



COMPETITION COMMITTEE

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS
IN ARGENTINA**

2003

1. Changes to competition laws and policies, proposed or adopted

1. In the Report 2002 it has been explained that in order to facilitate enforcement of the new law with regard to ex ante review of singular or particular mergers & acquisitions where national or public interests is involved, it would be important to have a concluding political stage to apart from and modify or amend Tribunal decisions in those particular cases.
2. Nowadays, the informal debates continue but there ins't any governmental and fomal initiative for new legislation.
3. This is the **Executive Summary** on Competition Policy and Enforcement for the year 2003.

2. Enforcement of Competition Law and Policies: 2003 Report of Enforcement Activities

2.1 Ex ante review of mergers and aquisitions (Act N° 25.156, article 6°)

4. During 2003 CNDC investigated possible anticompetitive effects of 32 mergers and aquisitions notified on that year and on the second semester of the previous one. With regards to most of them CNDC did not expressed any concern and so were cleared. One acquisition in the broadcast cable system sector was rejected for creating a dominant position in a small city of Buenos Aires Province. In one case, the CNDC denied authorization till the firms reduce to two years the time length a non competition clause.
5. In three major operations, the Parties got the authorization after compromising to certain actions. One of them was Brazilian State owned PETROBRAS acquisition of a private local group named "Pecom Energía" active in the whole energy sector (oil & gas, gasoline, electricity and petrochemicals). Although CNDC has not recommended divestitures, the operation has been authorised by the Secretariat only after PETROBRAS compromised to sell Transener, which operates the main Argentine electric distribution system.
6. Another one was the acquisition, by the major Brazilian brewery company named "Brahma" active in both, Argentina and the rest of Latin America, of Quilmes, the most important brewery company operating in Argentine, also active in Latin America as a whole. The operation has been analysed during 2002 and proceedings terminated in January 2003. The decision has been to authorise operation only after completion of divestitures required: a brewery plant, a malt facility, some beer brads and giving third parties to both Parties distribution network. This process of divestiture is nowadays interrupted due to an appeal to Federal District Court.
7. The last significant operation was the adquisition by ALTO PARANA (a local affiliate of Chilean Arauco, one of the main Latin American companies active in the wood industry) of PECOM FORESTAL, an Argentine main competitor company, owner of land, forestry and a saw mill in Misiones Province (where most of Argentina wood industry is located).
8. The operation was authorised when ALTO PARANA compromised to continue selling 115,000 tns of round wood per year during five years (which was the bought company's volume of sales of the round wood), to continue PECOM FORESTAL founding I&D public projects, to make available PECOM FORESTAL Pinus Taeda genetics basis to third parties and to preserve a wild forest located in PECOM FORESTAL property.

9. In addition, it should be mentioned that during 2003, BAYER has successfully stepped forward in divesting the agrochemical products required permanent co-operation and oversight by CNDC specialised staff, in order to both protect competition and minimise business impact.

10. It also should be noticed that during 2003, CNDC has imposed four fines due to out-of term notification of mergers&acquisitions, two in the passenger air-transport industry, one in health insurance sector and the last one in gasoline station sector.

3. Prosecution and Investigation of anticompetitive practices.

3.1 *Terminated investigations*

11. During 2003 CNDC has finished thirty nine (39) investigations of possible violations to competition law. Most of them involved cable television and fuel sectors. Those investigations initiated because of petitions submitted by market players or customers, which were mainly accusations of abuse of dominant position (18), refusal to deal (7), exclusion of competitors (4) and collusion (2).

12. Out of the thirty nine cases, three (3) resulted in penalties. One of them was the abuse of dominant position in the bottled liquefied gas of petroleum (LPG) saled for house heating at Bariloche city (a turist popular destiny in Patagonia region). Other case consisted of a river sand price fixing agreement between producers located along Parana River, in Entre Ríos Province. In both cases defendants were penalised with the imposition of fines.

13. In the last case, CNDC has imposed fines to a health insurance provider for having obstructed an ongoing investigation. The rest of the cases were dismissed for not infringing the competition law.

3.2 *Bills of indictment*

14. During 2003 CNDC has found enough elements to level charges in eight (8) ongoing investigation. According to the law, defendants have already stated their defense (Act. 25156, art 32) which will be judged by CNDC during the first semester of 2003 to reach a final decision and penalise the defendants, if CNDC concludes that statements are not persuading.

15. Four out of those involved exclucionary practices by companies operating in the cable television sector. Two other cases refer to collusion in the bottled liquefied gas of petrol for house heating. Another case comprises colussion among domestic providers of air transportation services. The last proceeding consist of bid rigging among providers of liquid oxygen to hospitals.

3.3 *Preliminary Injunctions (Act. 25.156; art. 35)*

16. During 2003, CNDC has ordered twelve (12) preliminary injunctions in order to avoid possible and inmediate damages resulting from anticompetitive practices under ongoing investigations in sector such as telephone services, health, cable television, because operations are not expected to lessen competition. Nevertheless, three of them, has been appealed to the Courts.

4. Guidance

17. During 2003, CNDC has answered twelve (12) requests of guidance submitted by companies. All of them were asked about the obligation to notify a particular merger or acquisition planned or performed, considering particular terms of the agreements and/or specific issues related with calculation of Parties volume of sales to seek if it meets the threshold established in the law. In two of the cases, firms have been ordered to notify the operation on stake.

5. Performance under appeals

18. Argentine Republic has been established as a federal one, separates in Provinces and a Federal District. Judicial Branch follows this separation. The Argentine Competition Authority is a federal or national body with jurisdiction in the whole country, but, due to Judicial Branch organisation, its decisions should be appealed to each district Courts, accordingly to defendant's address or main business location. As a conclusive stage, Courts decisions can be further appealed to Supreme Court.

19. In general terms Competition Authority decisions perform very well under appeals. During 2002 and 2003, the Authority imposed penalties in five (cases). All of them has been appealed. During 2003 Courts have confirmed two of out those five decisions but favoured defendants reducing fines amount. One of the decision fined providers of health services involved in market foreclosure practices in Entre Ríos Province (a decision that was taken in 2002). The other one was the aforementioned penalised river sand cartel in the same Province. Both fines reduction stated by Entre Ríos Court has been appealed to Supreme Court by Competition Authority.

20. Just once during 2003, a Court has wholly rejected a Competition Authority decision. It is referred to fines imposed in 2001 to cable television operators and signals providers for abusing dominant position in pay-per-view football championships market. Court has not agreed with the relevant market scope, stating that it should include every kind of sports and football championship summaries delayed-broadcasted by free TV. Competition Authority has appealed Court's statement to Supreme Court.

21. Almost twelve preliminary injunctions imposed during 2003 has been appealed to Courts, but proceedings are not terminated. For other hand, in 2003 Federal District Court wholly confirmed a preliminary injunction ordered in 2002 to one of the main telephone services provider. The order consisted of continuing to provide the plaintiff –a minor telephone services provider - with 0-800 service. The plaintiff has charged defendant for refusal to deal. Federal District Court also reduced a per-day fine imposed to a defendant for not accomplishing a preliminary injunction issued in 2001 consisting of ordering a newspaper and magazines distributor to continue providing the plaintiff, who has charged defendant for refusal to deal.

22. It should be said that as it is usual in this kind of proceedings, there is a lot of appeals originated in non-substantial issues related to, for example, inclusion of documentation in the filing or terms that are used by defendant's counsel to delay proceedings. None of this kind of appeal has been won by defendant's before Courts.

23. With regard to merger & acquisitions review, decision on Brahma acquisition of Quilmes brewery. As it was aforementioned, the Authority stated that the operation was to be authorised after Parties divest production facilities, some brands and give third parties access to Quilmes distribution system. It was also required that the buyer were not active in Argentine market. This issue has been appealed by other companies operating in Argentina, expressing having been excluded as possible assets buyers. Courts proceedings have not terminated yet.

24. Two other appeals have been suited in mergers & acquisitions field during 2003 and have not been decided yet by Courts. Those appeals referred to aforementioned rejected acquisition of a local cable operator of a Buenos Aires Province small city and the requisite to reduce non competition clauses term to obtain authorisation in another acquisition.

6. The role of Competition Authority

25. 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 regularly those final decisions follow CNDC`s recommendations.

26. 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.

27. 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.

28. 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.

29. 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.

6.1 The Competition Law

30. 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)

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.

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.

31. 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.

32. 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 authority. 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.

33. 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 Defense in MERCOSUR (named "Protocolo de Defensa de la Competencia del MERCOSUR" and also known as "Protocolo de Fortaleza").

34. 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.

35. 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.

7. Mentions in national/regional press

36. CNDC activities has been reported in the newspapers several times. The main issues picked out by press were: Brazilian-State-owned PETROBRAS acquisition of PECOM ENERGÍA S.A. (a main Argentine group operating in the energy sector); ongoing divestiture process ordered to authorise Brazilian brewery BRAHMA acquisition of a main local brewery named Quilmes; Chilean Arauco-Alto Paraná acquisition of PECOM ENERGY wood business (named "PECOM FORESTAL"); fines to Bariloche City bottled liquefied petroleum gas cartel; possible acquisition of a major hypermarket company active at national level (named "Disco"); prosecution of 28 oil & gas appealed to Supreme Court by Competition Authority.

37. As it was in paragraph 21, almost twelve preliminary injunctions imposed during 2003 has been appealed to Courts, but proceedings are not terminated. For other hand, in 2003 Federal District production companies for stating anticompetitive clauses in contracts for selling natural gas agreed with huge industrial consumers and companies operating natural gas distribution to houses and smaller industries and competition defence co-operation agreement signed with Brazilian Competition Authorities.

8. Conclusion: 2003 year has been a successful one?

37. Year 2003 has been a successful one. As it was aforementioned CNDC has investigated three major mergers & acquisitions, all of them involving huge Brazilian and Chilean companies acquiring important local firms operating in brewing industry, the whole energy sector and wood industry.

38. These operations have required a sophisticated competition assessment and a thorough discrimination of those divestitures or business practices necessary to avoid restriction to competition. Nevertheless CNDC has not lasted more than a year to terminate the proceedings, a reasonable commercial time frame. In addition, during 2003 CNDC has successfully stepped forward the divestiture of agrochemical assets the year before required to Bayer due to Aventis Croscscience acquisition. It should be stressed that in those cases and in every operation notified, CNDC has successfully managed to protect and promote competition without discouraging investments or obstructing the development of Argentine economy.

39. With regard to anticompetitive practices prosecutions, as it was aforementioned the Competition Authority has successfully managed to terminate two important cases imposing fines, as it has been the river sand cartel and the Bariloche City bottled liquefied gas of petroleum cartel. In addition, as it was aforementioned, CNDC has reached the last prosecution stage, levelling charges in eight ongoing investigations, one of them of singular importance involving bid rigging among inputs providers in the health sector. Also as aforementioned, CNDC initiated a significant investigation of anticompetitive clauses stated by 28 oil & gas producers in contracts for selling natural gas agreed with major industries and house and other users distributors.

40. It should be emphasised that during 2003, CNDC has successfully managed to gradually allocate more resources to prosecution of anticompetitive practices. This field had been in some way postponed due to the fixed terms of merger & acquisitions review.

41. Finally, 2003 year has also been a successful one in international co-operation field. As it was aforementioned Brazilian and Argentinean competition authorities, in view of their economies integration and increasing expansion of across- the- borders effects of anticompetitive practices and mergers & acquisitions, have signed in October a co-operation agreement in order to deal with those issues.

42. The Argentinean Competition Authority is aiming to deep and enlarge cooperation. During 2003, 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, also known as "protocolo de Fortaleza". In addition, although Argentina has not yet sign any other effective cooperation agreement on competition policy, the Commission maintains informal contacts with competition officers from Spain, US, Mexico and the other countries to collect opinions about competition issues that may arise during investigations.

43. The Commission has access to this informal network of cooperation because of its participation in most of the existing international forums on competition issues such as: MERCOSUR's Technical Committee N° 5: Competition Defence, Latin American Competition Forum, OECD Competition Committee, 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, and International Competition Network.

9. Resources of Competition Authorities.

9.1 Annual Budget.

44. 2003 Annual Budget was \$2,254,967 (local currency equivalent to USD 965,190. December 2003 exchange rate).

45. The list of the sources of funds was: General appropriations 98%, multilateral credit institutions 2%. General appropriations are separated between CNDC budget (81%) and other branches of Executive budget (17%). This latter funds support part of the staff salaries which involved 61% of the budget.

Argentine Competition Authority does not fund merger filing fees or fines.

9.2 Human Resources -Technical Staff/analysts. Number of employees.

46. The total staff size is 42 (forty two): 36 technical - analysts and 6 administrators.

47. There are 14 (fourteen) lawyers on the staff and all of them are “competition” lawyers, the economists on the staff are 16 (sixteen), 2 (two) are advanced economic students and 1 (one) is marketing student. The chief of economist has a master degree in business, five other economic analysts have a master degree in public economy, another one has a master degree in health economy and two other have postgraduate training in antitrust issues by CNDC, local academic institutions and foreign agencies like US, FTC and DOJ, 1 (one) economist has experience in private consulting, accounting for the 6% of the economists on the staff. Besides, there are 2 (two) accountants, specialised in audit.

48. In 2003 CNDC technical staff joined 9 (nine): 4 (four) economists, 4(lawyers) and 1 (one) marketing student and 5 (five) : 2 (two accountants, 1 (one) economist, 1 (one) lawyer and 1 (one) advanced economics student left the staff. The percentage of the total staff left in 2003 was 14.3%, including technical, administrative or clerical staff and excluding executives.

49. The average age of the technical staff is 37 (thirty seven).

9.2 a, b, c.

50. All technical staff (36) work on mergers. Task is not divided according to the kind of practices or conducts investigated. Usually task separates according to degree of complexity and time allocation of each investigation and also according to industry or economic sector involved. So more experienced lawyers and economic analysts deal with more complex investigations. Among the economist, sometimes familiarity with the industry or economic sector involved is also considered.

51. During 2003 guidance has focused in answering companies questions about obligation to notify mergers & acquisitions and chief of lawyers has worked in most of them.