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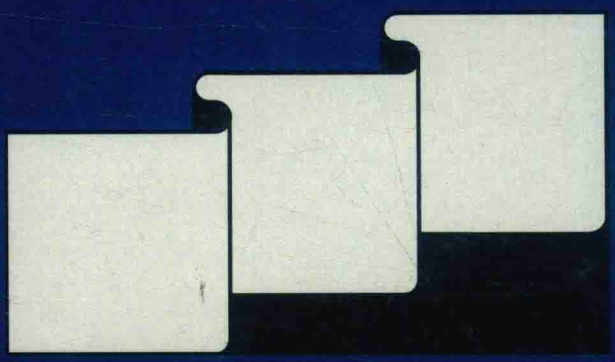
UNFAIR TRADING PRACTICES



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Unfair Trading Practices

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Editor's Note

"Unfair trading practices" is generally defined as consisting of deceptive, fraudulent, or otherwise injurious conduct, referring to practices that directly affect consumers or competitors.

In business-to-consumer relationships, unfair trading practices may involve misleading claims and advertising, conditional selling, excessive pricing, discriminatory pricing, and other misrepresentations. In business-to-business relationships, the prohibited conduct may be trade mark infringement, misappropriation, false advertising, bait-and-switch sales tactics, unauthorized substitution of brands of goods, use of confidential information by a former employee to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel, and false representation of products or services.

In this edition of the Comparative Law Yearbook of International Business, practicing lawyers from Argentina, Austria, Brazil, China, Germany, Italy, Japan, Poland, South Africa, South Korea, Sweden, the United Kingdom, the United States, and the European Union examine unfair trading practices in their respective jurisdictions.

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Introduction

Unfair trading practices are not regulated in a coherent and uniform manner. Rather, regulation is dispersed among several laws. The main areas in which unfair trade is regulated are:

(1) Antitrust laws;
(2) Intellectual property laws;
(3) Consumer protection laws; and
(4) Fair trade laws.

In addition, Argentina, as a member of the World Trade Organization (WTO), has adopted the international treaties regulating international unfair practices, especially the Antidumping Agreement.

There is no legal tradition of claims between companies for unfair practices outside intellectual property practice. Most claims related to infringement to antitrust laws and fair trade regulations are brought by administrative agencies (the Antitrust Commission and the Fair Trade Commission).

Most claims against companies for unfair practices are brought under consumer protection regulations. The introduction of class actions related to consumer protection actions has resulted in many consumer association monitoring and challenging market practices. Litigation is most active against financial institutions and insurance companies.

Unfair Acts and Practices

Impeding Free Competition

In General

In Argentina, impeding free competition is punished by Antitrust Law Number 25,156 (the "Antitrust Law"), passed in 1999, which has been

recently amended by Law Number 26,993, passed on 17 September 2014 (the "Antitrust Amendment"). The Antitrust Law prohibits certain acts relating to the production and exchange of goods if they restrict, falsify, or distort competition or if they constitute an abuse of dominant position, provided that they cause, or may cause, harm to the general economic interest. A behavior or conduct is not unlawful unless it has the potential to cause harm to the general interest, but it will be unlawful even if such potential damages do not become actual.

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 "effect theory").

Largely based on the European Union's model, the enforcement of the Antitrust Law is mainly conducted by an administrative agency. In Argentina, the competent agency is the Antitrust Commission (*Comisión Nacional de Defensa de la Competencia*), which conducts antitrust investigations and issues a non-binding opinion to the Secretary of Trade, who has the authority to make the final decisions. This situation may change since the Antitrust Amendment reserves this competence to the Enforcement Authority, which has not yet been appointed by the Government.

The Antitrust Commission, in the past almost exclusively focused on economic concentrations approvals, has regained interest in the investigation of anticompetitive conduct and has launched several high-profile investigations, with a special focus on price discrimination and other conduct that may have a direct impact on the pricing structure of consumer goods.

Types of Infringements to Free Competition

The Antitrust Law prohibits both unilateral anticompetitive behavior and collusion between competitors. Section 1 provides the general prohibition to incur in any act or conduct that would harm the general economic interest.

As in European law, in Argentina, there are no *per se* infringements since the conducts sanctioned are those that may prejudice general economic interest. Section 2 provides a non-exhaustive list of the types of infringements.

Unilateral Anticompetitive Behavior

The unilateral conduct prohibited by the Antitrust Law is abuse of dominant position. The Antitrust Law sets out the criteria to be taken into account when defining a dominant position.[1]

As mentioned, a dominant position is not anticompetitive *per se*, since in the Antitrust Law, the abuse of dominant position is forbidden if it may prejudice general economic interest.[2] However, the Antitrust Commission considers that a dominant participant must employ a greater degree of care when acting in the market. The most common conduct singled out by the Antitrust Commission as abuse of dominant position includes:

(1) Predatory pricing — The Antitrust Law defines predatory pricing as "selling goods or providing services at prices below cost, without a reason based on commercial usual practices in order to exclude competition in the market . . .".[3] The Antitrust Commission has sanctioned it only in a few cases. The Antitrust Commission has considered in some cases that sales carried out for a limited amount of time and for a promotional reason cannot be considered a predatory practice.[4]

(2) Price discrimination — The Antitrust Law describes price discrimination as "to impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market".[5] The landmark case concerning price discrimination in Argentina was *Commission* vs. *YPF*,[6] in which the Antitrust Commission found price discrimination based on the presence of the following elements: (a) a dominant position by YPF and a foreclosure of the market; (b) the tracking of YPF's prices by other participants in the market; and (c) the prohibition on re-importing YPF's own exports that were sold at significantly lower prices since YPF could not exercise dominant power in those markets. The Antitrust Commission imposed a fine of US $109,000,000.

(3) Resale price maintenance — The Antitrust Law defines resale price maintenance as that "[t]o set, impose or carry out, directly

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1 Antitrust Law, Sections 4 and 5.
2 Antitrust Law, Section 1.
3 Antitrust Law, Section 2.
4 *Cámara Argentina de Papelerías y Librerías* vs. *Supermercados Makro*, Docket Number 064-000962/97.
5 Antitrust Law, Section 2(k).
6 *Commission* vs. *YPF and Others*, Docket Number 064-002687/97.

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".[7] The Antitrust Commission generally enforces the prohibition against minimum resale price. It has considered that, in certain cases, recommended resale prices allow efficiency gains and prevent distributors to abusively increase prices.[8]

(4) Tying arrangements — The Antitrust Law characterizes tying agreements as the act of "conditioning 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",[9] There are several cases on this matter. In *Ferrari* vs. *Supercanal*[10] and *Ferrari* vs. *Plan Ovalo*,[11] the Antitrust Commission rejected the claims, observing that there were other options to the tied products.

(5) Refusal to deal — The Antitrust Law defines refusal to deal as that "to deny with no justification the provision of a specific request for the acquisition or sale of an asset or hiring of a service which had been carried out in the current conditions of the corresponding market".[12] The Antitrust Commission has stated that refusals to deal may be unlawful where the supplier could offer no specific commercial reason for its refusal other than the connection of the refused party to a competing group of the supplier.[13]

(6) Essential facilities — While this anticompetitive behavior is not expressly described by the Antitrust Law, the Antitrust Commission may prohibit refusals to grant access to essential facilities, on the basis of the general prohibition of abuse of dominance. In its first case concerning a potential essential facilities claim,[14] the Antitrust Commission held that the granting of a public authorization (in this case, to operate 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 must be based on objective grounds.

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7 Antitrust Law, Section 2(g).
8 *FECRA* vs. *YPF*, Docket Number 607.043/93.
9 Antitrust Law, Section 2(i).
10 *Ferrari* vs. *Supercanal*, Docket Number 333.165/31.
11 *Ferrari* vs. *Plan Ovalo*, Docket Number 064-000802/2000.
12 Antitrust Law, Section 2.1.
13 *Decoteve* vs. *Pramer*, Docket Number 064-006301/99.
14 *A. Savant* vs. *Matadero Vera*, Docket Number 30.782/81.

Similar cases have involved a wide range of industries, such as ski resorts, the certification for welding of metal coffins, and credit card network systems. Remedies have included granting access to the plaintiff as well as, in some cases, imposing moderate fines on the infringer.

In a recent case,[15] 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 equal access. The Antitrust Commission stated that, while companies had the freedom to determine their own agreements, dominant companies could not block access by their competitors in the downstream market without a valid commercial justification.

Dealing with Competitors

The Antitrust Commission has carried out extensive investigations regarding interactions with competitors that have led to three major collusion cases, known as the *Cement*,[16] *Liquid Oxygen*,[17] and *Tierra del Fuego*[18] cases. The most frequent cases of collusion conducts with competitors are the following:

(1) Horizontal price fixing — The Antitrust Law describes horizontal price fixing as "fixing, agreeing, or manipulating 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".
(2) Allocation of customers or territories — Allocation of customers or territories is prohibited by Section 2.c of the Antitrust Law.
(3) Exchange of information — Exchange of information is understood as entailing sensitive market information between competitors and is prohibited as leading to collusion behavior.

Most cases involving horizontal collusion concern complex and long running understandings between competitors combining the three mentioned prohibitions. The Antitrust Commission has shown an increased interest in the relationships between competitors, leading to three major cases.

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15 *Empresa Almirante Guillermo Brown and Others* vs. *Terminal Salta*, Docket Number S01:0030739/2002.
16 *Cement*, Docket Number 064-012896/99 (2005).
17 *Liquid Oxygen*, Docket Number 064-011323/2001 (2005).
18 *Tierra del fuego*, Docket Number S01:0000803/2008 (2012).

In the *Cement* case, six major cement producers were accused of staging a nationwide market allocation framework for at least 20 years. The Antitrust Commission found that the exchange of market information was performed via the Association of Portland Cement Manufacturers (APCM). The Antitrust Commission was not able to fully prove the existence of price coordination; however, since it verified the existence of a market allocation scheme as well as the coordination of production output between the parties, it did not examine the issue in full. In the *Cement* case, the Commission issued one of its most important sanctions, in which the total amount of the fines surpassed US $100-million. The fine has been confirmed by the Supreme Court.

In the *Liquid Oxygen* case, 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 the 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 that lasted for five years. The Antitrust Commission imposed a fine of US $30-million. The fine has been confirmed by the Supreme Court.

In the *Tierra del Fuego* case, the Antitrust Commission condemned eight (out of twelve that are active in Argentina) car terminals to pay the highest fine ever applied (approximately US $125,000,000). The case is under appeal before the Supreme Court, after the Federal Court of Comodoro Rivadavia reversed the Antitrust Commission's decision in full.

Infringement of Intellectual Property Rights

Patents

Actions for Infringement of Patents

Direct infringement of patents is regulated by Section 8 of the Patent Act and Article 28 of the TRIPS Agreement which, according to the case law of the Supreme Court, is self-executing in Argentina. According to Section 8 of the Patent Act, a patent confers on its owner the following exclusive rights:

(1) When the subject matter of the patent is a product, to prevent third parties from manufacturing, using, offering for sale, selling, or importing the patented product without its consent; and

(2) When the subject matter of a patent is a process, to prevent third parties from carrying out any act of using such process and any act of using, offering for sale, selling, or importing for subsequent sale the product obtained directly through such process, without its consent.

Section 11 of the Patent Act provides that the right granted by a patent will be determined by its first claim, which defines the invention and establishes the scope of protection. Only one independent claim is allowed. The description and the drawings or plans and, when applicable, the deposit of biological material, will be used to interpret the claim. Once they have been granted, patents enjoy a presumption of validity. Therefore, patents are considered to be valid and enforceable in principle. The Patent Act does not expressly provide for provisional protection for a patent application before its grant.

The so-called "doctrine of equivalents" has been accepted by Argentine courts. Even though there are only few and old cases in which the doctrine was applied and which were decided under a previous Patent Act, the doctrine should be equally applicable under the current Patent Act since the principles under which the doctrine was created have not been modified.

Indirect or contributory infringement is not expressly provided for in the Patent Act. However, some legal commentators indicate that indirect infringement should be considered as patent infringement. The Argentine Constitution, as well as general provisions of the Civil and Commercial Code (good faith in transactions, abuse of rights, and accomplices' joint and several liability), can be grounds for a finding of contributory infringement by the courts. There is no case law addressing this issue.

Section 81 of the Patent Law provides that the patentee is entitled to file a civil suit to have the infringer cease using the patent. Section 81 of the Patent Law also provides that the patentee is entitled to file a civil suit to obtain a compensation for the damages suffered as a consequence of the infringement. Typically, such compensation includes the damage that the patent holder is able to prove he has effectively suffered and lost profits. Financial relief is assessed based on the evidence submitted by the patentee. Lost profits, profits obtained by the infringer, price erosion, and the value of a reasonable royalty are ordinarily taken into account.

A patent holder also may request a preliminary injunction on the basis of Article 50 of the TRIPS Agreement, the Code of Civil Procedure,

and Section 83 of the Patent Act. Preliminary injunctions can be applied for before bringing the main infringement action to the court. Section 83 of the Patent Law further entitles the patentee to request the drawing up of an inventory or the attachment of the infringing goods and the machinery especially intended for the manufacturing of the product.

Finally, the Patent Act also provides for criminal sanctions for patent infringement. According to Section 76 of the Patent Act, those who knowingly manufacture or have someone manufacture one or more products infringing the rights of the patent owner, or import, sell, offer to sell, market, exhibit, or introduce into the country one or more products infringing the rights of the patent owner, will be punished with imprisonment for six months to three years and a fine.

Argentine law does not provide for criminal liability against legal entities for infringement, although they may be held liable for damages. Criminal participation and concealment are punishable pursuant to the general principles of the Criminal Code. Patentees ordinarily prefer to commence civil actions as, in criminal cases, it is the court that takes control of the case. There are very few cases of criminal sanctions imposed upon infringers of patent rights.

Actions for Wrongful Appropriation of Trade Secrets

Trade secrets in Argentina are governed by the Confidentiality Act, which essentially implements Article 39.2 of the TRIPS Agreement. Hence, anyone in control of undisclosed information has the right to prevent third parties from disclosing, acquiring, or using it contrary to fair commercial uses, so long as such information:

(1) Is secret;
(2) Has commercial value because it is secret; and
(3) Has been subject to reasonable steps to keep it secret.

Upon verification of illegitimate access to such confidential information, the holder is entitled to request for interim measures in order to stop the illicit act and commence civil proceedings demanding an injunction and/or compensation for damages. In some cases, disclosure of confidential information also can amount to a criminal offense.

In addition, according to the Confidentiality Act, those having access to confidential information as a consequence of their work or business have an explicit obligation not to use it or disclose it without

consent or due cause, provided that they are previously warned of the confidential nature of the information.

The recently enacted Civil and Commercial Code protects the confidential information shared by the parties during contractual negotiations. The party who reveals the confidential information or uses it for an unauthorized manner for its own benefit must pay the damages caused.[19]

Actions for Publication of False or Misleading Representations

Section 78 of the Patent Act provides that a fine will be imposed upon anyone who, without being the owner of a patent or no longer enjoying the rights granted thereby, makes assertions on the products or advertisements susceptible of inducing the public to error with regard to the existence of those rights.

Trade Marks

In General

The basic statute governing Argentine trade marks is Law Number 22,362 (the "Trade Mark Law"), enacted in 1980. In addition to the Trade Mark Law, there are other statutory provisions applicable to trade marks, including Decree Number 558 of 1981, which regulates the implementation of the Trade Mark Law and several other decrees and resolutions which refer to the use of specific terms and/or symbols. Several international treaties relevant to trade mark practice have been ratified by Argentina, namely the following:

(1) The Montevideo Treaty of 1889, which provides for certain minimum levels of trade mark protection;
(2) The Paris Conventions, ratified by Law Number 17,011 and Law Number 22,195; and
(3) The TRIPS Agreement, ratified by Law Number 24,425.

Actions for Infringement of Trade Marks

The Trade Mark Law provides both civil and criminal remedies applicable in cases of infringement of trade mark rights. Criminal infringements of trade mark rights are punishable with fines and imprisonment of

19 Civil and Commercial Code, Section 992.

up to two years. However, in practice, criminal prosecutions based on infringement of trade mark rights are rare, and imprisonment has never been imposed.

An infringement of a trade mark owner's exclusive rights results in possible civil remedies against the infringer, which exist in favor of both registered and unregistered trade marks, although the remedies are broader in the case of registered trade marks. The Trade Mark Law identifies the behaviors listed below as trade mark infringements:

(1) Falsifying a trade mark;
(2) Imitating a trade mark;
(3) Using a trade mark without authorizations;
(4) Selling or offering to sell a falsified trade mark or a trade mark that has been illegally imitated; and
(5) Selling, offering to sell, or otherwise marketing goods or services identified with a falsified or illegally imitated trade mark.

Trade mark owners may request courts to order the infringer to stop the use of the infringing trade marks and recover damages from the infringer. The latter is not regulated by the Trade Mark Law but results from general principles of tort law derived from the Civil and Commercial Code. In addition, trade mark owners are entitled to provisional remedies, including:

(1) Attachment of the infringing goods;
(2) Inventory and description of the infringing goods;
(3) Seizure of samples of the infringing goods;
(4) *Incidente de explotación*, a preliminary measure that provides for the interruption of the use of the infringing trade mark unless the alleged infringer provides a bond determined by the court to guarantee damages;
(5) Court orders requesting information related to infringing goods, including original and purchase documents, sales figures, and data of persons who purchased the infringing goods;
(6) Destruction of infringing trade marks and/or of any elements bearing said trade marks; and
(7) Publication of the court decision.

Actions for Wrongful Appropriation of Trade Names, Trade Dress, and Trade Secrets

Trade Names. Trade names are governed by Law Number 22,362, in its Second Chapter under "designations". Multilateral industrial