

The Handbook of Competition Enforcement Agencies

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Overview

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Antitrust regulation and enforcement

Although Argentina's first antitrust act was passed in 1923, the first legislation contemplating administrative agencies focused on the enforcement of antitrust legislation was enacted in 1980 by means of Law 22,262. This law organised a dual authority vested upon the National Commission for the Defence of Competition (CNDC) as an advisory body purported to submit non-binding recommendations to the trade secretariat of the Ministry of Economy and Production (the Secretariat), ultimately the officer in charge of enacting final administrative antitrust rulings subject to appeal before judicial courts.

Following the amendment of the Argentine constitution in 1994, which included protection against anti-competitive practices and control over natural and legal monopolies as constitutional rights, new antitrust legislation was enacted in 1999 by means of Law No. 25,156, later regulated by Presidential Decree No. 89/2001 and other related decrees and regulations (collectively, the Antitrust Law). The Antitrust Law addresses both the prosecution of anti-competitive practices and the mandatory notification of certain economic concentrations not previously required under Law 22,262.

The Antitrust Law also provides for the creation of a new antitrust law enforcement body, the National Tribunal for the Defence of Competition (TNDC). The TNDC is intended to be a decentralised body, fully independent in decision making and enforcement. To this date, the constitution of the TNDC is long past due. Failure to create the TNDC triggered challenges to the authority of the CNDC and the Secretariat to enforce the Antitrust Law. In 2008, the Federal Supreme Court confirmed that until the TNDC is appointed, the antitrust authority remains dual, with the CNDC having instruction and advice powers, and the Secretariat having decision-making powers (*in re Belmonte, Manuel otro v Estado Nacional*, CSJN, 04/16/2008).

CNDC's structure

The CNDC has five members, a president and four commissioners. Commissioners are appointed by the Argentine president for a four-year term.

Two commissioners must be lawyers and the other two economists. The CNDC president is also a political appointee of the Argentine president designated without a fixed term. Non-binding recommendations are decided by a majority of members' votes.

Judicial review

The Antitrust Law provides that decisions imposing fines, issuing remedial orders, denying mergers or dismissing complaints may be appealed before federal courts.

Regarding Presidential Decree No. 89/2001, there have been uncertainties as to whether the federal civil and commercial courts or the federal economic criminal courts are the proper venues to hear appeal cases, with contradictory court rulings on the subject. Without a final mandatory ruling for all courts, the matter remains unresolved.

Recent developments

During 2008, a new regulation approved an internal reorganisation of the CNDC creating the positions of first and second vice president with administrative duties. These vice presidents were appointed from the already designated commissioners.

While the CNDC remains not fully integrated as the two positions for economists are still vacant, a former judge was appointed as new president of the body in mid-2008.

Some improvement in the speed of case resolution has been noticed recently as the majority of the decisions of the period on anti-competitive practices were adopted during the second semester (24 out of 35 cases). The CNDC continued to focus on the analysis of some economic sectors, including health, media, natural gas and LPG markets. Only one fine was imposed (health sector) and four investigations were concluded with parties' commitments to cease alleged anti-competitive practices. Several precautionary measures were imposed, especially in the health sector.

At present, a CNDC team is assessing the convenience of the incorporation of a leniency programme.

Judicial courts have confirmed the highest aggregate fine ever applied by the antitrust authorities (to a cement cartel), though a final decision is still pending as the parties have appealed.

Merger review

During 2008, the CNDC decided 48 mergers, a number slightly lower than in 2007. The number of conditioned approvals rose from 5 per cent to 10 per cent. The most significant mergers reviewed during 2008 include *Cencosud/Disco*, in which analysis had been temporarily suspended by a local court until the TNDC was formed, *São Paulo Alpargatas/Alpargatas Argentina*, in which the buyer committed to divest certain brands and assets, *Saint Gobain/Abrasivos Argentinos*, in which the buyer committed to divest brands, *Telefónica/Telecom*.

Telefónica/Telecom

Arguably the highest-profile merger with possible antitrust implications during 2008 was the acquisition by telecom company Telefónica and

other parties of Olimpia, a company with assets in Telecom Italia. After a preliminary order and the appointment of two observers, the CNDC considered that the transaction has local effects and ordered the parties to carry out a notification.

In its resolution, the CNDC weighted Telefónica's asymmetric access to sensitive and strategic information of Telecom Argentina, its main local competitor. The CNDC also assessed that even though parties explicitly subordinated the transaction to the approval of the EU antitrust authority, they failed to include a similar provision in connection with the Argentine approval or any provision addressing the absence of effects of the transaction in case of rejection.

In an unprecedented decision, the CNDC explicitly highlighted that the transaction must not have effects in Argentina until its clearance and warned the parties to refrain from exercising the political shareholders' rights purported to be transferred pursuant to the transaction until CNDC approval is granted. It remains to be seen whether this warning will apply to other cases in the future.

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Quevedo Abogados is a law firm committed to providing high-quality professional services that cater to its clients' needs. Its members are devoted to offering the best, most direct and clearest advice possible, and enjoy feeling that they have a personal stake in the successful outcome of the opportunities they help to seize, or the challenges they help to meet. The firm values the diversity of talents, knowledge and experience of its members and believes that their combination, together with a close working relationship with its clients, a critical analysis and a practical "real world" approach towards problems contribute to finding creative and effective solutions adding value to its clientele. The team is formed by professionals with extensive local and international experience in a wide variety of legal problems and industries. Main practice areas include M&As, corporations, antitrust, mining, oil and gas, energy, administrative law, forestry, media, finance, arbitration and litigation.

The antitrust team includes attorneys with extensive professional experience who have successfully advised in high-profile merger reviews and complex antitrust investigations before the National Commission for the Defence of Competition and the judicial courts, having also advised foreign public entities in antitrust matters. The firm has been selected as Leading Firm in the area of Antitrust in Argentina by *Chambers Latin America 2009*. Partner Viviana Guadagni, who served as commissioner of the CNDC and is vice chair of the Antitrust Commission of the Buenos Aires City Lawyers Association, has been distinguished as Leading Individual in the area of Antitrust by the same publication.