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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
by Argentina****5 December 2017**

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More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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1. Introduction

1. Safe harbours and legal presumptions are useful tools that competition agencies use to make a more efficient use of its scarce resources. In particular, in the analysis of mergers and acquisitions, safe harbours are used as a first screening device to decide whether an operation is worth analyzing by the competition agency. The types of safe harbours used by Argentina's competition authority in merger control are the subject of this contribution. On the contrary, safe harbours and legal presumptions for anticompetitive practices are not discussed.

2. Argentina's Competition Act No. 25,156 (LDC) in its article 8 establishes the obligation to notify to the competition authority all operations of mergers and/or acquisitions that are above the following thresholds:

- The total turnover of the affected companies is above ARS 200 million (USD 11.4 million) in Argentina;² and
- The value of the transferred assets, shares or rights exceeds ARS 20 million (USD 1.4 million); or
- The acquiring company has carried out operations in excess of ARS 60 million (USD 4.2 million) in the last three years.

3. These thresholds work as absolute safe harbours, in the sense that they are not rebuttable. Consequently, if said thresholds are not met, there shall be no obligation to notify the concentration before Argentina's Antitrust Authority. The LDC also includes other safe harbours for those economic concentrations (as defined under article 6),³ that even when the abovementioned thresholds are met, shall be exempted from the obligation to notify, which can be classified in two groups:

- Operations involving companies which conduct economic activities outside Argentina, whenever said activities shall not have effects in the Argentine market (article 3 of the LDC);
- Exemptions to the obligation to notify (article 10 of the LDC).

¹ This contribution was prepared by Lucía Quesada, Federico Volujewicz and Eduardo Aracil and received comments from Esteban Greco and Eduardo Stordeur. Contribution from the National Commission for the Defense of Competition, Argentina.

² As established in article 8 of the LDC, total turnover is understood as the amounts resulting from the sale of products and the provision of services performed by the affected companies during the last year corresponding to their ordinary activities, after deduction of the discounts on sales, as well as value added tax and other taxes directly related to turnover.

³ Under article 6 of the LDC, a concentration could be achieved either through merger of companies; bulk transfers; acquisition of ownership of interest in a legal entity that amounts to legal control or enables the purchaser to obtain substantial influence thereof; or by any legal act that either transfers the assets of a business or grants a "substantial" influence or "determining influence" in the government and administration of the business.

4. Finally, the National Commission for the Defense of Competition (CNDC) has established internal (rebuttable) safe harbours for merger control in order to better allocate its resources.

2. Companies with activities outside Argentina

5. Article 3 of the LDC establishes that companies with no activities in Argentina would be under de scope of the law “to the extent their actions, activities or agreement have effects on the domestic market.”

6. In order to determine whether an operation involving companies that perform their business activities outside Argentina has effects on the domestic market, CNDC’s case law established that substantiality, frequency and predictability of exports to Argentina shall be taken into account.⁴ Moreover, the CNDC has recently clarified that the three conditions together (substantiality, frequency and predictability) should be verified for the operation to generate “substantial effects” in the domestic market.⁵ Whenever one of the conditions is not satisfied, an agreement between companies outside Argentina shall not be subject to the obligation stipulated under article 8 of the LDC.

7. Finally, to determine whether local sales shall be relevant or not, CNDC’s case law shall also be observed. When delivering Advisory Opinion⁶ No. 44 and 75⁷, among others the CNDC established that exports of the involved companies to Argentina, representing less than 15% of the local consumption in the relevant market, shall not have substantial effects on the local product market. On the other hand, when delivering Advisory Opinion No. 65,⁸ the CNDC established that exports to Argentina representing 21% and 27% of the markets involved in the transaction shall be deemed substantial.

8. Similar quantitative criteria have been recently confirmed by the CNDC. Indeed, in the acquisition of a Dutch company by an Austrian company in the market of flexible packaging, the CNDC stated that frequent and predictable exports accounting for less than 9% of the market should not be deemed substantial.⁹ On the contrary, in an operation

⁴ File No. S01:0302829/2012, entitled “ANHEUSER-BUSCH INBEV N.V./S.A. Y GRUPO MODELO S.A.B. DE C.V. S/ CONSULTA INTERPRETACIÓN LEY 25,156 (OPI No. 224) CNDC Opinion 1016 dated September 9, 2013 and Resolution 102 of the Secretary of Domestic Trade dated September 16, 2013 OPI No. 44 dated May 23, 2000 (Productos Roche S.A.Q - I, Hoffmann - La Roche AG); File No. S01:0036395/2003 (OPI No 68) dated March 20, 2003 (CATERINA HOLDING S.A y HARTFORD LIFE INTERNACIONAL, LTD); among others.

⁵ File No. S01:0067864/2015, entitled “CONSTANTINOPLE ACQUISITION GMBH y CP GROUP 1 B.V. S/ CONSULTA INTERPRETACIÓN LEY 25.156, (OPI 256)”, CNDC Opinion 1303 dated 22 July 2016 and Resolution 189 dated 28 July 2016 of the Secretary of Commerce.

⁶ As stipulated on Resolution No. 26/2006 the parties shall request an advisory opinion from Argentina’s Antitrust Authority, which will decide whether an operation shall be notified or not.

⁷ OPI No. 44 dated May 23, 2000 (Productos Roche S.A.Q - I, Hoffmann - La Roche AG) and File No. S01:0172831/2003 (OPI No. 75) dated September 18, 2003 CNDC Opinion 179 (GE COMPAÑÍA FINANCIERA S.A.- TRANSAMERICA FINANCE CORPORATION)

⁸ OPI No. 65 dated September 25, 2000 (International Paper Company - Champion International Corporation)

⁹ File No. S01:0067864/2015, entitled “CONSTANTINOPLE ACQUISITION GMBH y CP GROUP 1 B.V. S/ CONSULTA INTERPRETACIÓN LEY 25.156, (OPI 256)”, CNDC Opinion 1303 dated 22 July 2016 and Resolution 189 dated 28 July 2016 of the Secretary of Commerce.

involving two companies in Brazil in the steel market, the CNDC concluded that frequent and predictable exports accounting for more than 25% of total imports should be considered substantial.¹⁰

3. Exemptions to the obligation to notify

9. According to article 10 of the LDC, some operations that would be notifiable under article 8 are exempted from notification because they are presumed not to restrict competition, whenever:

- The purchaser already holds more than 50% of the shares of the acquired company;
- The acquisition comprises bonds, debentures, certificates of indebtedness or shares without voting rights;
- The acquisition of a domestic company by a foreign company that does not own any shares or assets of another domestic company;
- The acquisition of a business under liquidation, which has not conducted business during at least the latest year; or
- The amount of the transaction or the assets acquired does not exceed ARS 20 million (about USD 1.14 million),¹¹ unless there has been more than one acquisition in the preceding 12 months and their total value exceeds that amount, or the value of the total of such acquisitions in the preceding 36 months exceeds ARS 60 million (USD 3.4 million). The transactions subject to the 12 and 36 months accumulations must have occurred in the same market.

10. None of these exemptions is rebuttable. In particular, despite the fact that it is not always true that more than 50% ownership provides control, the law presumes that there is no change in control if the buyer already owns more than 50% of the target company and, therefore, exempts the operation from the obligation to notify.¹²

¹⁰ File No. S01:00534686/2016 entitled “GERDAU S.A., SUMITOMO CORPORATION Y THE JAPAN STEEL WORKS, LTD S/ CONSULTA INTERPRETACIÓN LEY N° 25.156 (OPI N° 281)”, CNDC Opinion 153 dated 18 July 2017 and Resolution 583 dated 25 July 2017 of the Secretary of Commerce.

¹¹ For the case of international operations, the value of the transaction is not an appropriate indicator because it includes assets and businesses outside Argentina. In this case, the CNDC estimates the value of the transaction *in Argentina* by multiplying the value of the transaction by a factor that measures sales in Argentina of the relevant products relative to global sales. See File S01:583732/2016 entitled “PFIZER INC, ASTRAZENECA PLC Y ASTRAZENECA S.A. S/ CONSULTA INTERPRETACIÓN LEY N° 25156 (OPI N° 284)”, CNDC Opinion 185 dated 28 August 2017 and Resolution 671 of the Secretary of Commerce dated 4 September 2017.

¹² The CNDC used to interpret that this exemption was rebuttable when a change in control could be proved [File S01:0457519/2011 entitled “ETEX GROUP NV/SA Y LAFARGE GYPSUM INTERNATIONAL S.A.S S/CONSULTA INTERPRETACIÓN LEY N° 25.156 (OPI N° 213) CNDC Opinion 943 dated August 17, 2012 and Resolution 80 dated August 27, 2012 of the Secretary of Commerce]. However, recent developments established that the exception exemption is not rebuttable.

4. Fast track procedure for merger control

11. Notification thresholds work as a first screening device to discriminate between operations that could restrict competition from those whose impact would be limited. Current thresholds, however, are very low because they have been set in Argentine pesos and have not been updated since 1999.¹³ For this reason, the CNDC started in 2017 an internal fast-track procedure for merger control. This procedure includes a number of quantitative indicators aiming at identifying operations with a low probability to restrict competition, which are presumed to be legal. In particular, for operations with a low level of impact on competition, the CNDC will use a simplified evaluation procedure. In such cases, the analysis will be limited to classifying operations according to whether they are horizontal, vertical or conglomerate, and eventually to measuring the market shares of the companies involved.

12. Following this approach, an M&A operation would be analysed under the fast-track procedure if it satisfies the following conditions:

- Conglomerate operations;
- Changes from joint control to exclusive control
- In the case of horizontal operations:
 - Joint market shares of less than 20%, or
 - Joint market shares greater than 20% but less than 50% and an HHI variation lower than 150 points;
- For vertical operations
 - Market share of less than 30% in the related markets

13. None of these safe harbours is absolute. On the contrary, they may be rebutted when certain conditions are met. In that case, the operations would go through the ordinary procedure. The conditions for rebuttal are the following:

- The proposed operation eliminates a “maverick”,¹⁴
- The proposed operation combines two important innovative companies;
- There are signs that the operation could impede the expansion of competitors;
- A firm is created that can serve as a coordinator for competitors;
- There are crossed minority shareholdings;
- Market shares cannot be determined exactly;
- The operation increases market power due to the combination of technological, financial or other resources;
- Firms compete in closely related markets with shares above 30%;
- At the enforcement authority’s discretion, when it considers that the economic reality requires more information or analysis to determine the possible effects.

14. Although the fast track procedure has only started to be implemented in June 2017, the CNDC has already approved some fast track operations.

¹³ The inflation rate in Argentina during this period has been above 1300% and the exchange rate relative to the US dollar has increased from ARS 1/USD in 1999 to ARS 17.6/USD as of 31 October 2017.

¹⁴ A maverick is a vigorous and effective competitor that is characterized by acting in an unpredictable manner and by providing benefits to consumers beyond their immediate supply, forcing other suppliers to provide better products and higher consumer surplus.

15. For example, the acquisition of LUMILEDS HOLDING B.V. by APOLLO GLOBAL MANAGEMENT LLC.¹⁵ The buyer was a financial company focused on private equity investments that also controls other companies from different commercial activities (such as tourism and entertainment). The main activity of the target company, on the other hand, is the manufacturing of conventional and LED lighting products. Therefore, the merger was classified by CNDC as a conglomerate operation and, consequently, was analysed through the fast track procedure.

16. A second case is the acquisition of NEOKEI by SONY PICTURES, through the company IMS, a provider of advisory services for online communications, marketing and related activities.¹⁶ Before this operation, control over NEOKEI was jointly held by SONY PICTURES itself and BOHEMIA PLUS INC. Given that the operation concerned a change from joint control to exclusive control, the CNDC concluded that the concentration levels in the market would not be altered and, therefore, the operation was treated under the fast track procedure.

17. Finally, there have been certain cases in which the exceptions to fast track procedures have been applied. In one such case (currently under analysis by CNDC), the market shares cannot be precisely defined without an in-depth analysis.¹⁷ The reason is that the operation involves a market in which the CNDC's jurisprudence has defined relevant regional geographic markets as opposed to one national geographic market. In this case, a horizontal operation that, at first glance (if the geographic relevant market is defined as national), seems to meet the requirements to be solved under the fast track procedure, was later derived to the ordinary procedure.

18. In sum, through the fast track procedure the CNDC has established new safe harbours for M&A operations, on top of those set forth in the law, that are presumed not to restrict competition. These can be rebutted when certain conditions are met, or at the competition authority's discretion.

5. Conclusions

19. Argentina has two types of safe harbours in merger control. On the one hand, those safe harbours that have been established in the competition act, and which refer to operations that should be notified to the competition authority ("legal" safe harbours). On the other hand, safe harbours that allow for a more efficient allocation of resources within the CNDC ("internal" safe harbours).

20. Legal safe harbours are usually based on quantitative indicators that are easily verifiable with objective information about the operation in question. The reason is that companies involved in the operation should be able to easily calculate those indicators in order to assess whether the operation should be notified to the authority. This is why legal

¹⁵ File EX-2017-13785968-APN-DDYME#MP, entitled "APOLLO MANAGEMENT, L.P., KONINKLIJKE PHILIPS N.V. Y LUMILEDS HOLDING B.V. S/NOTIFICACIÓN ART. 8 DE LA LEY 25.156", CNDC Opinion 162 dated July 27, 2017 and Resolution 728 of the Secretary of Commerce dated September 22, 2017.

¹⁶ File EX-2017-12164030-APN-DDYME#MP, entitled "INTERNET MEDIA SERVICES Y BOHEMIA PLUS, INC. S/NOTIFICACIÓN ART. 8 DE LA LEY 25.156", CNDC Opinion 167 dated August 9, 2017 and Resolution 766 of the Secretary of Commerce dated October 2, 2017.

¹⁷ The details of the case are not provided because the investigation is still ongoing.

safe harbours refer to the turnover of the affected companies or the amount of the operation.

21. Internal safe harbours, on the other hand, are based on more specific information such as market shares, changes in the HHI or the type of operation, which are evaluated once the operation has been notified. They require, therefore, an initial analysis by the competition authority, to determine whether the operation qualifies for a fast track procedure. As explained above, internal safe harbours are always rebuttable and an operation that would otherwise qualify for the fast track procedure could go through the ordinary one if some conditions are met or at the enforcement authority's discretion.

22. To conclude, Argentina is proposing a change to its Competition Act, which will, on the one hand, formally update the notification thresholds and, on the other hand, formalize in a way the fast track procedure.