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LATIN AMERICAN COMPETITION FORUM

-- Session III: Strategies for Competition Advocacy --

Contribution from Argentina

8-9 September 2010, San José (Costa Rica)

The attached document from Argentina (National Commission for the Defence of Competition) is circulated to the Latin American Competition Forum FOR DISCUSSION under session III of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.

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LATIN AMERICAN COMPETITION FORUM

8-9 September, San José (Costa Rica)

Session III: Strategies for Competition Advocacy

-- CONTRIBUTION FROM ARGENTINA --

Paula Molina -Diego Povoło

Introduction

1. The Defence of Competition Act, Law 25,156, has now been in effect for 10 years.
2. This law was promulgated in order to reinforce the attributes and powers of the enforcement authority as a means of promoting and preserving the general economic interest.
3. With this decade of work behind it, the National Commission for the Defence of Competition (CNDC, *Comisión Nacional de Defensa de la Competencia*) set out to take stock of the goals achieved and the new challenges emerging.
4. These new challenges include the important task of instilling a culture of competition in society as a whole, and not only in specialised spheres, and this is the route we have taken.
5. Consequently, this contribution from Argentina will focus on responding to some of the specific questions suggested so as to describe the circumstances and to orient the reader, before going on to discuss the tools developed or in progress for promoting competition.

1. Role taken by the Agency in Regulatory Reform

6. In the early 1990s Argentina was driven by domestic and external factors alike to undertake a political and economic reform that involved, among other things, the privatisation of public enterprises.

7. This reform process produced new fields for competition policy enforcement: with the sale of enterprises that acted as implicit regulators in their markets, it became necessary to determine whether privatisation had opened the way to the abuse of market power by those enterprises.

8. In addition, new regulatory bodies appeared, the functions of which at that time intersected with the powers of this Commission.

9. As cases evolved, the issue of overlapping powers was addressed more carefully in the privatisations that took place in the latter part of the 1990s, establishing for example a procedure which left it to the regulatory bodies to investigate punishable conduct and to the Commission to assess the evidence and prepare the final report.¹

10. This logical and consistent process produced the need to expand the agency's powers and attributes in order to protect the public interest effectively, and this led to the repeal of Law 22,262 and the approval of Law 25,156 and its supplementary rules.

11. Among other improvements, *ex ante* control was instituted over mergers and acquisitions, the overlapping of powers referred to above was definitively resolved, giving the competition authority absolute jurisdiction over matters relating to the defence of competition in all sectors, promoting competition studies and research, issuing nonbinding opinions on questions relating to competition and market freedom as they concerned laws, regulations, circulars and administrative acts, issuing general or sector-specific recommendations on the modalities of competition in various markets, working with the bodies responsible for the negotiation of treaties, conventions and international agreements relating to competition regulations and policies.

12. In fact, at a time when privatisation was in full swing and the regulatory bodies were being designed and set up, the CNDC lacked sufficient powers to play its *ex ante* oversight role.

13. However, with the 1994 constitutional reform the consumer interest in competition was enshrined in the highest law of the land. Article 42 of the Constitution declares that "consumers and users of goods and services have the right to the protection of their health, safety and economic interests; to adequate and truthful information; to freedom of choice and equitable and decent treatment. The authorities shall provide for the protection of said rights, education for consumption, defence of competition against any kind of market distortions, control over natural and legal monopolies and over the quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations ..."

14. Article 42 of the Constitution contains stipulations on two fronts: the right of users and consumers to have their personal and economic interests protected, and the concomitant duty of the State to guarantee those interests. These guarantees are automatically enforceable and do not depend on regulation, given their nature and the legal route expressly provided in article 43 of the Constitution.

¹ *La transformación económica de la Argentina y la defensa de la competencia* (The economic transformation of Argentina and the defence of competition). <http://mecon.gov.ar/cndc/memorias97>.

2. Comments on Proposed Sector Regulations and on other Government Policies

15. The question of competition advocacy can be examined from two angles, one relating to the competition agency's role in providing advice to the government and the regulatory agencies in the design and implementation of competition-related legislation and regulations, and the second focusing on promoting the training and specialisation of technical staff and instilling a competition culture among the public as a whole.

16. Referring to the first aspect, pursuant to article 24 of Law 25,156, the authority's powers and functions include issuing nonbinding opinions on competition questions in relation to laws, regulations, circulars and administrative acts.

17. The following pro-competition opinions and recommendations are of particular interest:

- Rights to TV broadcasting of national football team games.
- Compressed natural gas.
- Liquefied petroleum gas: subsidies policy.
- Retail oil sales.
- Mobile telephony: recommended regulatory framework.
- As a more recent example we may cite Law 26,522 on audiovisual media services, which regulates such services throughout the national territory. The preamble to that law contains references to the case law of this agency, as well as to investigation of the relevant market.²

18. Given the vast array of markets that CNDC must investigate and analyse, the agency does not always have the technical expertise needed to respond appropriately in light of their specific circumstances.

² Note to Arts. 45, 46 and 48: "This draft text also follows the provisions of Law 25,156 on the defence of competition and the prohibition of the abuse of dominant position, as well as the criteria developed in domestic jurisprudence on the application of that law. It also takes into account the importance of avoiding monopolistic actions or the abuse of dominant position in an area such as that dealt with here. Article 12 (13) of this law gives the authority responsible for enforcing this regime the power to refer to the National Commission for the Defence of Competition any conduct prohibited by law 25,156"; the Note to Arts. 77, 78, 79 and 80: "This text takes as its sources the principles and regulations established by the recent European Directive 65/2007 as well as Law 21/1997 of 3 July regulating broadcasting and retransmission of sporting competitions and events in Spain, and resolutions of the competition tribunals, including the precedents set by the CNDC of Argentina. The existence of exclusive rights negotiated between private parties not only excludes part of the population from full exercise of its right of access but also constitutes a potential market restriction, in that it impedes participation by other players and therefore unreasonably restricts the channels for broadcasting and retransmitting events of this kind. Events of this kind, and sporting events in particular, are very important for the public. It is the State's duty to implement mechanisms so that this right to access does not affect the holding of the event and is not financially detrimental to the entities that must provide the means for these broadcasts or retransmissions. This chapter accordingly gives priority not only to the right to information over any exclusive rights that may exist, but also to guaranteeing that certain types of transmissions will be free. On this point, see the 2007 document "Competition Problems in Television Broadcasting in Argentina", produced by CNDC under the programme of research grants on competition issues in the distribution sector funded by the International Development Research Centre (IDRC) of Canada, and in particular chapter 5 with its comparative examples."

19. Consequently, the agency is empowered by article 24 (a) of Law 25,156 to require documentation and co-operation from private parties and from national, provincial and municipal authorities, as well as consumer protection associations.

20. This power has been used more than once to request evidence and documentation from private parties and consumer protection associations, issuing as required an official notice to supply information, and relying as well on informative statements from specialists.

21. On several occasions, when notified of an economic concentration, the Commission has conducted its own analysis of competition in regulated markets such as telecommunications, transportation, electricity distribution, gas transport, port services and infrastructure, and airport services. In these cases, pursuant to article 16 of Law 25,156, before issuing a resolution the Commission will request the state regulatory body to provide a substantiated opinion on the proposed economic concentration (regarding both its competitive aspect and its regulatory compliance). That request is issued in writing, with reference to the activities in question, and while it is not binding on the regulatory body it is taken as an important point of reference.

22. The CNDC's close and regular interaction with the regulatory bodies has not posed any reputational problems; on the contrary, the Commission enjoys considerable prestige.

23. With respect to the CNDC's credibility with other parts of government we must note that it is reinforced on a daily basis, and other agencies have become increasingly aware of its powers and functions, thanks to the pertinence of its resolutions. We are currently working to develop and strengthen the links established to date.

3. Advocacy with Regional and Municipal Governments

24. Promoting effective competition throughout the country is not an easy task but it clearly adds value to our work.

25. To achieve this objective the agency encourages the negotiation of reciprocal co-operation agreements at the provincial and municipal levels to establish the exchange of technical and bibliographic information of mutual interest, programmes, visits and other forms of professional development, the application of technological resources to issues in common, as well as inter-agency co-operation in national and international forums, such as the agreements signed with the provinces of Formosa, San Juan and Mendoza.

26. The Commission also fields executives or staff members to take part in training events, such as the recent "Consumer Protection Day" in the Province of Buenos Aires, marking the fifth anniversary.

4. Competition Advocacy and Law Enforcement: New Challenges

27. As noted above, our Defence of Competition Act has now been in force for 10 years.

28. This event has been taken as an opportunity to review the work accomplished and the objectives to be achieved.

29. At the risk of repeating ourselves, until recently the application authority had neither the powers nor the structure needed to fulfil its role properly.

30. The budgetary deficit persists, but we have won some battles, large and small.

31. SCI Resolution 70/2008 has restructured certain areas and has included the Investigations and Audit Area in the CNDC organisation chart.
32. We have conducted studies and research in various markets, including liquefied petroleum gas, granulated urea, round iron, pay-TV, fruit-growing in the Province of Rio Negro and others now underway, some of which have resulted in antitrust investigations.
33. This restructuring has meant a considerable increase in the Commission's staff, and turnover has been reduced as a result of improved working conditions.
34. The Investigations and Audit Area has been making a tremendous effort, and with greater resources and more specialised personnel it could do even more.
35. One of our most important efforts has been to promote in-service training for our professional staff.
36. We began with our middle-level managers, and subsequently extended the programme to other staff.
37. As an example we may mention our participation in the international exchange of the FTC, publications of the Ibero-American School of Competition, the exchange programme with the [Brazilian] Ministry of Finance, the programme on regulation and defensive competition offered by the Universidad Torcuato Di Tella, etc.
38. Moving on to the realm of community outreach, the Commission's authorities have taken part in various conferences, courses and training sessions to publicise its role.
39. In recent years we have succeeded in awakening interest in various academic circles, and Commission professionals and staffers have given lectures as part of graduate and judiciary courses.
40. The CNDC has updated its institutional webpage, and all its reports will eventually be published there. The site includes relevant legislation and regulations, important reports, press releases and pro-competition opinions.
41. In line with best international practice, a project is now underway to incorporate a clemency programme into Argentine legislation as a way of pursuing the anti-cartel campaign.
42. The approach taken has been highly participatory, in order to ensure that the draft legislation produced by the Commission carries the approval of both academic and institutional circles.
43. Much remains to be done, in particular for modelling a programme that will explain the benefits of competition to the public in a simple and straightforward manner.
44. Creating public awareness in this way is one of the best tools for preventing anti-competitive practices in the future.
45. We are devoting ourselves to the task of conveying this message through the enforcement authority's resolutions, our press department, and other specific programmes, in the academic world, primary and secondary schools, and the communications media.