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## Antitrust Enforcement in Argentina Under Stricter Judicial Scrutiny

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## I. INTRODUCTION

In the past couple of years, the courts have become increasingly stricter when reviewing decisions taken by the antitrust authorities in Argentina. Although historically the courts of appeals have sometimes overturned fines imposed by the antitrust authorities, in recent months different courts of appeals have questioned certain powers of either the *Comisión Nacional de Defensa de la Competencia* (“CNDC”) or the Secretariat of Domestic Trade (“SDT”) and have even annulled several decisions taken by such agencies. These court decisions have been taken both in anticompetitive behavior investigations as well as in merger control cases and most of them relate to cases that are still in the pipeline.

Although the courts have always played an important role in antitrust cases and have revoked different CNDC and SDT decisions on grounds of insufficient evidence, the type of control exercised by the courts in recent times goes further since it even questions the CNDC’s and the SDT’s power to take decisions. This process started in 2003 with the “judicialization” of antitrust enforcement due to the institutional fragility derived from the lack of implementation of the *Tribunal Nacional de Defensa de la Competencia* (“TNDC”), an independent agency created by law in 1999 to replace the CNDC that even today has not yet been implemented.

The greater importance of competition cases (much higher fines and important merger cases) has forced the courts to a stricter scrutiny of the decisions taken by the Argentine antitrust enforcers.

## II. HISTORICAL LIMITS IMPOSED BY THE COURTS (1980-2002)

Ever since the enactment of the Competition Law in 1980, the courts have reviewed the decisions taken by the antitrust authorities in Argentina. Through 2002, this control was limited to either upholding or revoking a government decision mainly based on two causes: i) the use of dubious or insufficient evidence, or ii) insufficient competitive analysis.

On only a few occasions had the courts ordered the CNDC to restart an investigation, such as in *Ecsal*<sup>2</sup> and in *Industrias Welbers*,<sup>3</sup> two Supreme Court cases in the early eighties. During this period, only once had a court nullified a decision taken by the government,<sup>4</sup> and in no case had the courts questioned either the CNDC’s or the SDT’s power to take any competition-related decision.

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<sup>2</sup> Supreme Court of Justice - *Ecsal* - Buenos Aires, September 29, 1983.

<sup>3</sup> Supreme Court of Justice - *Industrias Welbers* - Buenos Aires, April 5, 1984.

<sup>4</sup> Criminal Economic Law Court of Appeals - Chamber A - *Eg3* - Buenos Aires, December 3, 1998.

Such court behavior was valid in all jurisdictions throughout Argentina and was kept in the first years of the 1999 law.

### III. THE “JUDICIALIZATION” OF ANTITRUST ENFORCEMENT (2003-2007)

Due mainly to a weakening of the institutional framework, there has been growing judicial involvement in competition-related matters since 2003 when a first-instance judge in the province of Salta issued an injunction against a divestment decision in the *Quilmes* beer merger<sup>5</sup> and especially after the various *Cencosud* rulings in the province of Mendoza.<sup>6</sup> From 2003 to 2007, a growing number of federal courts have intervened in merger cases on a first-instance basis in a trend known as the “judicialization” of antitrust enforcement in Argentina. Those judges ignored the role of judicial review established by the 1999 law. Some judges argued that since the government had infringed the law by failing to create the TNDC, it was the judges who should act to protect competition.

Since 1980, the competition work has been shared by the CNDC, as an investigative body, and the SDT, as the decision-making body. Both entities depend politically and financially on the Ministry of Economy. But the 1999 law contained changes in this institutional framework. The new law created the TNDC as an independent agency while maintaining the old institutional mechanism *extant*, though, as mentioned above, to date the TNDC has not yet been implemented.

However, the institutional framework has been weakened since then by several factors, but mainly by different court rulings challenging its legality. Many courts have questioned the fact that the TNDC has not yet been established, while others have argued that the CNDC has been acting without the required quorum. Twice, the CNDC has not had five members for four consecutive years (from 2001 to 2005 and from May 2006 to date), and twice it has undergone long periods without an appointed President. Other rulings have alleged that the transitional institutional framework was totally in hands of the CNDC and not shared with the SDT, though this discussion was settled by the Supreme Court in the *Recreativos Franco* ruling in 2007,<sup>7</sup> which determined that as long as the TNDC is not implemented, the CNDC will be the body in charge of investigations and the SDT the one that takes decisions.

During the 2003-2007 period, judicial intervention also took place by means of a constitutional action called “*amparo*,” which allows any individual to go to court when a constitutional right is considered to be harmed. Since the 1994 constitutional amendment, the right to free competition has been raised to a constitutional level. The use of this action has allowed third parties (consumers and competitors) to interfere in different merger cases and now, since anybody can go to any federal judge and challenge any merger, all parties are far more uncertain of the outcome.

### IV. STRICTER JUDICIAL REVIEW ON ANTITRUST ENFORCEMENT (2008-2010)

Since 2008, the courts started to set stricter limits on the government regarding its antitrust enforcement. This new trend included: i) restrictions on the CNDC’s and the SDT’s power to issue injunctions and to decide on appeals filed by the parties and ii) reviewing the use of discretionary powers in merger control cases.

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<sup>5</sup> Federal First Instance Court of Salta - *Cia. Industrial Cervecera* - Salta, March 5, 2003.

<sup>6</sup> Federal First Instance Court of San Rafael (Mendoza) - *Cencosud* - April 16, 2004 and others.

<sup>7</sup> Supreme Court of Justice - *Recreativos Franco* - Buenos Aires, June 5, 2007.

### A. Lack of Power to Issue Injunctions

Historically, the CNDC issued injunctions in its anticompetitive behavior investigations and the courts upheld its decisions. Moreover, the courts have even exempted the CNDC from paying a “contra-cautela,” a monetary guarantee which is one of the legal requirements for those parties that request injunctions. Furthermore, in 2006 a Court of Appeals ordered the CNDC to issue an injunction in a merger case.<sup>8</sup>

However, in July 2008, a Court of Appeals upheld an injunction issued by a first instance judge ordering both the SDT and the CNDC to refrain from issuing an injunction in a merger.<sup>9</sup> Since then, at least three different courts of appeals have revoked or nullified injunctions issued by the CNDC on the grounds that such measures could not be taken either by the CNDC or by the SDT but only by a court of justice at the SDT’s request. Although this change in the case law is an institutional setback for the CNDC, at least until June 2010 it continued to issue new injunctions.<sup>10</sup>

Although the CNDC invokes the “need to exercise the State’s power” to protect the general economic interest, the argument on which the courts have changed their position has been that the CNDC cannot have greater powers nowadays than those granted by the 1980 law that created it since the 1999 law only allowed the CNDC and the SDT to continue in existence until the TNDC was implemented.

For this reason, the courts of appeals have systematically revoked or nullified the CNDC’s injunctions issued in recent merger cases. For instance, in December 2009<sup>11</sup> and in February 2010,<sup>12</sup> a Court of Appeals issued an injunction temporarily suspending the effects of certain injunctions issued by the CNDC, while on various rulings—including three rulings issued on June 17, 2010—another Court of Appeals declared the nullity of different injunctions issued by the CNDC in the *Telefónica-Telecom* merger case.<sup>13</sup>

### B. Lack of Power to Decide on Appeals

On May 13, 2010, a Court of Appeals nullified a CNDC decision that rejected an appeal filed by the parties of an investigation on the grounds that the CNDC was not a decision-making agency.<sup>14</sup> Such decisions shall, pursuant to this ruling, be taken exclusively by the SDT in accordance with the Supreme Court *Recreativos Franco* ruling.

### C. Review of Merger Control Decisions

On February 12, 2010, a Court of Appeals nullified a resolution issued by the SDT based on a recommendation prepared by the CNDC ordering a divestment in the *Telefónica-Telecom*

<sup>8</sup> Federal Civil and Federal Court of Appeals - Chamber 3 - *Isenbeck*- Buenos Aires, August 24, 2006.

<sup>9</sup> Federal Administrative Court of Appeals - Chamber 5 - *Multicanal* - Buenos Aires, July 18, 2008.

<sup>10</sup> On June 9, 2010, the CNDC issued an injunction against *Cablevisión* ordering it to include a TV signal in its listings.

<sup>11</sup> Federal Civil and Commercial Court of Appeals - Chamber 2 - *Grupo Clarín*- Buenos Aires, December 18, 2009.

<sup>12</sup> Federal Civil and Commercial Court of Appeals - Chamber 2 - *Cablevisión* - Buenos Aires, February 18, 2010 and *DirrecTV*, February 25, 2010.

<sup>13</sup> Criminal Economic Court of Appeals, Chamber A, *Sintonia, Telecom Italia -queja- and Telecom Italia -rec.dir-*, Buenos Aires, June 17, 2010.

<sup>14</sup> Federal Civil and Commercial Court of Appeals - Chamber 3 - Buenos Aires, May 13, 2010.

merger.<sup>15</sup> The main reason for the ruling was that the decision to order a divestment was totally unsubstantiated and that the investigation did not respect the due process. Therefore, the Court of Appeals ordered the CNDC to restart the investigation.

## V. CONCLUSIONS

The decisions taken by the courts in recent years show an unprecedented level of judicial control over antitrust enforcement in Argentina. Although this level of scrutiny is the result of multiple causes, it can be explained as due both to a weaker institutional framework and to an increase in the level of importance of the decisions taken by the antitrust enforcers in anticompetitive conduct investigations as well as in merger control cases.

Since most of the judicial decisions of the past two years are still pending the review of the Supreme Court, it is too early to predict the final outcome of such rulings and how they will impact antitrust enforcement in the future. However, what has been clearly reflected is the growing interest of the courts in setting tighter limits on the discretionary powers of the antitrust enforcers in Argentina.

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<sup>15</sup> Criminal Economic Court of Appeals, Chamber A, *Pirelli and others*, Buenos Aires, February 12, 2010.