

ARGENTINA

Latin American Competition Forum

This paper describes the situation of the National Commission on Competition in regards to the various topics of discussion that fall under the theme, “Institutional Challenges for the Promotion of Competition,” a theme that will form part of the first session of the Latin American Competition Forum.

By way of introduction, it is worth mentioning that the Law on the Defense of Competition N° 25.156 in effect in Argentina was enacted in 1999. That same law provided for an enforcement authority, the National Tribunal for the Defense of Competition (or TNDC by its Spanish-language acronym), which has not yet been created. Once it is formed, the Tribunal’s decisions will not be amendable by any other entity of the federal government. The decisions made by the National Commission for the Defense of Competition (or CNDC by its Spanish-language acronym) are sent to the appropriate State Secretariat, in this case the Secretariat of Technical Coordination of the Ministry of Economy and Production.

Institutional Independence

In relation to this point, besides the information mentioned above, it should be mentioned that the highest authorities of the CNDC (its president and four members) are nominated directly through a Decree of the National Executive Power in terms similar to the designation of Ministers, Secretaries, and Undersecretaries of the State, which constitutes an institutional situation relatively less independent than the Law intended when it established the TNDC. Its members will be chosen by a Panel¹ responsible for conducting an open competition, from where an examining committee will send to the President a list of those qualified to form part of the Tribunal.

Economic Independence

Currently, the CNDC does not have budgetary autonomy. The monetary resources assigned to it annually come from the budget of the Ministry of Economy and Production. On one hand, it lacks the ability to generate its own financial resources, while Law N°25.156 establishes that the TNDC, besides elaborating its own annual budget projection, can charge fees for the services it provides.

Jurisdictional Overlap with Other Regulatory Agencies

¹ The Law establishes that the members of the Panel will be the Treasurer, the Secretary of Industry, Commerce, and Mining (which today corresponds to the Secretariat of Technical Coordination of the Ministry of Economy and Production), the presidents of the Congressional Commerce commissions, the president of the National Chamber of Commercial Appeals, and the presidents of the National Academy of Law and the National Academy of Economic Sciences.

The powers granted the TNDC by the Law on the Defense of Competition, and currently exercised by the CNDC, cannot be undertaken in any way by other regulatory organizations. These organizations can only act within the regulatory framework of the sector over which they have jurisdiction.

There exist some instances in which it is not entirely clear whether a problem, such as a complaint of a possible anti-competitive practice, falls under the jurisdiction of the Law on the Defense of Competition or the regulatory framework of a specific sector. Once clarified, the intervention of the CNDC is immediate.

One possibility specifically addressed in Law 25.156 is those anti-competitive practices originating in the violation of other regulations (such as laws tax and prevision laws, and standards for regulated sectors of the economy). In these cases the Law on the Defense of Competition is applicable once the violation of other regulations has been declared by administrative act or decisive verdict.

From a more general perspective, other types of situations that occurred recently in Argentina had their origin in the macroeconomic instability that resulted from the abandonment of the convertibility regime and the devaluation of the peso in January 2002. In this context, the Argentine government opened negotiations in certain unregulated sectors in order to control the price increases of certain basic goods such as flammable liquids, GLP, private medical services, and others. Such initiatives had as their legal framework Law N° 25.561, known as the “Public Emergency and Exchange Rate Regime Reform,” in which the temporary regulation of markets identified as inputs and critical goods and services is considered.

Overlap of Functions with Other Regulatory Agencies

As indicated previously, the central question facing the CNDC when it must intervene in a sector of economic activity where another public regulatory agency has authority is establishing whether a problem exists from a competition perspective, as it may relate to possible anti-competitive processes, the analysis of an operation of economic concentration, or a market investigation. There are no limits for applying the Law on the Defense of Competition to regulated sectors of economic activity.

In the case of accusations of possible anti-competitive practices, the CNDC undertakes the corresponding investigations. In recent years, officials have investigated accusations in sectors with specific normative frameworks and regulatory agencies such as telecommunications, medicines (with respect to their approval for entry into the market), shipping services, etc.

Similarly, officials have analyzed numerous activities of economic concentration in sectors such as telecommunications, transport and distribution of electricity, transport of gas, shipping services and infrastructure, airport services, etc. In these and other cases, the CNDC, according to Law 25.156, must solicit the opinion of the corresponding regulatory organization.

In regard to market investigations, which are initiated without the occurrence of a previous complaint, with the effect of establishing whether there exist competition problems, there are no restrictions in bringing them forward. By way of example, some of these investigations have been initiated at the request of regulatory agencies, as in the case of contracts for wellhead sales of gas.

Relations between the Judicial Branch and the Competition Authority

The relations of the CNDC and, in this case, the Secretariat of Technical Coordination (designated by the Spanish acronym SCT) with the judicial branch are basically referred in such a way that the relations of the former can be appealed before the courts. This involves those actions of the CNDC, ordering cessation of or refraining from possible anticompetitive conduct, the rejection of complaints and decisions relating to operations of economic concentration.

What can be observed in regard to this point is that neither the CNDC nor the SCT has special legitimization to take action as parties before the courts and that the decisions made by judges in regard to appeals do not always take into account the elements of judgment from the point of view of the defense of competition.

In this sense, as neither the CNDC nor the SCT has an expediting mechanism to bring technical elements of analysis beyond the judgments that it issues, this constitutes a limitation on adequately basing judicial decisions on the issue of the defense of competition, as the Resolutions of the Secretariat on the decisions issued by the CNDC issues may be cause for appeal.

Ability to Ensure Compliance with the Law and Power of Investigation

Without the risk that the decisions of the CNDC, as indicated, may be appealed before the courts, in practice of the application of the Defense of Competition Law there have not been observed significant difficulties in regard to carrying out decisions.

Nonetheless there exist some specific areas, such as making effective the decisions on the conditioning of operations of economic concentration, in which it would be advisable to form within the organization a group of professionals specialized in these tasks when greater resources are available. The effective completion of those tasks requires a process of discussion with the communicating parties to the operation in question to carry it out in practice, such as permanent supervision until the operation has been carried out in its totality.

An example is the eventual disinvestments called for by the CNDC in certain rulings, with the object of reestablishing conditions of competition in markets where those conditions were negatively affected as a result of a concerted concentration operation.

The operational improvement of the CNDC in this regard would not require any upgrading of the prevailing standards other than to some extent making available some extra professional resources and, on that basis, reorganizing existing resources.

It would be suitable to engage in similar reasoning in regard to the investigatory powers that the Law grants to the competition authority. In effect, these powers are very extensive, but the incorporation of a greater quantity of professionals would permit reorganizing the tasks usually undertaken in the generation of tests related to anticompetitive practices in such a way as to have available, perhaps, a group of technical experts of this type. At the same time, to develop fully the potential of a specialized team it is necessary to carry out methodological work that harmonizes the accounting focus and the economic focus, minimizing the risks that the evidence generated by these means might have a basis for being called into question.

While this type of work is currently being carried out, it tends to be undertaken in the presence of important restrictions, as undertaking tasks that do not allow for extensions of established legal deadlines (e.g., operations of economic concentration) inhibits fully addressing activities such as those mentioned.