[33] U.S. Supreme Court, FTC v. Actavis, Inc. 570 U.S. 133 S. Ct. 2223 (2013).

[34] One may also think of the not unusual case of an agreement between competitors to set an industry standard with the intention of excluding a particular competitor from the market.

[35] Article 29 of the New Competition Law. The envisaged "permit system" resembles that in force in the European Union under the now extinct Council Regulation 17 of 1962, whereby the parties to an agreement had to submit a notification to the European Commission to obtain clarification as to whether such agreement was exempted from the application of article 81(1) of the TFEU as it satisfied the conditions of article 81(3) TFEU.

[36] Article 3, paragraph (l) of the New Competition Law.

[37] The New Competition Law only refers to information sharing in article 3, which lists a number of both unilateral conducts and concerted practices for which the presumption of illegality of article 2 does not apply.

[38] "Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities (…)", European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 74.

[39] See footnote 17 regarding the yearly update of the notification thresholds and, where applicable, fines.

[40] Article 59, paragraph (b) of the New Competition Law.

[41] Nonetheless under article 60 (a)(4) of the New Competition Law, a company which destroys or conceals evidence of a cartel can neither benefit from immunity nor leniency under the leniency programme created by the New Competition Law.

[42] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"), article 23.1 (c).

[43] Regulation 1/2003, article 24.1 (e).

[44] It is nonetheless true that individuals that refuse to submit to an inspection carried out by a public servant, can likewise be charged with the crime of resistance to the authority, which is sanctioned with prison from 1 month to 1 year pursuant to article 237 of the Argentinian Criminal Code.

[45] The features (especially, the possibility of reducing fines to subsequent applicants in the range from 50% to 20%) and the terminology employed in the drafting of the leniency programme, suggest it is largely modelled on the EU's leniency programme. However, unlike the EU leniency programme, firms may still qualify for immunity despite having coerced other firms to join or remain in a cartel.

[46] Directors, managers, employees and legal representatives involved in a cartel may apply for leniency either individually or jointly with the company on behalf of which they were involved in the cartel.

[47] Successful leniency applicants shall nonetheless be liable for any private damages actions to the extent explained in section 4 below. Furthermore, through –in my view- an unintended loophole in the New Competition Law, a successful leniency applicant could potentially be banned as a supplier of the State for up to 8 years according to article 55, paragraph (e) of the New Competition Law. This is so because article 60 exempts successful leniency applicants solely from the fines established in article 55, paragraph (b) of the New Competition Law. For those companies whose primary source of income stems from supplying the national government (e.g. a construction company), the uncertainty as to whether they could be exposed to such sanction will certainly operate as a mayor disincentive to self-report their involvement in a cartel. The same problem could stem from the provision establishing the disqualification of directors and the general prohibition of companies to do business from 1 to 10 years provided in article 58 of the New Competition Law, which could also potentially be applied to a successful leniency applicant. The lack of certainty as to the costs and benefits stemming from a leniency application, will undoubtedly reduce the attractiveness of Argentina's leniency programme.

[48] Article 300 of the Argentinian Criminal Code provides the imprisonment from 6 months to 2 years for individuals that "make the price of a merchandise raise or fall by means of false news, fake negotiations or meetings or coalitions between the main holders of a merchandise, with the aim of not selling them or selling them but only at a certain price". More specifically, article 309 of Argentinian Criminal Code foresees the imprisonment from 1 to 4 years for individuals which engage in the same conducts established in article 300, but in relation to any financial instrument. To the best of my knowledge, none of these provisions has ever resulted in the effective imprisonment of any individual. Despite their existence, public prosecutors have never applied them in practice and it could be argued that cartels are *de facto* not criminally sanctioned in Argentina. The New Competition Law however, in order to convey certainty and thus lure self-reporting, foresees that successful applicants "shall be exempted from the sanctions provided in articles 300 and 309 of the Criminal Code". The New Competition Law could trigger the debate about whether cartels constitute a criminal offense in Argentina, and whether Congress is sending a message to criminal prosecutors that imprisonment is available to punish cartelists.

[49] If an investigation into a given cartel is already ongoing, immunity shall still be available only if the Argentinian competition authority lacks sufficient evidence to prove the existence of the conduct.

[50] Hammond, "Cornerstones of an effective Cartel Leniency Programme", ICN Workshop on Leniency Programs (Sydney, November 22-23, 2004) 4-5.

[51] Predictability "is a journey, not a destination. Transparency is an ongoing goal that cartel enforcers strive to achieve each day in every policy and enforcement decision they make". See O'Brien, "Leadership of Leniency", in Beaton-Wells and Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion* (Hart 2015) 24.

[52] Argentinian Law 25,156, article 51.

[53] Lower court of ordinary jurisdiction in commercial matters No. 14, Secretariat No. 27, "*Auto Gas S.A. c/ YPF S.A. y otro s/ ordinario*", 16 September 2009. For a comment on the case, Julián Peña and Federico Rossi, Argentina's chapter in Julián Peña and Marcelo Calliari (eds), *Competition Law in Latin America: A practical guide* (Kluwer Law International, 2016), p. 169.

[54] According to article 19 of the Argentinian Constitution, everything which is not forbidden is allowed.

[55] Article 1794 of the Argentinian Civil and Commercial Code foresees an action to seek redress in the case on unjust enrichment. A leeway for the judge to consider whether the plaintiff has partially or totally passed on the overcharge and, if so, to diminish the level of compensation accordingly, is provided by article 1742 of the Argentinian Civil and Commercial Code, which sets forth that a judge can attenuate the quantum of the compensation taking into account "the personal situation of the victim and other circumstances of the case".

[56] See article 13, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("EU Damages Directive").

[57] Article 64 of the New Competition Law.

[58] If the Argentinian competition authority (when imposing a fine for an anticompetitive conduct) and the courts (when awarding damages as a consequence of that very same anticompetitive conduct) both use the seriousness of the offense as the primary criterion, this could have a bearing on the double jeopardy principle embedded in the Argentinian Constitution as it be construed that a company is being punished twice for the same offence. The seriousness of the offence should be, for the most part, considered and weighed by the competition authority, which is entrusted with public enforcement of competition law.

[59] The English translation is "damages compensation".

[60] Article 62 of the New Competition Law.

[61] Argentinian Civil and Commercial Code, article 1740. This provision is very similar to article 3 of the EU Damages Directive.

[62] Argentinian Civil and Commercial Code, article 1738. Also, this provision largely resembles recital 12 of the EU Damages Directive.

[63] Article 65 of the New Competition Law.

[64] EU Damages Directive, article 11.

[65] Article 65, second paragraph of the New Competition Law

[66] Such expedited proceeding (*proceso sumarísimo* in Spanish) provides for abridged legal terms, which, unless otherwise established, shall have a duration of three days. Furthermore, appeals within such type of procedure are limited, and most importantly, the production of evidence is not expressly contemplated.

[67] "These actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action", White Paper on Damages Actions for breach of the EC Antitrust Rules, article 2.8.

[68] Until the new National Competition Authority is established, decisions will continue to be adopted by the Secretary of Trade based on the non-binding technical advice of the National Commission for the Defense of Competition (*Comisión Nacional de Defensa de la Competencia*).

[69] Removing all political influence will be difficult to achieve since, according to the New Competition Law, the budget of the new National Competition Authority will require the approval of the Executive Power. However, under the prior competition law, dependence was greater since the competition agency's budget was determined at the sole discretion of the Executive Power.

[70] At present and until the new specialised court is effectively set up, antitrust-related appeals will continue to be heard either by the Federal Court of Appeals in Civil and Commercial matters or by National Court of Appeals in Criminal-Economic matters, both of which are non-specialized courts since they hear appeals on a wide range of matters, besides antitrust.

[71] Article 62 of the New Competition Law.