

ARGENTINA
2002

1. The Competition Authority

1. Since the 80`s the Argentinian Competition Law has been enforced by the National Commission for Competition Defense - CNDC¹, which nowadays reports to the Technical Coordination Secretariat of the Ministry of Economy and Production². The Secretariat takes the final decisions about anticompetitive conducts and mergers & acquisitions based on CNDC technical reports. Nevertheless those final decisions follow regularly CNDC recommendations.

2. CNDC is the agency that performs the investigations which end up in reports and recommendations based on the legal and economic antitrust principles. Both mergers and antitrust investigations are subject to the antitrust analysis performed by CNDC. The agency also advocates for competition, issuing non binding recommendations on competition matters to other governmental agencies.

3. The CNDC consists of a President and four Commissioners, who are advised by a Chief Economist and a Chief Attorney and a staff of approximately 35 lawyers and economists or accountants.

4. It is worth stressing that in a short term and as a result of 1999 change of the Competition Act, CNDC will be replaced by the National Tribunal for Competition Defense - TNDC³. The latter will be a body constituted within the Ministry of Economy wholly autonomous to enforce the law.

5. TNDC will be constituted by seven members, to be appointed by the President of the Republic after a selection process, involving a public contest which includes examinations and interviews before a special jury. According to the new Act, the jury has been composed by representatives of each branch of the government and of remarkable academic bodies⁴. The special jury was constituted in December 2002 and the selection process of the candidates has already begun.

¹ Comisión Nacional de Defensa de la Competencia, in Spanish.

² Until June 2003 CNDC reported to the Competition, Deregulation and Consumer Defence Secretariat (SDCyCD), which in turn was under the Ministry of Production. New government has created the aforementioned Technical Coordination Secretariat to which the CNDC and the consumer defence agency directly report. In turn, the Secretariat reports directly to the Ministry of Economy and Production, which resulted from the merger of former Economy and Production Ministries.

³ Tribunal Nacional de Defensa de la Competencia, in Spanish.

⁴ Accordingly to the Act, the Jury has been constituted by the General Attorney of the Government, the Secretariat for Trade, Industry and Mining of the Ministry of Economy, the Presidents of both High and Low Congress Chambers Committees for Trade, the President of the National Court for Appeals on commercial subjects and the Presidents of both the National Academy of Economics and the National Academy of Law.

2. Changes to competition policies, proposed or adopted

6. Argentinian modern competition policy initiated in 1980, with Competition Act 22.262 and the creation of CNDC. In 1999 that legislation was replaced by Act 25.156 which basically completed and improved Act 22.262 by: i) introducing ex ante review and authorization of mergers and acquisitions, ii) giving the competition authority full jurisdiction on competition issues in every sector of the economy and iii) ordering the setting up of the aforementioned TNDC as an independent body to enforce the law.

7. The new Competition Act was passed after the consolidation of the process of economics reforms intended to yield inflation control through the functioning of free market forces, gradual opening of the economy and privatization of state owned assets, in opposition to the 80`s decade scenario of price control, trade barriers, and government enterprises, which made competition enforcement useless.

8. Some major legal innovations on competition legal framework took place during 2001, when the new Competition Act 25.156 was complemented by Decree 89/2001 and amended by Decree 396/2001. Decree 89/2001 defined the necessary proceedings for the creation of the aforementioned TNDC and regulated some aspects concerning the notification of mergers and acquisitions to the authority⁵. Decree 396/2001 amended the volume of sales threshold by which mergers and acquisitions must be notified to CNDC in order to avoid notification and investigation of minor operations.

9. As it was said, in 2002 it was initiated the process for the institution of the new competition authority (the aforementioned TNDC). In addition during 2002, Argentina and the others State Members of the MERCOSUR stepped forward in building a competition policy framework for the region, by approving a Regulation for the Agreement on Competition Defence in MERCOSUR (named "Protocolo de Defensa de la Competencia del MERCOSUR" and also known as "Protocolo de Fortaleza")⁶.

10. It must be highlighted that today, in an environment of increasing regional integration, the Competition Authority is aiming to deepen and enlarge cooperation with Brazilian Competition Authorities to deal more effectively with the increasing consolidation of regional enterprises that operates in extended MERCOSUR market.

11. To such aim, on the second semester of 2003 Brazilian and Argentinian Competition Authorities initiated negotiations to sign a cooperation and coordination agreement for the enforcement of competition law, which is expected to be signed before the end of the year.

3. Enforcement of competition laws and policies

3.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions*

a) *Summary of activities*

12. In 2002 CNDC arrived to a final recommendation to the SDCyCD on thirty two cases of possible anticompetitive actions investigated during 2002 and previous years. Most of them involved cable television, fuel and medical services sectors. Those investigations were initiated because of petitions

⁵ In turn, Decree 89/2001 was complemented by Resolutions N° 40 and N° 164, the former establishing the kind and the timing of the information that firms must provide during the mergers and acquisition review proceedings and the latter, setting up the guidelines for the economic analysis of mergers.

⁶ The Protocol is not yet effective. Its regulation has been considered a previous necessary step to its effective implementation.

COMPETITION LAW AND POLICY IN ARGENTINA

submitted by market players or customers, which were mainly accusations of abuse of dominant position (9), refusal to deal (7), exclusion of competitors (4) and collusion (2).

13. Out of the thirty two cases, two resulted in penalties (both in the health services sector) such as the imposition of fines and other sanctions. The others were dismissed for not infringing the competition law.

14. In addition, in three cases under investigation that *prima facie* raised competitive concern it were imposed preliminary injunctions in order to restore competitive conditions until completion of the Commission proceedings.

b) *Description of significant cases.*

Summary of Cases related with health services

15. In August 2002, the Commission recommended SCDyDC to impose a fine of \$300.000 (local currency equivalent to a bit more than 100.000 U.S. dollars) upon an association of private hospitals located in the Province of Entre Ríos (named "Asociación de Clínicas y Sanatorios de la Provincia de Entre Ríos" - ACLER -). The defendant was found responsible of denying access to its network of health services providers to a new medical center (the plaintiff).

16. The investigation showed that 80% of the health-insurance services suppliers active in that region satisfy their associates' health-care needs through ACLER network of providers (55% directly and 25% by means of a related public institution). So, the Commission considered that taking part of ACLER network was necessary for the successful entry of new providers to the health services activity.

17. Therefore, in addition to imposing a fine, the Commission advised to order ACLER to open up its network to any possible provider and to communicate so to the plaintiff and any other health-service provider that had been previously rejected. The SCDyDC shared the Commission's considerations and followed its recommendation.

18. In July 2002 the Commission found that a professional association active as provider of dental care services in the Province of Chaco, which encompasses most of the dentists of the region, had infringed competition law when requiring its members to terminate a contract with a dental-care services private entity (the plaintiff), under the threat of excluding them from the association's membership.

19. The Commission considered that the defendant's conduct effectively banned their associates from contracting with another dental care provider. It was found that the association conduct had been anticompetitive since it forced dentists to work exclusively for the defendant. This in turn would result in preventing the defendant's direct competitors to remain or develop in the dental-care activity.

20. The Commission recommended to order the defendant to cease requiring their professionals to terminate contracts with its competitors, to cease excluding members from membership when working for those competitors, and to impose the defendant a fine of \$30.000 (local currency, a bit more than 10.000 US dollars). The recommendation was followed by SCDyDC.

Summary of Cases related with TV cable systems and television rights

21. In this market the Commission initiated several proceedings during 2002. Some of them are still under investigation and some others terminated without finding the companies guilty. Those proceedings referred to the following practices:

COMPETITION LAW AND POLICY IN ARGENTINA

- a) Refusal to deal: by contents producers or distributors
 - b) Price discrimination: by cable operators, in favour of clients with more than one supplier option, or by contents distributors in favour of cable operators forming part of the same business group.
 - c) Abuses of dominant positions: price fixing by the dominant cable operators
- a) Refusal to deal: these practices were alleged by companies that found difficulties in reaching agreements with the supplier of contents. In order to establish the possibility of an anticompetitive action the Commission must find evidence of anticompetitive intent. In most of the cases the Commission found that the refusal to deal was originated in difficulties to arrive to a convenient commercial agreement between the companies involved. Nevertheless the Commission has made some benchmarking between similar firms in order to address if there were a real discrimination against the petitioners and found that the major problems of that kind were originated in the prices asked by the sellers of the television rights of sports, particularly football games.
- b) Price discrimination: it was detected as a typical conduct in the TV cable market. When a new operator enters to a regional antitrust market building up a new network, the incumbent lowers his prices only to the clients in the competitive area, maintaining higher prices to the rest of the clients (who have no alternative provider). In these cases the Commission, on the one hand, verified that the incumbent operator had not fixed a lower price than the entrant's price but had matched the entrant's price level, and on the other hand, investigated both the entrant and the incumbent costs to look up if their prices were below each costs.
- c) Abuses of dominant position: there has been many petitioners reporting that the dominant cable operators charge higher prices or rise them without any significant change in the supply conditions. The Commission does not have many actions to take on this kind of pricing practice. Nevertheless, the Commission analyzed the importance of the price increase and its justification. The Commission has found that in many cases there was a possible justification related with technical issues of the system or with the increase of the number of channels distributed.

22. In addition, it should be noticed that as a result of an investigation performed during 2002, in 2003 the Commission charged the Argentinian Football Association, which owns the national championship football broadcast rights and the licensor of those rights and a related distribution company (Torneos y Competencias S.A. and Televisión Satelital Codificada S.A.) for establishing competition limiting, restricting and distorsive clauses in the contracts. Those clauses were referred to the scope and period of the exclusivity agreement performed for the use and commercialization of those broadcasting rights. The defendants have already entered their plea of not guilty but at the same time contested the claim in court, arguing defects in some formal aspects of the proceedings. Consequently the issue is now under judicial revision and CNDC proceedings interrupted till court decision.

Summary of the compressed natural gas stations cartel case

23. For price and availability reasons, in Argentina a great portion of the vehicles (cars, vans, trucks, and other) works impulsed not by gasoline (petroleum) but by the same natural gas that is used in houses for cooking. The natural gas which is distributed by the natural gas network is compressed in stations similar to the gasoline stations (named as GNC stations) to fill special tanks carried by the vehicles⁷.

⁷ Vehicles can work either with gasoline or compressed natural gas. It is usual that gasoline stations also sell compressed natural gas.

24. In the second half of 2002, almost 30 GNC stations located in Rosario city were accused by a taxicabs association of having agreed a price increase of GNC. The Commission initiated an investigation, which included breaking into the office of the GNC stations' association by surprise to search relevant documentation (with a judicial search warrant, according to Argentinian law). Documents proving that the price increase had been fixed in an association meeting were found. So, the Commission issued a preliminary injunction consisting of an order to bring the prices back to the level prior to the agreed increase.

3.6 *Mergers and acquisitions*

a) *Statistics on number, size and type of mergers notified and/or controlled under competition laws;*

25. During 2002 CNDC issued recommendations to the SCDyDC about twenty six M&A cases. From this total, 92% of the cases were recommended for authorization without any conditions, one acquisition was blocked and in the rest of the cases, it was recommended that the approval were subject to remedial conditions.

26. The distribution of the cases analyzed according to the kind of concentration is: horizontal mergers 35%, vertical mergers 38%, conglomerate mergers 15% and 13% horizontal and vertical mergers. The distribution of the cases according to the economic sector was: oil & gas and fuel: 36%, grains trading: 14%, financial services: 9% and air transport: 9%. Thus, four sectors represented 68% of the cases investigated.

b) *Summary of the most important cases.*

Ambev (Brahma) - Quilmes Merger

27. The proposed merger, which was notified to the Commission in May 2002, involved two out of the four main suppliers of beer in Argentina: Ambev (Brahma) – a Brazilian firm involved in the production, marketing and supply of beer and other beverages in South America – and Quilmes –an Argentine company active in manufacturing, marketing and distribution of beer and other beverages –. In addition, both parties are involved in the production of malt (the most important production input of beer)⁸.

28. The operation raised serious competition concerns from an horizontal as well as vertical point of view. In the Argentine beer business⁹ the market shares were as follows: Quilmes 65,7%; CCBA (Brahma) 15,7%, CCU (Budweiser) 11,7%; Isenbeck 6,2%, and others 0,7% (based on 2001 data). So, the combined market share of the parties was 81,4%.

29. In the Argentine malt business the market shares were: Maltería Pampa (Brahma): 46%, CMQ (Quilmes): 24%, Malteurop (rents the production facilities to Quilmes): 6%, and Cargill: 24%.

⁸ The operation comprised the adquisition of a 37.5% economic interest (36% of voting rights) in Quilmes and equal representation on its Board by Ambev (Brahma). Quilmes would receive: US\$ 346 million in cash, Ambev's beer assets in Argentina, Uruguay and Paraguay, and access to Ambev's Brazilian distribution network. However, embedded in this price there is the obligation by Ambev after 7 years to exchange the remaining Quilmes A shares into Ambev shares, what in turn suggests that Brahma could fully take over of Quilmes.

⁹ The Commission argued that the geografic relevant market are national in scope: the four main product market participants are nationally focused - their advertising campaigns and their pricing policy aim to the national market and the participation of foreing trade was marginal.

COMPETITION LAW AND POLICY IN ARGENTINA

30. Furthermore, the Commission has taken into account the following considerations: i) beer market has a relatively high degree of product differentiation and competition is based on brand image, quality and customer services as well as on price; ii) the merger implied the elimination of a vigorous competitor (Brahma); iii) the merger implied the creation of a portfolio of brands with a high share in every market segment. In addition the Commission identified significant barriers to entry that makes difficult to defeat the would-be dominant position of the merged firm¹⁰. Based on the high product differentiation of the beer market, the Commission splitted it out in three segments, according to brand image and price: i) high-price premium beers, ii) medium-price beers and iii) low price beers.

31. Moreover, the Commission considered that the \$37.5 million pesos of efficiency gains alleged by the parties were excessive, having found convincing evidence that the amount would be certainly lower (\$27 million pesos), grounded on the so-called "merger specificity" of the efficiency gains.

32. As a result, the Commission concluded that the proposed merger raised significant competitive concerns. Nevertheless, the Commission decided not to recommend to block out the operation if certain remedy measures were fully accomplished by the parties.

33. Those remedy measures amounted to: i) selling the brewing plant owned by Brahma to a new competitor, ii) selling the beer brands "Bieckert", "Palermo", "Norte" (the later one only if required by the buyer), iii) divesting "Heineken"'s franchising license (if not possible, selling the beer brand "Imperial" in its place); iv) assuring open access during 7 years to the Quilmes-Brahma post merger distribution network; v) continuing with the manufacture of the beer brands ordered to divest at Quilmes's plant¹¹ and, vi) selling or renting Quilmes facilities for producing malt by means of a long term contract to an independent firm without brewing operations.

34. The Commission remedial measures proposal intended to assure inputs availability for competitors and create enough competition against the ultimate beer brands of both parties ("Quilmes" and "Brahma"). Those recommendations were fully supported by the Secretariat of Deregulation, Competition and Consumer Defense, to which in turn the Commission reported.

35. According to the Argentine Law, the operation has not yet been authorized. The authorization will only take place if those orders are thoroughly fulfilled by the parties. Nowadays (september 2003) the parties are on their way to accomplish the required remedial measures.

The Acquisition of The Home Depot Argentina S.R.L.

36. In October 2001 Hipermercados Jumbo S.A., a major homecenter in Argentina, notified to the Commission the acquisition of the 100% of the shares of The Home Depot Argentina S.R.L., a subsidiary of popular American retailer, by which the latter company abandoned its operations in the Argentine market. The operation was cleared without any objections in March 2002.

37. Both parties were active in the commercialization of the average product offered by homecenters: electric and other appliances, building supplies, paint and wall coverings, plumbing materials, tools, kitchen and bath equipments, heating and cooling systems, furniture and others.

38. The Commission considered that homecenters did not constitute a relevant product antitrust market in itself, based on a multiplicity of factors and different sources of evidence, like a consumer survey

¹⁰ Advertisig and brand image, distribution network access, and idle capacity of the production facilities.

¹¹ The volume of production of the beer brands ordered to divest must be equal to former years`production, plus an additional 20%, if so is required by the new owner.

COMPETITION LAW AND POLICY IN ARGENTINA

and a market study (designed altogether with Consultant CCR) and information collected in hearings held with the main actors of the sector. Moreover, the Commission determined that in each line of business, homecenters competed with different types of retailers, including traditional specialized stores and multiproduct retailers of smaller spread than the parties.

39. In addition, the Commission restricted the geografic relevant market to the area of influence of the parties' homecenters. This area was settled as the zone to which the consumers can reach in vehicle in 20 minutes' time. In this way, it was identified three urban areas where the parties overlap: Federal District (Buenos Aires City), "Don Torcuato" and "Quilmes" (important cities located near the Federal District in Buenos Aires Province jurisdiction).

40. The combined market shares of the parties in each line of business and geografic area was on average 16%. The ceramic tile market showed the higher combined market shares: 27% at Quilmes, 33% at the Federal District (Buenos Aires City) and 41% at Don Torcuato. On the contrary, the household electric and heating systems market showed the lower combined market shares (3% and even less, depending on the geografic area).

41. Furthermore, the Commission took particularly into account that the homecenters business was considerably underdeveloped in Argentina compared with other countries and that more traditional channels of sales still prevailed for the kind of products that homecenters offer.

42. So, as the combined market shares of the parties implied a low impact of the proposed merger and the low saturation of the homecenters retailing channel additionally suggested that there is available room for entrants, the Commission recommended to clear without objections the notified operation, which in turn was so done.

Bayer acquisition of Aventis Cropscience.

43. In November 2001 Bayer and Aventis Cropscience – agrochemical worldwide producers – notified to the Commission the operation by which the latter incorporates to the former. One year later (November 2002), the parties were informed about the assets they should sell in order to get the operation cleared since it raised serious competitive concerns. Nowadays, the parties are in process of doing so, under the Commission oversight.

44. With regard to the investigation process, the Commission has taken full consideration of the U.S. and E.C decision on the matter, particularly in relation with the divestitures ordered and the assessing of the market performance of new generation agrochemicals.

45. In Argentina, Bayer and Aventis Cropscience's subsidiaries are major players in the agrochemical business and direct competitors. They have a combined participation of 16% of the sales. However, the combined participation showed very high in some relevant antitrust markets, which were, on the whole, defined in accordance with the therapeutic application of each product.

46. There was particular concern about the strengthening of Bayer position in the insecticides and insecticide seed treatment products markets, through the addition of the Pyrazol-class insecticides (like Fipronil) to their Nicotinoids-class insecticides (both last generation insecticides) and the incorporation of Aventis's portfolio of Piretroid-class insecticides, one of which, named Deltametrina, is spreadly used in Argentina, and constitutes the major competitor of Bayer's own piretroids products.

47. Moreover, it was found that competition could be diminished in nematicides, defoliant and fungicide seed treatment products, by the incorporation of the products traded under the brand names "Temik" (nematicide), Dropp and Finish (defoliant) and Premis (fungicide seed treatment).

COMPETITION LAW AND POLICY IN ARGENTINA

LAPA acquisition by AEROPUERTOS ARGENTINA 2000.

48. In July 2002, the Commission recommended to the SCDyDC to block the vertical integration between the concessionaire company that operates the main Argentine airports (named Aeropuertos Argentina 2000 - AA2000 -) and LAPA, one of the main domestic commercial airlines at that moment. The operation would be implemented through the acquisition by the stakeholders of AA2000 of a firm (Fexis) which is the owner of the majority of LAPA shares.

49. AA2000 operates in exclusivity the major 32 Argentine airports and so it is the sole supplier at those airports of the various airports services that air carriers must contract to provide both passenger and freight airtransport services both at domestic and international level. In addition, AA2000 has links with a company named EDCADASSA, which is the concessionaire of the fiscal stores operation at the airports. Those fiscal stores must be used for the import/export freight transport activities. At the moment of the analysis LAPA accounted for a share of 40% of the passengers airtransport domestic market, and its share was even higher on certain routes (which constituted the relevant antitrust markets).

50. The Commission found the proposed operation raised serious competitive concerns because AA2000 could use its position on the airport services market to damage or exclude LAPA competitors in the downstream airtransport markets and the regulatory legal framework did not seem to contain the necessary provisions to preclude this possible future conduct. Moreover the Commission did not accept the failing firm defense alleged by the parties with respect to LAPA considering not evident that a vertically integrated carrier and a higher number of players in the airtransport market would lead to further competition.

51. The CNDC recommendation was followed by the SCDyDC and the vertical integration was prevented. It should be noted that, in legal terms, SCDyDC authorized Fexis acquisition only if it did not in turn involve AA2000 stakeholders taking control over LAPA, so ordering them to prove the termination of any formal or factual participation or influence in LAPA¹².

4. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies.

52. Even though the Argentinian law does not grant authority for the antitrust agency to operate in formulating or implementing other policies, the competition authority may lawfully exercise the competition advocacy.

53. With that purpose, the Commission market investigations, in both conducts and mergers cases, seek to identify any kind of legal provision distorting competition. In those cases the Commission recommends the SCDyDC to make aware of the issue to the government agency involved and, if possible, suggests a course of action.

5. Resources of competition authorities

54. In 2002 the National Commission for Competition Defence has had an annual budget of \$2.296.000 (local currency, equivalent to approximately 830.000 US dollars).

¹² The unusual legal modality used by SCDyDC to block the acquisition was originated in the fact that the stake holders of AA2000 had already taken control over LAPA a year ago, despite the lack of the necessary authorization, what was highlighted by a dissenting opinion issued by one of the Commissioners.

55. During 2002, its professional staff has been of about 10 lawyers headed by a Chief of Lawyers and 15 economists/accountants (supported by 3 advanced economics students) headed by a Chief of Economists. Those professionals investigate both anticompetitive conducts and mergers. There are five other people (three administrative employees and two private assistants to the President and the Commissioners).

56. The SCDyDC to which the Commission reported during 2002 has a considerable amount of human resources, but most of them were dedicated to the consumer defence policy. Therefore, not more than two or three people were dedicated to the Commission oversight.

6. Cooperation and international relations

57. Although Argentina does not have yet any effective cooperation agreement on the competition policy field, as it was mentioned before, the country is stepping forward to sign a cooperation agreement for the enforcement of national competition laws with Brazil. In addition the State Members of MERCOSUR have made significant progress towards the building of a common competition framework for the region.

58. In spite of the lack of a formal cooperation framework, the Commission maintains informal contacts with competition officers from Brazil, Spain, US, European Union, Mexico and other countries in order to collect opinions about different competition issues that may arise during the investigations.

59. It should be emphasized that the Commission has access to this informal network of cooperation as a result of its participation in most of the existing international forums for cooperation and negotiation on competition issues like: MERCOSUR Technical Committee N° 5: Competition Defence, Iberoamerican Forum for Competition Defence, WTO Working Group on the Interaction between Trade and Competition Policy, UNCTAD Group of Experts on Competition Policy, FTAA Group of Negotiation on Competition Policy, International Competition Network and OECD Competition Committee.

60. It must be highlighted that in December 2002 Spain supported the participation of CNDC members in the first edition of the Iberoamerican School for Competition Defence (related to the aforementioned Iberoamerican Forum) held in Madrid, where those members received intensive training on competition issues and presented some Argentine leading cases.

61. In addition, in September 2002 and June 2003, UNCTAD and WTO Secretariats respectively held regional seminars on competition issues for Latin America in Buenos Aires. All CNDC members attended these seminars in order to improve their knowledge on the subject, to get updated about competition policy international agenda and to meet international competition experts and colleagues from other countries.

62. Finally, it must be remarked that the Commission is committed to deepen and extend all kind of cooperation activities at regional and international level in order to better deal with anticompetitive business practices that increasingly take place at a world-wide level, resulting in lessening trade and development possibilities of developing countries.