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**COMPETITION LAW AND STATE-OWNED ENTERPRISES**

**Contribution from Argentina**

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## *Competition Law and State-Owned Enterprises*

### **- Contribution from Argentina<sup>1</sup>-**

#### **1. Introduction**

1. Antitrust cases concerning mergers and anticompetitive behaviour can lead to some particular challenges in situations in which state-owned companies are involved. For example, the role played by the State in these situations can hinder the analysis of the affected market, especially when a state manages companies in different economic sectors. It can also occur that the involved state-owned enterprises have economic objectives which are different from profit maximization (for example, total welfare, consumer surplus or government revenue maximization) or other objectives that do not have an economic end, like national defence, public health or others. Finally, it can also occur that a state controls some firms that operate in places that are not under the jurisdiction of that state, as is the case of state-owned companies that operate abroad.

2. This contribution reviews the experience of the Argentine Competition Commission (CNDC) in cases involving state-owned enterprises. Section 2 is devoted to the very first cases that the CNDC had to analyze in its early years, while the remaining sections are about more recent cases. Special analyses are included concerning cases that involved the state-owned oil company known as YPF, and cases that involved companies controlled by foreign states.

#### **2. Early cases concerning state-owned enterprises**

3. The first Argentine antitrust cases concerning state-owned enterprises were analyzed under the Act N° 22,262, issued in 1980, and they were all about complaints of allegedly anticompetitive conduct. This was due to the fact that such act (which was the competition act applicable until 1999) did not include a merger notification procedure. Those cases, however, were important to define the scope of antitrust law in Argentina, and they established precedents for future cases involving state-owned companies.

4. The first case in which a state-owned enterprise was accused of anticompetitive behaviour was “Acindar v. Fabricaciones Militares” (1981), which was about a complaint of price discrimination and predatory pricing.<sup>2</sup> The accused firm was the steel company Altos Hornos Zapla, which belonged to the state-owned consortium Fabricaciones Militares (which was itself a part of the Argentine Ministry of Defense). At the very beginning of the case, the accused company raised an issue about the jurisdiction of the CNDC to analyze those matters, arguing that competition law was not applicable to state-owned military enterprises, and hinting that, if the complaint were acceptable, then it should

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<sup>1</sup> This contribution has been prepared by Exequiel Romero Gómez and Germán Coloma, with comments from Marina Bidart, Esteban Greco and Lucía Quesada.

<sup>2</sup> Expte. N° 107.435/81 (Cond. 26): “ALTOS HORNOS ZAPLA ACINDAR INDUSTRIA ARGENTINA DEL ACERO S.A.”.

be analyzed using the Military Justice Code. This argument was rejected by the Secretary of Commerce in his preliminary decision concerning this case, establishing that competition law was applicable to all the firms that operated in a market (regardless of their ownership regime), provided that the behaviour under analysis fell within the scope of Act N° 22,262.<sup>3</sup>

5. A similar situation occurred in another early case in which the same complainant (Acindar) accused another state-owned steel company known as Somisa (1982).<sup>4</sup> The case was about a pricing policy that Somisa had towards some of its customers, which were at the same time competitors of Acindar. That policy, that was part of an indirect vertical integration strategy, was supposedly predatory, and it implied linking the wholesale price of an input (steel billet) to the price of the outputs that Somisa's customers elaborated with that input. In its defense, Somisa argued that the Argentine competition act was not applicable to it, since Somisa was not a "profit-seeking commercial company". To sustain this argument, the firm cited the law that created it as a public enterprise (Act N° 12,987), but this claim was rejected by the CNDC (and by the Secretary of Commerce, in the decision that closed the case) because that law did not have any specific antitrust exemption towards Somisa in particular, or towards state-owned enterprises in general.<sup>5</sup>

6. The decisions concerning the applicability of antitrust law to Somisa and Fabricaciones Militares contrasted with other decisions in which the accused party was a government agency that acted as a regulator rather than an economic agent in a market. In "Executive Class v. Fuerza Aérea Argentina" (1995),<sup>6</sup> for example, the CNDC indicated that the complaint made by a private taxi cab company (Executive Class) about the anticompetitiveness of an exclusivity agreement between the Argentine Air Force (which was in charge of the regulation of the Ezeiza International Airport) and another private taxi cab company (Manuel Tienda León), had aspects that exceeded its jurisdiction. The justification used was that the CNDC could not decide about the design of regulatory measures taken by government agencies, although it could make recommendations about the impact of those measures on market competition. The case, therefore, ended with the recommendation that the exclusivity contract should be cancelled, but with no penalties for either the Argentine Air Force or Manuel Tienda León.<sup>7</sup>

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<sup>3</sup> The case actually continued after that preliminary decision by the Secretary of Commerce and was finally dismissed in 1986, because the alleged anticompetitive conduct by Altos Hornos Zapla was deemed to be inexistent (in the sense that it was not a violation to the Argentine competition act).

<sup>4</sup> Expte. N° 65.522/80 (Cond. 1): "SOMISA ACINDAR INDUSTRIA ARGENTINA DEL ACERO S.A.".

<sup>5</sup> The case, nevertheless, ended without a penalty for Somisa, since the CNDC and the Secretary of Commerce understood that its behavior was not a violation of the Argentine competition act.

<sup>6</sup> Expte. N° 613.289/94 (Cond. 344): "EXECUTIVE CLASS S.R.L. c/ FUERZA AEREA ARGENTINA s/AMPARO LEY N° 16986".

<sup>7</sup> This was actually the first case in which the CDNC issued an opinion about its powers to question other State agency's powers, but not the last one. In "MSC v. AGP" (2007), for example, the CNDC denied a petition to oppose a measure of the Argentine ports' agency, declaring the inapplicability of antitrust law to public acts performed in the regular use of a regulator's authority (Mediterranean Shipping Company v. Administración General de Puertos, Decision N° 576, National Commission for the Defense of Competition, 22/10/2007).

7. Under Act N° 25,156 (which was the competition act that was issued in Argentina in 1999), there appeared several new cases involving state-owned enterprises, which included merger review. The general criterion set out by the CNDC was that mergers in which there was participation of state-owned companies as buyers or sellers were subject to its authorization process, as long as they implied a change in the control of a pre-existing firm. The first of those merger cases was “AES/EPEC” (2001), in which a private firm (AES Electricidad) purchased the stock of the state-owned provincial electricity firm EPEC, which operated in the province of Córdoba.<sup>8</sup> That privatization was approved without restrictions, based on the fact that it did not generate any detrimental effects on competition.

8. A more interesting case concerning privatization of a state-owned enterprise was “Banco Macro/Nuevo Banco Suquía” (2004)<sup>9</sup>, in which a private bank (Banco Macro) bought the stock of another bank (Nuevo Banco Suquía) which was previously under the control of the largest Argentine bank (Banco de la Nación Argentina, which happened to be a national state-owned company). This was actually a horizontal merger between two competing entities, but took place in a context in which the seller was a more important competitor (and also a public enterprise). The analysis of the CNDC was that the transaction was not a threat to competition but that it could actually help to promote it, since the buyer was a smaller firm than the seller, and the outcome of the merger was a situation in which the Argentine banking system became less concentrated than before.

9. More recently, an anticompetitive conduct case (“CNDC v. Prisma”, 2017)<sup>10</sup> involved two public banks (Banco de la Nación Argentina and Banco de la Provincia de Buenos Aires) and other twelve private banks. The banks were the shareholders of the firm Prisma, which acted as an agent for the marketing of the Visa credit card. Prisma was investigated for an alleged abuse of dominant position and potential collusive behaviour. The case ended with several remedies. The most important of them was the commitment of the banks to sell their shares in Prisma, which affected the two public banks (and all the others that were involved in this case).

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<sup>8</sup> Expte. N° 064-010662/01 (Conc. 337): “EMPRESA PROVINCIAL DE ENERGIA DE CORDOBA Y AES ELECTRICIDAD DE CORDOBA SCA -EN FORMACION- (CONC. 337) S/NOTIFICACION ART. 8° LEY N° 25156”.

<sup>9</sup> Expte. N° S01: 0363731/2004 (Conc. 486): “FUNDACION BANCO NACION S.A., BANCO NACION ARGENTINA S.A. Y BANCO MACRO BANSUD S.A. S/NOTIFICACION ARTICULO 8° LEY N° 25156 (CONC. 0486)”.

<sup>10</sup> Expte. N° S01:0391366/2016 (Cond. 1613): “INVESTIGACIÓN DE OFICIO CONTRA PRISMA MEDIOS DE PAGO S.A. Y SUS ACCIONISTAS EN LOS TÉRMINOS DEL ART. 1 Y 2, INC. a), f), g), h), j), k) y l) de la Ley 25156 (C.1613)” y Expte. N° S01:0306673/2017 (Cond. 1613 -Inc. 11-): “PRISMA MEDIOS DE PAGO S.A. S/SOLICITUD DE CONFIDENCIALIDAD, en autos principales: INVESTIGACIÓN DE OFICIO CONTRA PRISMA MEDIOS DE PAGO S.A. Y SUS ACCIONISTAS EN LOS TÉRMINOS DEL ART. 1 Y 2, INC. a), f), g), h), j), k) y l) de la Ley 25156 (C.1613)”.

### 3. The YPF cases

10. YPF S.A. is the largest company in Argentina, and its main activities have to do with oil and gas production, and with the refining of oil to produce liquid fuels. For many years it was entirely state-owned, until its majority stock was privatized in 1992. Some years later, in 1998, the remaining minority stock (which was still held by the Argentine national state) was also sold to a private firm (the Spanish company Repsol), which then became the controlling firm of YPF. Finally, in the year 2012, YPF was partially re-nationalized, and because of that it became once again a company under the control of the Argentine state.

11. Due to its size and its importance in the markets in which it operates, YPF has been involved in several antitrust cases, both during its time as a private firm and during its different periods as a public enterprise. In “Ifrisa v. YPF and Ecsal” (1982),<sup>11</sup> for example, YPF was penalized with a fine for a practice of tying the marketing of its fuel products with the marketing of ice, in the context of exclusivity contracts with the gasoline stations that operated within its network in the province of San Juan. Between 1981 and 1992 there were also other cases in which YPF’s behaviour was challenged due to antitrust concerns, but those cases always ended without penalties.<sup>12</sup>

12. During its period as a private firm, YPF was also repeatedly accused of anticompetitive conduct in several situations, and it also took part in different mergers that were analyzed by the CNDC. The most noticeable case was, undoubtedly, “CNDC v. YPF” (1999).<sup>13</sup> This was about price discrimination in the market for liquefied petroleum gas (LPG) and ended with a fine that amounted to more than USD 30 million, which was confirmed by the Argentine Supreme Court in 2002.<sup>14</sup>

13. Since its re-nationalization in 2012, however, the few antitrust complaints against YPF were dismissed.<sup>15</sup> Regarding merger cases, the largest number of them were horizontal but relatively small, and had to do with the exploration and production of oil and natural gas.<sup>16</sup> The largest merger in which YPF took part in recent years, conversely, was mainly vertical (YPF/Metrogas, 2013),<sup>17</sup> and in that transaction the CNDC found three different relationships (between natural gas production and natural gas distribution, between natural

<sup>11</sup> Expte. N° 108613/1981: “YACIMIENTOS PETROLÍFEROS FISCALES Y ECSAL S/ INFRACCIÓN LEY 22.262 (COND. 015)”.

<sup>12</sup> Among these, the following investigations can be mentioned: “Tidem v. YPF and Fram” (1984), “Oscar Bula vs. YPF” (1987), “Fiscalía Nacional de Investigaciones Administrativas vs. YPF, Copetro and Great Lakes” (1992), and “Ernesto Suárez vs. YPF” (1992).

<sup>13</sup> Expte. N° 064-002687/97 (Cond. 314): “YPF S.A. S/INCUMPLIMIENTO DE LA LEY 22.262”.

<sup>14</sup> While it was a private firm, YPF was also involved in a merger case in which it was precluded from acquiring another oil company (Dapsa) in 2007. This is one of the few acquisitions ever blocked by the Argentine antitrust authorities.

<sup>15</sup> See, for example, “Caraganopulos v. Service Trade and YPF” (2017), and “Ifrimen v. YPF and Don Salva” (2017).

<sup>16</sup> See, for example, “YPF/Pluspetrol” (2016), “High Luck/YPF” (2016), “YPF/Mobil” (2017), “YPF/Petrobras” (2017) and “YPF/Eogi” (2018).

<sup>17</sup> Expte. N° S01: 0090166/2013 (C. 1067): “YPF INVERSORA ENERGETICA S.A. Y BG INVERSIONES S.A. S/NOTIFICACION ART. 8 DE LA LEY 25156 (C. 1067)”.

gas production and natural gas marketing, and between natural gas distribution and the marketing of compressed natural gas). All these mergers were cleared without restrictions: in some cases the market shares of the parties were relatively low, while other cases where market shares were higher, turned out to be heavily regulated.<sup>18</sup>

#### 4. Cases involving foreign state-owned enterprises

14. Another point that has been analyzed by the CNDC had to do with actions of foreign state-owned companies which can affect the outcome of a market. In Argentina, the main issue concerning foreign state-owned enterprises had to do with the definition of the economic group that controlled the different companies. This may have an impact to define whether a merger should be notified, and also if a merger has to be considered as horizontal, vertical or conglomerate.

15. This last point has been a topic of discussion in several cases involving state-owned companies from the People's Republic of China, which were acquiring assets in Argentina. As the Argentine competition act has an exemption for notification of acquisitions that imply “first landing” (i.e., when a foreign firm that has no activity in Argentina acquires a company that is present in that country), it is sometimes important to define if several state-owned enterprises from the same country are part of the same economic group or not.

16. In several cases, the CNDC’s opinions focused on the relationship found between a certain Chinese public firm and the so-called “State-Owned Assets Supervision and Administration Commission” (SASAC), which is an entity that controls most of the state-owned Chinese companies that operate in Argentina. The conclusion generally was that all the Chinese companies directly or indirectly controlled by SASAC were part of the same economic group.<sup>19</sup>

17. This standard changed somehow in a recent advisory opinion issued by the CNDC in relationship with the merger of Sygenta and Nidera (2018).<sup>20</sup> In that case, it was

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<sup>18</sup> During the period 2012-2018, YPF was also involved in two conglomerate mergers, which did not present any noticeable competition concern. Those cases were “Petronas/YPF” (2017) and “PBB Polisor/YPF” (2017).

<sup>19</sup> See, for example, Expte. N° S01: 0172045/2016: “CHINA NATIONAL CHEMICAL EQUIPMENT CO. LTD Y MUNICH HOLDINGS II CORPORATION S.A.R.L. S/NOTIFICACION ART. 8 DE LA LEY 25156 (CONC. 1321)”, Expte. N° S01: 0206335/2015: “CHINA NATIONAL TIRE & RUBBER CO. LTD., PIRELLI & CO. S.P.A. S/NOTIFICACION ART. 8 DE LA LEY 25156 (CONC. 1256)”, Expte. N° S01: 0225876/2014: “NOBLE GROUP LIMITED, NOBLE AGRI INTERNATIONAL LIMITED Y COFCO (HONG KONG) LIMITED S/NOTIFICACION ART. 8 DE LA LEY 25156 (CONC. 1170)”, Expte. N° S01: 0536219/2016: “FIRION INVESTMENTS, S.L.U. Y ACS, SERVICIOS Y CONCESIONES, S.L. S/NOTIFICACION ART. 8 DE LA LEY 25156 (CONC. 1397)”, Expte. N° S01: 0225876/2014: “NIDERA CAPITAL B.V., NIDERA B.V. Y COFCO (HONG KONG) LIMITED S/NOTIFICACION ART. 8 DE LA LEY 25156 (CONC. 1178)”, and Expte. N° EX-2017-13246850-APN-DDYME#MP (Conc.1476): “BARRICK CAYMAN (V) LTD, ARGENTINA GOLD (BERMUDA) II LTD Y SHANDONG GOLD MINING (HONG KONG) CO, LIMITED S/NOTIFICACION ART. 8 DE LA LEY 25156 (Conc. 1476)”.

<sup>20</sup> Expte. N° IF-2018-35863066-APN-CNDC#MP (OPI 307): “OPI 307 – SYNGENTA CROP PROTECTION AG Y NIDERA B.V. S/OPINION CONSULTIVA”

considered that the two merging firms, which were already partially controlled by SASAC, were independent economic agents before its merger. This was due to the fact that both companies had separate management, with independent decisions about commercial strategy, budget and business plans, and therefore their merger created a new economic entity that did not previously exist.<sup>21</sup>

## 5. Conclusions

18. The Argentine Competition Authority, since its inception, had to study cases involving state-owned enterprises. In situations of allegedly anticompetitive conduct, several questions arose on how those enterprises should be considered and studied. The conclusion reached was that all companies, irrespective of their ownership regime, are reached by competition law if their acts are of a commercial nature. The same criterion was later applied to merger control, in which we find many cases where public companies had to notify transactions (both when those firms acted as buyers or sellers, or when the acquired firm was a public enterprise itself).

19. The scope of the Argentine competition law also includes foreign state-owned companies that have activity in Argentina. In some past opinions, the criterion used in those cases had been that firms controlled by the same state were not considered independent economic agents. Recently, the CNDC has changed the criterion, such that it now takes into account the management of the firm, so if they have a separate management, with independent decisions about commercial strategy, budget and business plans, their merger is assumed to create a new entity.

20. Although most cases related to public enterprises (both national and foreign) ended without penalties for those enterprises (and without restrictions regarding the mergers in which those firms have been involved), there is at least one example of a state-owned company that had to pay a fine in a case of abuse of dominance and another one where two public banks (and other private banks) had to divest their participation in a firm.<sup>22</sup> Conversely, there are no instances in which the CNDC has had an opinion that implied making any difference between the criteria used to evaluate state-owned company cases and the criteria used to evaluate private company cases.

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<sup>21</sup> The criterion that the CNDC uses now is in line with the one used by the European Commission.

<sup>22</sup> The first was the already mentioned case of “Ifrisa vs. YPF and Ecsal” (1982), in which the state-owned oil company YPF was found responsible of a conduct that involved tying between the marketing of liquid fuels and the marketing of ice. The second case was “CNDC vs Prisma” (2017).

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- Acindar v. Somisa, Decision N°124/1982, Secretary of Commerce, 28/04/1982.
- Banco Nación Argentina and Banco Macro Bansud, Decision N° 44/2005, Secretary of Technical Coordination, 07/03/2005.
- Barrick Gold, Shandong Gold and Minera Argentina Gold, Decision N° 58/2018, Secretary of Commerce, 18/01/2018.
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- CNDC v. Prisma, Decision N° 493/2017, Secretary of Commerce, 26/09/2017.
- CNDC v. YPF, Decision N° 17/1999, Secretary of Industry, Commerce and Mining, 18/04/1999.
- DAPSA and YPF, Decision N° 4/2007, Secretary of Internal Commerce, 22/01/2007.
- Empresa Provincial de Energía de Córdoba and AES Electricidad, Decision N° 95/2001, Secretary of Competition, Deregulation and Consumer Protection, 22/08/2001.
- Ernesto Suarez v. YPF and Ecsal, Decision N° 354/1992, Secretary of Industry and Commerce, 29/09/1992.
- Executive Class v. Fuerza Aérea Argentina, Decision N° 131/1995, Secretary of Commerce and Investments, 27/04/1995.
- Firion and ACS, Decision N° 308/2017, Secretary of Commerce, 18/04/2017.
- Fiscalía Nacional de Investigaciones Administrativas v. YPF, Great Lakes Carbon and Copetro, Decision N° 135/1992, Secretary of Industry and Commerce, 29/04/1992.
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- Ifrimen v. YPF and Don Salva, Decision N° 937/2017, Secretary of Commerce, 18/12/2017.
- Ifrisa v. YPF and Ecsal, Decision N° 106/1982, Secretary of Commerce, 12/04/1982.

- Mediterranean Shipping Company v. AGP, Decision N° 203/2012, Secretary of Internal Commerce, 28/12/2012.
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