Multiple Framework Contract FWC FPI PSF 2015

Lot 4 "Market Access and Trade & Investment Agreement Negotiation & Implementation"

**Request for Services 2019/408258/1**

# Technical Support to EU Market Access Team and Trade Analysis in Argentina

## *Ad-Hoc* Legal Analysis:

***Direct and indirect effects of the system CEF ("Capacidad Económica Financiera") and its application in practice on imports into Argentina.***

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**24 August 2020**

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Eurosupport Consortium for:
PARTNERSHIP INSTRUMENT – POLICY SUPPORT FACILITY

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*Delegation of the European Union in Argentina*

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**24 August 2020**

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# Table of Contents

# 1. OVERVIEW

After the tremendous reversal of short-term capital flows experienced in April 2018, the Argentine government deployed different regulations aimed at actively administering foreign trade and reducing the leak of international reserves. In this context, a new integral import monitoring regime (known as "SIMI") was approved in that year. In addition, the former national administration created a digital system, commonly referred as to "CEF", which was supposed to help reduce cases of over-invoicing and to avoid the performance of imports by opportunistic or occasional operators without a solid business history. However, practice shows that these measures create actual restrictions on imports, since they generate delays, create additional costs and provoke strong uncertainty for trade operators. The following sections describe the CEF regime and attempt to analyze its economic impact and legitimacy.

# 2. DESCRIPTION OF THE CEF REGIME

In August 2018, the AFIP (tax authority) issued General Resolution No. 4294/2018 whereby it created a digital system called "*Sistema de Capacidad Económico Financiera*" ("System of Economic and Financial Capacity", or "CEF", for its Spanish acronym), aimed at managing risks associated with tax, customs and social security operations. Mainly, the CEF identifies, assesses and controls data provided by individuals and legal persons, related to their tax and financial condition and their economic activities. Based on this information, each month the system calculates the economic and financial capacity of every single person. This parameter –basically equal to a specific amount valued in Argentine pesos– is subject to analysis by the AFIP in order to authorize some economic operations or to assess the legitimacy or the fiscal consequences of the performance of some activities.

Some of the conditions that are *inter alia* examined by the system in order to determine the CEF are the following: (i) Net Income Tax statement; (ii) mortgages; (iii) purchases or sales of vehicles; (iv) purchases or sales of real estate; (v) purchases or sales of consumption goods; (vi) wages paid to or earned as a result of an employment contract; (vii) payments made with credit or debit cards; and (viii) bank or financial debts. In addition, individuals or legal persons are entitled to request AFIP to recalculate the CEF determined for a specific month. For that purpose, parties must file a formal petition, attaching all supporting documents deemed necessary to demonstrate the actual or alleged CEF. The AFIP has five calendar days –counted from the submission of the request– to make a decision regarding the reprocessing of the CEF. Parties are authorized to file only one reconsideration petition per month.

Afterwards, in December 2018, the AFIP issued General Resolution No. 4364/2018[1], pursuant to which the AFIP must analyze the CEF of each importer after the submission of the SIMI applications ("*declaración SIMI*") and prior to their approval. According to this provision, individuals who do not have

[1] General Resolution No. 4364/2018 entered into force on 8 January 2019.

a CEF that equals or exceeds the FOB value stated in the import declaration, do not get the SIMI application approved and thus, are not permitted to perform import operations.

## 3. ECONOMIC IMPACT

Since the adoption of the CEF regime, importers and some sectorial chambers have raised numerous claims against this system.[2] In essence, they have argued that: (i) the value of the CEF is arbitrarily determined by a digital system that applies an unknown formula; (ii) irrespective of the history and size of the companies, the CEF is reprocessed on a monthly basis and its value is automatically reset to a default amount that is generally equal to AR$ 100,000, which is clearly insufficient to perform any import operation; and (iii) the monthly reprocessing of the CEF subjects importers to the burdensome task of filing reconsideration petitions (and attaching supporting documents).

Moreover, it has been noted that the CEF system tends to be particularly problematic for novel companies and for some multinational firms. In particular, for enterprises that have been recently incorporated, operators argue that –in some occasions– the CEF system does not consider bank or financial credits in order to determine the business capacity of these firms. Conversely, as the system particularly relies on the Net Income Tax declaration and Financial Statements, bank or financial credits tend to be only considered as debts that increase the liabilities of companies, but not as actual assets that would underpin the performance of the import operations. Since new companies are often more dependent on third-party financing to start their businesses, the way the system calculates the CEF might hinder the purchase of foreign goods, by rejecting or delaying the approval of SIMI applications.

For its part, multinational companies might also be affected by the deficiency in the system described in the previous paragraph. In Argentina, mainly because of the adverse macroeconomic situation and the existing capital and exchange controls, foreign companies tend to finance their local affiliates by means of intra-company loans or import credits and, conversely, often try to avoid making capital contributions. In this context, since the system usually does not consider third party credits or loans in order to determine the CEF, many multinational firms that resort to such financing methods have been assigned ridiculously low CEF values and thus, they have suffered blockages in the processing of SIMI applications.

It is worth noting that delays in the approval of the SIMI applications caused by a wrong processing of the CEF, could be absolutely damaging for importers. On the one hand, faced with these circumstances, importers could be forced to store goods in fiscal deposits with exorbitantly high costs. Such extra expenses might affect the final prices of imports and, in this way, seriously erode their

[2] See https://www.cronista.com/economiapolitica/Importadores-en-pie-de-conflicto-con-el-Gobierno-denuncian-trabas-al-comercio-20200719-0016.html and https://www.clarin.com/economia/volvieron-trabas-importaciones-queja-sector-planteos-gobiernos-extranjeros_0_-OMMsTg72.html.

competitiveness. On the other hand, the impossibility to clear goods for consumption, could force importers to breach contracts with local clients and, in some cases, even be charged with fines.

Additionally, the way the system processes the CEF and the lack of transparency regarding the methodology actually used to estimate such values, create uncertainty for importers, affect logistic projections and cash flows, and, as a result, discourage the performance of import operations.

## 4. LEGAL ANALYSIS

The CEF system has some features in its design, structure and implementation that could make this regime inconsistent with GATT 1994 Article XI:1, because the measure prohibits or restricts the importation of goods. Particularly, as it was explained in the previous section, importers must certify or demonstrate a CEF value equal or higher than the FOB value of the imported goods in order to be authorized to clear the goods for consumption. As such, the CEF system works as a precondition to import merchandise that is subject to the discretional analysis of the AFIP. Moreover, General Resolutions No. 4294/2018 and 4364/2018 do not specify which is the formula applied by the system to estimate the CEF and thereby, the AFIP has broad discretional powers to adopt any methodology and importers lack any certainty regarding their CEF.

In this regard, different WTO panels have recognized that the lack of transparency in import/export procedures together with a high degree of discretional powers, are two characteristics in the design of local regulations which are inconsistent with GATT 1994 Article XI:1, insofar as they hinder imports, generate additional costs and discourage future investment. Among others, in *China - measures relating to the export of various raw materials (2012)*, the Panel established for the purpose of settling this dispute, found that "... in the context of a licensing requirement, the open-ended discretion created by the unspecific and generalized requirement to submit an unqualified number of 'other' documents (…) creates uncertainty as to an applicant's ability to obtain an export license. The authority to deny the license is ever present because the conditions for granting it are subject to the demands of the particular licensing authority. This uncertainty amounts to a restriction on exportation that is inconsistent with Article XI:1."[3]

Similarly, in *Argentina - measures affecting the importation of merchandise (2014)*, the Panel found that those measures that cause increases in import costs have a restrictive effect and, therefore, they violate GATT 1994 Article XI:1.[4]

By adopting and maintaining the CEF regime, Argentina also appears to be acting inconsistently with the following WTO provisions:

[3] Panel Report, *China - Measures related to the exportation of various raw materials (2011)*, para. 7.948, WT/DS394/R, WT/DS39/R and WT/DS398/R.
[4] Panel Report, *Argentina - Measures affecting the importation of goods (2014)*, para. 6.474, WT/DS438/R, WT/DS444/R and WT/DS445/R.

- Article VIII:1(c) of the GATT 1994, because Argentina has failed to minimize the incidence and complexity of import formalities and decrease and simplify import documentation requirements.
- Article X:1 of the GATT 1994, because Argentina has failed to publish promptly in such a manner as to enable governments and traders to become acquainted with the laws, regulations and administrative rulings of general application pertaining to the operation of the measure.
- Article X:3(a) of the GATT 1994, because the CEF regime is not administered in a uniform, reasonable and impartial manner.
- Article 1.3 of the ILP Agreement, because the rules for its application are not neutral in application or administered in a fair and equitable manner.
- Article 1.4(a) of the ILP Agreement because Argentina has not published the rules and all information concerning CEF regime, in such a manner as to enable governments and traders to become acquainted with them.
- Article 1.6 of the ILP Agreement, because Argentina requests unnecessary information, such as information concerning the importers, certificates, translations and certifications by notaries
- Article 1.6 of the ILP Agreement, because CEF procedures are not as simple as possible.

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