Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

07-Oct-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2016)2
Unclassified

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by Argentina

-- Session IV --

1-2 December 2016

This contribution is submitted by Argentina under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

JT03402381

English - Or. English

SANCTIONS TO ANTICOMPETITIVE CONDUCTS[1]

-- Argentina --

1. Determination of the basic fine

1. In Argentina the Competition Authority has sanctioned fines for uncompetitive practices to a series of cases since 1980, when legislative action started being in effect in practical terms.[2] In this sense, some cases have been sanctioned under Act 22,262, active from 1980 until 1999, while other cases have been sanctioned under the current Competition Act 25,156. The type of sanction that is contemplated by both acts is of administrative nature. In other words, the idea of monetary sanctions aiming at punishing those who commit infractions and at dissuading those economic agents from committing future anticompetitive conducts.[3]

2. Act 25,156 in Section 46 considers the application of fines both to individuals and corporations. In fact, the normative foresees that whenever a law is broken by a corporation, the fine may also jointly apply to directors, managers, administrators, trustees or members of the Supervisory Board, agents or legal representatives of such corporate body. The reason behind this is that their action or omission of duty control, monitoring or surveillance could have contributed, encouraged or allowed the offense (Section 48). Until now, there has been only one case (the so-called gelatin for medicinal use cartel) which has been sanctioned, in which not only the companies involved were sanctioned, but also the individuals who administered or represented them.[4]

3. Section 46, subsection b) of Act 25,156 contemplates the application of a fine of at least ten thousand Argentine pesos (ARS 10,000) and at most one hundred and fifty million Argentine pesos (ARS 150,000,000).[5]

4. Regulation in Argentina does not contemplate a mechanism of setting fines by which a basic value is established by law and other prefixed incompliances added to the penalty, as is the case with the

1 This work was done by Marcelo D'Amore, with contributions made by Esteban Greco and Lucía Quesada. Contribution from the National Commission for the Defense of Competition, Argentina

2 The fine is imposed by a Secretary of State. Nowadays, the Secretary of Commerce within the Ministry of Production. It is to be noted that the National Commission for the Defense of Competition (CNDC for its Spanish acronym) is the agency that carries out the investigations and recommends the Secretary of Commerce, through a non-binding legal opinion, the application of a sanction, if applicable.

3 Act 22,262 also contemplated criminal charges for those who have committed crimes and these instance should be carried by a judge if the antritrust authority solicited it. However in practical terms, this type of sanction has never been utilized, due to the fact that no case during the period in which this law was active has reached the criminal instance.

4 The case in question is "Braun Medical S.A., Gobbi Novag S.A., Fresenius Kabi S.A., CSL Behring S.A.", Resolution N°705/15 from the Secretary of Commerce, dated December 4, 2015 and legal opinion by the CNDC N° 986/2015 dated November 25, 2015.

5 At the time this contribution was submitted, ARS 150 million is approximately equal to USD 10 million.

European Commission's "Guidelines on the method of setting fines pursuant to article 23(2)(a) of Regulation No 1/2003".

5. On the other hand, the already mentioned Section 46, subsection b) establishes a group of relevant factors, although it does not specify the weight of each of those factors into the value of the fine.

6. In this case, the aforementioned Section 46, subsection b) establishes that the amount to be fined is based on: (1) the loss suffered by all economic agents due to the prohibited activity; (2) the benefit obtained by all the active parties due to the prohibited activity; and (3) the value of the assets of the parties involved in previous point 2 at the moment that the violation was committed. In case of recidivism the fine is doubled.

7. These criteria established by Section 46, subsection b), must be combined with those established by Section 49 of Act 25,156, which indicates that the monetary penalty must correspond to: the seriousness of the infraction, the damage caused, the degree of intention, the market share of the offender, the size of the affected market, the duration of the practice or concentration and the recurrence or background of the responsible party, as well as their financial situation.

8. In some cases, which are considered serious (for example, some cartel cases), the Competition Authority has taken some elements of comparative law for the calculation of fines. In that sense, the defined "base" used was a percentage of the revenue of the companies involved taken from the company's financial statements, but only related to affected markets, if the company would have been involved in the production of other goods and services. Following the "base" value, there was an additional fine which represents a certain percentage of the volume sales (obtained via tenders) of the other companies involved in the cartel. For each company involved, a second additional percentage was taken into account for the sales coming from abusive prices over a defined "threshold" price, differentiating the degree of abuse committed by each firm based on the surcharge in each tender in which they participated. Finally, an additional percentage was added to the "base" because the good, product of the cartelization, was an intermediate good (e.g., liquid oxygen) used in the health sector.[6]

9. However, it should be noted that the methodology used by the Competition Authority in the case of the liquid oxygen cartel (2005) mentioned previously is not an institutionally defined procedure and, therefore, the criteria used can differ from case to case, and this has happened in the past.

10. Nevertheless, it can be noted that in all cases, the Competition Authority determined the value of the fine as a percentage of revenue (sales) and the duration of the infraction, which usually has had an important weight on the amount of the fine. Therefore, the fact that a conduct is serious in terms of comparative law (for example a cartel) constitutes a factor for imposing a higher penalty.[7]

11. Regarding the so-called "principle of proportionality", understood as the fact that the penalty should keep a certain relationship with the seriousness of the infraction, the duration of the infraction, and the financial situation of the offender, it can be said that Act 25,156 contemplates this principle. The only important detail to take into account is that the maximum legal limit that the Competition Authority can enforce is ARS 150 million, amount which results insufficient in cases where the damage produced or the illicit economic benefit obtained can be higher. Furthermore, in some specific cases in which the illegal surplus is lower than the legal limit, a fine below the maximum magnitude can also be insufficient, if the intention is to dissuade future behavior.

---

6 This occurred in the case of Liquid Oxygen decided by the Competition in Authority in 2005. Legal opinion of the CNDC N°510, dated July 8, 2005.

7 It is worth noting that Act 25,156 does not establish the infractions in different degrees (serious, very serious, moderate, light, etc.).

12. The reason why the upper bound of the fine in present times is so low is because of the high inflation process the country has experienced. In this regard, it must be taken into account that the upper bound of ARS 150 million was established in 1999, when it was equivalent to USD 150 million and has not been updated yet.

2. Adjustment of the basic fine

13. As explained before, the adjustment of the penalty fee is calculated as a function of diverse criteria following Act 25,156. On the other hand, the way to calculate the penalty fee according to Act 22,262 differed from the procedure stipulated by Act 25,156, as the former allowed for a fine of up to 20% above the illegal benefit obtained by the offender or offenders.

14. There was an important case in 1999 which served as a benchmark, where the main local oil company was involved in an exploitive abuse of dominant position in the liquified petroleum gas market (LPG). This case can be considered as the first step towards the use of explicit criteria for the calculation of a penalty fee, in the sense that the amount was computed as a function of a certain quantifiable variable (the illicit benefit obtained by the offender as a consequence of the prohibited behavior), intending also to dissuade similar behavior in the future. This, within the possibilities allowed by the current legislation.[8]

15. Instead, in those situations in which the damage produced by the behavior or the illegal benefit obtained could not be directly measured, the Competition Authority has repeatedly argued that in that specific case the behavior must have had produced a minimum effect in the affected market (for example, a raise of 5% in the weighted average price).[9]

16. In the case of a business cartel, considerations have been made regarding aggravating factors, because of the serious consequences of these particular actions and because the detection of this behavior results extremely difficult in comparison with other visible behaviors.[10] Another factor to take into account is the fact that the involved market could be sensitive for society, for example, if the relevant product market belongs to the healthcare sector.[11] The clear intention and the acknowledgment of the illicit

8 The case in question is "CNDC c/YPF S.A". Legal Opinion CNDC N°314/99 and Resolution N° 189/99 of the Secretary of Industry, Commerce and Mining. This case was decided by application of Act 22,262 and the fine imposed was equal to the surplus obtained illegally in addition to the 20% increment which was the maximum allowed by law. Another case, also analyzed under Act 22,262, in which the same methodology was used was "Loma Negra CIA SA, Cemento San Martín SA, Minetti SA, Corcemar SA, Cementos Avellaneda SA, Cementos El Gigante SA y Petroquímica Comodoro Rivadavia SA", legal opinion CNDC N°513, dated July 25, 2005.

9 In the case "Clorox Argentina S.A s/infracción Ley 25.156", legal opinion of the CNDC N°897 dated April 10, 2015 and Resolution N°65/2015 of the Secretary of Commerce dated April 17, 2015, this was the argument used by the CNDC. This same type of argument had been previously used by said agency in one of the cases with most public cases of cartelization of the history of antitrust law in Argentina, which occurred in the Portland cement industry; the case in question is "Loma Negra CIA SA, Cemento San Martín SA, Minetti SA, Corcemar SA, Cementos Avellaneda SA, Cementos El Gigante SA y Petroquímica Comodoro Rivadavia SA", legal opinion CNDC N°513, dated July 25, 2005. The Competition Authority assumed that the illegal benefit obtained was no less than un percent (1%) of the total turnover involved in the market of Portland cement during the period investigated.

10 "Loma Negra CIA SA, Cemento San Martín SA, Minetti SA, Corcemar SA, Cementos Avellaneda SA, Cementos El Gigante SA y Petroquímica Comodoro Rivadavia SA", legal opinion CNDC N°513, dated July 25, 2005.

11 The case in reference is "Braun Medical S.a., Gobbi Novag S.A., Fresenius Kabi S.A., CSL Behring S.A.", previously cited.

behavior also has been considered an aggravated factor.[12] Furthermore, it has also played an important role the fact that the conduct had mostly impacted on the most vulnerable economic population.[13]

17. Another important factor to be considered as mitigation of the sanction, has been the fact that the company involved in the cartel was pressed by the other competitors members of the cartel to be part of it, under the threat of a potential price war.[14]

18. On the other hand, recidivism represents an aggravating factor, in the sense that the basic penalty fee gets doubled.[15] Nevertheless, this aggravating factor has never been applied in practice.

3. Practical issues in determining the amount of fines

19. Act 25,156, according to its original wording established that the appeal of sanctions (including fines) has automatic suspensive effects.[16] However, a reform passed in 2014 established that in all cases, to be able to appeal the fine, the supposed offender must deposit to the relevant authority a monetary warranty equal to the penalty fee in question. If the deposit is not executed, the appeal will not sustain. The only exception of this rule is the case where the deposit of the warranty creates irreparable damage.[17] Therefore, people or corporations that are fined by the Competition Authority must pay these fees as a condition to file an action for reconsideration to the justice system. In such a way, rulings involving fines had been challenged under the argument of their unconstitutionality. However, it is too early to confirm that a final criterion has been defined regarding this issue.

20. The reduction of fines in judicial instances occurs rarely, although it has happened in the past. What usually happens in the review of judicial instances is that the decision of the Competition Authority is either accepted or overturned *in totum* (including the fine).

21. Regarding effective collection of the fines, it must be mentioned that the phenomenon of high inflation in Argentina during the last few years has substantially decreased value of the fines in real terms. This is because it is widely accepted that the payments must go through only once the judicial system abides by them and not from the moment the fine was imposed, which could mean several years later. Even with the inclusion of moratorium interest, which is an option legally available and has been used in some cases, it still does not solve the problem because they would only apply once the ruling has been confimed by a court of justice.

22. Including an inflation rate adjustment index for the calculations of penalties is clearly a decisive point to improve the workings of Argentina's competition system. In that sense, there were a recent announcement of a draft bill to be submitted to the National Congress proposes to change the way fines are determined.[18] The draft bill defines that the upper limit for the fine will be the greater of (i) up to 30% of

12 This criterion has been used in the already cited "Clorox" case.

13 This criterion has been used in the already cited "CNDC c/YPF S.A".

14 Such was the case with regards to Petroquímica Comodoro Rivadavia in the previously cited Case "Loma Negra CIA SA, Cemento San Martín SA, Minetti SA, Corcemar SA, Cementos Avellaneda SA, Cementos El Gigante SA y Petroquímica Comodoro Rivadavia SA", legal opinion CNDC N°513, dated July 25, 2005.

15 Section 46, subsection b) of Act 25,126.

16 The same feature was include in former Act 22,262.

17 The norm introduced by the 2014 reform was Act 26,993.

18 The announcement was made on September 27, 2016.

the turnover related to the products or services envolved in the illicit act during the last fiscal year, multiplied by the number of years of the duration of the act,[19] or (ii) up to 30% of the total national turnover registered in the last fiscal year by the economic group to which the violator belongs, or (iii) twice the economic profit obtained through the illicit act. If none of the criteria outlined in (i), (ii) and (iii) can be applied, the fine will be up to ARS 3,000 million (USD 200 million), figure that will be updated based on Argentine CPI. The amount of the fine will be doubled for those individuals or firms who had been fined in the previous 10 years. This proposal lines up with the current international standards in antitrust.

23. Currently Argentina does not have a leniency program for offenders of the Competition Act, but the proposed draft bill does contemplate one.

4. Alternatives to fines

24. In Argentina the sanctions associated to infractions of the Competition Act have mostly consisted of fines applied to companies as a whole and orders to cease anticompetitive conducts. Only in one case also the companies' managers have been fined.

25. The Competition Authority not only has the faculty to impose fines and order the cease of conduct, but can resource to other instruments such as imposing conditionings to be fulfilled by the companies involved aiming at neutralizing the anticompetitive behavior detected. In that sense Section 4, subsection c) of Act 25,156 establishes that notwithstanding other sanctions applied, when there is evidence of abuse of dominant position or when a monopoly or oligopoly position is established in violations of such law, the Competition Authority has the power to impose conditionings seeking to reduce or eliminate the negative effects on competition[20]. It also has the ability to request a judge to evaluate the dissolution, liquidation or separation of the companies involved (until now this has never been applied).

26. The second paragraph of Section 48 of the Competition Act, contemplates the possibility to impose complementary sanctions preventing them from engaging in business for a period of one (1) through ten (10) years to those directors, managers, administrators, trustees or members of the Supervisory Board, agents or legal representatives of such corporate body by their action or omission of duty control, monitoring or surveillance that would have contributed, encouraged or allowed the offense. Nevertheless, until now this type of sanction has never been applied.

27. There are no substantive differences between sanctioning a hard-core cartel and bid-rigging in public procurement, except for the fact that in the later case the fact that it has a direct effect on public expenditure has been taken into account as an aggravating factor.[21]

28. The previous Competition Act (Act 22,262) included criminal sanctions such as imprisonment for those individuals involved, but this was never used in practice. Moreover, it is important to highlight that in both the upcoming bill explained before and the current Act 25,156, criminal sanctions are not included.

---

19 To this end, a fraction larger than 6 months shall be taken as a full year.

20 An example of these policies even though that case was solved under Act 22,262 occurred in the case aforementioned Portland cement cartel. In that case, the "Asociacion de Fabricantes de Cemento Portland" (Association of Manufacturers of Portland Cement), the entity which represents the cement producer's interests, was acting as a "police" supervisor for the cartel. The Competition Authority forced the Association to adopt a new statistics system such that there be no exchange of sensitive information relevant for competition.

21 Examples of this are the Liquid Oxygen cartel and the case of gelatin for medical use that we mentioned previously.

29. Until now, there has only been one local incident of private action for damages suffered as a consequence of an anticompetitive behavior, in which a company client impaired by the offender received compensation for damages. This situation was a result of the already mentioned liquified petroleum gas (LPG) case concluded in 1999. The bill submitted to National Congress is intended to promote and make explicit these private actions.

5. Conclusions

30. Argentina's Competition Act establishes administrative sanctions to be applied in cases of anticompetitive conduct. It does not contemplate criminal sanctions, although fines can be complemented by inabilitation sanctions for companies and their directors, managers or other individuals involved in the case. Although the law allows fines to be extended to individuals of the companies involved, this prerogative has been used only once.

31. Act 25,156 does not define a mechanism to calculate the fine based on objective parameters. However, principles of comparative law have been applied to calculate fines in some cases that the Competition Authority considered to be serious violations of the law. However, this has been done on an ad-hoc basis rather than in a systematic way.

32. Act 25,156 also establishes the maximum fine that can be imposed. This amount, however has not been updated since 1999 and, therefore, it does not have a strong dissuasive power. Indeed, while the maximum fine was equivalent to USD 150 million in 1999, today it is has come down to USD 10 million. Detection and sanction of hard-core cartels are also difficult because Argentina does not currently have a leniency program.

33. Argentina is currently in the process of discussing a reform to its Competition Act. Regarding sanctions, the draft bill announced improves on the current Competition Act in two ways. First, it establishes an upper bound on the amount of fines that will be immune to inflation and, whenever possible, will be associate to the turnover of the firms involved in the illicit act. Second, it creates a leniency program that will facilitate cartel detection and sanction. Criminal sanctions, however, are not included in the draft bill.