

The Handbook of Competition Enforcement Agencies

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Overview

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Although Argentina's first antitrust act was passed in 1923, the first legislation contemplating administrative agencies focused on the enforcement of antitrust law 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 (the CNDC) as an advisory administrative body purported to submit non-binding recommendations to the Trade Secretariat of the Ministry of Economy and Production (the Secretariat), an office of the federal government ultimately 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 (the Law), 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 control of market structures through the mandatory notification of certain economic concentrations not previously required under Law 22,262.

The Law provides for the creation of a new antitrust enforcement body, the National Tribunal for the Defence of Competition (the TNDC). The TNDC is intended to be a decentralised body of the Federal Administration, fully independent both in decision-making and enforcement, formed by seven members appointed by the President of Argentina following a public competitive selection process. Despite the time elapsed since the enactment of the Law, the constitution of the TNDC is still pending and now long overdue. As a result, antitrust enforcement continues to be vested upon the antitrust authorities pre-existing the Law under, and as permitted by, temporary provisions of the Law. As indicated above such enforcement bodies are the CNDC and the Secretariat. 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, Argentine antitrust authority remains dual, with the CNDC having instruction and advisory powers, and the Secretariat having decision-making authority (National Supreme Court, *in re Belmonte, Manuel y otro v Estado Nacional*, 16 April 2008). Recently, the Court of Appeal on Economic Crimes issued two judgments with unusually severe criticisms on this matter, sustaining that the delay in the constitution of the TNDC represents a legal scandal and asking the National Supreme Court to request the National Executive Power to proceed with the formation of the TNDC.

The CNDC is constituted by five members, a chairman and four commissioners. Commissioners are appointed for a four-year term. Two commissioners must be lawyers and the other two economists. The CNDC chairman is a political appointee of the Argentinean president designated without a fixed term. At present, the chairman is a lawyer and former judge; of the three current commissioners, two are lawyers and one is an economist. The position of fourth commissioner, also an economist, is currently vacant.

The CNDC carries out investigations at party request or ex officio and submits non-binding recommendations to the Secretariat, the office ultimately in charge of enacting final administrative antitrust rulings subject to appeal before judicial courts. In the vast majority of cases, the recommendations of the CNDC are endorsed by the Secretariat.

Judicial review and its pitfalls

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

Following the Law and Presidential Decree No. 89/2001, there have been uncertainties as to whether the federal courts with authority on civil and commercial matters or the federal courts with jurisdiction on economic crimes are the correct venues to hear appeal cases, with

contradictory court rulings on the subject. These uncertainties increased during 2009 as, in addition to the aforementioned courts, the federal courts with jurisdiction on administrative law matters (*contencioso-administrativo*) have also declared themselves competent to review antitrust rulings. Without a final ruling for all courts, the matter remains unresolved.

Recent developments

Update on anti-competitive practices

In 2009 CNDC level of activity in anti-competitive practices remained similar to 2008 as relatively the same number of cases (36) were completed during the year. No fines for anti-competitive practices were imposed during the period. The foregoing does not jeopardise a noticeable proactive attitude of the authorities during the period, particularly in connection with cartel cases where two investigations for alleged collusive behaviour were launched *ex officio*. One of the aforementioned conducts under investigation concerns an alleged collusion in price increase among cable operators, while the other refers to an alleged agreement among banks and several of the largest retail shop chains for colluding on terminating all special promotions and discounts applied to credit cards purchases on certain week days. In both cases CNDC issued injunctive measures (*medida cautelar*) aimed at securing an immediate stop of the investigated conduct.

During 2009 a team of CNDC staff continued to work on a proposal for the incorporation of a leniency programme into Argentine antitrust law. A draft of such proposal, containing a partial amendment to the Law aimed at incorporating such programme, was circulated among practitioners for comments.

Merger review in 2009

During 2009, 43 mergers were decided by Argentine antitrust authorities, a number slightly lower than merger resolutions issued in 2008.

Telefónica/Telecom

As in 2008, arguably the highest-profile merger with antitrust implications during 2009 was the acquisition by telecom company Telefónica of an indirect stake in Telecom Italia that, in turn, controls indirectly Telecom Argentina, a competitor of Telefónica Argentina. After a preliminary order and the appointment of

two observers, the CNDC considered that the transaction entered into in 2007 has local effects and ordered the parties to carry out the mandatory notification imposed by the Law on certain economic concentrations. In an unprecedented decision, the CNDC explicitly highlighted that the transaction must have no 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 was granted. Eventually, in 2009 the antitrust authorities ordered Telecom Italia to disinvest its stake in Telecom Argentina. Later, the authorities set a deadline for the completion of the divestiture of August 2010. In addition, the Secretariat applied a multimillion-peso fine to various parties involved in the transaction for failure of such parties to observe the mandatory notification imposed by the Antitrust Law for this kind of concentration. These decisions were appealed. In response to such appeals the Federal Court of Appeals on Civil and Commercial Matters has recently suspended the divestiture time schedule fixed by CNDC. In addition, on 1 February 2010, the Federal Court of Appeals on Economic Crimes quashed by majority ruling the resolution of the antitrust authorities that imposed the divestiture, requesting in addition the issuance of a new resolution on the matter. The majority considered that the divestiture constituted a penalty that had been imposed on foreign companies that were not parties to the transaction and the proceedings, and that they had therefore been prevented from exercising their rights of defence and due process. The ruling indicates that Telecom Italia had been the target of the stock purchase. The majority also found that the divestiture had no sufficient grounds on the analysis of the case made by the antitrust authorities and that the nullification of such decision provided the authorities with a renewed opportunity to consider the implications of the transaction for the telecommunications market. Notably in this connection, the majority considered that the nullification of the divestiture prevents the antitrust authorities that had acted in the case from issuing a new resolution on the matter and calls for a new resolving body that, however, remains undetermined in the court resolution. The minority, on the contrary, confirmed the resolution of the antitrust authorities.

Cablevisión Multicanal

Also during 2009, and in an unprecedented decision, the antitrust authorities revoked an authorisation of a merger that had been previously approved. This decision affected the 2007 approval of the merger between leading cable-operators

Cablevisión and Multicanal and was based upon the failure of the merging parties to comply with commitments given by them at the time of the approval of the transaction. The commitments were deemed by the antitrust authorities as conditional on the approval previously granted.



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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&A, corporate law, 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 (CNDC) and the judicial courts, and also advised foreign public entities in antitrust matters. The firm has been selected as leading firm in the area of antitrust in Argentina by the 2009 and 2010 editions of *Chambers Latin America*. Partner Viviana Guadagni, who served as commissioner of the CNDC and as vice chair of the antitrust commission of the Buenos Aires City Lawyers Association, has also been distinguished in 2009 and 2010 as a leading individual in the area of antitrust by the same publication.