

## :: THE GONDOLA SHELVING BILL, A NEW BURDEN? ::

(The purpose of this bill is to encourage competition between trademarks, increase the participation of small and medium-sized enterprises by allowing them to place their products in the gondola shelves and to lower the prices for consumers)

By Marcelo E. Gallo

In the last decades Argentina has not improved key factors that would allow it to achieve a sustained growth. Neither the investment ratio nor the access to financing has been improved by it either. In the meantime, tax burden has been growing at an alarming rate; according to several sources, Argentina is the Latin American country having more tax burden. However, its infrastructure is delayed, both at a global level and in the region. The labor cost, informality and poverty have grown also.

Within this framework, the purpose of these lines is, in the first place, to inform the main aspects of the bill to “Encourage Competition in the Food Value Chain”, most commonly known by “The Gondola Shelving Act” (*la “Ley de Góndolas”*), approved by the House of Deputies on November 20, 2019 and included by the Executive Branch to be considered by the Senate at Extraordinary Sessions and, secondly, to try to understand if in case of being enacted - as it seems it will happen - it will be beneficial for society as a whole.

### **Declared purposes**

The declared purposes of the bill, pursuant to its section 1<sup>st</sup>, are the following:

- Contribute to the transparency and competition of the price of food, beverages, personal care products and household cleaning products.
- Avoid business practices that damage or imply a risk for competition or cause market distortions.
- Encourage the offer of national handmade and regional products manufactured by micro, small and medium-sized enterprises and the offer of family, peasant and aboriginal farming products, popular economy products and products generated in cooperatives and mutual aid associations.

### **Obligated subjects**

According to the bill (section 3<sup>rd</sup>), the establishments listed in section 1<sup>st</sup> of Act 18,425, will be obligated to comply it, namely:

a) Total supermarkets; b) Supermarkets; c) Superstores; d) Self-service food stores; e) Non-food self-service stores; f) Retail chain stores; g) Wholesale supply chains; h) Classifiers-packers of perishable products; e i) Shopping centers.

In all cases, except for those whose invoicing is equivalent to that of micro, small or medium-sized enterprises (MSMES).

### **Reached products**

Section 4<sup>th</sup> of the bill sets forth that its regulations shall exclusively apply to the commercialization of food, beverages, personal care products and household cleaning products.<sup>1</sup>

### **Rules to display the products reached by the bill in the gondola shelves and other physical and virtual spaces**

The bill defines gondola shelf (in its section 5<sup>th</sup>) as every physical space, furniture or shelf in which similar products are offered, including the “gondola shelf ends”.

It extends the provisions referred to the gondola shelving to the virtual locations of the obligated subjects, either directly or indirectly, as for example their web pages, mobile application, e-commerce stores or the like (Bill, section 5<sup>th</sup>).

Exclusive freezers, island displays and displays adjacent to checkout lines (Section 5<sup>th</sup> of the Bill) are excluded from the definition of gondola shelving, for which different display rules are provided for.

Section 7<sup>th</sup> of the bill provides for the following rules to display products in gondola shelving, other places of physical display and virtual locations:

- In gondola shelves and virtual locations the display of products of a supplier or business group cannot exceed 30% of the available space that it shares with products of similar characteristics. The participation shall involve at least 5 suppliers or business groups.
- In gondola shelves and virtual locations 25% of the available space shall be guaranteed for products of similar characteristics and different trademarks, to display products manufactured by

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<sup>1</sup> The enforcement authority shall, within ninety (90) days following the enactment of the law, prepare a list of the different categories of reached products commercialized by the subjects specified in section 3<sup>rd</sup> and shall provide the means for their advertising to the people in general. The list shall contain all the foods, beverages, personal care products and household cleaning products.

national micro and small-sized enterprises and/or manufactured by cooperatives and/or mutual aid associations and an additional 5% for family, peasant and aboriginal farming products and sectors of popular economy.

- In gondola shelves lower priced products - per unit of measure - shall be placed at an equidistant height between the first and last shelf.
- In virtual locations, the lower price products - per unit of measure - shall be published in the first visualization of the products of the category.
- In island displays and displays adjacent to checkout lines 50% of the space shall be used to exhibit products manufactured by national micro and small-sized enterprises and/or manufactured by cooperatives and/or mutual aid associations.
- In gondola shelves and virtual locations the display of imported products cannot exceed the percentage to be determined by the enforcement authority, on the basis of the capacity of the national industry to satisfy the demand of products.
- The products of trademarks licensed by the same commercial groups or enterprises related to or controlled by them shall be considered of a single trademark.

### **Temporary non-compliance for lack of competition**

Section 13<sup>th</sup> of the bill sets forth, under the title *Temporary non-compliance for lack of competition*, that the cases in which for a certain category of products it is temporarily impossible to comply with the minimum limits provided for in the law, the subjects specified in section 3<sup>rd</sup> shall inform to the enforcement authority the grounded reasons for said non-compliance and the expected term to comply with the law, that cannot exceed 30 days, and this period of time shall be extended only once for an equal term.

Exemption from the compliance of the caps provided for in the law shall apply only in cases where the enforcement authority verifies the factual impossibility of offering the products that the law intends to encourage.

Before determining that the offer of products in certain segments is non-responsive, the products, prices, guaranteed annualized demand and supply requirements shall be published for 60 days in the web site to be determined by the regulations in order to guarantee the search of new suppliers. The absence of suppliers shall allow the partial noncompliance with the Act until after a new supplier appears to satisfy the demand of the commercialization chains.

### **Limits to the freedom to contract. Anti-competitive behaviors**

According to section 6<sup>th</sup> of the bill, the subjects specified in section 3<sup>rd</sup> shall be obligated to comply with the following provisions as regards each category of products (food, beverages, personal care products and household cleaning products):

- a) It is forbidden to generate an anti-competitive exclusion of suppliers for the lease of spaces in the gondola shelves or virtual locations or preferential spaces in gondola shelves or virtual locations;
- b) Especially, the payment of charges or commissions, which as a result of their characteristics or magnitude obligate the supplier to choose only one distribution channel, shall be considered an anti-competitive exclusion.

Taken literally, the regulation of section 6<sup>th</sup> does not imply an absolute prohibition to rent spaces in gondola shelves or virtual locations or preferential spaces in gondola shelves or virtual locations, but only when it generates an anti-competitive exclusion of suppliers.

With the declared purpose of reducing costs for the suppliers of the subjects specified in section 3<sup>rd</sup>, section 8<sup>th</sup> of the bill (*Limits to the abuses of dominant position*) sets forth that the following conditions shall be complied with in the relationship between the suppliers and the sales establishments:

- The maximum term of payments to national micro and small-sized enterprises cannot exceed 60 running days.
- Suppliers may apply interest at the Lending Rate of the Bank of the Argentine Nation in case of late payments, provided that there are no legal and grounded reasons for nonperformance.
- No contributions or financial advances may be required from suppliers for any reason whatsoever.
- No economic withholdings or unilateral debits may be applied to suppliers; the debits may be applied only by mutual agreement and when the conditions to make them are expressly contemplated in the contract that joins them.
- In the contractual negotiation between the subjects specified in section 3<sup>rd</sup> and the supplier of one or several specific products cannot object as a condition for the delivery of free goods or goods under the supply cost, nor any other practice contrary to competition.
- In the negotiation of prices of one or several specific products no conditions or variations of third party suppliers may be submitted.
- It is forbidden to require from supplier the reverse distribution or replacement costs of the products.
- The costs for promotional sales of products or for the generation of waste or reductions shall be contractually set forth and by means of equitable and objective criteria.
- Contractual obligations and amendments thereof shall be formalized in writing.

- It is forbidden to draw lines on the provision of sensitive commercial information that is alien to the commercial relationship or that involves information referred to the supplier's relationship with other market operators or information of the competition.

To try to encourage the sale of regional products, section 9<sup>th</sup> of the bill provides the following for purchases to and contracts with the subjects of the family, peasant and aboriginal farming sector, popular economy sectors, products manufactured by cooperatives or mutual aid associations and producers of fruit and vegetables in general:

- No payment terms exceeding 40 running days may be agreed upon.
- Suppliers may apply interest by using the Lending Rate of the Bank of the Argentine Nation in case of late payments, provided that there are no legal and grounded reasons for the nonperformance.
- Flexible schemes should be provided for the delivery of products.
- Facilities shall be set in the requirements for contracting, distribution and commercialization.

### ***'Compre Mipyme'* (Buy in MSME)**

National products manufactured by micro and small-sized enterprises, by the subjects of the family, peasant and aboriginal farming sector, popular economy sectors, products manufactured by cooperatives or mutual aid associations, must be prominently displayed in the gondola shelves and virtual locations with an isologotype designed by the enforcement authority containing the legend *'Compre Mipyme'* (Buy in MSME) and specifying the number of the Act (Section 10<sup>th</sup> of the Bill).

### **Code of Best Practices**

Section 11<sup>th</sup> of the bill creates the Code of Best Commercial Practices of Wholesale and Retail Distribution, which observance will be mandatory for the subjects defined in section 3<sup>rd</sup> and which gross annual invoicing exceeds 300,000,000 Mobile Units (equivalent, during year 2020 to AR\$ 12,180,000,000), considering the invoicing of the whole economic group.<sup>2</sup>

The code shall be prepared by the enforcement authority, following the guidelines set forth in the law and with the participation of the national, provincial and municipal entities for the defense of consumer, as applicable.

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<sup>2</sup> The rest of the companies may apply the Code of Best Commercial Practices voluntarily adhering to it through the procedure to be set forth by the enforcement authority.

Pursuant to the regulation of section 12 of the bill, the Code of Best Practices shall include practices that are considered abusive according to the law and which arise from the commercial regulations in force on fair commercial practices, antitrust and consumer defense.

Likewise, it shall include:

- a) The obligation to appoint a responsible party of the company for the compliance with the code and to notify the appointment to the suppliers and the enforcement authority;
- b) To provide in the contracts an alternative procedure for the dispute resolution, that may be private mediation and/or arbitration;
- c) The periodical remittance to the enforcement authority of the information required on the compliance with the Code and the information required from the Food Value Chain Observatory (*Observatorio de la Cadena de Valor Alimenticia*) created by the law, as an affidavit.

Written contracts executed between the companies reached by the Act and its suppliers, shall include copy of the Code of Best Commercial Practices.

#### **Public Order Act. Insertion of regulations**

Section 14<sup>th</sup> of the bill sets forth that the provisions of the law are of public order and its section 15<sup>th</sup> provides that they are inserted with the general and special regulations applicable to the consumer and competition relations, particularly the Consumer Defense Act, the Antitrust Act and the Fair Commercial Practices Regime.<sup>3</sup>

#### **Adaptation term**

The subjects obligated to the compliance with the Act shall have a term of 120 running days as from its enactment to make the necessary modifications and implement the provisions thereof (Section 16<sup>th</sup> of the Bill).

#### **Penalties for noncompliance. Who are entitled to file reports? Use of fines.**

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<sup>3</sup> In case of doubt on the interpretation of the principles provided for by the law the most beneficial for the weakest sectors that participate in the production, commercialization and consumption chain of the products included in the system (Section 15<sup>th</sup> of the Bill).

In the event of noncompliance with the provision of the Act, section 17<sup>th</sup> of the bill provides that the enforcement authority shall apply the regulations referred to procedure and the penalties set forth in the Fair Commercial Practices Regime, encouraging the participation of the Consumer Defense organizations of the whole country.

The subjects listed in section 18<sup>th</sup> of the Bill (associations, trade associations, cooperatives of popular economy that gather the subjects that participate in the production and commercialization of the products comprised in the Act, as well as the consumers' associations registered with the National Registry of Consumers' Associations (*Registro Nacional de Asociaciones de Consumidores*) shall be entitled to file reports for noncompliance with the Act.

If noncompliance affects consumers, reports may be filed also before the national, provincial or municipal enforcement authorities of Act 24,240.

Noncompliance with the Act shall be punished with the penalties and fines set forth in the Fair Commercial Practices Regime, notwithstanding the other penalties that may correspond pursuant to the Antitrust and Consumer Defense Acts.

The funds collected as a result of the imposition of fines for noncompliance with the Gondola Shelving Act shall be assigned by the enforcement authority according to the following distribution:

- 70%, for advertising encouraging buying national food. From said amount, 50% of the budget shall be applied in mass media and 50% in media, small and medium-sized enterprises and cooperatives;
- 25%, for a development fund of the subjects of the family, peasant and aboriginal farming, popular economy sectors, Cooperatives and Mutual Aid Associations, through credits at a variable rate according to the inflation published by the Consumers Price Index (*IPC*) of the National Institute of Statistics and Census (*INDEC*) plus administrative costs of the Bank of the Argentine Nation;
- 5%, for the operation of the Food Value Chain Observatory.

### **Supervision of compliance with the Act**

Section 18<sup>th</sup> of the bill empowers associations, trade associations, cooperatives of popular economy that gather the subjects that participate in the manufacturing and commercialization of the products comprised in the Act, as well as the consumers associations registered with the National Registry of Consumers Associations (*Registro Nacional de Asociaciones de Consumidores*) to supervise the compliance with the Act in its capacity as ad honorem collaborators of the

enforcement authority, upon the execution of an institutional arrangement of the parties providing for the registration and training of persons authorized to such end.

### **Food Value Chain Observatory**

Within the sphere of the enforcement authority, the Food Value Chain Observatory is created, that will require and gather relevant information from the different stages of the production processes of the products reached by the Act within the territory of the Argentine Republic.

The duty of the observatory will be to follow up, consult, inform and analyze the operation of the value chain of the products reached by the Act, as well as to advise the public administration entities involved (Section 19 of the Bill).

### **National Registry of Popular Economy (*Registro Nacional de la Economía Popular*)**

Section 20<sup>th</sup> of the bill sets forth that the National Registry of Popular Economy, created by section 6<sup>th</sup> of Act 27,345, shall contemplate the particularities needed for the compliance with the Act.

### **Information of the objectives and contents of the Act**

As set forth in section 21<sup>st</sup> of the bill, the enforcement authority shall inform, in national and local media, on the street and in the web, the objectives and contents of the Act and shall set up free telephone lines for the reception of reports on lack of competition for consumers and consumers associations.

### **Opinion**

Besides the point that several regulations of the Gondola Shelving Act shall probably have to avoid issues on its constitutionality and that the effective application of the Act will be dependent on the existence of enough offer of new products that take up the spaces of the gondola shelves which the regulation orders to clear, it seems to me that this initiative of our legislators, once more, fails to consider that the real issue of Argentina is – in addition to the poor quality of public education, which there is no point getting into it in this comment - the lack of investments and largely as a result thereof, the lack of employment.

Authoritative observers have highlighted that the Gondola Shelving Act would probably bring along, among other negative effects, the loss of jobs in large supermarket chains (which are the largest employers of Argentina), a significant increase of their costs and consequent loss of profitability (investment in Argentina will prove to be then, even less attractive), a predictable



increase of the price of products as a result of both effects (that, of course, will be paid by us, the consumers, rich and poor) and a probable negative impact in the availability of products for lack of substitute goods (restricting freedom of choice).

All this leads me to think that once again the measures (and how many measures have been taken up to now...?) tending to artificially control prices – is nothing but, in my opinion, the Gondola Shelving Act – will fail. And that, as usual, we, the citizens will be “the butt of the joke”, for the new excessive increase of - since long ago - the “Argentine cost” that this Act looks like it is going to cause.

**Buenos Aires, 18 de marzo de 2020.**