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**Global Forum on Competition**

**ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

**Contribution from Argentina**

-- Session II --

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## **ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

### **1. Special definition of Hard Core Cartels**

1. In Argentina article 1° of the Competition Law (Law 25.156) prohibits acts or conducts, related to the production and exchange of goods or services, whose intent or effect is to restrict or to distort competition, and those that constitutes an abuse of dominant position, so that damage for the general economic interest can result. On the other hand, article 2° of the mentioned law enumerates in a non exhaustive form a series of conducts, that to be considered illegal must fulfil at the same time the requirements of article 1°. In this way a special definition for hard core cartels is absent in the Argentine antitrust law. To the extent that the law refers to "acts or conducts", it can be observed that the demonstration of the existence of an explicit agreement is not required. In that sense it is possible to sanction conducts on the basis of the demonstration of consciously parallel conduct plus one or more facilitating practice. It must be noted that the National Commission for the Defense of Competition (CNDC) is the technical organism that produces the reports (called "dictámenes") on the basis of which the Secretary of Technical Coordination makes the final decisions in the administrative branch.

### **2. Status of Hard Core Cartels under the Antitrust Law**

2. Under the Argentine antitrust law hard core cartels do not have any special status. Neither there are criminal provisions in the Law. The law effective prior to the present one contained criminal sanctions but they were never applied. The Argentine antitrust law does not contemplate "*per se*" illegal conducts. With regard to the harshness of the sanctions, article 49 of the law establishes that in the imposition of fines it will have to be considered, among other elements, the loss incurred among all the persons affected by the prohibited activity, the benefit obtained by all the persons involved in the prohibited activity, the gravity of the infraction, the damage caused, the intention. Therefore by virtue of this provision the fines imposed to hard core cartels could be increased according to the mentioned criteria. It should be mentioned that the maximum amount of the fine that allows the law ascends to one hundred fifty million Argentine pesos (\$ 150,000,000), approximately. U\$S 50.000.000. Under the Law there is not a more demanding standard to prove hard core cartels than to prove other anticompetitive conducts.

### **3. Prove of Cartels through indirect evidence**

3. Yes, it is possible to prove the existence of an agreement of cartelisation or other types of anticompetitive practices without direct evidence. In the case of the cement cartel fined by the CNDC in July of the present year a combination of indirect evidence, economic evidence and facilitating practices (exchange of sensible competitive information) was used to sanction the involved companies.

### **4. Judicial experience in cases of indirect evidence in Cartels**

4. To date judicial resolutions have not existed pronouncing on this topic.

### **5. Difference in the applicable sanctions**

5. In principle, that the evidence of the cartel is direct or indirect it does not make a difference in relation to the applicable sanctions.

## **6. Prosecution of Cartels**

6. The possibility of prosecuting cartels without need to produce direct evidence is a key factor for an effective fight against that type of practices, mainly in Argentina, that has not yet implemented a clemency program.

## **7. Evidentiary standards for developing countries**

7. Evidentiary standards should not have to be more lenient by the circumstance that in developing countries little experience in the prosecution of cartels exists, since otherwise constitutional guarantees of due defense could be affected.

## **8. Example of a case of cartel in Argentina**

- In Argentina recently, in the month of July of the current year, a record fine was imposed to the cement companies for having cartelised the cement portland market during a period of almost twenty years. The investigation took account of a journalistic publication whose source turned out to be an ex-employee of one of the investigated companies. This ex-employee, according to the journalistic publication, had compiled documentation and written an unsigned document (Book) where all the functioning of the cartel was described in detail. Unfortunately; this person could not be found during the investigation. The hard core cartel consisted basically of the allocation to each cement company of a predetermined percentage of the market on national scale, complemented with agreements on prices and other commercial conditions at a local (city/region) scale. The illegal practice was demonstrated with a series of elements of indirect evidence.
- One of the most important elements of indirect evidence turned out to be the competitively sensible exchange of information between the cement companies via the association that gathered them (Association of Cement Manufacturers Portland - AFCP). The AFCP handled a Statistical System of exchange of information by which each associated cement company sent to the AFCP information on its production and quantities of cement sold, with a high degree of detail. In that sense the companies sent with monthly regularity the production by plant of each company. On the other hand, the monthly sales (in quantities) were sent with diverse openings: by localities of a size suggestively narrow, by province, and also on a national scale, by type of client (public sector, private sector and export), by package (bags and bulk), and by means of transport (by truck, railroad, by sea, by waterway and internal consumption). In some occasions the AFCP also processed information of cement sales (quantities) of weekly character. The interchanged information had recent character, in the sense that it referred to the months immediate previous to the production of the information. After processing all this information, the AFCP gave back to the companies the production and individual sales (quantities) of all the companies associated. In this way each company knew strategic commercial information of its competitors. The interchanged information was classified as "confidential". The Statistical System was improved throughout the investigated period, displaying a degree of increasing sophistication whereas the information disclosed through the official publications of the AFCP was becoming more and more sparse. The System was designed to produce exits that allowed to compare the market share of each company and their evolution over time. In addition to numbers of definitive sales the statistics included provisional sales, which demonstrated that the companies needed the provisional numbers to adjust more perfectly to the agreement, since the definitive numbers were produced with a delay of only a month. In conclusion, the implementation of an exchange

of information with the aforementioned characteristics could only be fully explained by the necessity to control the fulfilment of an anticompetitive practice in the cement industry.

- Another element of indirect evidence turned out to be three audits of invoicing and sales (quantities) that the AFCP ordered to consulting companies. Specialised literature emphasizes the existence of audits like a typical characteristic of the cartelisation of an industry, whose purpose is to verify that the participants in these practices do not cheat declaring inferior sales or departing in some other way from the terms of the agreement.
- Thirdly, it was proved that the people who took part by the companies in the exchange of information through the AFCP, sending or receiving data, and/or in the operation and implementation of this system, turned out to be in their great majority commercial personal from the area of sales, of diverse hierarchies within each company.
- In fourth place, it was proved the existence of reclamations of the companies and the AFCP when delays in the sending of the information on the part of any of the associate companies took place. The typical delays in the delivery of some of the statistics of competitively sensible information that the statistical system of the AFCP produced did not go beyond few months: two, three, four or at the most five months. At the same time the reclamations made reference to the information exchanged as a "tool" that was useless if produced "out of time" and consequently it would lose its "value". The CNDC concluded that this type of reclamations, conducted so much by the companies associated as by the AFCP, obeyed to the urge of each associate to control other's market share and to fit its commercial decisions to the terms of the agreement, otherwise it is not understandable why delays of two, three or four months would make lose "value" to the mentioned "tool".
- Another element of indirect evidence turned out to be the fact that the information in which the journalistic article was based was provided by an ex-employee of one of the cement companies. This circumstance was considered by the CNDC as an element that gave credibility to the facts narrated in the Book and that ex-employee told to the journalist. On the other hand, although the cementer company where this person worked repeatedly claimed that the Book comprised of a manoeuvre of extortion in his against and that the journalistic publication was slander, at no moment it mentioned that it had initiated legal actions on the matter, as was expected if the version in it contained were false.
- An element of economic evidence consisted of the accreditation of diverse episodes of collusion in prices and other commercial conditions in different localities (city/region), that appeared mentioned in the documentation accompanied by the journalist, who was as well given to him by the mentioned ex-employee.
- The CNDC also proved the existence of meetings between personnel of sales of the companies investigated outside the scope of the AFCP. These meetings are mentioned in the Book and the documentation accompanied by the journalist, who as well received it from the mentioned ex-employee.
- Another element of economic evidence consisted of a predatory action undertaken in concert by the associates against one of the companies associated to force it to add itself to the cartel. This coordinated operation, that according to the Book was called "Operativo Patagonia", consisted of invading the patagonic region, in which the mentioned company was established, with cheaper cement and much more soft conditions of sale that the

effective ones in the rest of the country. This joint invasion was an atypical behaviour as in it participated companies whose plants were located very far away and was initiated in a simultaneous way by the firms. After this incursion the mentioned companies practically disappeared of the zone. At the same time during these years there was a fall in the sales and participation of market of the company attacked in the alluded region that was not explicable either considering its advantages from location.

- Another evidence of economic character turned out to be the evolution of the market shares on a national scale of the cement companies during the investigated period. These market shares behaved in accordance with which the Book indicated like fruit of the agreement. The allocation of market shares on a national scale for each one of the companies constituted the fundamental variable in the agreement during the investigated period. According to the narration contained in the Book, in year 1981 the initial market shares were agreed among the companies, and were subsequently modified in 1983 and 1991. The CNDC considered as a suggestive circumstance - corroborating in that sense the narration contained in Book- the fact that the three audits of invoicing and sales ordered by the AFCP took place very close to the years when according to the Book the market shares were fixed. Throughout all the investigated period the market shares observed indeed adjusted remarkably with the agreed participation.
- Finally, the CNDC considered that the facts independently verified gave credibility to the central aspects of the narrative contained in the Book, even though this was an unsigned document. In that sense it was proved a series of core affirmations contained in this document, as far as which: a) in the system of exchange of information participated personal in the companies of the commercial area, b) the information was processed by the employees of the AFCP, c) the imputed companies, by its side and with similar lists, verified the process, d) the system tracked the sales factory by factory and company by company and the respective participation within the dispatched total of cement, e) of those numbers also took an accumulated ones that was watched in a percentage form, f) there existed an interchange of weekly numbers of sales, g) the interchanges of numbers had confidential or reserved character, h) to ensure that the associate companies did not cheat in the numbers of interchanged sales the Association contracted an external auditor, i) between years 1987 and 1989 it was verified the so called “Operativo Patagonia”, and j) the companies agreed in prices in diverse localities.
- The amount of fines applied to the cement producers and the AFCP was the following: Loma Negra (\$ 138.700.000, U\$S 47,8 millions), Minetti (\$100.100.000, U\$S 34,5 millions), Cementos Avellaneda (\$34.600.000, U\$S 11,9 millions), Cemento San Martín (\$28.400.000, U\$S 9,8 millions) and Petroquímica Comodoro Rivadavia (\$7.300.000, U\$S 2,5 millions), AFCP(\$ 529.289, U\$S 182.513). In total: \$309.629.289.000, U\$S 106,70 millions.
- A recent pronouncement of the Court of Appeals confirmed the decision of the Antitrust Agency in this case with regard to the statute of limitation. The decision on the substantive matters is still pending.