Argentina

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1. Legislative development

1.1. 29 March 2007 Bill

On 29 March 2007 Senator Jorge Milton Capitanich submitted to Congress a bill with proposed amendments to the Competition Act 25,156 ("the Act"). The Bill has been subject to criticism, for the following reasons:

(1) The Bill provides that economic concentrations affecting the "national interest" in the utilities, defence, energy or mining sectors, or those sectors having "a substantially high impact on employment or investment in accordance with standards set forth by the enforcement authority, with respect to the level of impact in each sector", may be subject to a second review, not by the competition authorities but by the Ministry of Economy. This new review is to be based on purely political grounds.
(2) While on the one hand the Bill provides for the completion of the steps required for the formation of the new competition agency, the TNDC, created by the Act, on the other it appoints the members of the existing agency, the CNDC, as members of the TNDC for the first tenure, while at the same time providing that the two new members who must be appointed to complete the seven-member TNDC will be appointed by the President of Argentina within 30 days from the passing of the law. This procedure would change the rules for the formation of the TNDC as originally provided for in the Act (election through an independent jury in a competitive process).

The text of the Bill almost completely reproduces the text of the bill that a former Minister of Economy of Argentina had introduced on 17 August 2005 (see below). Compared with the latter bill, the text of the Bill only adds the word "substantially" when referring to the required impact on employment or investment of the concentration, thus somewhat raising the standard for political intervention.

The proposed amendment contained in the Bill is at odds with the idea of an independent competition agency, as was originally intended by the Act. Given that the Act provided that the TNDC would be the only agency with powers over competition issues (today the CNDC issues non-binding reports to the Secretariat, which decides on the matter), the Bill seems to try to maintain the status quo by giving the Government broad discretion to overrule a decision of the TNDC on merger control matters when "national interest" issues so require.

This bill has still not been approved by any of the Houses of Congress.

1.2. 19 July 2006 Bill

This bill proposes to appoint the Consumer Protection Undersecretariat ("the Agency") to a prosecutorial role in all kinds of competition proceedings. The Agency would be granted the power to file complaints and have an active role in all filings submitted before the CNDC, including economic concentrations. Such role includes the capacity not only to submit opinions, documents and information, but most importantly to appeal final administrative decisions, a right which in the context of mergers the courts have so far restricted as applied to consumers, and under the Bill the Agency would be able to exercise its role more easily with the interest of the consumers in mind.

1.3. 5 July 2006 Bill

This bill proposes a potentially significant amendment to the substantive test contained in the Act as applied to anti-competitive practices (Section 1). Presently a conduct is in violation of the Act if it not only restricts competition but also harms "the general economic interest", this term being interpreted by the CNDC in a similar way to the concept of economic efficiency (total surplus). Section 7 of the Act – comprising the substantive test for merger appraisal – uses the same language, but in this case the CNDC has assimilated the term to the concept of consumer surplus.

The Bill penalises acts that restrict competition while harming "... *the economic interest of consumers or the general economic interest*".

Given that the interpretation of the term *general economic interest* offered by the CNDC and the courts includes the concept of "consumer surplus" (either directly or as part of total surplus), the introduction of a specific provision preventing harm to the *economic interest of consumers* might cause some confusion in terminology. During at least the last nine years, Section 1 of the Act has been basically taken to read simply that any act restricting competition (as modern economic theory defines it, that is, affecting consumer or total welfare) violates the Act. The new wording might lead the CNDC or the courts to conclude that a practice that appears on its face to be anti-competitive might infringe the Act if it causes some harm to consumers apart from the one competition rules are intended to sanction or, alternatively or concurrently, that the meaning given to the term *general economic interest* must be changed, to include interests other than total or consumer surplus.

Although the Bill does not seek to amend Section 7 of the Act, it seems inevitable that any inconsistency arising from it will spill over to merger review.

1.4. 17 August 2005 Bill

On 17 August 2005 the Government of Argentina submitted to Congress a bill with proposed amendments to the Competition Act 25,156 ("the Act"). The Bill was subject to criticism similar to that directed at the 29 March 2007 bill discussed above.

The proposed amendment contained in the Bill was considered to demonstrate the Government's opposition to the idea of an independent competition agency, as was intended by the Act. Given that the Act provided that the TNDC would be the only agency with powers over competition issues (today the CNDC issues a non-binding report to the Secretariat, which decides on the matter), the Bill seemed to maintain the status quo by giving the Government

broad discretion to overrule a decision of the TNDC on merger control matters when "national interest" issues so required.

In the end however, the Bill was not enacted into law and, since the statutory terms lapsed, it in fact lost its parliamentary status.

1.5. Advisory Opinions

Advisory Opinions are rendered through a procedure created in order to enable firms to seek advice from the competition authorities as to whether the notification of a given economic concentration is required under the Act or not. This procedure has been implemented since the enactment of the Act, when the CNDC started to render Advisory Opinions *de facto*. The Regulation later provided that the filing of a request for an Advisory Opinion suspended the terms for the notification, but these opinions were not binding on the parties. In July 2006 the former Technical Coordination Secretariat (the then adjudicatory authority) issued Resolution 26/2006, whereby control over this procedure was granted to the adjudicatory authority (currently, the Secretariat of Internal Trade). Resolution 26/2006 provides that the CNDC will issue non-binding opinions in connection with requests for confirmation as to the "reportability" of concentrations, and then the Secretariat will decide on the matter through a binding resolution which can be appealed by the parties (first before the Secretariat and second – if the decision is not reverted – before a Court of Appeals).

2. Case law development

2.1. Pernod Ricard/Allied Domecq

On 14 October 2005 the CNDC recommended the approval of the acquisition of Allied Domecq Plc ("AD") by Pernod Ricard SA ("PR") (through its subsidiary Goals Acquisitions Limited) subject to several disinvestment undertakings.

The relevant market was defined as that for wines, on the one hand, and that for each of the drinks regarding which the parties' activities overlapped (whisky, gin, ginever, vodka, tequila, rum, cognac, brandy/neo-brandy, and liquors), on the other. While in connection with the market segment for wines the CNDC concluded that the transaction would not result in the parties' having a prominent market share, regarding the markets for whisky, gin, vodka and liquors, the CNDC held that the transaction raised competition concerns. Accordingly, the CNDC suggested that the Secretariat impose the following undertakings:

- PR would transfer to a third party the whisky businesses carried out under the "Teachers" and "Old Smuggler" brands.
- The ginever business carried out under the "Bols" brand would be transferred to a company independent and different from AD and PR.
- The parties would refrain from launching new brands in the Argentine gin, vodka and liquor markets, and discontinue certain brands in the same.
- PriceWaterhouseCoopers was appointed as oversight agent.

After PR gradually complied with all undertakings imposed, on 7 August 2007, the CNDC and Secretariat granted final approval of the transaction.

2.2. Pampa Holding

In the Pampa Holding (transfer of the shares of an energy company) case, the members of the CNDC other than its President issued a partially dissenting opinion regarding the powers of the CNDC to require certain information. Although they agreed with the President that the transactions under examination should be approved, they were of the opinion that information requests in areas such as tax, exchange control and environment, which the notifying parties had been required to address at the request of the President of the CNDC, fell outside the scope of a merger control investigation. In this case, the Secretariat approved the concentrations and specifically addressed the matter confirming the aforementioned position.

2.3. Suez SA/Gaz de France SA

This case also showed a diverging opinion between the President of the CNDC and its remaining three members. Differences were more serious than those seen in the Pampa Holding case, given that in this case the President recommended the suspension of the merger review process until Suez, one of the notifying parties, desisted from a claim it had brought against the Argentine Republic before the World Bank's International Centre for Settlement of Investment Disputes. Notwithstanding the foregoing, the transaction was approved without undertakings by the Secretariat.

2.4. Kimberly-Clark/Klabin

In November 2000, in the Kimberly Clark Argentina/Klabin case, the CNDC held that it was appropriate to limit the term of a non-compete clause in a share transfer acquisition not involving the transfer of know-how to two years. On 28 May 2007 the National Appeal Court on Economic Crimes, in a divided opinion, confirmed the CNDC's view in spite of the fact that neither the CNDC nor the Secretariat explained why such restriction over seller had an appreciable impact on competition, as should have been the case under the Act.

2.5. Multicanal SA y otros c/Conadeco

While Section 35 of the Act empowers the TNDC to issue cease-and-desist orders, subsection (m) of Section 24 of the Act states that the TNDC must resort to courts for the issuance of "precautionary measures". In practice, the CNDC (which has been appointed by the Act to apply the Act until the formation of the TNDC) has relied on Section 35 of the Act and not resorted to courts where a cease-and-desist order was requested in procedures concerning prohibited acts. However, given that Section 35 is included in the Chapter of the Act that pertains to anticompetitive practices and not concentrations, the CNDC has so far not issued such cease-and-desist orders in the context of merger control proceedings. Just in case, in re *Multicanal SA y otros c/Conadeco* (a decision issued in the context of the high-profile merger between the two leading cable companies in Argentina), an Appellate Court confirmed a decision by a lower court whereby a precautionary measure was granted, ordering the CNDC to refrain from issuing cease-and-desist orders. The Appellate Court stated that, although Section 35 has repeatedly been relied on by the CNDC, such provision actually refers to the TNDC and such power might not be temporarily awarded to the CNDC. According to this decision, the issuance of a cease-and-desist order may only be done under the terms of Section 24 of the Act, i.e., provided that a court has previously authorised such measure.

2.6. Repsol Yacimientos Petrolíferos Fiscales GLP Envasado en la Ciudad de San Nicolás/Luncheon Tickets s/Apelación Resolución Comisión Nacional de Defensa de la Competencia

Several court decisions have recently dealt with the issue of which is the competent court to hear an appeal filed against a decision by the CNDC or the Secretariat. In March 2006, in re *Repsol Yacimientos Petrolíferos Fiscales GLP Envasado en la Ciudad de San Nicolás*, the Argentina Supreme Court held that the National Appeal Court on Economic Crimes had jurisdiction over the case (a presumed cartel), indirectly declaring the unconstitutionality of the provision of the Regulation that, as regards the city of Buenos Aires, grants jurisdiction to the Federal Civil and Commercial Court. Based on such precedent, one of the three Chambers of the Federal Civil and Commercial Court of the city of Buenos Aires, in re *Luncheon Tickets s/Apelación Resolución Comisión Nacional de Defensa de la Competencia* (an abuse of dominance case), held that the Regulation was unconstitutional, and consequently declared its own lack of jurisdiction, in favour of the National Appeal Court on Economic Crimes. More recently the Supreme Court held in re *Multicanal SA y otros/denuncia infracción a la ley 22.262* that, at least in cases where the effects of the anticompetitive conduct are produced in jurisdictions other than the city of Buenos Aires (one of the provinces), the corresponding Federal provincial court has jurisdiction.

2.7. Repsol YPF

In November 2006 the CNDC issued its opinion as regarded a transaction whereby DAPSA sold oil and gas company YPF a going concern consisting of a single Compressed Natural Gas ("CNG") filling station located in downtown Buenos Aires.

Surprisingly, the CNDC concluded that the transaction infringed Section 7 of the Act and therefore recommended that the Secretariat deny approval, to which the Secretariat agreed through Resolution No. 04/07 dated 22 January 2007.

Key to the decision was a particularly narrow definition of the relevant geographic market and the present high barriers to entry.

As regards the former, although there were involved products other than CNG (e.g. fuel and gasoil), only the market for CNG raised concerns regarding the degree of concentration after the transaction. Consequently, the latter was the market thoroughly scrutinised by the CNDC and its decision was based upon such analysis.

On barriers to entry to the relevant market, the CNDC considered that there was not enough CNG to meet demand, that there was a high degree of uncertainty regarding operation in the natural gas and CNG market, and that barriers to entry were high. Accordingly, the agency concluded that it was unlikely that prospective competitors would achieve a substantial share of the relevant market in the short term.

2.8. Brahma/Quilmes

In 2003 the CNDC approved the economic concentration Brahma/Quilmes with undertakings. Despite non-fulfilment of the same, the concentration was implemented and started to render effects. Consequently, Cervecería Argentina Isenbeck SA, the competitor of the parties to the transaction, filed a claim with the CNDC in order to request a precautionary order instructing the parties to suspend the implementation of the merger. The claim was rejected by the agency and Isenbeck appealed.

On 24 August 2006 a National Court of Appeals granted the order requested by Isenbeck, reversing the resolution issued by the Secretariat of Technical Coordination. In accordance with Section 13 of the Act, the Appeals Court held that the effects of the transaction had to be suspended until the requisite conditions were met. Interestingly, the Court also held that the transaction may partially render effects, but only to the extent necessary for the companies to comply with the applicable conditions, and if so justified by the Competition authorities.

2.9. Arcor/La Campagnola

In August 2006 the CNDC examined the acquisition of Benvenuto SACI ("Benvenuto") by Arcor SAIC ("Arcor"). The CNDC concluded that the transaction violated Section 7 of the Act because it might restrict or distort competition. Accordingly, it recommended that the Secretariat approve it subject to a number of conditions.

The transaction involved horizontal relationships in a number of food markets (namely olive oil, tomato products, marmalades and jellies, vegetable, fish and canned fruits), as well as vertical relations in other markets. Regarding the marmalades and jellies markets, the CNDC found that the transaction would substantially increase the degree of concentration and that, even when entrance was likely in the short term, any such competitors would not dispute the merging parties' market power. In spite of the findings described above, the CNDC finally accepted relatively mild undertakings. Arcor offered to refrain from creating new marmalade or jelly brands for a term of three years and making investments in television advertising for a term of two years. In addition, Arcor offered to submit a quarterly report on the average price per kilo of marmalades and jellies manufactured by Arcor and Benvenuto, for a term of two years. Finally, the CNDC required that the five-year non-compete term included in the purchase agreement be reduced to two years, given that, in the agency's view, the agreement did not include the transfer of know-how.

2.10. Oxígeno Líquido

In the *Medical Oxygen* cartel case, decided on 15 July 2005, the CNDC examined – for the first time so specifically – the effects on competition of an acquisition that did *not* require mandatory notification. The CNDC concluded that Air Liquide's acquisition of competitor Messer, even when part of a foreign-to-foreign transaction, violated the Act, given that Messer, although a small company, was a strong competitor in a market that, in the CNDC's opinion, was cartelised. Consequently, it imposed on Air Liquide a separate fine of Pesos AR $1,185,938 (approximately US $409,000).

2.11. Grupo Clarín SA/Cablevisión SA

On 21 March 2006 the CNDC issued a long-awaited advisory opinion, declaring that the purchase by Grupo Clarín SA of a 20% share in Cablevisión SA was not subject to notification.

Cablevisión is the largest cable-TV company in Argentina, with over 1.2 million subscribers. Grupo Clarín is the largest local media group, with interests in, among other things, the newspaper, radio, internet, open and cable-TV and sports programming businesses. Most notably, it controls Multicanal, the second largest cable company and competitor of Cablevisión. Over the years both companies have been the target of a considerable number of competition law investigations.

Through a series of transactions, Clarín became the indirect owner of 20% in Cablevisión. It then submitted a request for an advisory opinion with the CNDC, in order for the latter to determine whether the transaction required prior clearance.

Clarín pointed to several provisions of the relevant shareholders agreement in support of its view that the transaction entailed no transfer of control, namely that:

- directors appointed by Clarín have to be independent
- Clarín cannot appoint or replace key employees in Cablevisión
- Cablevisión cannot provide sensitive information to a shareholder that is also its competitor
- no special voting majorities apply, with the exception of issues related to the "protection of the investment" of the minority shareholder, such as amendment of by-laws, merger, spin-off, financial indebtedness, etc.
- even when Clarín's vote is required to approve the budget if profits do not reach 28% of Cablevisión's EBITDA, in the last five years Cablevisión has exceeded that percentage.

Three of the five members of the CNDC, following certain past administrative precedents on the interpretation of the term "control" (which triggers the application of the Act's merger control provisions), concluded that no notification was required at that point. They did, however, warn Clarín that any additional change in the current control structure, or the disclosure of Cablevisión's confidential information to one of Clarín's directors, could render the advisory opinion inapplicable and/or trigger the opening of an investigation and the imposition of sanctions.

The remaining two members of the CNDC – in separate opinions – dissented, claiming not only that there were past advisory opinions where the existence of some of the items listed above in support of the exemption were considered as granting some sort of control, but also that an "economic reality" approach had to be taken, and consequently Clarín's position in Cablevisión should not be considered as that of a mere "passive investor".

Third parties have already commenced litigation in connection with the transaction described above. Considering that the Act provides that advisory opinions are not binding, in this case it is unlikely that the CNDC's advisory opinion will provide comfort to the acquirer, in particular given the stark difference of opinions within the CNDC.

2.12. Sanofi/Aventis

The Secretariat of Technical Coordination ("the SCT") recently decided to approve an economic concentration in which a change in control occurred in several local companies belonging to the multinational pharmaceutical company Aventis, as a consequence of the foreign-to-foreign acquisition of Aventis by Sanofi and the subsequent merger of both companies.

Notwithstanding this, the SCT imposed on the merged entity a penalty of AR $832,500 (approximately US $277,500) for late filing of the transaction under the Act. It is worth noting that Section 8 of the Act provides for the obligation to notify certain acquisitions of control of companies within a week of the conclusion of the relevant agreement. The transaction in the case at hand was carried out through a tender offer filed by Sanofi Synthelabo before the Paris, New York and Frankfurt Stock Exchanges. The offer expired on 20 August 2004. According to the administrative resolution, the transaction was notified in Argentina with a delay

of 185 business days. The fine is the highest imposed to date for late filing, both in absolute figures and when considering the daily fine taken into account by the SCT for purposes of the total fine (AR $4,500 vs. AR $3,000 in the *Air Comet SA – SEPI de España* case, where the previously highest fine had been imposed).

When setting the level of the fine in the case, the CNDC – in its recommendation to the SCT – took into account several mitigating and aggravating factors. Mitigating factors included the following circumstances: (i) that the tender offer was a hostile one, thus making access to information about the target company by the acquirer difficult; (ii) that the transaction had to be notified in more than 18 jurisdictions worldwide; and (iii) the difficulty experienced by Sanofi to determine precisely the turnover of the relevant companies within its group. Aggravating factors on the other hand included the following ones: (i) more than eight months had elapsed between closing and notification; (ii) had the transaction been timely notified, the CNDC would have noticed in advance potential anti-competitive effects in the heparin market (a concern which however was addressed as a consequence of the undertakings imposed by foreign competition authorities); and (iii) the turnover of the companies in Argentina was significant, with over AR $270 million in the relevant year.

2.13. Disco/Jumbo

In a recent judicial ruling in the *Disco/Jumbo* case (acquisition of a nationwide supermarket chain by a competitor) the Federal Court of Appeals of Mendoza expressly acknowledged that the CNDC has jurisdiction to carry out the merger control analysis prescribed by the Act, until the TNDC is finally constituted.[1]

Although several courts have already recognised the CNDC's power in this regard, they have generally also acknowledged that its role is an advisory one – as it was under former Competition Act 22,262 – namely a role complemented by a final decision by the Internal Trade Secretariat (the former SCT). This dual role – existent under the former Competition Act 22,262 and expressly continued by the regulation of the Act and the CNDC's and SCT's practice – has been somewhat challenged by this ruling, which contrary to prior decisions of the same court held that the CNDC had the same powers reserved to the to-be-created TNDC, and consequently the power is adjudicatory rather than simply one for carrying out advisory tasks.

However, the Federal Court also interpreted that due to the fact that the Act provides that the TNDC would have seven members and the CNDC has only five, CNDC decisions require unanimity in order to assimilate the CNDC operation as much as possible to that of the TNDC.

Given the recent resignation of one of the voting members of the CNDC and the non-appointment of his replacement as of the present date, it appears that the long-awaited *Disco* merger decision will be delayed even longer. Due to several judicial challenges, the administrative review of this case has become one of the longest ever, stretching over 28 months.

Furthermore, if the criterion of the Federal Court is adopted by other tribunals – something that is doubtful but that remains to be seen – a unanimous CNDC quorum would be required for all decisions based on the Act (not only merger control ones), thus effectively halting the adoption of decisions in this field.

1 The creation of the TNDC was provided for by Section 17 of the Act.

Armenia (Republic of Armenia)

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1. Economic growth

In relation to the economic growth in Armenia, GDP growth rate has been at double-digit levels since 2002; real GDP growth for 2002 was 13.2%, for 2003 14%, for 2004 10.1%, for 2005 13.9%, and for 2006 13.3%.

2. Relevant legislation and statutory standards

The Constitution of the Republic of Armenia was amended in 2005. Article 8(2) of the new version of the Constitution stipulates that the "Republic of Armenia guarantees freedom of economic activity and free economic competition".

The Law of the Republic of Armenia on Protection of Economic Competition (the "Law") provides a first fundamental regulatory framework for competition assessment of economic entities in commodity markets. It prohibits concerted practices and abuse of a dominant position, regulates mergers, and deals with unfair competition and consumer protection issues, as well as state aid. It is largely aligned with the rules of the European Community (EC), in particular with those of the EC Treaty.

3. Decision-making bodies and enforcement authority(ies)

One of the important amendments to the Law, introduced as recently as 22 February 2007, is the granting of the right of inspection to the Commission, which will essentially enhance the powers of the Commission in terms of supervising the competitive environment. This right of inspection is expected to cause new problems for the Commission however. The Commission is not institutionally well developed and problems in relation to the internal distribution of powers of inspection within the Commission and human resources are likely to arise. In general, the establishment and development of the inspection mechanism is a long-term process and requires significant financial resources. Thus, currently the Commission's powers of inspection will be limited only to examining and verifying the basis of documents provided by economic entities as part of their merger notifications.

4. Tasks and functions of the Commission

One of the tasks assigned to the Commission is the provision of an appropriate environment for fair and free competition.

5. Notification requirements and procedures

5.1. Notification thresholds

According to recent amendments to the Law, the criteria for notification have been changed and currently the value of assets serves as a basis for notification of concentrations. The Law states that:

2. Concentration of economic entities, before its practising or participation therein, shall be subject to declaration if:

a) The joint value of assets of the participants was at least 3 billion AMD in the financial year preceding its establishment;
b) Participants operate on the same product market, and the joint value of their assets was at least 1 billion AMD in the financial year preceding its establishment;
c) The value of assets of one of the participants was at least 3 billion AMD in the financial year preceding its establishment;
d) Participants operate on the same product market, and the value of assets of one of them was at least 1 billion AMD in the financial year preceding its establishment.

5.1.1. Asset value

Changing the notification criteria from gross income to asset value is largely explained by the peculiarities of an economy in transition when most undertakings do not fully utilise their capacities and when a concentration between undertakings may significantly enhance their opportunities to increase their share in the market and their influence on the competitive process. Moreover, since consolidation of assets underlies concentration, it was considered expedient in the current stage to regulate concentrations in terms of abuses of dominant position. However, in the authors' view, concentrations should be subject to declaration, taking as a basis for notification the volume of turnover, since this expresses the real potential of the participants in a given commodity market. Indeed, considering the logic behind the amendment made to the notification thresholds in the Law, it should be noted that the change introduced is not without drawbacks. First and foremost, a question arises why the production capacities may not be fully utilised. If the reason is physical and moral depreciation, then the justification for the amendment made to the Law loses its logic. Secondly, when reference is made to assets it may be understood that this concerns only tangible assets; in fact, if this is so, this means that intangible assets will be excluded. On the other hand, if intangible assets are to be included, certain difficulties may arise in the assessment of those assets: among other things, the real value of intangible assets is not presented in the "balance" submitted by the merging parties and it is not necessarily possible to calculate and quantify it. In this respect, it is also necessary to be aware of one hypothetical situation: since tangible assets are presented in the balance by their historic value and since in the current stage of economic development tangible assets of various undertakings are almost physically depreciated, it is possible that the sum of assets of the parties to the concentration does not exceed the established threshold but nonetheless those undertakings have a significant share in the market and, thus, may essentially hinder free competition in the future.

5.1.2. On the given commodity market

Following the recent amendments to the Law, vertical and conglomerate mergers are within the scope of the Commission's review of merger operations.