GLOBAL ANTITRUST COMPLIANCE HANDBOOK

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Introduction

1.01 The latest Antitrust Law No. 25,156 (the "Antitrust Law") passed in 1999 in Argentina prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify, or distort competition or if they constitute an abuse of dominant position, provided that in either case they cause, or may cause, harm to the general economic interest. Such behavior or conduct is not unlawful as such, nor must it cause actual damages; it is sufficient that the conduct is likely to cause harm to the general economic interest.

1.02 The provisions of the Antitrust Law apply to all individuals and entities that carry out business activities within Argentina, and those that carry out business activities abroad to the extent that their acts, activities, or agreements may affect the Argentine market (known as the "effects theory").

1.03 While, in the past decade, a greater emphasis was placed on merger control procedures, over the last two years, the *Comisión Nacional de Defensa de la Competencia* (the "Antitrust

Commission") has rekindled its interest in the analysis of anticompetitive conduct and has launched several high-profile investigations, with a special focus on price discrimination as well as any other conduct that may have a direct impact on the pricing structure of consumer goods. Regarding its relation with the government, in a high-profile investigation in 2012, the Antitrust Commission issued a resolution which stated that "…the competition policy in Argentina must keep in line with the economic policy of the last years," and included a description of the achievements of the current political administration.

I. Acting alone

1.04 In order to determine the existence of dominance, s. 4 of the Antitrust Law sets out that an undertaking holds a dominant position when: (i) it is the only buyer or supplier of a given product within the market; (ii) when, without being the only supplier or buyer, it lacks substantial competition or; (iii) it is able to determine the economic feasibility of competitors because of a certain vertical or horizontal degree of integration. In addition, s. 5 establishes three relevant factors for determining the existence of a dominant position: (i) the degree of substitution for a product or service; (ii) the existence of regulatory barriers; and (iii) the extent to which a company can unilaterally set prices or restrict output.

1.05 It is important to bear in mind that the Antitrust Law does not set out that a dominant position is anticompetitive per se, since its s. 1 states that the types of conduct sanctioned by law are those that may prejudice the general economic interest. A non-exhaustive list of abuses of dominant position is provided under s. 2 of the Antitrust Law, but this list must only be taken into account for illustrative purposes, since the threshold in all cases will be whether the conduct has had an impact on the general economic interest.

1.06 By itself, the fact of being a dominant participant in the market will not trigger an antitrust accusation, but a greater degree of care will have to be employed by the dominant company. Furthermore, the Antitrust Law does not set out a market share threshold on what should be considered a dominant position. Consequently, the analysis of the dominant position will have to be carried out on a case-by-case basis regarding each specific market.

1.07 Since the early 1980s, the Antitrust Commission has been investigating conduct that falls under the abuse of dominant position. Over the first decade of dominance abuse investigations, the Commission carried out extensive (and often repetitive) investigations in certain specific markets, such as real estate, bakery and, surprisingly, the connection between the hiring of electrical services and of funeral insurance. However, no significant sanctions were imposed until 1999 in the *Commission v. YPF*[1] case concerning price discrimination when a local petroleum company incurred a significant sanction for abuse of its dominant position by discriminating prices in the liquid gas market. As of currency exchange rate on that day, the fine imposed by the Antitrust Commission on the infringing company was of USD 109,000,000. In 2000–05, the Commission would shift its focus to collusive practices.

1.08 Presently, however, the Antitrust Commission is using its investigatory powers to monitor key sensitive markets, such as the oil industry where it is running two major investigations regarding price discrimination on bulk diesel sales and the provision of aerokerosene. Other sectors that are also under the probe are the provision of port services, commercialization of cars, and the dairy industry. Lately, the Antitrust Commission has also started analyzing the

[1] *Commission v. YPF and others*, Docket No. 064-002687/97 (1999).

software industry and, in particular, the relation between online search engines and mobile operative systems.

A. Predatory pricing

1.09 Predatory pricing is sanctioned under s. 2(m) of the Antitrust Law, which describes it as "[s]elling goods or providing services at prices below cost, without a reason based on commercial usual practices in order to exclude competition in the market . . . ."

1.10 The Antitrust Commission has sanctioned a very limited number of cases relating to predatory prices, and in most cases the conduct was considered ancillary to another, principal type of anticompetitive conduct. For example, in *Tolaza v. Centro de Panaderos de Santiago del Estero*,[2] the Commission considered that the accused party had used predatory pricing techniques in order to enforce a price imposed by an industry association on certain members.

1.11 In *Cámara Argentina de Papelerías y Librerías v. Supermercados Makro*,[3] the Antitrust Commission held that, should the sale be carried out for a limited amount of time (i.e. in this case for fifteen days) and for a promotional reason, no anticompetitive conduct could be construed. This "promotional" exemption was also used in *Cámara Empresaria de Olavarría v. Supermercados Toledo*,[4] *SRT v. Cable Charlone*,[5] *EMI Odeon v. Libertad*,[6] and *Caratzu v. Granaderos Market*,[7] among other cases. The Antitrust Commission has also stated that no predatory pricing can take place in public bids (pursuant to *Stella Marias Alvarez v. Cooperativa de Electricidad Bariloche Ltd.*[8]) and that lower prices as a result of an industrial promotion regime could not be considered to be unlawful by the regulator, since it falls outside the scope of the Commission's analysis, as shown in *Cámara Argentina de la Motocicleta v. Zanella Hermanos y Compañía*.[9]

1.12 The Antitrust Commission's current review process on predatory pricing was evidenced in *Decoteve v. Cablevisión*,[10] in which it set out the conditions that must exist in order to establish predatory pricing, namely (i) dominant position, (ii) intent to carry out a market exclusion of competitors, and (iii) barriers of entry so as to prevent the entry of new competitors after the pricing, so as to be able to recoup the losses caused by the predatory pricing. In the event those circumstances are met, predatory pricing liability may be established if the dominant firm's prices were below average total cost.

B. Exploitative offenses

1.13 Excessive pricing has been analyzed regarding several sensitive markets such as medicine supplies in *Commission v. Bago*,[11] in which the Commission held that significant increases in price that had no foundation in legitimate commercial reasons could indicate an abuse of dominant position.

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[2] *Tolaza v. Centro de Panaderos de Santiago del Estero and others*, Docket No. 18.254/82 (1983).
[3] *Cámara Argentina de Papelerías y Librerías v. Supermercados Makro*, Docket No. 064-000962/97 (1997).
[4] *Cámara Empresaria de Olavarría v. Supermercados Toledo*, Docket No. 064-002856/2001 (2002).
[5] *SRT v. Cable Charlone and others*, Docket No. 064-010415//2001 (2002).
[6] *EMI Odeon v. Libertad*, Docket No. 064-000870/2001 (2003).
[7] *Caratzu v. Granaderos Market*, Docket No. S01:0109838/2004 (2005).
[8] *Stella Marias Alvarez v. Cooperativa de Electricidad Bariloche Ltd.*, Docket No. 064-002885/97 (1998).
[9] *Cámara Argentina de la Motocicleta v. Zanella Hermanos y Compañía*, Docket No. S01:0154237/2002 (2007).
[10] *Decoteve v. Cablevisión*, Docket No. S01:0130563/2005 (2010).
[11] *Commission v. Bago and others*, Docket No. 106.179/89 (1992).

1.14 As valid commercial reasons, the Antitrust Commission has accepted factors beyond the scope of the supplying company, such as the imposition of foreign surcharges for long-distance communications in *Smolensky v. Telintar*,[12] as well as specific industry factors, such as safety standards for handling radioactive material in *Autoridad Regulatoria Nuclear v. Search*.[13] It has also discarded accusations regarding abusive pricing when the prices were regulated by the state, as shown in *Torrisi v. El Popular*.[14]

1.15 Furthermore, the Antitrust Commission has also taken into account an Argentina-specific factor relating to its 2001 currency crisis. In *Bamenex v. Terminales Portuarias Rio de la Plata*,[15] *CAPCICA v. Terminales Rio de la Plata* and *Hospital de Pediatria Profesor Garrahan v. Laboratorios Northia*,[16] among other cases, it considered that steep price increases generated by currency exchange recalculations upon a devaluation cannot be considered as abusive.

C. Monopsony

1.16 The Antitrust Commission has held that the exercise of monopsony power is not, per se, a violation, but that it might be one if it entails an abuse of dominant position, thus harming the general economic interest. This can be seen in *Commission v. Industrias Welbers*[17] in which the Antitrust Commission determined that the use of this condition in order to impose credit conditions beyond the normal course of business was a clear abuse of dominant position, since it used its position in the sugarcane acquisition market to unnecessarily delay payments to its suppliers. Monopsony cases have been seldom adjudicated by the Antitrust Commission.

D. Price discrimination

1.17 Price discrimination falls under s. 2(k) of the Antitrust Law, which contains the following description: "To impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market."

1.18 In *Unión General de Tamberos v. Cooperativa Popular de Electricidad de Santa Rosa*,[18] the Antitrust Commission stated that the freedom to buy or sell and of the manner to do so in the most convenient manner is limited in the case in which a dominant position is held since a reasonable justification would be needed. A reasonable justification was found to be a shortage of production output, as decided in *Safety SACIF v. Carboquímica Argentina*[19] or the granting of volume discounts, as stated in *Castro*[20] and *Jacoubian v. Shell*.[21] In *Autrotransportes Cita*[22] the Antitrust Commission held that a price difference generated by a public regulation refund could not be construed as price discrimination.

1.19 The guidelines for the determination of price discrimination can be found in *Lafalla v. Juan Minetti*[23] in which the Antitrust Commission considered that for price discrimination to take

[12] *Smolensky v. Telintar and others*, Docket No. 609.259/92 (1995).
[13] *Autoridad Regulatoria Nuclear v. Search*, Docket No. 064-011746/99 (2000).
[14] *Torrisi v. El Popular*, Docket No. 064-019229/2001 (2002).
[15] *Bamenex v. Terminales Portuarias Rio de la Plata*, Docket No. S01:0148930/2002 (2003).
[16] *Hospital de Pediatria Profesor Garrahan v. Laboratorios Northia and others*, Docket No. S01:0214185/2002 (2005).
[17] *Commission v. Industrias Welbers*, Docket No. 106.403/81 (1983).
[18] *Unión General de Tamberos v. Cooperativa Popular de Electricidad de Santa Rosa*, Docket No. 104.084/81 (1982).
[19] *Safety SACIF v. Carboquímica Argentina*, Docket No. 10.307/81 (1984).
[20] *Carlos Alberto Castro*, Docket No. 307.353/91 (1992).
[21] *Jacoubian v. Shell*, Docket No. 064-009518/2001 (2002).
[22] *Autrotransportes Cita*, Docket No. S01:0250619/2005 (2006).
[23] *Lafalla v. Juan Minetti*, Docket No. 064-006002/2000 (2000).

place three factors were necessary, namely: (i) the possibility of effectively carrying out a segmentation of the market; (ii) the encumbering of, or restriction on, reselling the product; and (iii) the existence of market power. Additionally, an adequate geographical market definition proved to be essential as a factor to be taken into account in the differentiation in pricing, as shown in *Falcioni v. EG3*.[24]

1.20 The landmark case (and the most important fine imposed as of that moment) concerning price discrimination in Argentina was *Commission v. YPF*,[25] in which the Commission considered the following factors: (i) the dominant position held by the accused party; (ii) the non-essential market shares of its competitors; (iii) the tracking of YPF's prices by other participants in the market; (iv) high barriers on entry onto the relevant market; and (v) the prohibition on reimporting YPF's own exports to other countries in which it did not hold a dominant position and thus charged significantly lower for its products. The Commission imposed a fine of USD 109,000,000 as per the exchange rate on the day of the issuance of the fine. In a followup case in 2009,[26] the Antitrust Commission decided not to impose a sanction on the same company since it considered that the company no longer held a dominant position.

1.21 In early 2012, the Antitrust Commission initiated two major investigations in fuel-related markets, namely an investigation into an alleged discrimination between bulk and retail diesel oil, and another concerning the aerokerosene fuel used to power aircraft. In both cases, the Antitrust Commission issued preliminary injunctions to preventively stop the alleged discrimination. These cases are currently on appeal. The Commission is also actively pursuing another investigation regarding the commercialization of cars in certain areas with tax incentives.

E. Dictating or influencing resale prices

(i) Resale price maintenance

1.22 Resale price maintenance (RPM) is encompassed by s. 2(g) of the Antitrust Law, which defines it in the following terms: "To set, impose or carry out, directly or indirectly, in agreement with competitors or individually, in any manner, prices and conditions for the acquisition or sale of assets, rendering of services or manufacturing."

1.23 The printing of recommended resale prices in the products has been considered by the Antitrust Commission as competitive, as long as the reseller retains the freedom to choose the final price, as stated in *Federación Argentina de Supermercados y Autoservicios v. Danone*.[27]

1.24 The Antitrust Commission considered that maximum resale prices have a positive benefit on consumers since the consumers end up paying lower prices. In *FECRA v. YPF*,[28] the Antitrust Commission pointed out that, by recommending resale prices, the producer was trying to undercut downstream players selling the products at higher prices than those that were considered more convenient by the manufacturer in its competition against other players on the market. The Commission also took this position in *Cámara de Comerciantes de Derivados del Petróleo, Garages y Afines de Tucumán v. YPF*,[29] among other cases initiated against YPF.

[24] *Falcioni v. EG3*, Docket No. 064-19885/2000 (2001).
[25] *Commission v. YPF and others*, Docket No. 064-002687/97 (1999).
[26] *Lafalla v. YPF*, Docket No. S01:0227185/2003 (2009).
[27] *Federación Argentina de Supermercados y Autoservicios v. Danone*, Docket No. S01:018144/2004 (2005).
[28] *FECRA v. YPF*, Docket No. 607.043/93 (1994).
[29] *Cámara de Comerciantes de Derivados del Petróleo, Garages y Afines de Tucumán v. YPF*, Docket No. 614.364/93 (1995).

In principle, pursuant to these precedents, the setting of maximum resale prices would not generate an antitrust concern.

1.25 While there have been precedents concerning minimum resale prices, their scarcity and lack of uniformity do not allow for a unified understanding of the conduct. In the *Recorridos de la Tarde v. AAE* case,[30] the Antitrust Commission held that the imposition of minimum resale prices was legal, while in *Commission v. TeleRed Imagen*,[31] it held that such minimum RPM allowed for collusion. In *TeleRed*, there was an agreement whereby the owners of the soccer matches broadcast rights agreed on the prices with the paid-TV operators. The Antitrust Commission considered that the fixing of minimum resale price in this case was a mechanism ensuring the collusion among paid-TV operators. However, *TeleRed* was ultimately revoked by the Court of Appeals, and the appeal decision was upheld by the Argentine Supreme Court of Justice. Both courts expressed that there was no effective restriction on competition evidenced in the case. They stated that there was no evidence that, as a consequence of the agreements among the paid-TV operators, the prices charged to consumers were maintained artificially high producing harm to consumers.

(ii) Minimum advertised price programs

1.26 While there have not been any major cases specifically dealing with minimum advertised price (MAP) programs, should a company try to prevent a distributor from advertising prices below the recommended resale price, the Antitrust Commission could initiate a case of abuse of dominant position based on the generic provisions regarding abuse of dominant position set out by the Antitrust Law.

F. Tying arrangements

1.27 Section 2(i) of the Antitrust Law characterizes these agreements as the act of "[c]onditioning the sale of an asset to the acquisition of another one or the hiring of a service or conditioning the usage of a service to the hiring of another one or the acquisition of an asset."

1.28 The first major investigation into tying arrangements was carried out by the Antitrust Commission in *Asociación de Empresa de Servicios Funebres y Afines de Villa María*.[32] In this case, the regulator uncovered the unlikely link between the provision of electrical light and funeral services insurance in one of the provinces in Argentina. The tying arrangement consisted in the fact that the electrical light users were being forced to also contract funeral services insurance provided by affiliated companies. The Antitrust Commission ordered the cease of the arrangement, and imposed fines. This case led to several other similar cases across the country on exactly the same grounds, effectively turning tying arrangements into one of the key conducts adjudicated by the Antitrust Commission, a trend that would later decrease.

1.29 In *Ferrari v. Supercanal*,[33] the Commission held that a supplier's offer of secondary supplemental services which could be freely rejected by the customer without termination of the primary contract could not be considered a tie-in sale. Further, in *Ferrari v. Plan Ovalo*,[34] it disregarded a claim regarding alleged restrictions to acquire insurance services in car financing schemes other than those suggested by the defendant company, since several separate insurance offers were available. The Commission also highlighted the interest of the party

[30] *Recorridos de la Tarde v. AAE*, Docket No. 600.221/92 (1992).
[31] *Commission v. TeleRed Imagen and others*, Docket No. 064-002331/99 (2001).
[32] *Asociación de Empresa de Servicios Funebres y Afines de Villa María*, Docket No. 106.213/81 (1982).
[33] *Ferrari v. Supercanal*, Docket No. 333.165/31 (1995).
[34] *Ferrari v. Plan Ovalo*, Docket No. 064-000802/2000 (2000).

providing financing to the prospective car buyer in setting out specific requirements that the buyer be duly covered in the event of an accident for the duration of the financing agreement.

1.30 A recent case[35] involved an alleged abuse of dominant position by a sports channel operator, whereby it tied the supply of a high-definition sport channel to the hiring of a new signal by a cable company. While the Antitrust Commission has not yet issued a decision on the matter, it has ordered a preventive injunction ordering that the operator refrain from tying one signal to another. It must be noted that, in *Telecentro*, the Commission has not yet adjudicated whether the sport channel exerted an abuse of dominant position in the tying market.

G. Exclusive dealing

1.31 There have not been a great number of precedents on exclusive dealing. In *Commission v. Acfor*,[36] the Antitrust Commission prohibited granting two distributors of Ford vehicles exclusive distribution for sales to the Argentine government administration since the government agencies located within their territories had to acquire vehicles solely from those Ford distributors. The Court of Appeals overturned this decision arguing that the supplier had the right to choose how to carry out the distribution of its products and that it had done so in a competitive market.

1.32 In a later case[37] concerning a sub-distributor that was prevented from contracting an agreement with a distributor because the supplier disallowed such sub-contracting, the Antitrust Commission held that if the market under analysis is duly supplied or competitive, producers and distributors must be guaranteed their freedom to conduct business in the manner of their choice.

1.33 In *SADIT v. Massalin and others*,[38] the Commission held that the imposition of exclusive intra-brand distribution can have a twofold effect. On the one hand, it can be anticompetitive if it results in a market power increase, allows market power to be exercised in a more efficient manner, or restricts the entry of new competitors. On the other hand, exclusive distribution can also be pro-competitive if the parties had the prior option of contracting with other parties or if the exclusivity generates cost savings or increases the quality of the products. However, this investigation is still being carried out following a judicial order.

1.34 As regards exclusive rights granted by official bodies, in *Executive Class S.R.L. v. Manuel Tienda León*,[39] the Antitrust Commission requested the annulment of an exclusivity agreement that had been granted to a transport company servicing the Buenos Aires international airport. The order was based on the fact that the transport company charged much higher prices to incoming passengers than any other company not allowed to operate within the perimeter of the airport. In a similar case, *Castro v. Catedral Alta Patagonia*,[40] the Antitrust Commission held that the enforcement of an exclusivity generated by a governmental authorization beyond the scope of the purpose for which the authorization had been granted was an abuse of dominant position.

H. Refusal to deal

1.35 The conduct known as refusal to deal is defined as follows in s. 2(l) of the Antitrust Law: "To deny with no justification the provision of a specific request for the acquisition or sale of an

[35] *Telecentro v. Fox Sports Latin America*, Docket No. S01:0316202/2011 (2011).
[36] *Commission v. Acfor and others*, Docket No. 100-6-22-0869/79 (1983).
[37] *Pregal v. Basualdo and others*, Docket No. 323413/91 (1994).
[38] *SADIT v. Massalin and others*, Docket No. 064-000960/97 (1997).
[39] *Executive Class S.R.L. v. Manuel Tienda León and others*, Docket No. 613.289/94 (1995).
[40] *Castro v. Catedral Alta Patagonia*, Docket No. S01:0343037/2005 (2012).

asset or hiring of a service which had been carried out in the current conditions of the corresponding market."

1.36 In the majority of cases that implied an alleged refusal to deal behaviour, the Antitrust Commission rejected the claims by stating that the real grounds for those allegations were commercial or business disagreements between the supplier and the purchaser of a product.

1.37 Furthermore, it has stated in several cases, such as *Casa Amado v. Massalin*[41] and *Kosloff v. IATA—JURCA*,[42] that an abuse of dominant position must be proved beyond the mere freedom of the parties to carry out a commercial agreement. Thus, in *Campos v. Buena Vista Columbia Tristar Films of Argentina*,[43] the Commission held that the lack of a commercial background for the specific market and unusually aggressive attitudes during the initial stages of negotiation could be considered as a justification for the refusal to deal. It has also accepted that a spotty credit history or preexisting debts can also be considered a legitimate justification for refusing to deal (as stated in *Axelirud v. Páginas Doradas*[44] and *Representaciones Siderúrgicas v. Siderar*[45]).

1.38 Another factor that has been taken into account by the Antitrust Commission in upholding refusals to deal is the existence of alternative and adequate sources of supply, as evidenced in *Ferretería Alborelli v. R.O.R. Mayorista*.[46]

1.39 However, the Commission has held that refusals to deal may be unlawful in cases where the supplier could offer no specific commercial reason for its refusal other than the connection of the rejected party to a competing group of the supplier.[47]

I. Essential facilities

1.40 While this anticompetitive behavior is not expressly described by the Antitrust Law, the Antitrust Commission may construct an essential facilities doctrine based on the general prohibition of abuse of dominance.

1.41 In its first case concerning a potential essential facilities claim, *A. Savant v. Matadero Vera*,[48] the Antitrust Commission held that the granting of a public authorization (in this case, to run a slaughterhouse in a small town) entails the responsibility to satisfy demands of all sorts, even from competitors in the downstream market, and that any denial to supply would have to be based on objective grounds. Other similar cases have involved a wide range of industries, such as access to ski resorts, the certification for the welding of metal coffins, or credit card network systems. Remedies have included granting access to the plaintiff firm as well as, in some cases, imposing moderate fines on the respondent.

1.42 In a recent case,[49] the Antitrust Commission considered that the owner of a transport company that also owned the sole bus terminal in a town had to allow other transport companies to have access to it on equal terms. As such, the Commission stated that, while companies had the freedom to determine their own agreements, dominant companies could not block

[41] *Casa Amado v. Massalin*, Docket No. 84.596/83 (1985).
[42] *Kosloff v. IATA—JURCA*, Docket No. 064-002855/97 (1998).
[43] *Campos v. Buena Vista Columbia Tristar Films of Argentina*, Docket No. 064-001065/98 (1999).
[44] *Axelirud v. Páginas Doradas*, Docket No. 064-007195/2001 (2003).
[45] *Representaciones Siderúrgicas v. Siderar*, Docket No. 064-0147/2001 (2005).
[46] *Ferretería Alborelli v. R.O.R. Mayorista*, Docket No. S01:0171584/2003 (2006).
[47] *Decoteve v. Pramer*, Docket No. 064-006301/99 (1999).
[48] *A. Savant v. Matadero Vera*, Docket No. 30.782/81 (1982).
[49] *Empresa Almirante Guillermo Brown and Others v. Terminal Salta*, Docket No. S01:0030739/2002 (2011).

access to their competitors in the downstream market without a valid commercial justification; it also stated for the record that the denial of access to the terminal would entail a monopoly in the downstream market.

Despite these cases, the main focus on the essential facilities doctrine has been placed on merger control decisions. **1.43**

J. Bundling (including loyalty and market share discounts)

The relation between discounts and exclusive dealing was analyzed by the Antitrust Commission in *Bieza v. Sierras del Mar*,[50] in which it stated that the granting of discounts was of no interest to the regulator, except in those cases in which the discounts were related to exclusivity provisions. **1.44**

Additionally, in *Compañía de Radiocomunicaciones Móviles S.A. v. Telecom Argentina Stet-France*,[51] the Antitrust Commission considered that bundling would generate concerns if it also entailed predatory pricing conduct. **1.45**

K. Standard-setting groups (disclosure requirements, licensing arrangements, and licensing pools)

The Antitrust Commission has not dealt specifically with these issues, but should they be proven to involve abuse of the dominant position, an investigation could be initiated pursuant to s. 1 of the Antitrust Law. **1.46**

L. Customer termination

While customer termination has not been identified as anticompetitive conduct, the Antitrust Commission has launched a series of investigations in order to determine whether the said terminations could point towards the existence of an abuse of dominant position, primarily in conjunction with the essential facilities doctrine. However, there have not been any relevant precedents that could provide guidelines for the Antitrust Commission to follow in dealing with the matter. **1.47**

A special sub-classification regarding customer termination can be considered as anticompetitive, as described in s. 2(l) of the Antitrust Law, which prohibits "[t]he suspension of provision of a dominant monopolic service in the market to a public service or public interest operator." **1.48**

M. Termination of intermediaries (retailers, wholesalers, dealers, and value-added resellers, agents, and brokers)

Like the behavior with respect of customers discussed above, the termination of agreements with intermediaries has not been characterized as anticompetitive conduct, but it could indicate one, such as failure to comply with a supplier's RPM. The Antitrust Commission has launched investigations in answer to claims from intermediaries whose agreements had been terminated, in an effort to identify whether an abuse of the dominant position was committed. However, there have been no relevant precedents that could offer any guidelines for the Antitrust Commission to follow. **1.49**

[50] *Bieza v. Sierras del Mar*, Docket No. 107.337/81 (1984).
[51] *Compañía de Radiocomunicaciones Móviles S.A. v. Telecom Argentina Stet-France and others*, Docket No. 064-012623/2000 (2005).

N. Termination of relationships with competitors

1.50 The types of conduct that have been adjudicated by the Antitrust Commission have mostly pertained to situations that may have led to the termination of relationships with competitors, such as the lack of consensus regarding possible collusion or situations relating to the essential facilities doctrine. These cases have been largely deemed to be ancillary to the main anticompetitive conduct.

O. Exemptions

1.51 The sole parameter employed by the Antitrust Law is whether a particular conduct has harmed the general economic interest. There are no exemptions regarding the *de minimis* impact, or any other kind of impact, of the conduct.

1.52 However, pursuant to the provisions of s. 36 of the Antitrust Law, the alleged infringer may propose a "commitment" to the immediate or gradual cessation of the actions which originated the accusation. Such commitment can be submitted at any time prior to the Commission's issuance of a resolution on the matter. If the proposal is accepted, the investigation is automatically suspended, and the Commission must supervise compliance with the terms of the undertaken commitment.

1.53 In this regard, the Antitrust Commission has stated that "... the legal figure set forth in s. 36 of Law No. 25,156 should not be automatically granted, being reserved only for those cases in which the irrelevance of the conduct under analysis, measured by the near inexistent prejudice to the general economic interest...."[52] The Antitrust Commission has lately shown a tendency to accept commitments in non-essential cases but no major case has been concluded by means of a commitment.

II. Dealing with competitors

1.54 The Antitrust Commission has carried out an extensive probing regarding interactions with competitors in the past, but it has also run into problems while trying to uncover cartels. Thus, while its investigations have led to two major collusion cases, namely the *Cement*[53] and *Liquid Oxygen*[54] cases, the lack of a leniency program has held back these investigations.

1.55 However, the Antitrust Commission has been actively monitoring since its inception encouraged the interactions within trade associations and has made several findings of illegality in that regard.

A. Horizontal price fixing

1.56 Section 2(a) of the Antitrust Law describes this conduct as "fix[ing], agree[ing] or manipulat[ing] in a direct or indirect manner the price for the sale or acquisition of assets or services that are offered or demanded on the market, as well as exchanging information in this regard."

1.57 In the *Bariloche Liquid Petroleum* case,[55] the Antitrust Commission stated that the key factors that encouraged collusion included low elasticity of demand, the lack of close substitute products, low quantity of operators, the homogeneous product quality, the existence of trade

[52] See e.g. *Petroquímica Cuyo v. PBB Polisur*, Docket No. S01:0468538/2010 (2012).
[53] *Cement*, Docket No. 064-012896/99 (2005).
[54] *Liquid Oxygen*, Docket No. 064-011323/2001 (2005).
[55] *Bariloche Liquid Petroleum*, Docket No. 064-003996/98 (2003).

associations, and significant barriers to entry. The Commission also noted that long duration of the conduct was also a factor.

1.58 In *Federación de Clínicas Sanatorios, Hospitales y Otros Establecimientos Privados de la Provincia de Buenos Aires v. Rouc-OCEFA*,[56] the Antitrust Commission stated that an analysis of a possible horizontal price-fixing conduct must take into account whether the market-wide increase could have been generated by external reasons, as was the case in the 1995 "Tequila crisis," for example. The Commission has also noted that certain regulations set out by the state in sensitive markets as part of state economic policy and their subsequent impact on price homogeneity across the industry could be justified by an emergency situation in the economy, as evidenced in *Confederación de Asociaciones Rurales de Buenos Aires y La Pampa v. Bunge Argentina*.[57]

1.59 However, external forces, such as an economic crisis, need not necessarily impact all the involved companies in exactly the same manner, as shown in *Administración General de Puertos Sociedad del Estado v. Centro Coordinador de Actividades Portuarias*,[58] in which the Antitrust Commission did not accept a defense based on the increase in variable costs in order to justify a market-wide fixed-price surcharge.

1.60 In the *Cement* case,[59] the Antitrust Commission was not able to fully prove the existence of price coordination; however, since it had already been to verify the existence of a market allocation scheme as well as the coordination of production output between the undertakings, it did not delve into the issue in full. The Commission issued one of its most important sanctions as of today in the *Cement* case, in which the total amount of the fines surpassed the USD 100,000,000 mark as of the currency exchange rate of the date of issuance.

1.61 Finally, there were cases concerning oligopoly markets in which the Antitrust Commission determined the existence of price parallelism, but was unable to prove that it had arisen from collusive practices.[60]

B. Horizontal agreements to allocate customers or territories; agreements not to compete

1.62 Section 2(c) of the Antitrust Law defines market allocation by prohibiting the practice of "…horizontally allocating [zones, markets, clients and sources of supply."

1.63 In the *Sand Producers* case,[61] the Antitrust Commission uncovered a scheme mounted by sand producers in the Buenos Aires area that had the backing of naval sand transport unions. A cartel was found whereby the sand producers and the unions formed an agreement setting production quotas. If one of the competitors in that market decided to leave the cartel, the transport unions would block their transportation.

1.64 Regarding the possible intervention by governmental bodies, in the *Liquid Petroleum Gas Investigation* case,[62] the Antitrust Commission held that, even though the accused parties had

[56] *Federación de Clínicas Sanatorios, Hospitales y Otros Establecimientos Privados de la Provincia de Buenos Aires v. Rouc-OCEFA and others*, Docket No. 034-003749/95 (1998).

[57] *Confederación de Asociaciones Rurales de Buenos Aires y La Pampa v. Bunge Argentina and others*, Docket No. S01:0486731/2006 (2007).

[58] *Administración General de Puertos Sociedad del Estado v. Centro Coordinador de Actividades Portuarias and others*, Docket No. 602.494/94 (1996).

[59] *Cement* (n 53).

[60] *Asociación de Titulares de Taxis Independientes v. Servicios Gas Automotores*, Docket No. S01:0227995/2002 (2010).

[61] *Sand Producers*, Docket No. 70.332/84 (1986).

[62] *Liquid Petroleum Gas Investigation*, Docket No. 84.543/83 (1989).

invoked an official regulation in order to carry out a customer allocation scheme, the fact that the regulation had been issued by a body that did not deal with antitrust matters could not be considered as a defense.

1.65 In *Mayol v. Shell*,[63] the Antitrust Commission stated that a "hard core cartel" was prejudicial to the general economic interest without it being necessary to prove any actual harm. The Commission applied a per se rule, even though the Antitrust Law provides for a "rule of reason." The case originated in a claim filed by a distributor of liquid gas who stated that, after having switched suppliers, he was refused a sale by the new supplier due to an agreement the latter had with its former supplier, aimed to divide the clients in the city of Posadas. However, the Antitrust Commission was later challenged in court regarding its decision. The Federal Court of Appeals for the City of Posadas overturned the decision since it considered that the Antitrust Commission had not followed a real competitive analysis in order to evaluate whether an illegal conduct had been committed. The court stated that the Antitrust Commission did not specify the relevant market in which the participants offered their products, and therefore failed to analyze the real competitive effect of the conduct. Additionally, the court pointed out that the evidence gathered by the Antitrust Commission was not sufficient to impose a sanction. According to the Court of Appeals, the absence of a general analysis of the testimonies showed that there were not enough evidences to demonstrate the existence of a collusive agreement that may have harmed the general economic interest.

1.66 The best known case regarding these types of agreement in Argentina is the *Cement* case[64] in which six major cement-producing companies were accused of staging a nationwide market allocation and production output-setting framework which lasted almost 20 years. The Antitrust Commission's investigation began in 1999, when a disgruntled employee revealed to a newspaper that the cement companies were illegedly exchanging information and dividing their market shares through an agreement. According to the findings of the Antitrust Commission, the exchange of detailed confidential market information was performed via the cement trade association. The Antitrust Commission found records of real-time software that was used to exchange current commercial records between the cement companies. As mentioned above, the Commission issued in this case one of its largest fines to date.

1.67 In the *Liquid Oxygen* case,[65] after performing several raids on the liquid oxygen companies and obtaining documentary evidence, the Antitrust Commission unveiled an alleged cartel that had been rigging bids for liquid oxygen. The four members of this alleged cartel were thought to have actively set among themselves the amounts and conditions of their offers in each bid so as to determine who would be the supplier for each public hospital. This was considered as a division of market among competitors, and it lasted for five years. The Antitrust Commission seized emails that evidenced the information exchange corresponding to the bids to be offered by the accused parties to the public hospitals. As a result of the investigation, a major fine of over USD 30,000,000, as of the currency exchange rate of the date of issuance, in total, was imposed on the parties. A similar case, related to pathogenic waste disposal[66] was later adjudicated by the Antitrust Commission, which rendered a non-unanimous decision to accept a behavioral commitment and ordered the termination of the proceedings.

[63] *Mayol v. Shell*, Docket No. 064-004881/2001 (2006).
[64] *Cement* (n 53).
[65] *Liquid Oxygen* (n 54).
[66] *Eco-System v. Pelco and others*, Docket No. S01:0091114/2003 (2010).

A recent customer allocation scheme case[67] adjudicated by the Antitrust Commission involved the allocation of the infrastructure of the former operator between two new entrants in a cable TV market. The Antitrust Commission uncovered the market allocation scheme which was being carried out under the cover of a division of assets. **1.68**

C. Horizontal boycotts

While the Antitrust Commission has not rendered any specific decision in this matter, it must be taken into account that horizontal boycotts could be considered as an exclusionary collusion, and as such an investigation could be launched. **1.69**

D. Joint ventures and other competitive collaborations

The absence of case law regarding joint ventures and other competitive collaboration, as well as the provisions of the Antitrust Law, could lead to the conclusion that these types of behavior are not considered to be anticompetitive per se unless they entail harm to the general economic interest. As such, as long as collaboration among competitors cannot be determined to constitute collusion or produce any other anticompetitive effect, it cannot be considered as anticompetitive under the Antitrust Law. **1.70**

E. Trade associations

Over the past thirty years, the Antitrust Commission has been probing the recommendations and impositions by trade associations. In one of its earliest cases, *Commission v. Cámara Inmobiliaria Argentina*,[68] the Commission imposed a sanction on a realtor trade association due to an industry-wide communication that was intended to produce systematic price adjustments in real estate properties in Argentina. A similar approach was taken by the regulator, among other similar cases, in *Commission v. Cámara del Flete*,[69] *Commission v. Colegio Oficial de Farmaceúticos y Bioquímicos de la Capital Federal*,[70] and *Commission v. Centro de Industriales Panaderos*.[71] However, the Commission has accepted that the publication of "reference" prices is not anticompetitive per se, provided that pricing decisions would be independently taken by each member of the association.[72] **1.71**

The recommendation to set up a determinate minimum fee for the rendering of professional services was also considered to be anticompetitive in *Commission v. Colegio de Graduados en Ciencias Económicas-Consejo Profesional de Ciencias Económicas*[73] and in *Commission v. Colegio de Traductores Públicos de la Ciudad de Buenos Aires*.[74] Nevertheless, it must be taken into account that in *Cámara Argentina de Farmacias v. Colegio de Farmacéuticos de la Provincia de Buenos Aires*,[75] the Antitrust Commission stated that a trade association's functions of oversight do not necessarily entail an abuse of the dominant position. **1.72**

[67] *Sabella de Prina and others v. Video Cable 6 and others*, Docket No. 064-004218/98 (2011).
[68] *Commission v. Cámara Inmobiliaria Argentina*, Docket No. 100.676/81 (1981).
[69] *Commission v. Cámara del Flete*, Docket No. 10.031/81 (1981).
[70] *Commission v. Colegio Oficial de Farmaceúticos y Bioquímicos de la Capital Federal*, Docket No. 109.419/81 (1982).
[71] *Commission v. Centro de Industriales Panaderos*, Docket No. 109.696/81 (1982).
[72] *Commission v. Asociación Empresaria Hotelera Gastronómica de Mar del Plata y Zona de Influencia*, Docket No. S01:0251931/2002 (2008).
[73] *Commission v. Colegio de Graduados en Ciencias Económicas-Consejo Profesional de Ciencias Económicas*, Docket No. 20.548/82 (1983).
[74] *Commission v. Colegio de Traductores Públicos de la Ciudad de Buenos Aires*, Docket No. 22.963/82 (1983).
[75] *Cámara Argentina de Farmacias v. Colegio de Farmacéuticos de la Provincia de Buenos Aires*, Docket No. 115.462/81 (1984).

1.73 Another common thread running through trade associations was manifested in the healthcare industry, where medical associations forbade their members to negotiate directly with the healthcare providers instead of carrying out their negotiations within the association, as shown, among others, in *Dirección de Bienestar de la Armada v. Agremiación Odontológica de La Plata, Berisso y Ensenada y Sociedad Odontológica de La Plata*.[76]

1.74 In the *Cement* case,[77] the intervention of the trade association was considered to be vital to the market allocation scheme, since it allowed the parties to fully coordinate and oversee the operation of each one of its members.

F. Interlocking directorates

1.75 While there is no specific provision in the Antitrust Law pertaining to interlocking directorates, in *Unisys Sudamericana v. Impresora Internacional de Valores*[78] the Antitrust Commission stated that the presence of a preexistent link between the companies competing in a public bid resulted from a market structure issue rather than being a form of anticompetitive conduct. In *Ventachap v. Siderar*,[79] the Antitrust Commission examined whether there had been any collusive agreement due to the membership of a director appointed by a foreign competitor (which held a minor shareholding on the Argentine undertaking) in the Board of Directors of a local company, but found none.

1.76 A merger control decision shows a more recent approach taken by the Antitrust Commission in this matter. In the past, the Antitrust Commission had considered that joint control existed solely in the cases in which shareholders must reach an agreement regarding strategic commercial decisions. It further held that the existence of veto rights must be analyzed to determine the existence of joint control. Those veto rights might include the approval of a budget, business plans, regular investments, and appointment of key officers. The Antitrust Commission determined that holding one or more veto rights is sufficient to confer control.

1.77 However, the high profile *Telecom v. Telefónica* merger control decision[80] shows a clear departure from such interpretation, and includes a new factor to be taken into account: access to a competitor's information. As a result, joint control would take place not only when two shareholders have reached an agreement regarding strategic decisions, but also when a competitor—by means of the acquisition of a minority shareholding—could determine its competitive strategy based on its competitor's sensitive information.

1.78 While interlocking directorates have not yet been prohibited under the Antitrust Law, the Antitrust Commission has already stated that such arrangements can show a unity of control in certain cases, which could lead to collusion-based cases in the future.

G. Facilitating practices

1.79 Facilitating practices are not specifically covered by the Antitrust Law, and the Antitrust Commission cases have not specifically dealt with this issue. However, in the event that the Antitrust Commission should be able to prove that these practices might entail collusion

[76] *Dirección de Bienestar de la Armada v. Agremiación Odontológica de La Plata, Berisso y Ensenada y Sociedad Odontológica de La Plata*, Docket No. 614.897/92 (1997).
[77] *Cement* (n 53).
[78] *Unisys Sudamericana v. Impresora Internacional de Valores and others*, Docket No. 064-005104/2001 (2001).
[79] *Ventachap v. Siderar*, Docket No. 064-008057/1998 (2004).
[80] *Telecom v. Telefónica*, Docket No. S01:0014652/2009 (2009).

between competitors and thus prejudice the general economic interest, an investigation could be launched.

H. Information exchange

1.80 As mentioned above, exchange of information is specifically covered by s. 2(a) of the Antitrust Law.

1.81 The key case concerning information exchange in Argentina was the *Cement* case,[81] in which the Antitrust Commission uncovered an alleged information exchange cartel carried out within a cement industry association thanks to which companies exchanged statistical data that provided detailed, up-to-date information regarding geographic areas, manufacturing output, types of client, types of commercialization packages, and other sensible data.

1.82 The information exchange was considered to be anticompetitive since it deprived competitors of their independence when establishing their commercialization strategies; it also served to monitor companies' conduct to ensure compliance with the cartel. The Antitrust Commission held that shared information should not have included prices, client lists, productions costs, quantities, or manufacturing outputs. Furthermore, the degree of information as well as the fact that it was being constantly updated was taken into account by the Antitrust Commission.

I. Joint purchasing agreements

1.83 Joint purchasing agreements are not considered as anticompetitive per se. However, in the event that such agreements lead to collusion in purchasing, the conduct would fall under the prohibitions of the Antitrust Law. Thus, in *Ventachap v. Siderar*,[82] the Antitrust Commission considered that the setting up of a joint venture with competitors in order to obtain an award on a foreign public bid was not anticompetitive as long as no collusion takes place and the public bid rules are duly followed.

J. Joint lobbying/regulatory/legislative efforts

1.84 There are no joint lobbying exemptions under the Antitrust Law, and there are no specific precedents or provisions considering these types of conduct as anticompetitive. Nevertheless, it must be taken into account that the general standard regarding prejudice to the general economic interest remains in place and, should another anticompetitive practice take place while carrying out any of these practices, it would still be forbidden by the Antitrust Law.

III. General issues

A. Jurisdiction and applicable law (including sector-specific competition regulation)

1.85 The current applicable body of law is the Antitrust Law which, pursuant to s. 3, is applicable to "all persons or companies, either public or private, that carry out economic activities, either with or without the purpose of obtaining a profit, in all or part of the national territory and those that carry out economic activities outside the country, as long as their acts, activities or agreements may generate effects in the national market."

1.86 There is no sector-specific competition regulation but it is important to note that the recent Audiovisual Law No. 26,522 states that the Antitrust Commission will intervene in the

[81] *Cement* (n 53).
[82] *Ventachap* (n 79).

provision of cable TV licenses should there be an objection to the setting up of a new player in a specific region. The focus that the current administration is placing on media and telecommunications will most certainly trigger a more extensive intervention on the part of the Antitrust Commission than ever before.

B. Antitrust system

(i) Name of agency/agencies

1.87 The Antitrust Law created the National Tribunal for the Defense of Competition within the scope of the Ministry of Economy, which would be the ultimate antitrust regulator in Argentina. This Antitrust Tribunal would be composed of seven members, including the minimum of two attorneys and two accounting professionals.

1.88 However, the Antitrust Tribunal has not yet been created. After several diverging cases, the Argentine Supreme Court ultimately set out a double-tier regulatory structure,[83] consisting of enforcement agencies that would decide antitrust cases until the Antitrust Tribunal has been formed. This double-tier regulatory structure follows the provisions of the prior Antitrust Law no. 22,262, passed on August 1, 1980.

1.89 Under this new interpretation, the Antitrust Commission, i.e. the regulator created by former antitrust regulations, performs a technical review of mergers and investigations, and issues a recommendation to the Secretary of Domestic Trade of the Ministry of Economy, which is the body that ultimately decides antitrust cases. For the purposes of this chapter, this double-tier regulator structure has been referred to as the "Antitrust Commission."

(ii) Staff size and budget

1.90 According to the 2012 annual budget approved for the Antitrust Commission, the latter has a staff of approximately 158 employees and a budget of ARS 23,000,000.

(iii) Recent enforcement actions and trends

1.91 The current Antitrust Commission has been very active over the past years trying to re-ignite its investigations, after almost a decade of focusing on merger control decisions. This upsurge in investigations has been targeting certain sensitive consumer markets so as to ensure price control over those industries, over specific conducts.

1.92 A major emphasis has been placed on the oil industry in which there have been several attempts in order to restrain possible increases in prices. Furthermore, the software industry and, more specifically, the search engine industry has been a major concern for the Antitrust Commission, a fact evidenced by several investigations that have been carried out in this area. The Commission also envisages focus on telecommunications and media in the upcoming years.

1.93 It has been noted over the past years that the analysis timeframe for anticompetitive investigations has been greatly increased, and that the vast majority of cases, even non-material ones, are not concluded during the initial instruction stage. Due to the lengthy investigation timeframe currently in place, the Antitrust Commission has resorted to issuing preliminary injunctions pursuant to s. 35 of the Antitrust Law. However, the preliminary injunctions issued have faced court challenge, and in some cases, it was decided that the Secretary of Domestic Trade would have the power of issuing them, while the Antitrust Commission would not be able to do so on its own.

[83] *Recreativos Franco*, Supreme Court, Case no. S.C., R.1172, L. XII (June 5, 2007) and *Credit Suisse First Boston*, Supreme Court, Case no. S.C.C. 1216, L. XLI (June 5, 2007).

The renewed interest in investigations would also explain the interest of the Antitrust Commission in its leniency program proposal, which is currently being analyzed by Congress. **1.94**

A recent development in the performance of the Antitrust Commission can be found in a pending case, *Secretaría de Transporte v. YPF*[84] in which the regulator stated that "… the competition policy in Argentina must keep in line with the economic policy of the last years." The statement was included in a resolution in which the regulator also described the achievements of the current political administration, implying a closer alignment of the regulator with the political administration. This situation has been the result of the non-implementation of the Antitrust Tribunal that was envisaged by the Antitrust Law back in 1999. **1.95**

C. Private litigation

Regarding private claims, s. 51 of the Antitrust Law states that individuals or companies affected by the conduct prohibited under the provisions of the Antitrust Law may invoke the right to compensation for the damages suffered before a competent court. **1.96**

As of today, there has only been one major case entailing private antitrust litigation, namely the *Auto Gas* case,[85] in which the plaintiff was awarded ARS 13,094,457 of compensation for the damages suffered as a result of an abuse of the dominant position. **1.97**

In *Auto Gas*, the court merely referred to the analysis carried out by the Antitrust Commission and established a connection between the conduct that the Commission found illegal and the damages suffered by the plaintiffs. However, the fact that the Civil Code already contains provisions allowing for private damages actions leaves the door open for courts to examine their own cases, namely to investigate anticompetitive acts in order to determine the conduct and then determine the appropriate reparation for damages. **1.98**

While there has been only one case to date providing damages, there are several cases currently pending. However, there have not been any other judgments in that regard due to lengthy court review times in Argentina. **1.99**

D. Follow-on litigation

In the *Auto Gas* case,[86] the most important antitrust damages award in Argentina, the court considered that the claimed abuse of dominant position had already been identified by the Antitrust Commission. As a result, the court would only review whether there was a factual connection between the identified conduct and the damages claimed by the plaintiff. To date, there have been no court cases determining whether the court could veer away from the Antitrust Commission's analysis in the matter. **1.100**

E. Arbitration and alternative dispute resolution

There is currently no arbitration nor alternative dispute resolution (ADR) regarding antitrust matters in Argentina. **1.101**

F. Remedies

(i) Civil liability

In addition to the s. 51 provision regarding private claims, s. 1109 of the Civil Code sets out that in order to seek reparations, the following conditions must be met: (i) there must be an **1.102**

[84] *Secretaría de Transporte v. YPF and others*, Docket No. S01:0013373/2012 (2012).
[85] *Auto Gas*, National Commercial Court No. 14, Clerk's Office No. 27, Judgment of September 16, 2009.
[86] *Auto Gas* (n 85).

illicit act; (ii) there has to be damage; (iii) there has to be a link between the former and the latter; and (iv) the act must have been performed either by negligence or by means of deceit.

(ii) Criminal liability

1.103 Pursuant to s. 300 of the Argentine Penal Code, any person that may generate a rise or a decrease in the price of a merchandise, public offer funds, or securities by means of false news, fake negotiations, or by an agreement among the main holders of the good, in order to sell or to refrain from selling it at a specific price, will be sanctioned with imprisonment, which may range from six months to two years. As can be seen, not all types of conduct are included, but mainly those related to price fixing. These types of conduct would be investigated by criminal prosecutors, but there have been no relevant cases to date.

1.104 The proposed leniency bill does not cover immunity from s. 300 of the Argentine Penal Code.

G. Leniency and immunity

1.105 On December 15, 2010 the Commission finalized a draft bill to include a Leniency Program in the Antitrust Law that makes available two different scenarios to infringing parties, namely an exemption scenario and a reduction scenario, both based on a "race-to-the-door" structure.

1.106 An infinging party must comply with the following requirements in order to be exempt from the sanctions under the Antitrust Law: (i) it must be the first party among the participants in the conduct, which provides the Commission with information and evidence, regardless of whether the Commission has launched an investigation or not, but has not yet been able to gather sufficient evidence; (ii) it must immediately cease engaging in the infringing conduct, unless the Commission deems otherwise in order to preserve the investigation; (iii) it must collaborate until the end of the investigation; (iv) it must not destroy, forge, or conceal evidence of the anticompetitive conduct, nor make public the fact that it has filed for a Leniency Program, unless such communication is addressed to another antitrust regulator; and (v) it must not be the leader of the anticompetitive conduct.

1.107 Parties that are not the first to require the enforcement of the Leniency Program could request that the sanctions be reduced, if they are able to meet requirements (ii)–(v) and provide the Commission with information useful in the investigation. The bill sets out that sanctions can be reduced by 20 percent, 30 percent, or 50 percent. The reduction ratios are to be determined by the Commission by taking into account the chronological order of the filing, as well as the number of participants involved in the conduct.

1.108 The bill also includes a "leniency plus" provision, by means of which parties which are unable to request an exemption regarding anticompetitive conduct but which could provide information on a second instance of anticompetitive conduct can obtain an exemption on the latter, and a 30 percent reduction on the former.

1.109 Additionally, the bill specifically sets out that there can be no joint enforcement of the Leniency Program, the sole exception being if a company and its directors or other members of its staff request the enforcement of the program.

H. Document creation and retention

1.110 The Antitrust Law does not have any specific rules regarding document creation and retention. However, the Argentine Commercial Code sets out an obligation for the retention of commercial documentation for ten years.