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LATIN AMERICAN COMPETITION FORUM

Session I: Competition Issues in Trade Associations

Contribution from Argentina

13-14 Septembre 2011, Bogotá (Colombia)

The attached document from Argentina is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

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LATIN AMERICAN COMPETITION FORUM

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Session I: Competition Issues in Trade Associations

-- CONTRIBUTION FROM ARGENTINA* --

1. Introduction

1. Associations play an important role in every human community because mankind is “sociable”. As Aristotle said, man is a “political animal” (“*zoon politikón*”).
2. This observation provided the philosophical cornerstone for what the Romans recognised as natural human right, namely the “right to associate” or the “right of association”.
3. The development of Roman associations reached its apogee with the creation of the Roman *collegia* (particularly the *collegia opificum*), the true precursors of our modern-day associations.
4. In line with this tendency, Article 14¹ of our *magna carta* guarantees the right to “associate for useful purposes”.
5. It is clear that this right is not absolute, and we find its limitations in the words enshrining it which state that the right will be for “useful purposes”.

* This document is presented by María Paula Molina (National Commission for Advocacy of Competition).

¹ Cf. National Constitution “Section 14. – All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for useful purposes; to profess freely their religion; to teach and to learn.”

6. A useful purpose is one for which the community as a whole is the ultimate beneficiary of the common-good objective pursued by the association, for which the State grants standing as a legally recognised entity.

7. It is worth noting that, to date, our country has no specific legislation which comprehensively regulates civil associations.

2. Definitions

8. In our case, that is to say with regard to the issue of competition advocacy, chambers and business and professional associations are legally recognised entities whose objective is to represent an industrial sector in negotiations and grievances, as well as to seek improvements in the activities in which their members are engaged.

9. While their purposes must be useful, it is also true that occasionally associations often serve as effective, and even necessary, instruments for advancing concerted practices that are collusive in nature (cartels).

10. In Argentina, a high percentage of the cases that have resulted in competition authorities sanctioning horizontal concerted practices have involved chambers or associations (with varying degrees of involvement), given that our competition law, both in the old law and in the current text of Law No. 25.156, Articles 3², 46³, 47⁴, and 48⁵, provides that both individuals and entities that do not comply with the provisions of the law will be subject to sanctions.

11. Furthermore, if an entity is accused, it will be for the conduct of individuals that have acted in its name, and the fine imposed would be applied severally against its directors, managers or administrators.

12. Therefore, chambers, business associations, professional societies, and their members are not beyond the reach of competition law.

² “Article 3 — Subject to this law are all public and private physical and juridical persons, for-profit or not-for-profit, that conduct economic activities in all or part of the national territory, and those that conduct economic activities outside of the country, to the extent that their actions, activities or agreements could produce effects in the national market. For the purposes of this law, to determine the true nature of the actions or conducts and agreements, it will address the economic situations effectively conducted, pursued or established.”

³ “Article 46 — Physical or juridical persons that do not comply with the provisions of this law will be subject to the following sanctions...”

⁴ “Article 47 —Juridical persons can be held accountable solely for the conduct of the physical persons that have acted as human beings, having been aided and benefitted by the existence of the juridical person, even when the act that would have provided the grounds for representation is ineffective.”

⁵ “Article 48 —When the infringements provided in this law have been committed by a juridical person, the fine shall be imposed severally against the directors, managers, administrators, union leaders or members of the Oversight Council, heads or legal representatives of said juridical person that by its action or omission in performing its duties to control, supervise or oversee contributed, encouraged or allowed the commission of the infringement. In such a case, a supplemental sanction that prohibits the juridical person and the natural persons listed in the foregoing paragraph from conducting business for a period of from one to ten years may be imposed.

13. Before looking at the administrative law relating to this issue and the role associations have played in the aforementioned practices, we must specify the collusive practices that Article 1⁶ of Law No. 25,156 broadly defines as "...acts or conduct... that seek to limit, restrict, falsify or distort competition..." and those that are more specifically defined in Article 2⁷, items a, b, c, d, e, g and h.

14. Also, though Argentine law requires that in order for anti-competitive conduct to be punishable it must cause real or potential injury to the overall economic interest, which in practice is interpreted as a requirement for application of the rule of reason to all anti-competitive conduct, it is clear that the current trend in case law is to punish all concerted horizontal practices that have been sufficiently proven.

15. Before discussing a few emblematic cases that will serve as examples of what is mentioned above, we would like to make a short digression to address an issue that is certainly not unfamiliar to any competition agency.

16. Knowledge of and changes to antitrust law have led to the development of highly sophisticated collusive practices that make it highly unlikely that a clear-cut cartel with a documented pact of the type that used to exist in the past could now be uncovered.

17. Accordingly, competition authorities must now tackle tacit collusion in one of the following two ways: (a) by controlling mergers so as to prevent the consolidation of tacit collusion and (b) by eliminating commercial practices that enable tacit collusion, prominent among which is the sharing of competitively sensitive information.

18. As concerns prior control of economic concentration, this was addressed by Res. 164/2001 ("Guidelines for economic concentration control"), when it states that "...When, as a consequence of concentration, the proper conditions exist for businesses engaged in the operation to enjoy, in coordination with other businesses in the market, the potential to exercise market power. Concentration does not necessarily allow businesses to unilaterally increase prices in the relevant market. However, by reducing the number of competing companies it becomes easier to fix prices in the relevant market. The (tacit or express) fixing of prices depends on the specific conditions of each market. Therefore, in each concentration analysis must be conducted of the conditions of the relevant market that would enable the design and successful implementation of price-fixing strategies..."

⁶ "Article 1 — Any act or conduct related to the production and exchange of goods and services that have as object or effect to limit, restrict, falsify or distort competition or market access, or that constitute an abuse of a dominant market position in such a manner that it could result in injury to the general economic interest is prohibited and will be sanctioned according to the rules of this law."

⁷ "Article 2 — The following conducts, inter alia, to the extent that they fit the hypothesis of Article 1, constitute anti-competitive practices: a) fixing, concerting or manipulating, directly or indirectly, the sale or purchase price of goods or services supplied or demanded by the market, as well as the sharing of information for that purpose or effect; b) establishing obligations to produce, process, distribute or commercialise only a restricted or limited quantity of goods, to render a restricted or limited number, volume or frequency of services; c) horizontally allocating zones, markets, clients, and supply sources; d) concerting or co-ordinating competitive bidding positions; e) concerting to limit or control the technical development or investment aimed at the production and commercialisation of goods and services; ... g) fixing, imposing or practicing, directly or indirectly, in agreement with competitors or individually, any form of price or conditions for the purchase or sale of goods, the rendering of services or production; h) regulating markets of goods and services through agreements to limit or control research and technological development, production of goods or rendering of services, or hindering investments aimed at the production of goods or services and their distribution..."

3. Administrative case law

3.1 Various markets

- “Silos Areneros de Buenos Aires vs. Arenera Argentina et al.” (1986)

In this case, sand companies in the Buenos Aires region colluded to fix production quotas. The price-fixing was supported by the maritime shipping unions which transported the sand.

The quotas were set in a committee established for that purpose, made up of representatives of the sand companies and the unions.

The role of the trade association was to ensure that members of the cartel complied with the agreed quotas. In exchange for performing that task, the trade association secured a promise that a certain level of employment and wages would be maintained in the sand industry.

The investigation revealed that the number of voyages made by sand ships was reduced as a result of the agreement, which increased the price of sand.

Both the sand companies and the trade association were punished by sanctions that were upheld by the courts.

One of the outcomes of this investigation was that the *Comisión Nacional de Defensa de la Competencia* [National Commission for Advocacy of Competition] (CNDC) opened parallel investigations into the sand market in various regions of the country and uncovered other identical cases.⁸

- “LARA GAS et al. vs. AGIP et al.” (1991)

In this case, the business chamber, namely, the *Cámara de Empresas Argentinas de Gas Licuado* [Argentine Chamber for Liquefied Gas Companies] (CEAGL), was a contributing factor in forming a cartel.

Distributors of liquefied petroleum gas (LPG), which controlled an 85% market share, colluded to fix both prices and customer allocations.

CEAGL played a role by organising the information needed to enforce compliance with the agreement and creating a container clearing system which enabled it to allocate customers. Both the colluding companies and the chamber were punished by sanctions that were upheld by the courts.

One of the arguments used by the Supreme Court of Justice of Argentina in this case was that, although it had not been proved that anti-competitive practices had either increased prices or reduced quantities, the pricing agreements and market allocations were inherently capable of affecting the general economic interest, even if that impact were only a potential one.

⁸ e.g., “*CNDC vs. Areneras del Litoral et al.*” (1988). In this case one of the parties provided written evidence of the cartel, collaborating with the investigation. Therefore, despite the absence of a clemency programme, the collaborating company was not sanctioned, “*Miguel Altamirano vs. Arenera de la Cruz et al.*” (1991).

- “Lina Tripicchio vs. Centro de Industriales Panaderos de Lanús” (1997)

In this case the bakers’ association suggested a price list for the sale of bread. In particular, these prices were higher than those in surrounding areas.

The association monitored compliance with its suggested prices and “punished” bakeries that did not follow its suggestion by installing a street-vending outlet nearby offering lower prices, thereby steering customers toward other bakeries that were engaging in the practice.

The Chamber escaped punishment because it entered into a commitment with [CNDC] to cease fixing prices and to prohibit its members from committing further violations of competition law.

- “CNDC vs. Cámara Argentina de Empresas de Seguridad de Investigación (CAESI)” (1998)

In this case the subject was able to include a clause in its collective labour agreement that prohibited its members from giving quotes at prices lower than the indices for the cost of providing security services, which in itself would have not been a problem. However, the Chamber is also the entity that publishes those costs, which are derived from data provided by its own members.

Again, and with the *ex officio* investigation having found that the Chamber’s actions harmed the general economic interest, [the Chamber] entered into a commitment with [CNDC] in which it undertook to desist from using the agreement clause that was the subject of the prosecution.

- “CNDC vs. Loma Negra S.A. et al.” (2005)

For many reasons, this was a landmark case for CNDC administrative case law.

This case clearly demonstrates the evolution and sophistication of horizontal collusive practices over time and how far an association can stray from its ultimate objectives. It also shows clearly that the sharing of sensitive information, from the standpoint of competition advocacy, causes the same injury to the general economic interest as does an explicit agreement. The case also resulted in the highest fine ever imposed by this body.

The *ex officio* investigation was opened on 31 August 1999 following publication of a news article on 26 August of that same year, in which the magazine *Veintidós* made reference to the existence of global collusion in the Portland cement industry, which included market allocation, a conspiracy to block the entry of new competitors, price fixing, sharing information about monthly and weekly dispatches and other cartel conduct in which the cement companies and their associative body, the *Asociación de Fabricantes de Cementos Portland* [Portland Cement Manufacturers Association] (AFCP) were engaged.

According to the article, there was evidence that this conduct had been taking place since July 1981 throughout the country.

Taken together, the investigated facts, which were inextricably interrelated, pointed to numerous infringements of competition law, such as setting quotas and market share allocations on a nationwide scale, monitoring via the AFCP statistical system, and the sharing among cement companies of competitively sensitive information, for which the AFCP statistical system served as a conduit.

First, this sharing of competitively sensitive information violated the law by the fact that it was an essential and integral component in setting quotas and market share allocations.

Second, a concerted act to share competitively sensitive information among competitors is, on its own, illegal conduct, in that the sharing of this type of information, which reveals the competitive behaviour of each company in a market as highly concentrated as the cement market, distorts competition by facilitating or enabling co-ordination or tacit collusion by the companies.

During the course of the investigation many of the facts were proven, such as: competitively sensitive information contained from the AFCP statistical system was shared; audits were conducted on AFCP's invoices and dispatches to specialised companies; personnel from the commercial or sales divisions of the companies involved had intervened in the sharing of information through AFCP; complaints had been registered by companies and the AFCP when one or some of the associated companies delayed or fell behind in providing information; AFCP treated the processing of weekly dispatches as ultra-confidential items, which was also the case with the weekly distribution of those dispatches. Additional proven facts included: that the cement companies communicated through AFCP and colluded in the use of private strategic information; that the competitively sensitive information shared among the cement companies through AFCP was confidential in nature; that the cement companies and the AFCP paid particularly close attention, throughout the investigation, to refining the system for sharing competitively sensitive information, so as to ensure that the individual information from each company could be shared in the most systematic, most detailed, quickest, most streamlined, and most reliable manner possible.

As a result, *Loma Negra* was fined USD 138,700,000, *Minetti* was fined USD 100,100,000, *Cementos Avellaneda* was fined USD 34,600,000, *PCR* was fined USD 7,300,000, and *Cemento San Martín* was fined USD 28,500,000 (USD 2.85 was equal to USD 1.00 at the time the fines were imposed).

In AFCP's case, the fine imposed was the maximum provided under the law because the entity had played an indispensable role in the conduct related to fixing quotas and allocating markets, as well as in the conduct of sharing competitively sensitive information. Furthermore, AFCP worked systematically and deliberately to refine its statistical system as a mechanism for support and control of quota and market allocations. AFCP also knew perfectly well that the actions that comprised its concerted anti-competitive behaviours were illegal, therefore it treated the documentation and competitively sensitive information generated by its statistical system as confidential and restricted information.

The findings report also advised that AFCP be ordered to henceforth abstain from distributing among its members any competitively sensitive information relating to the production, importing and shipping of Portland cement by its members, and that it take all security measures necessary to ensure that the individual information about each company be accessible solely to AFCP personnel in charge of managing the statistical system, who should hold such information in strict confidentiality.

- *Estaciones de Servicio de GNC (ROSARIO) re: Violation of Law 25.156' (2010)*

This was one of the most recent cases to be sanctioned by Argentinean competition authorities. In this case, the plaintiff is an association. The defendant comprises numerous service stations that sell compressed natural gas (CNG) in the city of Rosario, a company that sells fuel and the federation that represents sellers in the country's interior region.

In other words, this case provides an example of the two roles an association can play, either as advocate and protector of free competition or as its detractor, straying from the purpose for which the association was formed.

The complaint states that on 13 August 2002, 31 of the 34 service stations that sell compressed natural gas in the city of Rosario, Santa Fe Province, raised their prices for sales to the public.

The evidence on file confirms that overall prices rose at most of the accused service stations, the outcome of which was an identical final price at all stations, and that these prices were not the result of decisions taken independently by each station, but rather the result of a concerted agreement.

In other words, the investigation proved the existence of an anti-competitive strategy adopted by the indicted companies and verified not only that prices had increased simultaneously (price parallelism). The investigation also determined that the companies had behaved in the same manner, charging the same prices, after having previously charged differing prices.

The indicted federation functioned as organiser and facilitator of communications and co-ordination among the colluding companies, having suggested this CNG price increase and having invited its members to go along with the suggestion.

3.2 *Markets of Health Service Providers*

19. This market will be treated separately, given that it contains a number of characteristics that differentiate it from other markets.

20. A number of factors, both intrinsic and extrinsic, oblige the State to play an active role in providing and regulating health services. However, this does not diminish the capacity of competitive mechanisms to enhance the functionality of these markets by promoting values such as the efficient use of resources, continuous improvement in the quality of services, and the necessary innovation of those services.

21. In seeking to achieve a sustainable equation in these markets, entities have arisen that play intermediary roles between the original providers of a service and its end users. These usually take the form of “provider associations” (for example, professional associations, trade groups and the like) and “administrators of health care funds” (for example, social programmes, prepaid medication and the like).

22. Because provider associations are at the heart of supply in the health services market, over time competition-related problems have been detected.

23. Perhaps the most important and harmful of these problems occurs when an association acts as the vehicle for engaging in concerted anti-competitive practices to fix prices or quotas, allocate markets, or when it acts as the enforcer of these practices.

24. The National Commission for Advocacy of Competition, both during the period when Law 22.262 was in force as well as under the current law, has investigated numerous cases that involve associations of health service providers and administrators of health service funds.

25. The behaviours investigated fall into two major groups: a) fixing of prices, fees, and professional honoraria⁹, and b) the imposition of exclusivity clauses in health service contracts.¹⁰

⁹ “CNDC vs. Colegio Oficial de Farmaceuticos y Bioquimicos de la capital federal” (1982), “CNDC vs. Asociación Argentina de Anestesiología” (1983), “Camara Argentina de Farmacias vs. Colegio Oficial de Farmaceuticos y Bioquimicos de la CAP. FED” (1987), “CNDC vs. Asociacion Rosarina de Anestesiología” (1988), “Instituto de Seguridad Social de Neuquen vs. Colegio Medico de Neuquen” (1988), “INOS vs. Asociacion Urologica de Rosario” (1988), “INOS vs. Circulo Medico de Tandil” (1995).

26. Furthermore, a series of generally applicable interpretive principles applied to these types of cases have established that professional associations are not excluded from the effects of competition law and that a patient's free election of a health service provider cannot be invoked as justification for those providers to engage in collusive conduct in price fixing or hindering contracts between individual providers and users. Last but not least, these interpretive principles establish that the fact that an association of providers is a non-profit entity does not mean its actions cannot affect the general economic interest.

27. We should note that for several years now there has been a decrease in price-fixing cases, which shows that market players have become conscientious of their actions that harm the general economic interest.

3. Final considerations

28. Associations play the role of protagonists in the development of society; but as we have seen, this role can also be that of the "villain".

29. We have stated that mankind is sociable, but we must not lose sight of the fact that on rare occasions companies and/or business leaders come together solely because of a social interest.

30. It is important that the sensitive information each of them handles be unknown to his/her competitors, given that uncertainty of a rival's commercial activities is what most intensifies competitiveness in the market.

31. The elimination of uncertainty regarding certain competitive variables, such as prices or quantities, helps companies reduce rivalry.

32. It is in the heart of these associations, or through them, that this information can be revealed, which is why every competition agency must pay special attention to their actions.

33. The National Commission for Advocacy of Competition is not unaware of this situation. For this reason it periodically presents talks at business and professional associations, underscoring the role associations and their members must play in keeping their business aligned with the law.

34. Lastly, understanding that the task it has begun does not go far enough, [CNDC] is engaged in developing general guidelines on this issue.

¹⁰ *"Staff Medico vs. FEMEBA"* (1982), *"Camara Argentina de Farmacias vs. Colegio de Farmaceuticos de la Provincia de buenos Aires"* (1984), *"Asociacion de Clinicas, Sanatorios y Hospitales Privados de la Provincia de Cordoba vs. INSSJYP, et al."* (1988), *"Famia s.a y Okane vs. Colegio Farmaceutico de la Provincia de Santa Fe et al."* (1989), *"Grupo de Medicos vs. Circuo Medico de Misiones Alto Parana"* (1992), *"Grupo de Medicos vs. Circulo Medico de Misiones Zona Sur"* (1995), *"Policlinico El Dorado y Sanatorio Monte Carlo vs. OSPRERA"* (1997).