UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

ARGENTINA

UNITED NATIONS

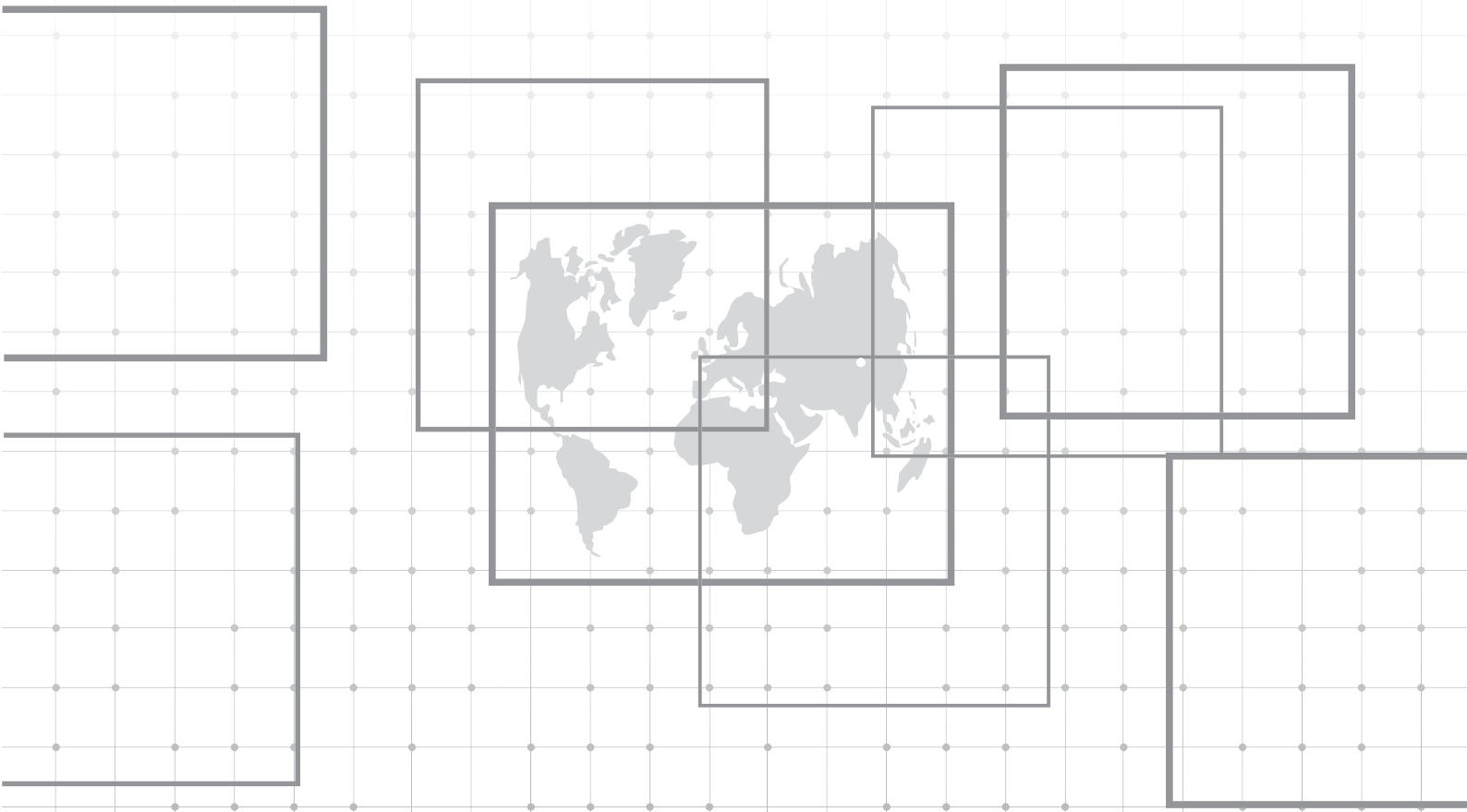
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

VOLUNTARY PEER REVIEW OF COMPETITION

LAW AND POLICY:

ARGENTINA



UNITED NATIONS
New York and Geneva, 2017

United Nations publication issued by the United Nations Conference on Trade and Development.

UNCTAD/DITC/CLP/2017/1

ACKNOWLEDGEMENTS

Voluntary peer reviews on competition law and policy are conducted at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy and at the Inter-ministerial Conferences of the United Nations tasked with examining the United Nations Set of Principles and Rules on Competition. The substantive preparation is carried out by the Competition Policy and Consumer Protection Unit of UNCTAD, under the direction of Teresa Moreira, Director of the Competition and Consumer Protection Branch, in the Division on International Trade in Goods and Services and Commodities.

This report has been prepared for UNCTAD by Luis Berenguer Fuster, lawyer and member of the Advisory Group of Experts for the programme on Competition and Consumer Protection in Latin America (COMPAL). Juan Luis Crucelegui, Arnau Izaguerri and Valentina Rivas were responsible for the substantive support for and review of the report.

UNCTAD wishes to acknowledge the assistance of the National Commission for the Defence of Competition of Argentina, whose contribution to this report has been crucial, and to thank all those individuals and representatives of the various public and private institutions who were interviewed.

NOTE

UNCTAD is the coordination centre for all issues relating to competition policy within the United Nations Secretariat. The goal of UNCTAD is to promote an understanding of the nature of competition law and policy and its contribution to the development and creation of a favourable environment for the efficient functioning of markets. The work of UNCTAD takes the form of intergovernmental discussions, training activities, policy advice and research and analysis on the relationship between policy and the development of competition.

The voluntary peer review of competition law and policy organised by UNCTAD is part of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set of Principles and Rules on Competition") agreed multilaterally and approved by the General Assembly in 1980. Among other things, this Set is designed to help developing countries to adopt and enforce effective competition defence laws and policies which are adapted to their development needs and their economic situation.

TABLE OF CONTENTS

1. CONTEXT AND BACKGROUND

1.1 Economic context of Argentina

Lying in the extreme south of the continent of America, Argentina is the eighth biggest country in the world and the second biggest in Latin America in terms of surface area, with 2.8 million km^2. Furthermore, with a population of 43 million, it is the third most populous country in Latin America, with the majority of its population located in Buenos Aires.

Despite the succession of economic problems with which it has been beset over the years, Argentina continues to play an important role in the world economy, in particular through its agricultural production. This is primarily based on the production of cereals, citrus fruit, tea and fruit products such as the grape, representing approximately 10.5% of the country's gross national product (GNP). Being a country with abundant natural resources in agriculture and energy, Argentina stands out for its food production, in addition to being the fourth largest oil producer and the third gas producer in Latin America. For its part, the industrial sector, which employs almost a quarter of the working population, features industrial food preparation, milling, the automotive sector, the textile sector, and chemical, petrochemical and metallurgical activities. Finally, the tertiary sector is primarily based on the development of ***software***, ***call centres***, nuclear energy and tourism. The contribution made by the latter two sectors to Argentine GDP is in the region of 30% and 60% respectively.[1]

It should also be noted that with a GDP of over 550,000 million dollars, Argentina is one of the biggest economies in Latin America. With regard to this macroeconomic indicator, experts forecast that GDP will continue to rise gradually, reaching approximately 12.446 billion Argentine pesos in 2018 and 14.801 in 2019.[2] Unemployment is projected to continue falling year on year, from approximately 9% in 2016 to 6.8% in 2021.[3] The foregoing notwithstanding, the International Monetary Fund has forecast in its ***World Economic Outlook Report***, that Argentina has "a lesser expectation of growth" in the short term due to that fact that it experienced lower than expected growth in the second half of 2016.

It should be stressed that competition law has been in place from a relatively early stage in the political and economic development of Argentina. Free competition in the markets and open competition policies are the factors that create the most appropriate setting in which companies can achieve their standards of competitiveness, which undoubtedly affects the economy of a country and, in any event, consumers who seek to take free decisions without the intervention of any forces other than market-specific forces, and with adequate information on the price and quality of the products offered.

Thus, it would appear that the influence of the United States of America occasioned a very early concern that a competition policy has a place on the Argentine political scene, - on paper at least - but certainly well before other countries, such as the European countries, were to legislate on the matter.

The foregoing notwithstanding, in recent years there has been a suspicion of political manipulation of competition policy, and therefore a current imperative need exists to strengthen the independence of the competition authorities in order to restore the credibility of its actions.

The incumbent Government of Argentina has demonstrated great interest in bolstering competition policy, introducing positive changes and adopting initiatives accordingly, such as the appointment of a new president and four commissioners to the National Commission for the Defence of Competition (hereinafter referred to as the "CNDC" (Comisión Nacional de Defensa de la Competencia) or the "Commission") and the start of a legislative process that is expected to culminate in the adoption of a new Defence of Competition Act (hereinafter referred to as the "LDC" (Ley de Defensa de la Competencia).

1.2 Background to the existing Defence of Competition Act

Market regulation is a public policy mechanism which goes beyond an exclusively contractual scope or one of business customs and practices, to focus on a structural vision which is combined with other instruments of state regulation. This means that competition law has become an issue of the utmost importance and is constitutionally

protected, thereby enshrining the interest of the State in providing safeguards against monopolistic distortions and promoting open access to it.[4]

Competition is protected in particular in Articles 42 and 43 of the Constitution of Argentina[5], both of which were incorporated in 1994[6], the former expressly establishing the duty on the part of the State to "defend competition against all forms of distortion in the markets and control of natural or legal monopolies", which is perfectly compatible with economic freedom and free private initiative. Ultimately, it is a question of guaranteeing a transparent market in which the consumer has access to a range of options, and ensuring that the State fulfils this obligation by issuing regulations containing clear and defined rules of play. This is supplemented by Article 43 which, with respect to guarantees, provides for action for the protection of constitutional rights so that those who consider themselves to be "prejudiced" can enforce their rights before the courts, expressly extending the protection of action to encompass competition protection rights National Tribunal for the Defence of Competition.[7]

In this context, general agreement exists regarding the increasing importance of the defence of competition; hence the necessity for a system that is provided with appropriate instruments ensuring that decision making through supply and demand is not flawed, guaranteeing the efficient and transparent functioning of the market.

To this end, and with the aim of prohibiting certain anticompetitive behaviours, Law 11.210 was enacted in the early twentieth century, in 1923.[8] This was the first precedent of significance in competition legislation. This law was predominantly criminal in nature, the first law to sanction acts intended to establish or maintain a monopoly, and which also established the so-called "acts of monopoly", in one of its articles. This law was amended on numerous occasions, but never came to be implemented effectively.

As a consequence of this, the law was repealed by Law 12.960 of 1946, which remained in force until 1980. This law maintained from its forerunner the criminal nature of acts leading to the development of monopolies and included a general prohibition clause and a list of practices held to be prohibited, being designed to create monopolies.[9]

In this section, it is necessary to refer to a debate around the deterrent value of competition laws, and whether this is achieved through criminal or administrative provisions. This debate is ongoing today within international organisations. Without doubt, to criminalise anticompetitive practices, particularly cartels, would have a greater deterrent effect[10], but this effect would be offset - and this is the widespread view in those countries in which competition legislation does not fall under criminal law - by the fact that in requiring the application of criminal legislation with a higher standard of evidence and protection, a large proportion of practices currently sanctioned as administrative offences would go unpunished. It is for this reason that no changes are envisaged in this regard in countries where competition infringements are regarded as constituting administrative offences.

The modern era of the implementation of competition laws started in 1980 (under the military dictatorship), with the enactment of the de facto Law 22.262. This provision established criminal sanctions for infringements of the rules of free competition and created a body tasked with overseeing compliance with competition rules: the National Commission for the Defence of Competition.

The inadequate enforcement of competition legislation was due in large part to its criminal nature, under the clear influence of United States legislation. It is not unreasonable to believe that a society such as Argentina's might be reluctant to treat acts regarded as normal in commercial trade as criminal offences.

Finally, because of a number of complaints of practices contrary to free competition, a new provision was necessary which was adapted to the market situation. According to news reports of the time, the adoption of a new law was strongly motivated by the intention to include the control of mergers, against the background of the acquisition of Yacimientos Petrolíferos Fiscales (YPF) by Repsol[11], and consequently the main change of the reform necessarily consisted in the introduction of a control of corporate merger operations. Thus, in 1999 the current Defence of Competition Act, Law 25.156, came into force. This law abolished the criminal sanctions and viewed competition infringements as administrative infringements. At the same time, it introduced certain mechanisms to prevent restrictive behaviours, such as

conducting an ex-ante control of mergers, as indicated above. Accordingly, the control of mergers and acquisitions was introduced with the aim of preventing concentration in cases where the change to the structure of the market may lead to impediments to competition with potential damage to the general economic interest.

The main points covered by the original draft of Law 25.156[12] were the creation of a National Tribunal for the Defence of Competition (hereinafter referred to as the "Tribunal") with seven members, the aim of which was to control concentrations carried out by market operators, the establishment of the regulations applicable to the said concentrations and the determination of restrictive practices, both those arising from agreements and those constituting abuse of dominant position.[13]

However, this Tribunal was never created and consequently remained without effect with the reform of the said law, which took place in 2014, through Law 26.993. The changes introduced by that law primarily related to administrative and procedural issues.[14] Thus, Law 26.993 brought about a new drafting of Article 17 of the current law, which provided for the creation of the said Tribunal, an action that was forgotten, while establishing that the Executive Power would determine the Enforcement Authority for the law. It contained the further provision that the said Enforcement Authority would be assisted by the CNDC and that any reference in the law to the Tribunal must be understood as referring to the Enforcement Authority.

However, this was not the only change introduced by Law 26.993. With regard to appeals, the time limit for lodging an appeal was reduced from 15 working days to 10 working days as of notification of the resolution, and a ***solve et repete*** system was established in the event of appeals against administrative resolutions imposing sanctions in the form of fines. This system consists in depositing the amount of the fine with the authority imposing it, failing which the appeal will be disallowed unless compliance with this requirement would entail "irreparable damage". Similarly, a new forum for appeal was created through the creation of the National Chamber for Appeals in Consumer Interactions; however, this chamber was never created and so great confusion has existed over the appropriate forum for hearing competition-related appeals.

2. CURRENT REGULATION OF THE DEFENCE OF COMPETITION ACT

For an understanding of the new challenges faced by Competition Law in Argentina, it is necessary to perform an analysis of the various aspects of Competition Law according to the current LDC (Law 25.156). To this end, the application of competition law can be divided into two major branches: first, ***enforcement,*** which provides for the sanctioning of anti-competitive behaviours (***ex post action);*** and, second, the control of corporate concentration operations (***ex ante***[15]) control. These two branches can be supplemented by a third, relating to the promotion of competition. Although this encompasses actions lacking immediate legal effects, it is of great importance in extending the culture of competition in Argentina, in broadening knowledge of the markets and, to a large extent, in advising and influencing public authorities in order to promote standards which favour competition.

2.1 Anti-competitive agreements and practices

Chapter I of the Act regulates "prohibited agreements and practices", making its first article the core of the entire anti-competitive legal system, in that it contains a general prohibition fixing the three parameters which must be met - all of them together - in order to sanction a behaviour, that is to say, in order for it to be deemed anti-competitive. They are:[16]

a) It must entail a behaviour relating to the production and exchange of goods or services

b) This behaviour must be capable or distorting competition, a term that encompasses the action of "limiting", "restricting" and "falsifying", abuse of dominant position being a particular form of competition distortion[17]

c) The distorting behaviour must be capable of damaging the protected legal right: "the general economic interest".

As can be seen, Argentine legislation does not determine illegal practices ***per se***, rather it is necessary to pay heed to the circumstances of the case, applying the "rule of reason". Yet there is no clear distinction between concerted actions

and agreements, on the one hand, and abuse of dominant position on the other, rather a general prohibition of anti-competitive behaviour is established, followed by a list of specific practices considered illegal (establishing a ***numerus apertus***), provided that the conditions set out in Article 1 are fulfilled. This failure to differentiate between collusive and abusive behaviours in the legislative text has occasionally meant that enforcement of the law includes, for example, a categorisation of the behaviour that includes both types, as will be seen below.

As regards anti-competitive agreements, doctrine and legislation have traditionally[18] classified these into horizontal agreements, vertical agreements and abuses of dominant position.

Horizontal agreements

Horizontal agreements are those entered into between competing companies which are involved in producing or exchanging equivalent or similar products in the same geographical market, whereby they basically agree, directly or indirectly: a) to set prices; b) to share out the market between them; and/or c) to exclude existing or potential competitors.[19] These are the most damaging behaviours for the competitive functioning of the market.

As stated above, an agreement is not in itself collusive, but only to the extent that the circumstances set out in Article 1 of the LDC are in place; however, case-law has tended to regard certain explicitly collusive practices as illegal where the unlawful behaviour is deemed to be sufficiently proven. The basis has been that, insofar as the purpose or effect of the agreement is to increase prices or limit the quantities offered, the damage to the general economic interest can be clearly inferred[20], that is to say, they have been sanctioned, without putting forward arguments as to whether or not the general economic interest has been affected. A clear example of this is the case of cartels, which constitute the most serious infringement of competition rules for the general economic interest, inasmuch as they entail not only an attack on business efficiency, as companies are under no obligation to innovate and offer good products and services at reasonable prices since they are not under pressure from the competitors with which they are cartelised, but also on consumers who are forced to pay higher prices while at the same time their options to purchase goods and services of higher quality and in greater variety are restricted.

Moreover, horizontal agreements encompass the decisions and recommendations of collective entities formed by mutually competitive operators; these include business associations, professional bodies or intellectual property rights societies.

Vertical agreements

Vertical agreements are agreements entered into between companies positioned at different levels of the productive or distribution process, although doctrine in Argentina tends not to regard these agreements as illegal if they do not strengthen a dominant position or do not facilitate horizontal agreements. Vertical agreements include the fixing of resale prices and other impediments affecting sales to third parties, including limiting the volume of sales and profit margins of third parties, price discrimination and tied selling.

By contrast, according to predominant current thinking in other countries it is not necessary for vertical agreements to be designed to create or consolidate a dominant position, they merely need to have the purpose or effect of restricting competition. Very extensive international literature[21] exists on the subject, European in particular, which analyses the various forms of restricted distribution (particularly exclusive distribution, selective distribution and franchises) as mechanisms for limiting competition which can be regarded as anti-competitive unless they meet certain requirements.

Abuses of dominant position

In addition, with regard to abuse of dominant position, there is another concept used by the LDC to frame certain acts or behaviour within practices deemed to be anti-competitive. As a prerequisite for the existence of "abuse", a person (a natural person or legal entity) has to hold a dominant position in a given market and must take advantage of this dominant position to affect the competition, by excluding a competitor, hindering their entry into the market or imposing abusive conditions. But the dominant position does not extend to the whole of the market, rather it relates to a relevant market, previously delimited

geographically and from a product viewpoint. A distinction can be drawn between exploitative abuses and exclusionary abuses, and both have been prosecuted in Argentine practice, as will be discussed below.[22]

Abuse of dominant position has commonly been interpreted as a looser notion than that used in Article 2 of the United States Sherman Antitrust Act (1890), according to which the "monopolisation" of the market, or attempted monopolisation, is deemed illegal; in some cases, this can be classed as the simple existence of a dominant position.[23]

As a general comment on the practice of the CNDC in taking action against behaviours contrary to free competition, of note is the time taken by the Commission to examine cases of infringements, which can take more than five years to conclude. However, it should be pointed out that a significant reduction in the time taken to process cases has been observed since 2016, bringing down to 24 months the average period for processing cases in which the alleged perpetration of anti-competitive behaviours is investigated. On the other hand, there has been a considerable increase in the Commission's work, such that the year 2016 saw a tripling of the number of opinions issued by the CNCD compared with the average for the previous eight years (period 2007-2015), increasing from an average of 33 opinions per year (2007-2015 average) to 97 opinions issued in 2016 alone.

2.2 Control of economic concentrations

Although not stipulated in all legislations on this subject, one of the most important functions is the control of corporate concentration operations. This control has been regulated in Argentine legislation since 1999. In order to prevent the harmful effects on market functioning produced by increased market power in the hands of operators, the option to establish certain preventive (***ex ante***) mechanisms, such as prior control for some concentrations, was chosen. In this way, analysis for approval or prohibition has been based on the fact that a concentration may give rise to a situation in which the competition is substantially affected, either because a dominant position is created or strengthened or because the effects of coordination or cooperation between competitors are facilitated, either within a given relevant market or in related markets.

In accordance with Article 6 of the LDC, an economic concentration exists when a company takes control of another company or exerts a substantial[24] or decisive influence over it, on a lasting basis[25], "control" meaning "effective decision-making power over business affairs, through the possibility of formation of the corporate will".[26] Accordingly, the Law identifies four acts which involve the acquisition of control, namely:

a) Company merger

b) Business transfer

c) The acquisition of the ownership or any right over shares or equity or debt securities which provide any type of right to be converted into shares or equity or to have any kind of influence on the decisions of the person issuing them when such acquisition grants the acquirer control of or substantial influence thereover

d) The transfer of assets from one company or a transfer which grants decisive influence in the adoption of ordinary or extraordinary administration decisions.[27]

Consequently, the prevailing idea regarding concentration is not limited solely to the circumstances of a classic corporate or contractual grouping (merger), rather the essential idea for establishing the existence of a concentration consists in determining whether any form of acquisition of control is present, such as control of its assets, or significant influence over business decisions. This is an economic rather than a legal view, and the interpretive guidelines must therefore be based on this consideration.[28] According to the interpretation assigned to the rule, the formation of a ***joint venture*** constitutes a concentration.

Furthermore, the economic concentrations referred to in the law can be horizontal, vertical, mixed or conglomerated.[29] The latter are agreements between companies operating in markets which are not interconnected, and so no horizontal or vertical relationships exist between the companies involved. In fact, is its more difficult to prove an adverse impact on competition with this type of operation, and they will therefore only be regarded as potentially damaging in cases

where it is demonstrated that in the absence of the concentration one of the companies involved would have entered the relevant market in which the other involved companies operate.[30]

The passing of Law 25.156 in 1999 entailed a fundamental innovation in the competition regime: the prohibition of concentrations capable of affecting competition with possible damage to the general economic interest and the obligation for prior notification of acts of concentration, or within one week of reaching the corresponding agreement.

Thus, supplementing the said Article 6 of the LDC, the competition regulations (Article 7) stipulate the prohibition of economic concentrations whose purpose or effect is, or might be, to restrict or distort competition, potentially damaging the general economic interest.

In this respect, it is essential to have a clear definition of the "general economic interest". In the years during which that Defence of Competition Act has been in force, both the Commission and the various courts have maintained a certain consistency in criteria (which appears to have been broken in recent times), even though it cannot be said that the concept has been thoroughly developed. Thus, it is worth highlighting the fact that the general economic interest is damaged when there is a decline in social well-being, which is closely linked to the ineffective functioning of the market, the so-called "surplus" of consumers and producers, and economic inefficiency.[31]

The legislature having stipulated that the prohibition of economic concentrations "may" restrict or distort competition, it empowers the Enforcement Authority to intervene before they arise in practice and take a significant market position.[32]

In relation to the thresholds for notification[33], in accordance with the provisions of Article 8 of Law 25.156, when the total turnover of all the companies affected[34] exceeds the sum of 200,000,000 pesos in the country[35], for the acts listed in Article 6 the said companies will have to notify the operation to the Tribunal for the Defence of Competition for examination (which function is carried out in practice by the CNDC, as the Tribunal for the Defence of Competition has not been constituted).

The criterion for determining whether or not the obligation to notify a concentration operation for the purposes of control by the Enforcement Authority has arisen is therefore solely quantitative. Exactly what is considered to be the "total turnover" of all the companies involved is sufficiently precise in Paragraph 2 of the said article, and it is calculated on the basis of ordinary sales of products and services, according to the most recent balance sheet and before deduction of discounts, value added tax and other items such as gross income. This is to say, it is necessary to add up the amount of turnover of all the companies affected prior to the legal act of economic concentration.

This is supplemented by Article 10 e) which stipulates an exception to this obligation:[36] the situation in which the amount of the operation and the value of the assets - absorbed, acquired, transferred or controlled - located within Argentina do not each exceed 20,000,000 pesos (approximately US$1.25 million).[37]

Despite the fact that we shall return to this point later, it should be noted that this amount has been rendered out-of-date by the inflationary process to which the Argentine economy has been subject since the enactment of the law. As a consequence of the foregoing, companies whose size makes them unlikely to affect competition have been subject to control of corporate operations, which incur significant expenses (and time delays) for companies, and the CNDC has to devote its resources and time to processing minor operations of limited applicability from the viewpoint of competition.

With regard to the time period, as established in Article 8 of the law, companies have two notification options: a) prior to the execution of the operation; or b) within one week of the date of conclusion of the agreement, the publication of the purchase or exchange offer or the acquisition of a controlling stake. The latter issue is clarified in Regulatory Decree 89/2001, fixing certain rules relating to the starting date for calculation of the time period. By way of example, in the case of mergers between companies, the time period starts to run on the date on which the definitive merger agreement is registered, in accordance with the provisions of Article 83 (4) of Law 19.550; and in acquisitions of ownership or any right over shares or equity interests, on the date on which the acquisition of

such rights becomes fully effective, in accordance with the purchase agreement or contract.

As set out above, the CNDC receives the notification and is responsible for processing it, and it is also empowered to issue requests for the purposes of obtaining complete information.[38] After carrying out the appropriate investigations, the CNDC issues a non-binding opinion in which it sets out its conclusions and makes a recommendation, currently to the Secretary of Commerce, on the authorisation, subordination or denial of the concentration. The Secretary of Commerce therefore constitutes the competent body[39] for authorising or denying the operation, and he/she in turn can authorise the CNDC to monitor the imposed constraints and to issue the requisite resolutions for determining the content of the information to be monitored. In accordance with Article 13 of the LDC, the competition authority has a period of forty-five days within which to make a decision, which might be: to authorise the operation, to render the act conditional upon certain imposed conditions, or to deny authorisation. Where no resolution is issued within this period, the operation will be deemed to be authorised tacitly, producing the effects described below (Article 14 LDC).

Finally, mention should be made of the effects of the said notification. In operations subject to mandatory notification, acts only produce effects between the parties or in relation to third parties once tacit or express approval has been given.[40] It is no surprise, therefore, that it is normal practice for agreements on the sale or transfer of assets to be subject to the condition precedent of approval of the operation by the competition authority.[41] Failure to comply with this notification obligation will carry a fine of up to 1,000,000 pesos per day, starting from the deadline date for notification of planned economic concentrations. The same penalty fine can be imposed as of the moment of non-compliance with the undertaking or order to cease or abstain.

Moreover, despite the deadlines laid down by law, files are taking a considerable amount of time to process, and so if agreements are implemented, even when subject to the suspensory condition, a prohibition arrangement entailing deconcentration becomes inordinately difficult.[42]

2.3 The procedure with respect to behaviours: The administrative procedure as a supplemental provision

The provisions of Article 56 of the LDC establish the National Law on Administrative Procedures 19.549 as a supplemental law, such that its arrangements replace the former criminal procedure which appears to have been regarded as an enhanced protection for private individuals, in the light of the potential for penalisation of the LDC, in spite of which this protective criterion was not always invoked.

The introduction of this reform was based on a certain consistency, as the criminal procedure did not lend itself to implementation by an administrative commission and the Secretary of State and, furthermore, far from providing greater guarantees it made for greater severity, which goes against the intention of the legislature.[43] This is yet another demonstration of the decriminalisation of competition law and its incorporation into private property law. However, it gave rise to a considerable problem inasmuch as it contributed to lengthening the times for issuing resolutions by introducing an additional report. In fact, following the issuance of the CNDC's opinion and before the Resolution of the Secretary of Commerce, both behaviour and concentration related cases, a report by the Legal Directorate has been introduced, which unsurprisingly contributes to extending processing times, drawing criticism of the change from all sides, in spite of appearing to follow logic. Furthermore, this subjection to the rules of administrative procedure has an adverse effect in that it involves a rolling-back of the autonomy of the CNDC. Indeed, by requiring a Legal Directorate report, almost at the same level as the CNDC, the latter's key role as Competition Authority is largely devalued.

2.4 Court for the Defence of Competition

In the original configuration of the LDC, the Tribunal for the Defence of Competition was envisaged as an autarchic body placed under the auspices of the country's Ministry of Economy, Works and Public Services, and tasked with

enforcing and ensuring compliance with the law, with complete jurisdiction over all matters connected with competition and in all sectors of the economy. This Tribunal would be made up of seven members including at least two lawyers and two economic science professionals.

This Tribunal was never constituted, however, and so Law No. 26.993, enacted in September 2014 and called the "Dispute Resolution System in Consumer Interactions", removed the concept of the Tribunal and, in the current Article 17, stipulated that the Executive Power would determine the LDC Enforcement Authority. It is important to note that this wording was amended when this law was scrutinised in Congress, as the original wording expressly stipulated that the Secretary of Commerce would be the Enforcement Authority. It still remains to be seen which authority will be designated by the Executive Power, be it the Secretary of State or a different agency.[44] In this respect, in two judgements the Supreme Court had established[45]the continuation of the dual regulatory system created by the earlier Defence of Competition Act, Law No. 22.262, whereby the CNDC would carry out technical reviews on the control of economic concentrations and investigations and would make recommendations to the Secretary of Commerce at the Ministry of Economy (hereinafter referred to as the "Secretary of Commerce"), who would be the Enforcement Authority for making decisions.

It is clear that the amendment of the provision contained in Article 17 of the Defence of Competition Act may have entailed the weakening of competition defence in the Argentine system. The hope raised by the creation of an independent body such as the Tribunal for the Defence of Competition, separate from political power, and which would be able to enforce competition rules without being subject to influence from the Executive Power, faded completely. From the moment the law removed the possibility of creating the Tribunal, and allocated its competences to a body of the Executive Power, a message was sent out to the business and economic community that competition rules, and in particular decisions relating to the control of concentrations, would fall exclusively within the remit of the political will of the Executive Power.

Thus, until such time as the Tribunal was set up, the Enforcement Authority for the LDC continued to be the Secretary of State for Commerce and International Economic Negotiations, that is to say, as provided in the repealed law of 1980 and, as of 2006, the Secretary of Domestic Commerce, under whom the CNDC falls as an administrative branch with competence in this field.

This generated doubts as to which of these two authorities would have the powers laid down in the now-repealed Article 24[46] of the said Defence of Competition Act.[47] In the absence of the Court, the Executive Power itself brought forward a reform in 2014 which concentrated all decision-making authority in the hands of a single official: the Secretary of Commerce. As will be indicated below in comment on recent advances, Resolution 190/2016 of 28 July clarifies the problem insofar as certain of the Secretary of Commerce's competences are delegated to the CNDC as an interim measure until the adoption of a new law strengthening independence in the enforcement of competition legislation.

The failure to set up the Tribunal and the permanent consolidation of a temporary system whereby the Secretary of Commerce constituted the Enforcement Authority for the LDC attracted no little criticism, some of it crushing, such as the content of the judgement of 1 February 2010 handed down by Division A of the Court of Economic Criminal Matters in the TELCO case.[48] This judgement was handed down in an appeal brought against a resolution of the Secretary of Commerce in an economic concentration case, approving an operation categorised as a concentration, subject to conditions.

The judgement held that the Resolution issued should be annulled as being utterly arbitrary, discretionary and casual, as it flagrantly violated the rights of defence, and the pronouncement included a second section requesting that the Executive Power be issued with a communication that it should proceed with creating the Tribunal for the Defence of Competition. These considerations were based on the necessity of creating an independent body, which had guided the creation of the Tribunal in the law of 1999, as a formula for depoliticising the enforcement of competition rules. Among of its strong arguments justifying this consideration was the assertion that it was

scandalous that more than ten years after the envisaged creation of the Tribunal, it had not yet been constituted, thereby perpetuating political interference in the enforcement of the rules on the defence of competition which thus continued to lie with bodies such as the CNDC and the Secretary of Commerce, that is to say, with bodies that are dependent upon the Executive Power and which applied them using criteria which were not technical but primarily political. The Court held that this course of action, that is to say, ignoring the creation of an autonomous and independent body created by the law, constituted a form of applying the old colonial adage that "the law is respected but not enforced".

2.5 National Commission for the Defence of Competition

The CNDC is a decentralised body currently forming part of the Secretariat of Commerce of the Ministry of Production, which was created in1980 through the enactment of Law 22.262. In spite of the fact that its role was purely consultative initially, its powers have been increased gradually.

In this regard, and as indicated above, since the Tribunal for the Defence of Competition has yet to be created, the procedures and powers assigned to it by law have been exercised in part by the CNDC, giving rise to numerous issues concerning their scope. In addition, it should be stressed that as the result of the failure to set up the Tribunal, the Commission is now the sole technical authority on competition (inasmuch as it is the Enforcement Authority) and is a political body.

However, it is made up of a president and four commissioners[49] whose term of office is four years, with the possibility of their positions being renewed. In this regard, it should be pointed out that, in accordance with the provisions of Decree No. 491 of 12 March 2002, the members of the CNDC, in their capacity as civil service staff, will be appointed by the Executive Power. In practice, members of the CNDC are appointed by the President of Argentina, by decree.

As regards their duties, there are three key spheres in which they exercise their competences, namely:

Technical review, research and analysis on the control of economic concentrations, concerning which they subsequently make recommendations, via an opinion, to the Secretary of Commerce, who is the authority with decision-making competence. Accordingly, it carries out investigations of anti-competitive behaviour and structures in given markets.

a) Conduct of investigations of cases brought for anti-competitive behaviours, abuse of dominant position and cartelisation. In this regard, it issues the corresponding opinion, advising the Secretary of Commerce, among others, on the imposition of fines.

b) Promotion of competition through its participation in seminars on competition defence issues, dissemination activities in universities, international forums and workshops and collaboration with other international agencies and bodies.

c) Conduct of market research studies, with the aim of performing a diagnosis of the competitive situation in a given market; the said market study can lead to a market investigation allowing analysis in greater depth.[50] Where appropriate, a market investigation can lead to the development of pro-competitive recommendations or the opening of a complaint for anti-competitive behaviours.

2.6 Reparation of damages for infringements of competition rules

Among other things, competition defence law reflects the will of the State to intervene in economic activities, in order to achieve a competitive market in which consumers are able to purchase products of high quality at reasonable prices.

There can be no doubt that, in order to achieve this aim, deterrence plays a key role when setting rules for the defence of competition. Corrective measures certainly provide a certain level of deterrence for current and potential infringers, particularly when, as we shall see below, the amount of the measures is intended to be increased in the proposed reform of the LDC. However, these corrective measures applied by the competition authority - which primarily address the general interest of society - alone

are clearly insufficient at the same time to protect private interests within the framework of competition defence law.[51]

Thus, irrespective of the actual extent of the deterrent effect of damage actions in competition defence, it is unquestionable that the private enforcement of competition rules presents a significant additional deterrent factor in those jurisdictions in which substantial development has occurred[52], in addition to constituting the only means of compensating victims for the damage caused.

The national civil courts do not have the competence to convict or order the cessation of behaviours contrary to competition law, in defence of the economic public order, but rather the intervention of ordinary courts falls within the private sphere, protecting the particular economic interests that have been harmed by behaviours prohibited in Article 1 to 3 of the LDC. Such anti-competitive practices produce direct effects between citizens and at the same time create subjective rights whose protection, in relations between private parties, requires the intervention of the courts of ordinary jurisdiction. Consequently, the national judicial bodies are responsible for safeguarding private interests protected by the direct effect of these rules, not the public interest in maintaining free competition, as this falls under the competence of the competition authority and, ultimately, the courts hearing appeals against its resolutions.

In Argentina, since the entry into force of Law 25.156, there have been very few cases involving civil actions for reparation of damages and, although some case-law precedents existed[53] which might have suggested an increased number of cases in which civil liability for anti-competitive damage was sought, this was not the case in reality.

Thus, despite the fact that case-law has expressly recognised the possibility of compensating for and making reparation for damages for infringements of competition rules, and this has left the door open for future claims based on resolutions issued by the CNDC, Argentina is underdeveloped in this regard.[54]

According to expert opinion, this underdevelopment in the private enforcement of the rules of competition law in Argentina is due in large part to the fact that significant changes in the applicable legal system are required, for the creation of appropriate conditions to ensure that actions for damages for illegal anti-competitive acts have a reasonable framework within which to be developed.

It would therefore appear necessary to modify the regulatory framework with the aim of facilitating such actions, which will not only favour the possibility for "victims" of behaviours contrary to free competition to receive compensation but will also introduce an additional deterrent element in the public enforcement of the competition rules on the part of administrative bodies.[55]

2.7 The Enforcement Authority

On numerous occasions, this report has made reference to the "Enforcement Authority" and so, in this section, it is appropriate to give an approximation of what is deemed to be the enforcement authority according to the provisions of the LDC, which has frequently been queried in the courts.[56]

Since 1999, the CNDC and various secretariats of the Ministry of Economy have been acting as Enforcement Authorities for the LDC, on the basis of having been assigned this status under the now-repealed Law 22.262, Law 25.156 and Decree No. 357/2002.[57] However, as we have moved forward, with the enactment of the current LDC, the decision has been made to create the National Tribunal for the Defence of Competition and at the same time to establish this Tribunal as the Enforcement Authority. Nonetheless, in view of the failure to create the Tribunal in 2014, Law 26.993 replaced Article 17 of the LDC, determining that "the national Executive Power will determine the enforcement authority for this Law". In this regard, the initial draft sent by the Executive Power stipulated that the Enforcement Authority would be the Secretary of Commerce, yet this attribution of competence was amended in Parliament, and the issue still remains to be settled either through delegation or on the occasion of the issuance of new regulations or implementation of the LDC by the Executive Power.[58]

In the absence of the Tribunal since Law 25.156 was passed, both the CNDC and the corresponding Secretary issued resolutions concerning the defence of competition and, as was to be

expected, this brought with it questions in the courts regarding the competence of both bodies in enforcing the LDC.

Finally, in May 2015, the Executive Power amended Annex II of Decree 357/2002[59] to the effect of assigning the role of Enforcement Authority to the Secretariat of Commerce. The functions of the CNDC are consequently considerably limited, being assigned purely consultative and administrative operational tasks.

A significant change was introduced in this regard in 2016, such that, as an interim system pending the future reform of the law, certain powers held by the Secretary of Commerce, as the Enforcement Authority, were delegated to the CNDC.[60]

2.8 The control of behaviours procedure

We have had occasion above to mention the control of behaviours procedure, so here we are interested in analysing this procedure, that is to say, acts and behaviours manifested in any form and whose purpose or effects are those referred to in Article 1 of the LDC.

The procedure for enforcing the LDC, regulated in Chapter VI of the LDC, can be initiated either ex oficio or upon receipt of a complaint made by any natural person or legal entity, public or private. The statute of limitations is five years.

The current regulations give rise to certain problems relating to initiation, first inasmuch as complaints necessarily have to be dealt with and there is no rapid dismissal procedure for complaints which, at first sight, refer to facts which do not constitute an infringement as regards competition.[61] Second, the authority for ex oficio initiation lies with the Secretary of Commerce and not the CNDC.

Where the procedure is launched as the result of a complaint, one requirement is that the complaint must contain a clear explanation of the facts upon which it is based. On the other hand where the procedure is initiated ex oficio, it is envisaged that the list of facts and the legal basis they constitute will be passed on to the alleged perpetrator. Similarly, if the complaint be held to be admissible, an appointment will be made for the complainant to provide the explanations he deems appropriate. Once the allegations are deemed answered, or after a period of ten days has elapsed, the CNDC will be obliged to make a decision as to the appropriateness of investigating the complaint, so that if it deems the explanations to be satisfactory or if, upon completion of the investigation phase, there is insufficient evidence to pursue the procedure, no further action will be taken.

Upon conclusion of the investigation (which must be carried out within a maximum period of one hundred and eighty days), the alleged perpetrators have a period of 15 days within which to present their defence and offer evidence concerning the alleged behaviours which demonstrates compliance with the law. Upon conclusion of the evidence-taking period, the parties have a period of six days within which to put forward arguments concerning the merit of the evidence, although the decisions of the CNDC with regard to evidence are unappealable. Finally, when the investigation is complete, in the light of the alleged facts and the evidence put forward, the CNDC prepares an opinion which it passes to the Enforcement Authority - the Secretary of Commerce - who will issue a resolution within a maximum period of 60 days.[62] This resolution brings the administrative procedure to an end. A problem arises with the time periods, insofar as they are regulatory periods and non-compliance with them does not entail expiration of the case, with the result that they are very commonly exceeded.

Furthermore, Article 35 of the LDC makes provision for the parties to request precautionary measures, in order to halt the harm caused by the anti-competitive behaviour or abuse of dominant position: "at any stage of the procedure, the Tribunal can impose compliance with conditions, which it establishes, or order the cessation of or abstention from the harmful conduct. Where serious damage could be caused to the competition system, it can order measures which are more appropriate for the prevention of this damage in the light of the circumstances. In this regard, it should be recalled that the CNDC and the Secretariat of Commerce are the current Enforcement Authorities, with powers to analyse and decide on cases connected with the defence of competition, until such time as the Tribunal is set up. In this respect, the Supreme Court of Justice of Argentina[63] has reiterated the distinction between the activities falling within the remit of the CNDC and those within the remit of the Secretariat of Commerce, namely: activities

of investigation and advice and decision making activities respectively. The Supreme Court of Justice of Argentina held that precautionary measures would be included within the latter's remit, and for this reason it has overturned resolutions on numerous occasions[64], on the grounds that the CNDC lacks the competence to order precautionary measures.

It should also be noted that Article 36 of the LDC provides a specific means for settling cases without sanction: the agreed settlement. According to this precept, the alleged perpetrator will be able to undertake to discontinue or modify the behaviour under investigation before a resolution is issued. If they are acceptable and resolve the competition problems raised, they may be approved by the Enforcement Authority. After three years have elapsed since the date of the agreed settlement, and the undertakings have been honoured during that period, no further action will be taken.

The procedure for undertakings and agreed settlement constitutes a specific form of settlement of cases which is justified by serving two interests simultaneously: a) bringing the anti-competitive behaviour to an immediate end and b) saving the costs incurred in processing a case, allowing the competition authority to concentrate its efforts on processing the most important cases. The submission of undertakings does not imply an admission of guilt on the part of the party proposing them, and it entails the non-imposition of a fine.

Clearly, given the specific configuration and purpose of instituting an agreed settlement, it is reserved for those cases having a lesser impact on the general economic interest.[65] That said, the objection could be raised that the period allowed for acceptance of undertakings (up to the point of issuance of the resolution) is extremely long because, if one goal is precisely to free up material and human resources for the investigation of more serious behaviours, then accepting undertakings when the case has already been processed in full means that this goal is not met. However, insofar as there is no absolute entitlement to an agreed settlement to the benefit of alleged perpetrators, if undertakings are submitted at the last minute when a sanction is anticipated, and solely for the purposes of avoiding it, then the CNDC can refuse to offer this type of settlement and the Enforcement Authority can refuse to accept it.

In this chapter on procedure, it should also be pointed out that the CNDC has the power to summon parties to a public hearing where it deems it appropriate for the conduct of investigations, or to confer the status of interveners - in proceedings conducted in the said hearing - on those affected by the facts under investigation and on associations, provinces or any other party as might have a legitimate interest in the facts under investigation.

2.9 Sanctions

In continuation of the procedure, the LDC devotes Article 46 et. seq. to regulating the sanctions that can be applied to "***Natural persons or legal entities***" that fail to comply with the provisions of the law. The first article thus lists these sanctions, namely:

a) The discontinuation of the acts or behaviours.

b) Fines from ten thousand pesos ($10,000[66]) up to one hundred and fifty million pesos ($150,000,000[67]).[68]

c) When acts constituting abuse of dominant position are verified or where it is established that a monopolistic or oligopolistic position has been acquired in violation of the provisions of the LDC, the Enforcement Authority can impose compliance with conditions which are designed to neutralise the aspects which are distorting competition, or ask the competent judge to order the dissolution, winding-up, deconcentration or splitting of infringing companies.

d) Those who fail to comply with the obligations to notify concentrations or to discontinue or refrain from harmful behaviour, as ordered by the CNDC, at any stage of the process, and to honour the undertaking given by the party under investigation to discontinue or modify the behaviour will receive a fine of up to one million pesos per day, starting from the deadline date for the notification of planned economic concentrations, or as of the moment of non-compliance with the undertaking or order to cease or abstain.

Pursuant to Article 48 of the LDC, when a legal entity is sanctioned "the fine will also apply jointly and severally to directors, managers,

administrators, syndicates or Supervisory Board members, agents or legal representatives who, through their action or omission in their duties of control, supervision or stewardship, may have contributed to, encouraged or allowed the infringement".

Furthermore, the said article also provides that the CNDC can impose "an additional sanction of disqualification from engaging in trade for a period of between one and ten years".

There is no doubt that the ultimate purpose of the fines is prevention, and they must therefore meet two objectives: to punish and to deter, while not neglecting the principle of proportionality. Non-compliance with competition rules is profitable if the infringer goes unpunished or is only lightly penalised; this is patently true of cartels, where increased prices can generate enormous profits for the companies involved. Consequently, sanctions must be set at a sufficiently deterrent level to ensure that companies do not aspire to obtain economic benefits from infringements when making their own decisions.

The amount of the sanctions provided for in Argentine competition legislation is lower than those established in the legal provisions of countries which are further advanced in this area, and so reform of this issue is a matter of vital importance. It should be stressed that these sanctions have lost their power of deterrence in large part due to the inflationary environment and the devaluation of the Argentine currency, since when Law 25.156 was enacted the maximum fine was equivalent to 150 million dollars whereas at present this equivalence has reduced to 9 million dollars. We will deal below with the changes to sanctions envisaged in the latest draft amendment of the LDC. Furthermore, the possibility exists of imposing sanctions with great potential deterrent effect (disqualification of directors, structural measures etc.), although the fact that they are not applied, and never have been, weakens this effect.

2.10 Judicial appeal

The effectiveness of the Commission and of the competition policy is affected by the quality of the judicial institutions which act through appeals against the decisions of the Enforcement Authority.

Over the last decade there has been a discussion around which court was competent to review appeals against resolutions issued by the Enforcement Authority and, specifically, whether it should be the Cámara Nacional de Apelaciones en lo Civil y Comercial Federal (Federal Civil and Commercial Court of Appeals) or the Cámara Nacional de Apelaciones en lo Penal Económico (Court of Appeal for Economic and Criminal Matters), as both have handed down judgements on issues of Competition Law. In some cases, positive and negative conflicts of jurisdiction arose between the various divisions of both Courts.

Thus, in addition to the long-standing failure to define the Enforcement Authority there are doubts as to which judicial body - the Federal Civil and Commercial Court of Appeals or the Court for Economic and Criminal Matters - was competent to review the resolutions issued in the field of competition, although the majority of case-law tends towards the latter.[69] To compound the confusion, it might be thought that the submission of procedural rules to those of administrative procedure would mean that competence lay with the Administrative Appeal Courts, but that conclusion was not admitted, insofar as the amendment to the rules did not entail any alteration of jurisdiction.

2.11 Promotion of competition

Here, we will deal with those activities carried out by the competition authority, and the CNDC in particular, which are related to the promotion of a competitive environment for economic activities, primarily through relationships with other government agencies, and the promotion of the benefits of competition. To achieve this, the CNDC promotes institutional and international relationships through the organisation of seminars on issues of defence of competition, activities rolled out in universities, chambers of commerce and other private sector organisations. Also, at international level the CNDC has participated in international forums and workshops, internships and training programmes within other competition agencies, and has also collaborated with other multilateral agencies and organisations.

Although these activities were already being developed, the reforms implemented from 2016 have considerably enhanced their importance. In fact, until this year there was no specific unit within the CNDC with responsibility for the promotion of competition. But in 2016, a significant organisational change was made at the top operational level of the CNDC. The body tasked with carrying out these activities is currently the Directorate of Competition Promotion, created in the course of approval of the current organisational structure of the CNDC by virtue of Administrative Decision 759-2016 and Resolution 614/2016. Thus, as laid down by Annex II of the said Resolution 614/2016, the actions of the Directorate of Competition Promotion will be as follows:

a) To promote competition, transparency and efficiency in markets by advocating and disseminating the legal, regulatory and institutional framework.

b) To establish and maintain institutional relationships with international bodies, other competition agencies and public and private organisations.

c) To coordinate the participation of the National Commission for the Defence of Competition at events, meetings, forums and conferences relating to its function.

d) To analyse changes in international doctrine and case-law with respect to the promotion of competition.

e) To draw up codes of conduct for the public and private sector, which promote competition in the markets.

3. COMMENT ON THE MOST RELEVANT CASES

In this section, we refer to of certain defence of competition cases which have taken place in recent years in Argentina, which have been regarded as having practical relevance and which present elements linked to cartelisation, vertical relationships, abuses of dominant position and economic concentrations. Finally, mention will be made of activities relating to the promotion of competition.

3.1 Horizontal agreements

Cement cartel

Although this is a relatively old resolution (2005), it is still of current significance inasmuch as it relates to a case in which significant fines were imposed on the six companies forming the subject of complaint ($309,729,289.10 in total, with two of them fined more than 100 million pesos), reduced by the Court of Economic and Criminal Matters to an insignificant amount.

The agreements entered into by five cement companies had been in place for a long period of time, but the sanction only extended to collusive practices in the years in which the Law of 1980 had been in force (1981 - 1999) even though the anti-competitive behaviours preceded that date and continued beyond 1999.

Given that the agreements were formalised under the auspices of the Association of Manufacturers of Portland Cement (AFCP), in particular as a vehicle for the exchange of information between competitors (the five sanctioned companies), the AFCP was among those sanctioned.

The CNDC analysed the information relating to the quantities produced and sold by each company in each region of the country, information which the AFCP prepared and distributed among the cement companies. This information was highly detailed and could be used to facilitate tacit collusion between the companies and also to monitor compliance with the agreements made between them.

The Resolution was based on the parallel behaviour of the companies, relating to the maintenance of market share and the coordination of prices in some cities which, when combined with the information obtained through the AFCP, brought to light behaviour that could constitute a cartel.

As can be appreciated, the evidence was presumptive or circumstantial yet formed the grounds for the sanction in that market shares were being maintained, there was evidence of a certain price convergence and the information obtained from the Association was suitable for concertation. The indications were proven, collusion was a valid consequence of those indications and there was no valid alternative explanation, all criteria required for acceptance of presumptive or circumstantial evidence in punitive law. Furthermore, evidence

was obtained of reprisals against a company which withdrew from the market sharing agreements, as was evidence of some concrete price fixing. Ultimately, the sanction was not solely based on price parallelism, rather this factor was combined with additional evidence.

This Resolution contains a new element in the CNDC's practice, and it is largely worthy of emphasis, consisting in the system used to calculate the amount of the fine. Law 22.262 provided for an exclusive maximum fine of $529,289 and this amount could only be increased by virtue of the illicit profits obtained by the companies at issue.[70] Prior to the said Resolution, it had only been possible to use the criterion of illicit profits obtained through the anticompetitive behaviour in circumstances in which the said illicit profits could be calculated by objective means. In this case, by contrast, the CNDC opted to estimate the profits by means of a subjective estimation, whereby it was deemed that the illicit profits constituted 1% of product sales for the duration of the anticompetitive behaviour.[71]

The Resolution of the Secretary of Technical Coordination, the Enforcement Authority for the law at the time, was appealed. In its judgement of 26 August 2008, the Court of Appeal for Economic and Criminal Matters dismissed the appeal, although it slightly amended the amount of the fine. In a judgement handed down on 9 May 2013, the Supreme Court rejected the appeal brought against the judgement of the Court of Appeal for Economic and Criminal Matters.

Cartel of automotive companies

In 2008, two natural persons filed a complaint against certain vehicle dealerships in the province of Tierra del Fuego, Antarctica and the South Atlantic Islands for alleged price fixing for the sale of motor vehicles in that province.

After an initial investigation, which was limited to the dealerships, in 2012 the CNDC widened the investigation to include thirteen manufacturers and importers of vehicles and continued the procedure up to the point of proposing that the Enforcement Authority take no further action with respect to the dealerships and four of the manufacturers and/or importers, and that it sanction the remaining nine.

By the Resolution of 12 December 2014, the Secretary of Commerce, as the Enforcement Authority, adopted the Opinion of the CNDC and sanctioned seven manufacturers by the maximum amount permitted in law ($150,000,000), and imposed somewhat smaller sanctions on the remaining two, for fixing the prices of motor vehicles in the Special Customs Area (SCA).

According to the Opinion of the CNDC, the behaviour attributed to the alleged perpetrators consisted in the following:

a) Fixing the prices of some zero kilometre vehicle models in the SCA at the same level as in the rest of Argentine territory

b) Failing to apply the exemption from import and other taxes to the vehicles

c) Failing to apply the export refunds for components manufactured in Argentina

d) Limiting the importation of vehicles from outside Mercosur.

The evidence for this behaviour consisted in an analysis of the parallelism of the behaviours between the accused manufacturers or importers, which meant that prices were higher in comparison than those existing in Chile, a region also with exemption from duties, and matched those applied in the rest of Argentine territory, in which there was no such exemption. The fact is, however, that no additional proof of concertation was obtained beyond presumptions based on the structure of the automotive market. In this context, it was noted that the accused held a collective dominant position of percentages close to 100% of the market and that the behaviour of the companies was completely different to that seen in other similar areas of free trade.

The Resolution attracted multiple criticisms: first, because the manufacturers and importers were not the parties complained of; and, second, because the criterion of parallelism plus was not met, that is to say, in the absence of additional evidence, price parallelism alone is insufficient to prove concertation. Despite the fact that the CNDC considered that additional elements of proof of parallel behaviours existed, these additional considerations were nothing more than arguments relating to the structure of the market which was facilitating collusion, but other evidence was absent in the case, such as the existence of meetings or contacts between the alleged cartel members.

The companies lodged an appeal against the fine, which was brought before the Federal Appeal Court of Comodoro Rivadavia. The court rejected the motion for annulment submitted by the appellants, ruled on the substantive issue and revoked the Resolution of the Enforcement Authority. The State lodged an extraordinary appeal against these judgements, as being arbitrary, and it is currently pending a decision on the part of the Supreme Court of Justice of Argentina.

Medicinal Gelatins cartel

In his Resolution of 4 December 2015, the Secretary of Commerce adopted the Opinion of the CNDC and sanctioned four pharmaceutical laboratories for engaging in concerted practices in invitations to tender issued by public hospitals between 2005 and 2007, orchestrating false competition conditions in the various procedures for purchasing plasma expanders made from gelatins formulated for public and private health establishments.

In the course of this procedure, which took more than nine years to examine, searches were carried out at the headquarters of the companies under investigation, and in certain health and hospital establishments. Its importance is due to the existence of a completely new element, in that three individuals representing the laboratories under investigation were sanctioned with a fine of 200,000 pesos each. This was clearly in addition to the four fines of 10 million pesos imposed on each of the pharmaceutical companies.

An appeal was brought against the Resolution before the Court of Appeal for Economic and Criminal Matters, and is pending judgement.

3.2 Vertical agreements

Irrespective of the existing debate concerning the anticompetitive nature of vertical restraints, there is no doubt that these are considerably less harmful to competition than horizontal agreements. This is demonstrated by the fact that in jurisdictions which are more advanced in the field of competition there is currently a downward trend in prosecutions for vertical agreements.

In Argentina, the CNDC and the Enforcement Authority have not focused in particular on the prosecution of such vertical restraints either, even though action in this field would assist clarification of the various systems of restricted distribution (exclusive distribution, selective distribution, franchises etc.) and would at the same time shed light on certain circumstances which the decisions of most jurisdictions continue to regard as illegal, such as vertical price fixing or prohibiting sole distributors from making passive sales.

As mentioned above in relation to the report prepared for the ***peer review*** carried out by the OECD in 2006, in the period 2001 to 2006 the CNDC settled only three vertical restraint cases and none of these led to the imposition of sanctions. The same can be said of the action of the CNDC in the following years up to 2016 although, both then and now, instances of vertical restraint were considered in cases of abuse of dominant position. It is true that a large proportion of Argentine doctrine[72] regards vertical restraints, including absolute exclusivity and vertical price fixing, as lawful and not anti-competitive. This is line with the majority of decisions issued by the CNDC and the Enforcement Authority, which appears to adhere to this theory insofar as vertical restraints are not usually sanctioned if they are not accompanied by horizontal restraints or behaviours in abuse of dominant position.

The case of televised football

The case of televised football[73] is a prime example of the circumstances in which vertical restraints are addressed. The conduct of the two companies (TRISA and TSC) holding the television broadcasting rights for the Argentine championship as well as the three operators of cable television in Buenos Aires was sanctioned in this case. The Opinion of the CNDC and also the Resolution of the Enforcement Authority held that the rights holders, in a dominant situation, had imposed conditions on the cable operators forcing the latter to offer subscribers the same package called the "codified system" and for the same price, which would have the effect of excluding other operators. One might ask if in reality the CNDC did not take account of whether a cartel was formed between the three cable operators, while the two rights holder were acting as "cartel police".[74]

The Resolution was annulled by the Court of Appeal for Economic and Criminal Matters[75], which held that a vertical practice was involved.

This different opinion can be explained by the existing differences between the CNDC and the said Court in determining the relevant market. In this respect, the relevant market in the CNDC's view was constituted by the live transfer rights over games in the Argentine first-division football championship (thereby creating a monopoly for the TRISA-TSC group) while the Court of Appeal for Economic and Criminal Matters, by contrast, determined that the relevant market involved all televised football programmes, be they broadcasters of Argentine football abroad, through direct or delayed coverage. In the light of the foregoing, it is not surprising that the said Court should question where the TRISA-TSC group held a dominant position as provider of televised football programmes and, being a vertical behaviour engaged in by a party lacking a dominant position, it held that no offence existed. An appeal against this judgement was brought before the Supreme Court of Justice of Argentina, which considered that the conditions for admitting the appeal were not met as the Court of Appeal had not handed down an arbitrary judgement, but rather had interpreted the evidence in a different way to the CNDC.

Here, it can be said that the CND's approach to the controversial subject of vertical restraints in such cases consists in amalgamating them with other anti-competitive behaviours, in particular abuse of dominant position, as will be shown below in the section dealing with the Clorox Resolution. In any event, there is a certain tendency, manifested particularly clearly in the case-law of the Courts, not to regard vertical restraints as anti-competitive, including those such as the vertical fixing of resale prices which other legislations and jurisdictions regard as collusive.

3.3 Abuse of dominant position

Clorox Case: Exclusory or exclusionary abuse

In the Resolution of the Secretary of Commerce of 17 April 2015, the company Clorox Argentina SA (Clorox) received a fine of $50,000,000 for its conduct in the bleaches market, which constituted an abuse of its dominant position in this market, and also obstructed the presence of a competitor's product. The foregoing was in line with the Opinion of the CNDC, which was incorporated into the Resolution.

In this case, at the request of the complainant company (a competitor of the company at issue), precautionary measures were adopted. Clorox was ordered to suspend the behaviours in which it was engaged. These consisted in the refusal to supply its products or the limitation of discounts granted to wholesalers who purchased the product of the complainant company. The complainant based its complaint on the fact that Clorox held a dominant position in the bleaches market and that its behaviour was leading to the exclusion of the complainant's product from the relevant market. The investigation also covered other behaviours, such as the imposition by Clorox of a prices "***gap***" on wholesalers.

In its Opinion, the CNDC deemed the conduct under investigation to constitute an abuse of dominant position with exclusory effects. To reach this conclusion, first, it delimited the relevant market in terms of product (bleaches) and geographically (national dimension) and reached the conclusion that Clorox held a dominant position in this market. With the application of these parameters, it was evident that the behaviour of Clorox had an anti-competitive purpose, intended to obstruct the presence of other competitors in this market, the complainant among them.[76] This is a clear example of behaviour engaged in by the dominant operator in order to consolidate its privileged dominant position, in that it imposed more stringent conditions on distributors and customers if they purchased its competitors' products than if they only purchased the dominant operator's products. This conduct is contrary to competition through its purpose, as this clearly consists in limiting or obstructing the presence of competitors in the market, and this is why it constitutes a typical exclusory abuse.

It should be pointed out that the text of the Opinion contains references to vertical restraints in a case of abuse. Thus, for example, it is stated that the facts complained of in the case "fall within exclusionary practices known as vertical", later indicating that the vertical fixing of prices constitutes a circumstance contrary to free competition in the following terms: "vertical actions designed to fix prices at various stages of commercialisation affect many of the elements that make up a competitive market". However, a sanction for vertical restraints (bilateral or multilateral behaviour) does not follow

from these considerations, as sanctions are only imposed for the unilateral behaviour of abuse of dominant position.

Yacimientos Petrolíferos Fiscales Case: Exploitative Abuse

Adopting the Opinion of the CNDC, the Enforcement Authority imposed on YPF a fine of 109,644,000 pesos, and at the same time ordered the discontinuation of its behaviour. This merits comment even though it concerns an old Resolution because it is the highest fine hitherto imposed for abuse of dominant position.

The procedure against YPF was launched ex oficio in August 1997, following the preparation of a report which showed the existence of significant circumstances in the bulk liquefied petroleum gas (LPG) market and large price rises occurring between 1992 and 1997; price rises not justified by increased production costs. Mention was also made of a context of virtual stagnation in domestic demand, a significant increase in production and export on the part of the company and a widening gap between selling prices to local fractionation operators and export prices.

An investigation was conducted into whether YPF, a company holding a dominant position in the market for bulk supply in the LPG market, was pursuing a policy of restriction of internal supply in order to maintain the selling price in the national market at a high level in comparison with export prices. The presumption was that if YPF, instead of devoting a large volume of its production to export, directed it instead to the domestic market, prices within Argentina would be at the same level as export prices.

The relevant market was defined as being that of the domestic commercialisation of bulk LPG, including demand both from the petrochemical sector and local fractionation operators. The supply side of the market was made up of all the local companies producing LPG. In terms of the geographical dimension of the relevant market, this was deemed to be national.

The definition of the relevant market was based on the consideration of substitutability both in terms of supply and demand; from the viewpoint of demand, it was concluded that neither the petrochemical sector nor the local fractionation operators had the option in practice of substituting LPG for an alternative product. With regard to supply, the existence of significant entry barriers to the import of LGP led to the conclusion that it was not possible to find alternative supplies easily. Once this relevant market was established, it was determined that YPF did hold a dominant position in it.

Given these parameters, the CNDC was required to analyse whether the behaviour could be regarded as abusive. According to the Opinion, YPF was pursuing a commercial policy which consisted in diverting its production to export, for the purposes of maintaining domestic prices at a relatively high level compared with export prices, in addition to the fact that reimportation was prohibited. A number of factors combined to achieve this, all interrelated: the massive diversion of its LPG production to export, the increase in domestic prices, and the existence of price discrimination between the domestic market and the international market and contractual clauses prohibiting the re-entry of exported product.

The requirement to identify an impact on the general economic interest led to the analysis that, although the behaviour had occurred in the wholesale market, the effects were nevertheless felt "downstream" in the market for sales to consumers, who were obliged to pay more than they would otherwise have paid in the absence of the abusive behaviour, as the fractionation operators passed on the price rises to consumers. Furthermore, there was an aggravating factor in the behaviour, in that it concerned a basic need product, precisely for residents on low incomes with no access to natural gas networks.

In calculating the fine imposed, account was taken not so much of the damage to the general economic interest but of the profits illicitly obtained by YPF as the result of its abusive behaviour. Thus, total illicit profits for the period under investigation were estimated to be $91,370,000, an amount that was increased by 20% as permitted by Article 26 of the LDC, and the fine was consequently set at $109,644,000.

As a comment on this resolution, it can be pointed out this is an instance in which a sanction is imposed for the fixing of abusive prices, a form known as "exploitative abuse", as against "exclusory abuse",

the anti-competitive effects of which are obvious. It is not easy to determine when a price is abusive, but there are circumstances where parameters exist which facilitate this categorisation, such as the situation analysed in the above-mentioned Resolution. In fact, when one price is fixed for export and another for the national market while simultaneously preventing reimportation, if the price set for the national market exceeds that applied to international sales it can undoubtedly be regarded as abusive.

The conviction was upheld by the Supreme Court of Justice of Argentina in its judgement of 2 July 2002.

Royal Canin Case: Agreed settlement

On some occasions, in dealing with cases relating to anti-competitive behaviours, the CNDC has made use of the power provided for in Article 36 of Law 25.156 to approve an agreed settlement, accepting the undertakings offered by the alleged perpetrators of these behaviours.

One example of an agreed settlement is the Royal Canin Resolution issued by the Secretary of Domestic Commerce of 7 June 2012 which accepted the undertakings offered, concurring with the view of the CNDC, whose Opinion was incorporated into the Resolution.

In this case, a customer of products supplied by the company Royal Canin Argentina SA (RCA), and active in the veterinary and ***pet shop*** sector, filed a complaint with the CNDC alleging that the supplier had at certain times restricted the supply of products had been regularly purchased for years and which had allowed him to expand his business. The products, and therefore the market affected by the alleged behaviour, consisted of pet foods and the company at issue sold its products with no exclusivity requirement.

In its Opinion, the CNDC presented an analysis of previous cases in which undertakings had been accepted, specifying that undertakings do not have to be accepted automatically but rather in the light of the circumstances of each specific case. In any event, the institution of an agreed settlement was reserved for cases in which the undertakings generated greater benefits than would be gained by continuing with the investigation. In this case, the company at issue (RCA) gave an undertaking to resume supplies to the complainant, with certain discounts and at the same conditions as for other customers in the area, terms which were accepted by the complainant. The Opinion was therefore incorporated into the Resolution and served as its basis.

3.4 Economic concentrations

Telefónica–Telecom Case

In 2007, various companies, including Telefónica de España SA, purchased shares in the Italian company Telco SpA. (TELCO), the owner of the company Olimpia SpA, which owned assets in the form of shares in Telecom Italia (TI). This had a major impact in Argentina as TI held, directly or indirectly, 50% of the shares in the Argentine company Sofora Telecomunicaciones SA which, in turn, indirectly controlled Telecom Argentina SA (TA).

The problem lay in the fact that Telefónica España SA (TE) held 42% of the shares in TELCO, which in turn controlled Telefónica de Argentina SA (TELA). This gave rise to a relevant event whereby TE had an influence over the two main telecommunications operators in Argentina, total influence over TELA and indirect influence over TA.

This event was widely reported in the press and in Resolution 4/09 of 9 January the CNDC held that the change of control at TELCO constituted a concentration operation having effects in Argentina and that the acquisition of TELCO was subject to the notification requirement.

The CNDC processed the case and issued its opinion on 25 August 2009, in which it determined that this operation would affect competition in Argentina, reducing it substantially in markets in which both TA and TELA operate. On the basis of this opinion, the Secretary of Domestic Commerce issued Resolution 438/09, making the operation subject to the condition that TI and its subsidiary Telecom Italia Internacional (TII) should divest all their assets in Sofora, and thus cease to control TA, within one year.

An appeal was brought against the Resolution before the Court of Appeal for Economic and Criminal Matters which issued its judgement on

1 February 2010. By a majority of two votes to one[77], it was annulled on the grounds that the rights of defence of the parties involved had been violated as obligations had been imposed on two companies (TI and Telecom Italia International) which had not been party to the proceeding. As this was an interlocutory proceeding, the resolution was annulled but without consideration of the substance of the case.[78]

The Judgement ordered the issuance of a new administrative decision. At the time this judgement was made, the appeal lodged by the parties concerned against the Resolution of 9 January 2009, which held that the TELCO operation constituted a concentration and must be notified, was still pending. The Courts dismissed this appeal, thereby confirming the opinion that the operation should be notified in Argentina.

As the result of these two court decisions, the operation was required to be notified again and a new case processed, involving all the parties concerned.

Once the new administrative decision was issued, through the Resolution of the Secretary of Economic Policy of 13 October 2010, pursuant to the provisions of Article 13 b) of the LDC conditions were applied to the operation, making its approval subject to the fulfilment of the undertakings submitted by the notifying parties. These consisted in prohibiting TE from participating in or vetoing - in TELCO or any other company partly owned by TELCO - any issued relating to the Argentine market. These undertakings became conditions on which the approval of the operation was contingent. The same Resolution also confirmed the fine imposed previously for extemporaneous notification.

Attention can be drawn to the fact that, without having altered the competition conditions and making a similar analysis, this Resolution approved the operation subject to conditions, consisting of the establishment of Chinese walls, while the earlier Resolution made approval conditional upon disinvestment in TELCO.

As indicated above, within the context of the same operation, in his Resolution of 6 January 2010 the Secretary of Domestic Commerce of the Ministry of Economy adopted the content of CNDC Opinion 775/2010 and, deeming the TELCO operation to constitute an economic concentration which had not been notified within the legally stipulated time period, imposed large fines on the purchasers of TELCO, TE and another four companies, the latter being outwith the telecommunications market. The Resolution was partially annulled by the Court of Appeal for Economic and Criminal Matters, which reduced the fine imposed on TE to less than half and annulled those imposed on the other TELCO shareholders. An appeal was lodged against the judgement with the Supreme Court, which confirmed it, holding that the companies had indeed failed to fulfil the obligation to notify for a period of more than three hundred days, and set aside the amount of the fines, maintaining those imposed by the Secretary of Domestic Commerce, overruling the reduction applied to TE and ratifying the fine imposed on the remaining accused parties.

Hoyts/Cinermark Argentina case (approval with undertakings pursuant to Article 13 b) of the Defence of Competition Act)

By Resolution of the Secretary of Commerce of 6 May 2015, approval was given in a case of economic concentration which related to an operation whereby Cinemark Argentina Holdings INC acquired all of the shares in Boca Holdings INC, which in turn held 100% of shares in Hoyts General Cinema de Argentina SA. The companies affected by the operation focused their activity in the motion picture projection market.

Authorisation for the operation was contingent upon fulfilment of the undertaking presented by the notifying parties, together with clarifications in their regard by the CNDC which, in summary, consisted in a limitation of growth and the maintenance of prices[79] for a period of five years in two areas: the North Zone of Greater Buenos Aires and within the Autonomous City of Buenos Aires itself.

The CNDC report accompanied the Resolution. In this report, the CNDC first delimited the relevant market affected by the operation, performing the delimitation from the product viewpoint as well as geographically. With respect to the relevant product market, this was defined as the operation of multiscreen motion picture complexes, an activity which included the screening of films and the additional service of retailing foods and

drinks. Other forms of screening (single-screen cinemas, Premium theatres etc.) were not included in the reference market. The product market was delimited using the SSNIP (Small but Significant and Nontransitory Increase in Price) test.

The relevant markets were geographically delimited by taking certain isochrones into account, that is to say, the time required to travel the distance from the homes of cinema-goers to the motion picture theatre. To this end, nine zones were identified in the Autonomous City of Buenos Aires and Greater Buenos Aires. Of these nine zones, the operation involved an increase in share, in terms both of audience and billing, for the companies undergoing concentration of above forty percent or very close to this figure.[80] These market shares denoted competition problems caused by the operation (two of them, specifically) which would need to be remedied for approval to go ahead. The notifying parties offered certain undertakings which were analysed by the CNDC.

As indicated above, after an analysis of the potential remedies in terms of structure and behaviour, within the generic context of the concentration operations the CNDC analysed the proposed undertakings, with certain qualifications and clarifications. On the basis of these qualifications, the CNDC accepted the undertakings as they resolved the competition problems presented by the operations, and therefore proposed that the Secretary of Commerce make approval for the corporate concentration operation conditional upon the fulfilment of these undertakings.

It should be stressed that, by contrast with the Cablevisión/Multicanal Resolution analysed above, conditions were applied to the approval in accordance with the provisions of Article 13 b) of the LDC, and therefore the undertakings become conditions upon which approval for the operation was contingent.

Iberia Líneas Aéreas de España SA and British Airways PLA concentration (approval with conditions)

By means of an operation which was carried out outside Argentina, Iberia Líneas Aéreas de España SA and British Airways PLA merged, forming a new company called International Consolidated Airlines Group SA (IAG). The new company would become the ***holding*** company of both firms, which would continue to provide air transport services under their own brand names, bringing about an industrial financial and operational integration.

Because it exceeded the legal business volume thresholds for referral to a concentration control in Argentina, this operation was notified to the CNDC. The Commission analysed the operation and issued an Opinion in which it considered that the operation did affect competition and the general economic interest on the Buenos Aires/London, Buenos Aires/Brussels and Buenos Aires/Vienna routes, and it therefore proposed that the Secretary of Commerce make approval for the operation subject to compliance with the following conditions:

- For a five-year period, to maintain capacity, in terms both of frequency and number of seats, on the services provided on the Buenos-Aires/London route
- To monitor prices on the Buenos Aires/Brussels and Buenos Aires/Vienna routes for a period of three years.

The CNDC would be the body designated to monitor compliance with these conditions.

By the Resolution of 2 February 2015, the Secretary of Commerce decided to make approval for the notified concentration contingent upon the conditions proposed by the CNDC. The Opinion issued by the CNDC was incorporated into the Resolution and formed its basis. This Opinion contains an in-depth analysis of the markets, appropriately separating the cargo and passenger markets, in accordance with international precedents in airline concentrations. It included direct and indirect flights in the passenger market, as well as impacts on time-sensitive and non-time-sensitive passengers, and at the same time analysed the degree of concentration in the various origin/destination routes. To this end, the study was carried out using the HHI indices and the SSNIP (Small but Significant and Nontransitory Increase in Price) test, the markets by route, including sixteen routes in the analysis, all between Buenos Aires and various European cities. In two of these (Buenos Aires/Brussels and Brussels/Vienna), competition problems arose in that they created or consolidated the market shares of the merging companies at a level above 40%, while the Buenos Aires/London route was categorised as a "high

share route", because totalling the market share of the merging companies in the last three years gave shares in the order of 70% (69.2% in 2013, the last year analysed).

As a result of this analysis and of the competition problems detected, the aforementioned remedies were proposed, in the form of conditions applied to the operation.

Irrespective of the uncertainty that might exist regarding potentiality of price monitoring to prevent abusive pricing, greater doubts emerged as to the conditions relating to the Buenos Aires/ London route which, strangely, was not included in the price monitoring. It is difficult to understand how the competition problems detected on this route might be resolved by means of maintaining flights and passenger capacity.[81] This being the case, although it might ostensibly be beneficial for passengers on this route inasmuch as direct flights between these two points would not be withdrawn, this measure bears little relationship to the competition problems caused by the concentration. It therefore has the appearance of being a politically inspired measure unrelated to competition.[82]

Multicanal/Cablevisión concentration (approval with undertakings pursuant to Article 13 a) of the Competition Defence Act)

In 2006, notification was received of a complex corporate operation whereby Grupo Clarín SA and Fintech Advisory INC were to acquire a number of shares in the company Cablevisión SA which when added to those they already owned would represent 60% and 40% respectively. In turn, Cablevisión SA would acquire control of the company Multicanal SA, among others. In addition, Multicanal would acquire all of the shares in Prima SA.

The notified operation would constitute a concentration operation which, when analysed, raised competition problems due to the presence of horizontal relationships in the following markets:

a) The multiple signal distribution market, in particular through the integration of Cablevisión and Multicanal.

b) The internet access market, due to the integration between Cablevisión, Prima and Clarín Global.

In the case processed by the CNDC, the notifying parties assumed certain undertakings for a period of two years and, consequently, a (majority[83]) Opinion was issued and forwarded to the Secretary of Commerce, accepting the said undertakings and recommending approval of the operation under the terms of Article 13 a) of the LDC, that is to say, approval without conditions. Under the same terms as the majority Opinion, the Secretary of Commerce issued the Resolution of 7 December 2007 whereby the operation was approved pursuant to the aforementioned legal provision.

Once the operation had been approved and formalised, certain problems arose as the Executive Power deemed that the undertakings had not been fulfilled and so, through a Resolution of the Ministry of Economy and Production of 3 March 2010 (Resolution 113/2010), a failure to fulfil undertakings was declared and the authorisation ceased to be effective, compelling the parties to demerger.

The problem arose due to the fact that the operation had been approved pursuant to the provisions of Article 13 a) of the LDC (authorisation for the operation) and not those of 13 b) (whereby the approval was made contingent upon fulfilment of the conditions set), and the parties therefore appealed the said Resolution and, in September 2015, the Federal Civil and Commercial Court of Appeals made a judgement revoking Resolution 113/2010 issued by the Minister, on the grounds that authorisation for the concentration had not been subject to conditions, without prejudice to the fact that fulfilment of undertakings might be required through other avenues.

Fampa Argentina and AEI Servicios Argentina concentration (simple approval)

A Resolution of 28 August 2015 issued by the Secretary of Commerce approved a concentration operation which consisted of the acquisition by the company Empresa Distribuidora y Comercializadora Norte SA (EDENOR) of 77.19% of the Empresa Distribuidora Eléctrica Regional SA (EMDERSA); small shareholdings in other electricity distribution companies in which EMDERSA held the remaining capital; 99.99% of the firm AESEBA SA; and the purchase by Pampa Energía SA (the parent company of EDENOR) of the remaining

0.01% of AESABA SA. The approval was issued in line with the assessment of the CNDC Opinion which was incorporated into the Resolution. The said Resolution provided for the inclusion in the case file of a number of previous related operations, the aggregation of which had been recommended by the CNDC.

The CNDC Opinion stressed the great complexity involved in processing the administrative case, due to the existence of multiple related operations simultaneously pending processing by the CNDC, many of them the subject of appeals in the courts. The aggregation of the various cases was therefore recommended.

Furthermore, in its Opinion the CNDC gave a summary of the electricity market, highlighting the role of its four constituent submarkets: generation, transmission, distribution and trading. With regard to the geographical dimension of the relevant markets, in the generation market the territory of the Republic was divided into eight zones, according to the location of the electricity generation power stations. The operation affected the generation and distribution markets. It also had an impact on the gas trading market, which was geographically national in dimension.

After analysing the effects of the operation on the market, deeming the increase in market share resulting from the operation in the various markets analysed not to be significant (since, except in the distribution market in which the group created by the concentration would achieve a share of 26.38%, the resultant shares in the remaining markets analysed did not exceed 7%), the CNDC concluded that the concentration analysed did not raise any concern in terms of competition defence and it therefore recommended that the Enforcement Authority approve the operation without conditions.

3.5 Promotion of competition

In April 2016, as a clear signal of a fresh impetus intended for competition policy, the CNDC announced a firm commitment to the task of competition promotion as a highly effective means of introducing a culture of competition in Argentina. To this end, it announced the conduct of a total of eleven studies to assess competition conditions in highly concentrated sectors with a significant impact on consumers and production. The first of these reports is analysed below, and it should be pointed out that it drew praise in a range of sectors consulted as well as recognition of the fresh impetus given to competition policy.

The report on credit cards, debit cards and electronic payment methods

On 26 August 2016, through its Resolution 17 and as part of its function to promote Competition Law, the CNDC published an investigation into the company Prisma Medios de Pagos SA ("PRISMA") for anti-competitive behaviours and dominant market position and on the market for credit cards and electronic payment methods, and at the same time made a series of recommendations to the Banco Central de la República de la Argentina ("BCRA") and to the Secretary of Commerce. The report was the product of a joint initiative by the Banco Central and the CNDC and it demonstrated close collaboration between the two bodies.

In Argentina, 80% of electronic payments are made with credit cards, the market for which is led by Visa, with MasterCard in second place. In addition, the only means of acquiring and processing Visa electronic payments is via PRISMA.

Furthermore, the study reveals four relevant markets: a) the market for the issuance of electronic means of payment; b) the membership or acquisition market; c) the electronic payments processing market; and d) the market for the provision of terminals or interfaces for electronic payments. The study shows that the essential issues are, first, that PRISMA participates in the four markets involved and in the two existing marketing channels and, second, that the shareholdership of that company is made up of 14 banks. The fact that the shareholders of PRISMA are the country's biggest banks suggests the possible existence of a coordination mechanism which facilitates the fixing of commercial policies common to them all, consumer finance conditions among them.

In this respect, it should be noted that the current configuration of the market for means of payment in Argentina has effects which impede competition in the acquisition and financing markets, as there are incentives for engaging in exclusionary anti-competitive practices in segments in which PRISMA faces potential competition. Accordingly,

the Commission interprets these practices as the presumed abuse of dominant position on the part of PRISMA which warrants investigation.

As a consequence of the foregoing, the CNDC concludes that the following recommendations be made:

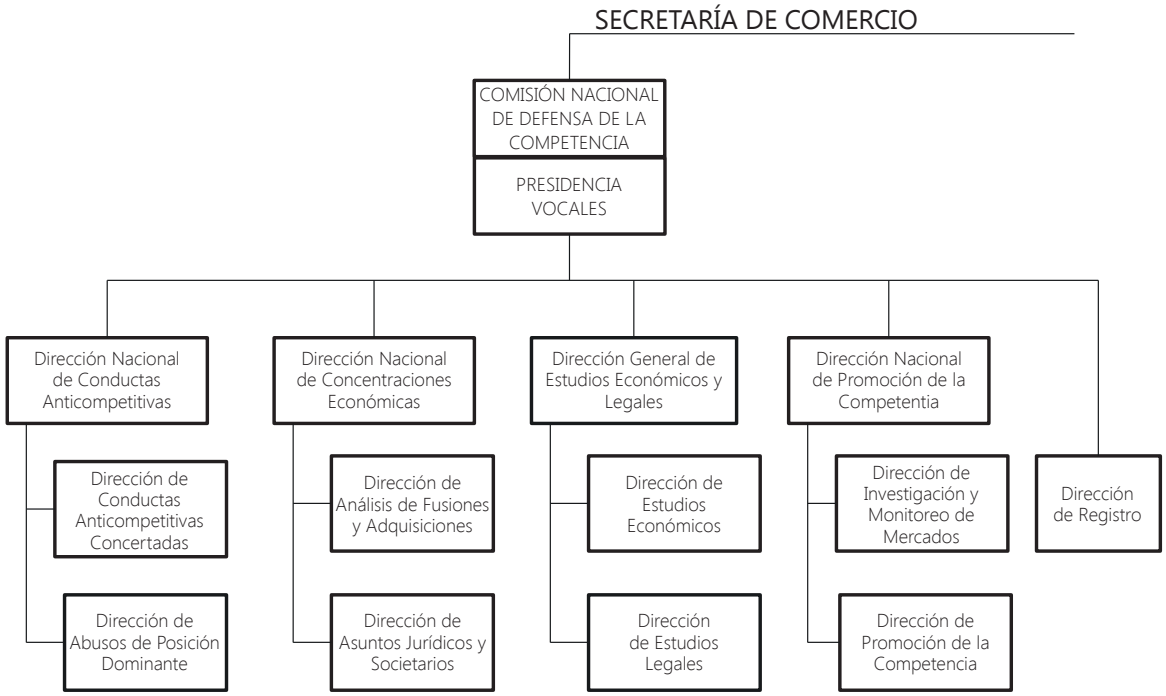
- That the BCRA perform a comprehensive review of the regulation of electronic means of payment, with particular emphasis on the implementation of policies that promote competition, including among others: minimising the barriers to entry into the markets, broadening access to licences, encouraging transparency in consumer finance etc.
- That the Secretary of Commerce initiate an ex oficio investigation against PRISMA and its shareholders, for alleged anti-competitive practices.

The Secretary of Commerce authorised the ex oficio opening of a case on the grounds of anti-competitive behaviours which is currently ongoing, but which has already had effects in that the banks are ready to sell PRISMA to a third party and at the same time accept the regulation of exchange rates.

4. NEW BOOST FOR COMPETITION POLICY (DRAFT AMENDMENTS OF THE COMPETITION DEFENCE ACT)

The constitution of a new Government after the 2015 elections gave a considerable boost to competition policy, which was regarded as a pillar of the government's new action. To this end, measures have been taken to enhance the functions of the bodies tasked with implementing it, the CDNC and the Enforcement Authority in particular.

With this aim in mind, on 16 January 2016 a new President of the CNDC was appointed and, in the months that followed, new commissioners were appointed to the Commission. Furthermore, through Decree 718/2016 the Secretary of Commerce, under the auspices of the Ministry of Production, was designated as the Enforcement Authority, which had not happened since the Law established in 2014 that the Tribunal would not be created and that the Government would designate the Enforcement Authority. Resolution 614-E/2016 created a new and more effective structure for the CNDC.



Through Resolution 190/2016, the functions of the Secretary of Commerce were delegated to the CNDC, assigning competence to the latter for the investigation of cases and the conduct of studies, at its own initiative and at the behest of the Secretary of Commerce. Also, authority was delegated to the CNDC to prepare non-binding reports for resolutions, in terms both of anti-competitive behaviours and the control of concentrations.

The primary goal of these measures was to re-orientate competition matters away from political pressures, and at the same time to prepare the institutions for the legal change that was required if the recommendations made in 2006 on the occasion of the ***peer review*** conducted within the OECD were to come into effect.

At the same time, a restructuring of CNDC staff was carried out, in pursuit of professionalization. To this end, many work posts deemed to be superfluous or unnecessary were reduced, which allowed new specialists to be hired and an appropriate resizing of the structure of the body[84], and including the development of staff training activities.[85] Increased activity within the organisation should also be noted, demonstrated by the fact that the number of opinions issued in 2016 has tripled. In 2016 a total of 246 opinions were issued, representing 3.2 times the average for opinions issued in the previous nine years. Furthermore, the average time taken over analysis of merger and acquisition cases in 2015 was 3.2 years, a figure reduced to 1.8 years by the end of 2016.

These new initiatives have been accompanied by the CNDC's active presence at international competition forums: International Competition Network, International Bar Association, UNCTAD, OECD etc. in which the improvements adopted are assessed.

Similarly, the new projects planned at the Commission include approval of various competition-related Guidelines, which will be enormously enlightening in transmitting information to all actors concerning the criteria for implementing the rules.

In combination with the foregoing, we should highlight the momentum in the sphere of competition advocacy, as indicated above in highlighting the organisational changes. In this regard, we should bear in mind the resolution in the case of credit cards, which is dealt with below, which constitutes an important contribution on the part of the unit, and the conduct of numerous market studies, among them inputs for widespread use (steel, petrochemicals and aluminium); basic household consumer goods (milk, meat, edible oil and laundry soap), the retail sale markets (supermarkets) and other markets such as transport and medicines.

For its part, on 27 September 2016, the Government presented the Unión Industrial Argentina (UIA) with details of the National Production Plan, which were designed to increase competitiveness, generate increased infrastructures, ensure openness to the world and create more high-quality jobs, among other goals. Thus, one of the eight pillars of the National Production Plan, coordinated to drive growth in the economy, was the defence of competition and market transparency, the main objective of which is "to promote the entry of new companies, reduce input costs, to encourage investment and the protection of consumer rights".

As a result, it was deemed necessary to pass a new law, consistent with present times, as has already been done in the OECD countries and Brazil, Colombia and Peru, among those in the region, which have made significant progress in the last decade.

As the reason for the review of competition policy in Argentina in 2006, conducted by the OECD, certain improvements were identified which should have been implemented by Argentina and which should really have been accomplished ten years on. The most advanced countries in the world already have these tools and it is for this reason that the said report advocated, even with some delay, that Argentina take forward a draft LDC which incorporates the succession of advances made in this sphere over the last decade, in line with the recommendations of the international body.

The legislative process started with the preparation, by the CNDC, of a draft reform which was completed in August 2016 and incorporated consultations with specialists and within Government. This draft bill was later put to public consultation, and opinions and suggestions were invited from specialists and various institutions such as IBA, the World Bank and OECD, among others.

In September 2016, Congress was presented with the draft bill to reform the Competition Defence Act, agreed on the basis of drafts from the President of the UCR Block of National Deputies and the Mario Negri-led Cambiemos coalition, and also the Civic Coalition founded by Elisa Carrió, which resulted in an adaptation to international best practices. The said reform was again revised, incorporating the new suggestions. It is expected to be dealt with in Congress in 2017 - where it will undergo the amendments which might arise from the parliamentary debate - because, as we have stressed, "It is one of the basic pillars of the Government's action."

In the words of the Deputy Mario Negri: "The aim of this law is to protect the well-being of consumers and the effective functioning of the market so as to prevent cartel behaviours and abuses of dominant position".

The draft Competition Defence Act which is currently going through Parliament has ninety-one articles grouped into fifteen chapters, the last of which is devoted to transitional and supplementary arrangements.

The contents are as follows:

Chapter I: Prohibited agreements and practices

Chapter II: Dominant position

Chapter III: Concentrations and mergers

Chapter IV: Enforcement Authority

Chapter V: Under Secretariat for the Promotion of Competition

Chapter VI: Budget

Chapter VII: Procedure

Chapter VIII: Sanctions

Chapter IX: Leniency Programme

Chapter X: Damages actions

Chapter XI: Appeals

Chapter XII: National Court of Appeal for the Defence of Competition

Chapter XIII: Statute of limitations

Chapter XIV: Competition promotion system

Chapter XV: Transitional and supplementary arrangements.

Chapter I is devoted to setting out prohibited agreements and practices, while Chapter II, entitled "Dominant position", lays down the criteria on the basis of which one or more operators can be categorised as holding a dominant position, although it should be pointed out that behaviours consisting of abuse of dominant position are regulated in Chapter I, the provisions of Chapter II being used solely to determine the circumstances in which an operator holds a dominant position in a given market.

Some observations and suggestions can be made with regard to the content of this chapter.

First, as in the majority of competition legislations, it would perhaps be appropriate to separate the two basic competition infringing behaviours: collusive agreements or pacts and abuses of dominant position, as this would make clear the existence of anti-competitive behaviours forming the subject of consensus (bilateral or multilateral behaviours) together with others which are unilateral behaviours, essentially abuses of dominant position.[86] One possible disadvantage of the system opted for in the draft bill is that it could raise doubts as to whether the behaviours listed in Articles 2 and 3 can be engaged in not only as the result of agreement or unilaterally by a party holding a dominant position, but by any operator, even one lacking a dominant position.

Second, although there is no doubt that the wording of Article 1 of the draft bill includes vertical agreements (acts or behaviour manifested in any way) the fact that the frontispiece of the draft provision mentions agreements "between competitors" could give rise to doubts as to interpretation, in particular in relation to whether horizontal agreements alone are prohibited. As mentioned above, the predominant trend in Argentina is not to prosecute vertical restraints if they are not accompanied by attempted monopolisation. This question should be clarified in the provision in order to remove any doubt as to whether or not vertical restraints should be included in the prohibition.

Third, the prohibition must include the acts of collective legal entities such as business associations, intellectual property rights entities or professional bodies which, although they appear unilateral, are in fact multilateral in that they are entities that bring together multiple competitors.[87]

Finally, we note that, in accordance with current legislation and Argentine legislative tradition, the concept requiring that the behaviours entail "harm to the general economic interest" is maintained. Of course, it is undeniable that behaviours contrary to free competition, by their very nature, cause such harm to the general economic interest, although some can create efficiencies which prohibition impedes, in that these efficiencies compensate for and limit the damage caused to the general economic interest. It could be interpreted in any event, however, that the "harm to the general economic interest" requirement might constitute yet another requirement which has to be proven in every individual case, when it is more appropriate to reverse the burden of proof: that is to say, behaviours contrary to competition cause this harm to the general economic interest and where this is not the case, or where the behaviours produce efficiencies which compensate for the damage caused, it must be for the perpetrator to demonstrate the existence of any such compensation. To a certain extent, this relates to ***per se***prohibitions, basically "hard core" cartels (price agreements, market sharing, limitation of production, ***bid rigging*** etc.) where the view can be taken that the presumption of damage to the general economic interest admits of no evidence to the contrary.

The draft articles 2 and 3 list a series of competition-restricting practices, in the former "absolutely restrictive of competition" and perpetrated by competitors and, in the latter, removing the adverb "absolutely" and without the requirement of being behaviours, as applicable, agreed between competitors. In large part they constitute a list of ***per se*** prohibitions (Article 2), the remainder subject to the "***rule of reason***" (Article 3). The draft constitutes a substantial improvement over current legislation, insofar as it distinguishes between the two types of behaviours, the first being particularly serious, and encouraging an appropriate interpretation. As indicated above, the behaviours included in the four sections of Article 2 correspond to hard core cartels, and it is appropriately provided that harm to the general economic interest is presumed in these circumstances.

Furthermore, elsewhere in the draft bill, specifically in Article 29, there is a proposal that makes provision for the possible distortion created by constant appeal to the "general economic interest", inasmuch as it authorises the Tribunal for the Defence of Competition to regulate permits for the implementation of contracts, agreements or arrangements "which envisage behaviours included in Article 2 of the law", but which, in the opinion of the Tribunal, do not constitute harm for the general economic interest. The opinion is currently being advanced that this draft provision may prove distorting while at the same time undermining the categorisation of the behaviours included in the draft Article 2 as ***per se*** infringements. In principle, it cannot be understood that the behaviours described in that article - which, as set out above, essentially involve had core cartels - could fail to affect the general economic interest, as it is not easy to foresee circumstances in which a price agreement between competitors, or a limitation of production, or market sharing or a rigged bid in public contracts could do anything other than affect the general economic interest or constitute an infringement of competition rules.

Something else might occur with the behaviours envisaged in the draft Article 3. In certain circumstances they may not affect the general interest, or might at least create efficiencies which compensate for distortions to competition, from the viewpoint of the general interest. It could therefore be suggested that the reference to Article 2 contained in the draft Article 29 be removed or, in any event, that it be replaced by a reference to Article 3 since, we repeat, some of these behaviours may create efficiencies which compensate for the damage to the general interest and, for the purposes of legal certainty, it would prove a positive move, following the European Block Exemptions Regulations model, to regulate those cases in which agreements can be excluded from the prohibition if they feature certain circumstances. Any such exclusion would, however, would only be granted in the situations listed in Article 3 and, on an exceptional basis if desired, those in Article 2.

In conjunction, another suggestion could also be made concerning both draft provisions contained in Article 2 and 3, to the effect that it might be advantageous to add that the list is not exhaustive, but simply illustrative, for example by adding the initial wording "among others".

The draft Articles 5 and 6 of Chapter II appropriately regulate the determination of dominant position in a relevant market, although the geographical

delimitation is not changed with respect to the current legislation, in that reference is still made to the national market "or in one or more parts of the world". Advantage should be taken of the reform of the provision, perhaps, to clarify the geographical dimension of the relevant market. As mentioned above, according to the law the dominant position must refer to the "national market or to one or more parts of the world". It is possible that a dominant position arises in markets which are more restricted than the national market, since the geographical delimitation of the relevant market involves determining the territory in which competition conditions are homogeneous. In this event, there are relevant markets that are more restricted than the national market and although it is clear that a part of the Argentine market would be included in the concept of "a part of the world", clarification to the effect that dominant positions exist in a geographical part of Argentina might prove beneficial, for example by adding the wording "or a significant part thereof" after the term "national market".

Furthermore, the current regulation is maintained in that it regards any entity not subject to "substantial competition" as holding a dominant position. In fact, as overwhelmingly accepted by the doctrine and practice of various jurisdictions, a dominant operator is characterised by the fact that it can act "with independence of judgement", that is to say, without fear of the reactions of its competitors, suppliers or customers. The concept could perhaps be improved if, as proposed in some of the intended draft texts, the term "effective competition" were to replace the current "substantial competition".

Chapter III is devoted to concentrations and mergers. Prior to making any comment, it might be appropriate to point out that the conclusions reached in the peer review report prepared within the OECD in 2006 pointed out some of the weaknesses of the Argentine concentration control system, suggesting that the following is required:

a) Increased efficiency in merger control. With measures such as:
   i) Increased thresholds for notification
   ii) Shorter time for approving simple mergers
   iii) Continued opposition to the right of third parties to appeal decisions relating to mergers.
b) A review of the current notification arrangements which allow the parties to carry out the merger before the competition Enforcement Authority completes its examination.

The draft proposals deal with these points. First, a system is established to increase the threshold for the obligation to notify concentrations, making reference to a unit of account called the Mobile Unit; concentration operations must be notified if they exceed 150 million Mobile Units within Argentina. This is designed to prevent the establishment of a figure in the national currency which could become obsolete if, as has happened in the past, Argentina experiences highly inflationary periods.[88] Considering that this provision, if confirmed and approved in the terms proposed, would mean that only corporate concentration operations of a business volume of 2,250 million pesos would be required to be notified, the planned reform is regarded as ideal for addressing the aforementioned observations made by the OECD in 2006. These entailed devoting efforts to the analysis of operations whose size makes them potentially liable to alter competition conditions and avoiding the deployment of public means and resources on cases with little or no impact on market conditions and competition.

Moreover, sections f) to i), both inclusive, of the draft Article 9 envisage a new method of business volume calculation which takes into account the turnover of the company taking control and not only that of the company subject to the change of control, which is extremely appropriate in that market power must be measured for the group of companies resulting from the operation, and not only for the affected company.

Also, it should be noted that it is a positive step (Article 10) that a consultation procedure is established, in which the Tribunal for the Defence of Competition is consulted as to whether an obligation to notify exists. However, the procedure (which must be established by the Tribunal itself) must be a summary procedure with a stipulated period for responding, as it is to be anticipated that the Tribunal, in order to issue an opinion, will require knowledge of the same information as is required for the notification. If a short time period

is not established, there might be incentives to proceed with notification of the operation (the tasks for which would involve a similar workload) than if a deadline was stipulated.

It is also to be commended that the draft bill incorporates the EOCD recommendations regarding the different processing of concentrations lacking the potential to limit competition, compared with those which do have this potential, providing for a procedure pending regulatory development, in two phases. The first, or initial, phase undertaken for all concentrations will be of forty-five days' duration. The second phase will only take place if, in the course of the first phase, circumstances are detected which have the potential to limit or impede competition (draft Article 14), and will be of 120 days' duration.[89] In addition, a summary procedure is envisaged for concentration operations with a lower likelihood of being prohibited. With these time periods, which are short and reasonable, it is possible to avoid the reticence felt by the business community due to the fact that the concentration cannot be completed until the Authority issues its decision. In any event, these time periods must be stipulated as being preclusive, that is to say, they can only be interrupted for sufficiently justified reasons.[90]

Unquestionably, this procedure will have to be subject to the issuance of regulations, but it would be appropriate to establish a system which allows the intervention of third parties, be they suppliers, competitors, customers or consumers.

In any event, the stipulated time periods are regarded as prudent, and it should be positively emphasised that the intention is to reduce to fifteen days the time period available to the sector regulator to issue its report on a concentration affecting a regulated sector, maintaining the reduction introduced by Decree 396/2001 in 2001.

Finally, provision should be made for the introduction of a Fee for concentrations, which would be paid by the notifying parties and would support the organisation's budget, following the model existing in a large number of jurisdictions.

Entitled "Enforcement Authority", Chapter IV contains the most significant innovations of the draft bill, insofar as it provides an institutional framework for the enforcement of the law which differs substantially from the one currently in place. The proposed institutional system consists of the creation of the National Competition Authority which will replace the previously existing bodies: The National Commission for the Defence of Competition and the Enforcement Authority (the never-created Tribunal for the Defence of Competition).

As a preliminary to analysis of the proposed new authority, it goes without saying that the system opted for combines all the requirements necessary to create a prestigious competition authority, and one removed from political influence for which the previous system was often criticised. The configuration of the new organisation and the transparency in the appointment of its members, in particular their security of tenure for their entire terms of office, strengthen a system which is able make its decisions without interference from political pressures or those exerted by the affected sectors.

As we have said, the draft bill provides for the creation of a National Competition Authority which will be formed by the Tribunal for the Defence of Competition, as the collegiate decision-making body, and two single-person bodies: the Secretariat for the Investigation of Anti-Competitive Behaviours and the Secretariat of Economic Concentrations, tasked with investigating the cases falling within their respective spheres of competence.

The Tribunal for the Defence of Competition is a collegiate body, as mentioned above, and will be made up of a President and four members. Also, as indicated above, the two Secretariats are designed to be single-person bodies and they will be headed by a person who must meet the required criteria and who will be appointed by a public process based on the candidate's experience, in accordance with the procedure laid down in the draft bill. Consideration should be given to the creation of a Secretariat for the Promotion of Competition, by way of a message regarding the importance which should be attached to this function.

For the selection of members of the Authority, that is to say, the President and members of the Tribunal for the Defence of Competition and the heads of the two Secretariats, a procedure is provided for whereby they are appointed after a public competition before an ***ad hoc*** jury which will

draw up a list for each post; this will be published and subject to a period of public scrutiny. During this period of public scrutiny, citizens, non-governmental organisation, professional colleges and associations and consumer and user protection organisations, as well as academic and human rights entities, will be able to submit observations on the make-up of the respective lists. After this period, the National Executive Power, through a reasoned decision, will appoint the members of the National Competition Authority.

As can be seen, the chosen system is transparent and contains elements which preclude the possibility of arbitrary appointments and the appointment of members deemed to be accommodating to political power.

With regard to independence, the system is strengthened by the fact that the various members of the National Competition Authority are chosen for a term of five years, during which they can only be dismissed for circumstances specified in the law and, even so, a system has been established (for special situations such as negligence, permanent incapacity or poor performance of duties, among other specified reasons) in which an enhanced majority (two thirds) of jury members is required for early dismissal, which is appropriate in that it prevents unjustified dismissals which might limit independence.

There can be no doubt that security of tenure of the appointees constitutes the main element strengthening the independence of the "independent authorities", such as the planned National Competition Authority. If it is possible for the Executive Power to dismiss a member of a supposedly independent authority (as happens in the current legislation with the President of the CNDC), then independence can become nothing more than an illusion. For this reason, the system stipulated in the draft bill is deemed to contain all the requirements necessary to ensure the independence of members of the Authority.

As indicated above, the Court for the Defence of Competition is formed by the President (who will also be President of the Authority) and four members. Its members must include two lawyers and two economists. In addition to the administration inherent in the running of an organisation, its functions relate to the case resolution phase, both in cases of anti-competitive behaviour and concentration control. In addition, it is responsible for the issuance of reports and studies specific to the promotion or advocacy of competition, in this case sharing its powers with the Under Secretariat for the Promotion of Competition, incorporated in the Executive Power, as will be shown below.

The Secretariat for the Investigation of Anti-competitive Behaviours will be the investigatory body tasked with processing cases of infringements of the law, and with proposing to the Tribunal for the Defence of Competition the charges and, where applicable, sanctions to be imposed on the alleged infringers of the law.

For its part, the Secretariat of Economic Concentrations will investigate and process all cases relating to corporate concentration control operations and it is responsible for settling cases of concentrations which are subject to the summary procedure. Other concentrations will be settled by the Tribunal for the Defence of Competition, although the Secretariat of Concentrations will be able to voice an opinion on any approval, subordination or denial of approval. In any event, although the jurisdiction of the Tribunal is clear under the provisions of the draft Article 14, it should be noted that the approval or denial of concentrations does not appear on the list of the functions and powers of the Tribunal (Article 28), although we are informed that this point is expected to be amended in the course of the parliamentary process.

Both Secretariats will possess investigative powers and authority for dealing with their corresponding cases.

Chapter V is devoted to the Under Secretariat for the Promotion of Competition. This Under Secretariat is established as the body of the Executive Power for participation in the tasks of promoting and enforcing the competition regulations. It may be asserted that a large proportion of the powers attributed to it in the draft bill are justified insofar as it constitutes a subsidiary body of the National Competition Authority, and, in large part, it is intended to contribute to the enforcement of the competition regulations. There may be more doubt regarding the power provided for in section c) of the planned Article

34, concerning the possibilities of participating as a party to economic concentration control procedures "representing the general interest". And these doubts arise where there is any fear that the proposed Under Secretariat might be used as an instrument to exert pressure on the Authority regarding the opinions of the Executive Power in certain corporate operations, which may consist in encouraging or alternatively preventing certain corporate operations for reasons other than competition-related reasons.

Furthermore, some functions have been attributed to the Under Secretariat (Article 34 g) for the issuance of reports (although certainly at the request of the National Competition Authority) on pro-competitive measures in various sectors. These functions might be deemed to fall within the remit of the National Competition Authority itself, through the creation of the Directorate for the Promotion or Advocacy of Competition, although, in accordance with the provisions of Article 28, this is a power reserved for the Tribunal and therefore the creation of this Directorate or the attribution of the function to any other department will fall under the competence of the Authority itself. In any event, the reforms introduced in 2016 tend towards strengthening the work of competition promotion through the creation of a specific Directorate. The recipient of these studies and recommendations would be the Executive Power itself, and the fact that they were carried out by an independent organisation, removed from the Government itself, would doubtless enhance the prestige of its content as there would be no suspicion of its contamination due to governmental interests.

Chapter VI of the draft bill is devoted to the organisation's budget, which must be prepared annually by the National Competition Authority and forwarded to the Executive Power. The possible existence of its own resources should be provided for, such as Fees for the study of concentration operations.

Chapter VII of the draft bill regulates the procedure through planned provisions which, although in principle concerning behaviour-related procedures as well as economic concentration procedures, their content refers in particular to the former, that is to say, to sanction proceedings for behaviour contrary to free competition. In our opinion, the procedure provided for in this chapter is appropriately balanced between the duties of transparency, the provision of resources to the Authority to enable inquiries into behaviours contrary to the law and the parties' rights of defence. The fact that interested third parties are able to participate in the procedure allows the Tribunal to consider the possibility of hearing facts and arguments that were not considered earlier in the investigation.

Furthermore, the possibility (draft Article 47) of an agreed settlement is provided for in that, prior to the Tribunal's decision, the alleged perpetrator can offer to discontinue the anti-competitive behaviour; and if the proposal is accepted by the Court and the undertaking is seen to have been fulfilled over a reasonable period of time, no further action will be taken. This is an appropriate system for terminating proceedings with an attendant saving of public resources, because the key objective is achieved in this way: bringing the infringement to an end, and with no need for a sanction.

Given that fact that acceptance of this agreed settlement is reserved for the Tribunal, it can be regarded as appropriate, although reflection is needed. The option to propose undertakings comes at an advanced stage, as it can take place right up to the issuance of the resolution, that is to say, when the entire procedure has been worked through. However, inasmuch as the aim of the settled agreement is to bring an end, without the need for a sanction, to the impediments to competition and to achieve a saving in public resources, it must be said that this latter aim is achieved only to a limited extent as the case can be settled when virtually all of those resources have been expended (that is to say, immediately prior to the resolution).

In this respect, it might be beneficial to stipulate an earlier period for the agreed settlement proposal, for example before the conclusion of the investigation, even though the Authority would in any event have powers to reject the agreed settlement proposal if it is submitted late. The system provided for in the draft bill, which does not differ substantially from the current system, may give rise to a situation in which the alleged perpetrator of the anti-competitive behaviours delays the proposal to discontinue them until the last minute, that is to say, until it

has a soundly based idea of the possible decision of the Authority, thereby maintaining the anti-competitive behaviours for a longer period of time and, as indicated above, when the bulk of the public resources has already been used, thus limiting the saving. An earlier point in time should therefore be stipulated for the proposal of undertakings which would bring an end to the impediments to competition. Similarly, undertakings could be deemed inadmissible in the most serious cases of infringement of the competition rules, that is to say, those involving hard core cartels which should in any event be subject to sanction, with the corresponding deterrent effects.

Chapter VIII of the draft bill is devoted to the regulation of sanctions. The draft bill significantly increases the amount of the sanctions provided for in the current legislation. To this end, the draft bill takes account of the recommendations on increased fines, in particular due to their deterrent effects. The amount of the fines (both for instances of anti-competitive behaviours and where an economic concentration contrary to free competition has been carried out without notification) must meet two basic criteria: they must be proportional and must have a deterrent effect. An analysis must be made of the extent to which the draft bill fulfils these criteria.

The draft Article 57 establishes three criteria for the determination of the fine:

a) Up to 30% of the business volume associated with the product or service involved in the illegal act committed during the last financial year, multiplied by the number of years of duration of the offence (affected market criterion)

b) Up to 30% of the consolidated business volume during the last financial year for the economic group to which the infringers belong

c) Two times the illicit profits obtained for the illegal act.

Where it is possible to calculate the figure on the basis of two or more of these criteria, the highest amount will be applied. Otherwise, the amount of the fine can be up to 200 million Mobile Units.

Unquestionably, the mechanisms and calculations established in the draft bill provide for a deterrent effect although one cannot say, perhaps, that the criterion of proportionality is met.

First, the criterion whereby, of the three elements envisaged, the greatest fine amount must be imposed precludes the existence of a maximum limit relating to the turnover of the company or group in question. Unlike the practice in other jurisdictions, which establish a maximum fine amount in relation to the turnover of the group of company involved, no such limit exists. The purpose of this limit is to prevent the fine amount from rendering the continued operation of the company unviable. Usually, this amount is set at 10% of the business volume of the group involved. Conversely, in the draft bill this percentage is set at 30% (according to the second of the aforementioned criteria) and even higher, taking account of the established set of criteria whereby the fine amount will, where possible, be the highest obtained through the application of the greatest of the three criteria. The possibility exists, for example, that the calculation obtained on the basis of the first criterion might significantly exceed the amount of 30% of the turnover of the company or group, and this fine amount would foreseeably render the continued operation of the company unviable. In this event, one might conclude that, by removing an operator from a given market, competition in that market is impeded. But while it is true that this limit refers to business volume within Argentina, in the case of Argentine companies with no international presence a fine of this magnitude, although undoubtedly of deterrent value, could cause the collapse of the company.

Furthermore, other measures largely designed as sanctions in the draft bill accentuate the deterrent effect. First, the possible exclusion of the executives involved from the National Register of State Suppliers, which means that the company affected will be ineligible for State contracts, with the considerable consequences this can entail.

The second measure that accentuates the deterrent effect of the envisaged sanctions is the inclusion of an executive of a company engaging in anticompetitive behaviour as one of the convicted parties (in addition, with the appropriate criterion that the amount of the sanction cannot be paid by the company) and, in particular, the disqualification envisaged for such executives.

With regard to the sanctions provided for in the legislation currently in force, there is no possibility of adopting structural measures, even leading to the winding-up of the company. Insofar as this constitutes an extraordinarily harsh measure, it is rarely applied.

The criteria provided for in the draft Article 58 for calculating the fine are regarded as suitable as they introduce a subjective element when prosecuting the anti-competitive behaviour, largely mitigating the rigidity entailed by the strict application of the criteria of the draft Article 57.

Chapter IX regulates the leniency programme, which constitutes a highly significant innovation in Argentine legislation. In fact, the introduction of the leniency programme constitutes a major innovation which is to be welcomed as its absence would leave a deficiency in the legislation, which made it impossible or at least difficult, to prosecute cartels. In this connection, it should be noted that the summary conclusions approved by the OECD in October 2006 proposed the introduction of a leniency programme as a means of strengthening anti-cartel activity, a recommendation based on the finding that, as mentioned above, the prosecution of cartels by the Argentine competition authority had been limited.[91]

The draft proposal incorporates the most successful experiences of countries in which a leniency programme has been applied, although, departing from traditional models, it does not limit the application of the programme to cartels, but rather to any infringing behaviour based on concertation.[92] The programme guidelines include the possibility of a full or partial forgiveness of the fine.

For the concession to be granted, the following is required:

- The applicant must be the first to provide information and evidence of collusive behaviour, even though the Court may have initiated an investigation but is not in possession of sufficient evidence at the time of the application
- There must be an immediate discontinuation of the behaviour unless, in order to facilitate the investigation, the Court authorises its continuation
- Full cooperation with the investigation
- No evidence must be destroyed
- The application for exemption must not be disclosed.

Furthermore, any party meeting the above-mentioned requirements, apart from being the first to provide information and evidence and provided that they have furnished the investigation with additional elements not already in its possession, will be entitled to a reduction of between 80% and 20% of the amount of the sanction. Between these figures, the reduction will be graduated in the light of the circumstances of submission of the application.

In addition, a situation of great interest is introduced. During an investigation, when one of the participants in the anti-competitive behaviour under investigation informs the authority of the existence of a second anti-competitive behaviour, irrespective of their entitlement to exemption for this, a reduction will be applied of one third of the amount of the fine for participation in the first anti-competitive behaviour.

Finally, it should be pointed out that, unlike the provisions in any of the preliminary drafts, there is no obstacle to granting the benefits of leniency to those who have promoted or led the anti-competitive behaviour.

As a new feature compared with the legislation currently in force, Chapter X of the draft bill includes regulation of the damages actions for infringements of competition rules.

Pursuant to the stipulations of the draft provisions included in this chapter, those who suffer damage as the result of anti-competitive behaviours will be entitled to claim compensation for this damage in the civil and commercial courts. Undoubtedly, the deterrent effects of other measures provided in law can be strengthened by the existence of a procedure whereby the perpetrators of behaviours contrary to free competition are not only exposed to the fines and other sanctions provided for, but are also obliged to provide compensation for the damage caused to those affected by such behaviours.

Since the existence of claims for damages might constitute a disincentive to the leniency programme, the draft bill proposes measures to avoid this effect, in that the court required to rule

on the claim can reduce it or grant exemption to a party to whom leniency has been granted. With the exception of their liability in respect of their purchasers or direct or indirect customers, or in the event that reparation of damage by the other participants in the behaviour has not been possible.

Moreover, if the actions proposed in the regulation contained in this chapter are initiated once a final decision has been issued by the Tribunal for the Defence of Competition, it will be classed as res judicata. Clearly, as confirmed after the establishment of various statutes of limitation, it is intended to allow monitoring actions (those initiated once a final decision has been issued by the Tribunal for the Defence of Competition) and independent actions (those not requiring a prior firm Tribunal decision).

Chapter XI of the draft bill proposes to regulate, in a system not substantially different from the system currently in force, appeals against the resolutions of the Tribunal of the Defence of Competition, although the great innovation lies in the provisions of Chapter XII, proposing the creation of a specialist Court (the National Court of Appeal for Competition Defence) to hear the various actions anticipated against the decisions and resolutions of the Tribunal for the Defence of Competition. The fact that judicial review is based in a specialist Court will enhance the quality of the judicial resolutions revising the decisions and resolutions of the National Competition Authority.

In Chapter XII of the draft bill, statutes of limitation are proposed, of five years for the prosecution of the prohibited behaviours. With regard to claims for damages, different time periods are set for independent actions; these are three years as of the discontinuation of the infringement or as of the injured party becoming aware of it, with reference to monitoring actions, which is set at two years as of the signature of the sanctioning resolution.

The draft bill devotes Chapter XIV to the Competition Promotion System, creating the Competition Promotion Fund to be administered by the Under Secretariat for the Promotion of Competition.

Finally, Chapter XV of the draft bill is devoted to Transitional and Supplementary Arrangements.

5. CURRENT SITUATION

In the peer review analysis carried out within the OECD in 2006, certain proposals were made for the improvement of the Argentine competition defence system, among them:

- To create the Tribunal for the Defence of Competition. The creation of an independent organisation would make it possible to remove decisions concerning the defence of competition from the sphere of political power.
- To increase the budget of the competition authority.
- To strengthen the roll-out of anti-cartel activity. To this end, fine amounts should be increased, strengthening their deterrent effect, and those responsible should be sanctioned. At the same time, a leniency programme should be introduced.
- Enhancing the efficiency of investigations into anti-competitive behaviours. To this end, a more transparent procedure should be established, accompanied by an increase in the thresholds for the notification of concentrations.
- To review the current notification arrangements which allow the parties to complete their merger before the competition authority completes its examination.
- To release the CNDC from as much political pressure as possible, until such time as the Tribunal is created.
- To continue and broaden the effects in order to build a culture of free competition in Argentina.
- To maintain effective and professional relationships with judges hearing appeals in competition-related cases.
- To broaden the functions of the competition authority in regulated sectors.

Analysis of the actions implemented as of the approval of that report should lead to frankly disheartening conclusions if it were not for the introduction, in 2016, of the above-mentioned draft bill and also the significant changes made in that same year through the appointment of a new President of the CNDC, some new commissioners and a new team, as they have not only developed the basis for the new draft bill currently under consideration but also adopted measures to enhance the effectiveness of the CNDC's actions.

But up to 2016, none of the reforms proposed by the OECD concerning institutional design had been implemented, independence had not been strengthened, the effectiveness of the fight against cartels had not been enhanced and the leniency programme had not been set up. On the contrary, instead of creating the court as a means of strengthening the independence of the system, dependence upon political power was increased by the permanent designation of the Secretary of Commerce as the Enforcement Authority.

In 2005, a draft bill was introduced creating the Tribunal and placing decisions on concentrations under its responsibility, but it was not passed into law.

However, it is important to recognise that, since 2016, significant measures have been adopted aimed at improving the Argentine competition defence system, measures which have been noted in the corresponding section but can be summarised as: a shortening of administrative deadlines and an improvement in bureaucratic systems, the appointment of new CNDC members, a restructuring of its staff and staff training, the delegation of appropriate powers to the Enforcement Authority (Secretary of Commerce) at the CNDC[93], and a restructuring of the latter's organisation which is resulting in the effective performance of its functions.

The efforts expended in the sphere of competition defence in Argentina, which have been analysed throughout the report, will undoubtedly lead to benefits for consumers (better prices, quality and variety of products), and in the generation of a climate of positive investment by the business community, both domestic and international.

6. CONCLUSIONS

One. The recommendations made in the peer review examination of 2006 within the OECD remain valid today. In particular, in the years since the approval of these recommendations and up to 2016, no apparent decline in political influence was evident in the enforcement of competition rules, although considerable progress has been observed in this regard since 2016.

Two. Since 2016, important initiatives have been adopted, not only in terms of the CNDC's organisation but also its action, which have constituted steps towards strengthening the independence and effectiveness of the Competition Authority.

Three. The fact that the powers of the Secretary of Commerce, as the Enforcement Authority, have been delegated to the CNDC, concurs with the previous conclusion and demonstrates the will to strengthen the Argentine competition defence system, consistent with the basic lines of international best practice.

Four. The introduction of a draft competition defence bill is also the outward expression of a commitment in line with the recommendations made in 2006. With total respect for the sovereignty incarnated in the Legislative Power of the Argentine Republic, votes must be held for the rapid adoption of the draft bill, which will mean that the Argentine competition defence system will have an advanced law in line with international best practice.

Five. The content of the draft bill introduced addresses all the concerns raised on numerous occasions and expressed in 2006, such as increasing the thresholds for the notification of concentration operations, regulating the suspensive effects of notification, reducing the time periods for the processing of cases, implementing a leniency programme and the creation of the Tribunal for the Defence of Competition. At the same time, the system chosen for the appointment of its members and their security of tenure for their full terms of office are suitable measures for strengthening its independence in the face of political influence and economic interests.

Six. Until the new law is adopted, it is to be recommended that the efforts made to shorten case processing times, in cases of both anti-competitive behaviour and concentration control should be continued. In this connection, the time period stipulated in the law should be regarded as preclusive and not simply regulatory, as is the case at present, so that once these periods have expired without duly justified interruption, the case will lapse.

Seven. As of 2016, in agreement with the Secretary of Commerce, the new Commission has carried out important work on the promotion of competition, not only through the creation of the Directorate

of Competition but also through the drafting of a report on the credit card market which has had a significant impact on economic life. It should be stressed that the promotion of competition is a highly suitable instrument for creating a culture of competition, and its intensification must be encouraged.

Eight. In tandem with, and even before, the adoption of the draft bill the Commission must be provided with sufficient economic resources to enable it to exercise its functions, without reliance on the political will of the Executive Power, and at the same time it must identify more flexible forms of hiring staff. This would give the best professionals access to the competition authority and thus heighten its prestige. It is important to provide the authority with the requisite financial resources. In this regard, the creation of a fee for concentration control might be envisaged. This would boost the Authority's resources and enhance its economic independence.

Nine. The private enforcement of the competition rules must be facilitated, offering suitable procedures to ensure that parties damaged by the infringement of competition rules are able to claim for the damage caused, thereby constituting a further deterrent element for infringers. The regulations must provide for any conflicts as might arise in this regard, with the leniency programme, and establish mechanisms to ensure that this programme is not disincentivised by the fear of actions for damages.

ENDNOTES

1 Articles published on Globaltrade.net: "Market Analyses about Argentina", and information published on the website of the Ministry of Economy and Public Finances and the Ministry of Agro-Industry.

2 Approximately US$779 billion in 2018 and US$925 billion in 2019.

3 International Monetary Fund: "2016 Article IV Consultation – Press release; staff report; and statement by the Executive Director for Argentina", page 43.

4 Eduardo Tambussi, Carlos: "Defensa de la competencia en la Argentina: aspectos constitucionales y vinculación con el derecho de usuarios y consumidores", ISSN 2313-1861, LEX No. 14, 2014.

5 Basterra Marcela: "La defensa de la competencia en la Constitución Argentina. El artículo 42 y su ley reglamentaria 25.156". Judicial Doctrine (2003-2), pages 837-844.

6 It should be noted that Laws 11.210, 12.906 and 22.262 were passed under the 1853-1860 Constitution, which contained no provisions specific to the defence of competition.

7 Constitution of Argentina, Article 43: "Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule. This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms...".

8 For a more in-depth analysis of the legislative history, see Cabanellas (1992).

9 It is an interesting fact that in the film "Gilda" by Charles Vidor (1946) the attention of Europeans was drawn to those years in which the Argentine police were pursuing one of the film's characters for promoting a global tungsten cartel. Within the International Competition Network (ICN), countries whose legislation provides for criminal sanctions for breaches of competition, with the United States of America at their head, insist that countries whose competition laws fall within sanctioning administrative law (treating infringements thereof as administrative offences) legislate to criminalise certain anticompetitive practices, cartels in particular.

10 In 2009, as part of a study carried out by the British Office of Fair Trading (An assessment of discretionary penalties regimes) a selective survey was conducted among companies and competition lawyers on the deterrent value of five measures (criminalisation, disqualification of directors, fines, reputational damage and compensation for damages). Companies and lawyers alike cited criminalisation as having the greatest deterrent value (it should be pointed out that when assessing the deterrent character of the other measures, the same concurrence did not arise; for example, companies assigned a only slight deterrent effect to fines, by contrast with the lawyers).

11 In January 1999, the Spanish oil company Repsol purchased 14.99% of the shares in YPF from the Argentine Government and immediately launched a takeover bid at US$44.79 per share for the remaining YPF shares. After allowing the YPF intervention in 2012, the Government of Argentina finally approved the compulsory acquisition of 51% of the shares in YPF, owned by Repsol (Repsol held 57.4% of the shares).

12 Before being amended by Law 26.993, in 2014.

13 Ruiz Díaz Labrano, Roberto: "Globalización, el derecho del mercado y la defensa de la competencia en el MERCOSUR", pages 215-217.

14 Law 26.993 created the Dispute Resolution System in Consumer Interactions, as part of a package of reforms driven in 2014 by the Government of Cristina Kirchner, with the aim of exercising greater control over prices and combating the inflationary environment.

15 Article 8 of Law 25.156 provides that acts will only have effect between the parties or in relation to third parties once the provisions of Articles 13 and 14 have been complied with, that is to say, once the control authority has approved, laid down conditions for or denied the operation, or once the operation is deemed to have been approved tacitly. Consequently, although the mechanism established by Argentine legislation with regard to merger control involves prior notification, the said article provides that economic concentration operations meeting the requirements established therein must be notified for the purposes of examination "...in advance or within one week of the date of conclusion of the agreement, publication of the purchase or exchange offer, or acquisition of a controlling shareholding...". This means in practice that merger control in Argentina has been developed as an ***ex post*** system since its creation.

16 Bonzón Rafart, Juan C: "Derecho de la competencia", ERREPAR, DPTyE, No. 23, May 2012, chap. 4. "Prohibited practices".

1 Articles 4 and 5 of Law 25.156 define a dominant position and the factors that must be taken into account in order to establish its existence.

18 Bonzón Rafart, Juan C. "Ley de defensa de la competencia: Ámbito territorial. Acuerdos y prácticas prohibidas. Posición dominante. Principio de realidad económica", ERREPAR, November 2012.

19 These three forms, which collusive operators can adopt in order to increase their market power, are not mutually exclusive. Quite the contrary, they are frequently combined in order to achieve greater effectiveness.

20 Malis, Ismael; Povolo, Diego; and Pereda, Jorge: "La lucha anticartel en la Argentina". Report of the Organisation for Economic Cooperation and Development (OECD).

21 Giner Parreño, César, "Distribución y Libre Competencia (el aprovisionamiento del distribuidor) Editorial Montecorvo, Madrid 1994. There has long been extensive regulation of vertical restraints under European Union (EU) regulations, through the Block Exemption Regulations, which set out the characteristics of agreements which, although restricting competition, nevertheless warrant exemption under Article 101.3 of the Treaty. The purpose or effect of any restricted distribution system is to limit competition, yet at the same time such agreements are beneficial for consumers insofar as they allow an improved offer of products in terms of quantity and quality. They thus warrant exemption provided that they do not contain certain clauses (vertical price fixing, for example). For years, a formalistic criterion prevailed in EU regulations, which changed in 1999 with the adoption of Regulation 2790/99 on Vertical Restrictions (now replaced by Regulation 330/2010), which introduced consideration of elements of economic analysis of the law, criteria gone into further depth in the current regulations. The European rules are therefore becoming more flexible in their consideration of the anti-competitive effects of vertical restraints. Furthermore, in the early years of implementation of the European competition rules, there was a large number of convictions for vertical restraints, but in recent years this picture has declined and the primary activity of the Commission with regard to competition is a focus on cartels and abuses of dominant position. This trend is explained by the fact that the aims of the European Commission are not limited to achieving a system in which competition is not affected, but the creation of a common market is also pursued, and certain forms of distribution can raise obstacles to this aim.

22 An example of exploitative abuse is the YPF case, and one of exclusionary abuse is the Clorox Resolution.

23 This interpretation appears in Cabanellas (1983), chapter 5; and is consistent with the content of the statement of legal reasons for Law 22.262.

24 The term "substantial influence" has been the subject of numerous debates concerning the defence of competition. Through its case-law, the CNDC has attempted to clarify the scope of the term. In the procedure leading to Consultative Opinion no. 124, it determined that"... decisive (or substantial) influence means the power to block actions that determine the competitive strategy of a business...". Years later, through Resolution 4/2009 of 9 January 2009, it determined that "... the substantial influence may eventually reach sufficient intensity to change into a "controlling" influence or an influence "of control", as control is an influence that provides dominance over the corporate will (and logically, in so doing, over corporate affairs)..."

25 Article 3 of European Commission Regulation 1310/9729, defines operations causing a lasting change in the structure of the affected businesses as "concentrations".

26 Rivera, Julio César, Instituciones de Derecho Concursal, Rubinzal-Culzoni, Santa Fe, 1.997, volume 2, page 279.

27 Bonzón Rafart, Juan C: "Concentraciones y fusiones", ERREPAR, August 2013.

28 Molina Sandoval, Carlos: "El control de concentraciones económicas y fusiones en el régimen competitivo argentino", 2010.

29 As defined in Resolution 164/2001, Annex I, "Guidelines for the control of economic concentrations".

30 Nochteff, Hugo and Soltz, Hernán "Defensa de la Competencia" Plan Fénix, FCE/UBA, February 2003.

31 Otamendi, Jorge: "El interés general y la eficiencia económica en la ley de defensa de la competencia", Law 1999-F, 1087.

32 OECD and IDB: "El control de concentraciones económicas en la República Argentina".

33 The procedure for the notification of economic concentration operations has been documented in more detail in the Guide for the Notification of Economic Concentration Operations (according to. Resolución No. 40/01), which supplements the Defence of Competition Act, detailing the forms to be submitted (F1, F2 and F3) and the various reporting requirements according to the complexity of the notified operation.

34 Article 8 of Decree 89/2001, regulating Law 25.156, defines the concept of "affected companies", including in the concept both the company coming under control and the company acquiring control.

[35] Approximately US$12.5 million.

[36] In addition, Article 10 establishes other exceptions to mandatory notification, namely: "a) acquisitions of companies in which the purchaser already owns more than fifty percent (50%) of the shares; b) acquisitions of company bonds, debentures, non-voting shares or debt instruments; c) acquisitions of a single company by a single foreign company not previously owning assets or shares in other companies within Argentina; d) acquisition of wound-up companies (which have not registered any activity within the country in the last year)*.

[37] Unless within the previous twelve months operations have been carried out which, in total, exceed this amount, or the amount of 60,000,000 pesos (approximately US$3.75 million) in the last thirty-six months, provided in both cases that the same market is involved.

[38] In accordance with the stipulations of Resolution 190 - E/2016 issued by the Secretary of Commerce, whereby the CNDC is mandated to pursue the investigation and examination of cases which are initiated, or have already been initiated, pursuant to Law 25.156, and it determines the powers devolved to that body for this purpose.

[39] Competence is assigned by virtue of the provision of Articles 13 and 58 of Law No. 25.156; Decree No. 357 of 21 February 2002 and amendments thereto; and decree 718/2016.

[40] In accordance with the provisions of Article 8 of Law 25.156.

[41] Notwithstanding the provisions of Article 8 of Law 25.156 with respect to the legal effects of acts subject to mandatory notification, the case-law of the CNDC dictates that "... a concentration operation duly notified to the Commission is subject to a resolutive condition and, consequently, once the operation has been notified, the parties could conclude the operation... despite the fact that its approval is pending. However, this Commission cautions that, should approval for the operation be denied or conditions set, they must revert to the situation as it stood prior to the signature of the operation". CNDC, Consultative Opinion No. 62 of 29 August 2000. Approximately US$62,500.

[42] Prior to 2016, the average processing time for concentration cases was 3.2 years, in spite of the low difficulty level of many of the cases, as the consequence of the low thresholds set for notification. After the new drive initiated in that year, this average has been reduced to 1.9 years.

[43] Orlanski, Leonardo T: "La defensa de la competencia desde el derecho público: su diseño institucional, su interacción con otras formas de intervención estatal en la economía y el procedimiento aplicable". Questions of State Intervention, Austral University. 2010 sessions.

[44] Del Pino, Manuel; del Rio, Santiago (Marval O´Farrel Mairal) article dated 31 October 2014, "Reforma de la Ley de Defensa de la Competencia".

[45] Opinion of 22 June 2006 "Credit Suisse First Boston Private Equity Argentina II" (S.C.C. 1216 L. XLI) and Recreativos Franco on appeal against CNDC resolution (SC, R.1172, L. XII).

[46] Article 24 confers upon the Enforcement Authority basic powers of investigation. These include carrying out market studies; holding hearings and taking statements; examining records and documents; and carrying out searches with court authorisation. The body is further empowered to issue opinions on competition matters; draw up its own internal regulations; bring actions before the courts; act in collaboration with competent departments in the negotiation of international agreements on competition policy; and sign consent agreements in cases.

[47] Del Pino, Manuel; del Rio, Santiago (Marval O´Farrel Mairal), article dated 31 October 2014, "Reforma de la Ley de Defensa de la Competencia".

[48] See Section 3.4 Economic concentrations, "Telefónica–Telecom" in this report.

[49] According to Article 8 of Law No. 22.262, two commissioners of the said Commission must be lawyers and two economic science professionals with recognised knowledge of the subjects specific to the said law. They must be at least thirty years old and have four years' professional experience. Also, in accordance with Article 1 of Decree 1190/2016, the four commissioners will have the rank of Under Secretary.

[50] The CNDC deepens the analysis by using new information obtained through information requests and by summoning the relevant actors to hearings.

[51] Trevisán, Pablo: "Indemnización de daños y perjuicios por infracciones a las normas de defensa de la competencia", JA 2013-IV, fascicle no. 4., Ed. La Ley, Buenos Aires, 23 October 2013.

[52] Historically, this type of civil action for damages prompted by violations of the competition rules have been brought more frequently in the United States, and although development has been slower in EU law, there have been numerous legislative, doctrinal and case-law related advances in this sphere. The "***Courage***" and "***Manfredi***" judgements handed down by the Court of Justice of the European Union reveal this deterrent element of claims for damages. As a consequence of the debate initiated, the European Union launched a process of reflection which concluded with the adoption of Directive 2014/104 of 26 November on certain rules governing actions for

damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

53 One example is the private complaint brought by Auto Gas SA as part of an investigation into the entity Yacimientos Petrolíferos Fiscales (Decision no. 314 issued by the National Commission for the Defence of Competition on 19 March 1999, later ratified by the Supreme Court of Justice of Argentina, in its judgement (Judgements 325:1702).

54 Trevisán, Pablo: "Reparación de daños por infracciones a las normas de competencia", year LXXIX no. 39. Ed. La Ley, Buenos Aires, 27 February 2015.

55 The above-mentioned EU Directive of November 2014 can be used as a model.

56 Among others, Belmonte Manuel and Asociación Ruralista General Alvear vs National State, S.C., B 1626, L.XLII; Cencosud S.A. on appeal against CNDC resolution, S.C., C.73, L.XLVIII.

57 As mentioned above, as of the amendment established by Decrees 1/2016 and 718/2016, the Secretariat of Commerce of the Ministry of Production of Argentina is the Enforcement Authority for the LDC.

58 De Dios, Miguel Ángel: "Un paso en falso en el Diseño Institucional para la Defensa de la Competencia" Revista de Derecho Constitucional, Number 6, IJ-LXXVII-977, May 2015.

59 This Decree was subsequently amended by Decree 741/2015.

60 Through Resolution190/2016 of the Secretary of Commerce.

61 The tendency to process every complaint means that a large proportion of material and staff resources are devoted to processing insignificant behaviours, diverting them from the prosecution of more serious behaviours, and at the same time slows down the processing of every case.

62 If the duration of the majority of cases analysed is taken into account, the time periods increase considerably insofar as there is frequent recourse to suspensions with interruptive effects. There has been considerable progress in shortening procedure processing times, given that the average duration of sanction proceedings was 4.9 years in 2016. Today, despite the large build-up of pending cases, the average processing time for new cases has been reduced to seven months.

63 Judgement of the Supreme Court of Justice of the Nation of 14 April 2015 in the proceedings "Cencosud S.A. on appeal against CNDC resolution".

64 Judgements handed down by Division A of the Court of Appeal for Economic and Criminal Matters on 21 October 2009 in the proceeding "Telefónica de España, Olimpia and others on pretrial proceeding on Law 25.156. Motion for verification of compliance with Resolution 44/09" and on 14 July 2011 in the proceeding "Papel Prensa on motion for appeal".

65 This form of case settlement has been accepted in the following proceedings: Nielsen (no. So1: 0266963/2003); Cooperativa de Lancheros Comandante Luis Piedrabuena (no. S01 0179868/2002); Cablevisión (no. 064-010050/2001); Cooperativa Entrerriana de Productores Mineros (no. 064-011479/1999), and Royal Canin (no. S01:0112741/2010).

66 Approximately US$650.

67 Approximately US$9 million.

68 The current legislation omits the element relating to illicit profits which was included in the earlier legislation, an element that allowed the amount of fines to be increased, as happened on numerous occasions. The removal of this element is regarded as a backward step inasmuch as the maximum amount of fines, as the result of inflation, is reduced to a fine of a little more than nine million US dollars today, a sum that cannot have an effective deterrent effect.

69 In the 2014 reform, judicial review is placed under the jurisdiction of the Chamber for Appeals in Consumer Interactions, which was never created. In accordance with the provisions of Article 76 of Law 26.993, until such time as this Chamber is created, those courts dealing with such matters before the enactment of the law will continue to do so.

70 As indicated above, the criterion of illicit profits was removed in the Law of 1999.

71 By some estimates, the illicit profits are considered to be, at the least, 10% of product sales made by the cartel.

72 Germán COLOMA, "La Ley argentina de Defensa de la Competencia: cinco predicciones acerca de su aplicación", La Ley (UCEMA supplement) pages 1 and 2, 6 July 2007, and a typewritten paper by the same author "Cartelización y relaciones verticales: comentarios sobre tres casos argentinos de defensa de la competencia".

73 Resolution of the Secretary of Competition, Deregulation and Consumer Protection of 12 August 2001, which concurred with the opinion of the CNDC.

[74] Germán COLOMA: Integración vertical o cartelización: El caso del fútbol codificado" Derecho Comercial y de las Obligaciones, no. 2008 pages 1032-1047, 2004.

[75] Judgement of Division B of the National Court of Economic and Criminal Matters of 29 August 2003.

[76] The behaviour analysed is a clear example of exclusionary conduct (refusal to supply, limitation of discounts etc.), although it cannot be clearly deduced from the text of the Opinion that the relevant market is as restricted as that of bleaches, in that it is not clear whether other substitute products exist; similarly, it appears that the dominant position of Clorox in this market is a well-known fact , but it would have been appropriate to refer to publicly available information in order to make this argument.

[77] The appeal court judge, Dr. Bonzón, disagreed with the majority opinion and, applying the concept of "economic reality", explained in a long individual opinion the criteria on the basis of which he considered that the appealed Resolution should be confirmed.

[78] Conversely the dissenting appeal court judge went into the substance of the operation and considered that it did constitute a concentration and did affect competition, and thus impeded competition in the telecommunications markets in Argentina.

[79] The companies involved in the concentration undertook to refrain from opening new film theatres in these areas for a period of five years, although this could be reduced if third party operators were to open new theatres in these areas during that period. The undertaking on prices refers to an obligation, within the same five-year period, not to change the price ratio existing between the area concerned and a reference market, which would be the province of Mendoza.

[80] In the geographical market of the Autonomous City of Buenos Aries, although the billing share of the companies undergoing concentration exceeds this figure, the shares of all the companies undergoing concentration, according to audience figures, were 39.95% in 2013.

[81] Under an Agreement between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland of 1992, the signatory parties gave the commitment that each would grant a licence to the other party's national carrier to operate the route between Buenos Aires and London on seven days of the week . Despite the fact that the situation has changed as the result of the liberalisation of the aviation market, no Argentine company has applied to take advantage of this agreement.

[82] It might be thought that the condition prevented the possibility of the withdrawal of the direct service between Buenos Aires and London, thereby strengthening the position of Iberia. Yet, conversely, any study of this measure would lead to the conclusion that any such withdrawal would lead not only to the strengthening of Iberia (which would have difficulty in absorbing in its indirect flights the entire share of BA in terms of direct flight), rather other companies would expand their market share. This means that the market share of IAG, and hence its dominant position, on this route would be reduced.

[83] The President of the CNDC dissented from the majority view and issued an Opinion in which he proposed that the operation be made contingent upon certain conditions.

[84] Whereas in February 2016 there were 144 staff within the CNDC, the number was reduced in the following month to 87 and, with the hiring of new specialists, the figure stabilised in March 2017 at 110 people.

[85] Staff training activities were implemented in the course of 2016, provided by officials of the FTC, DOJ, IADB, World Bank, OECD, together with the course at the INDECOPI – UNCTAD/COMPAL School or the implementation of competition week, in which the region's authorities and agencies took part.

[86] Although Article 1 (2) of the draft law, in line with the opinion of current legislation, makes mention of a unilateral behaviour which could be engaged in by a party not holding a dominant position: the gaining of significant competitive advantages through the infringement of other rules. This normally concerns an unfair competitive behaviour which, if it has consequences for the functioning of the market, can also be categorised as behaviour contrary to free competition.

[87] The application of competition legislation to Professional Bodies has already been seen, for example, in a series of actions against Medical Associations which were prohibiting their members from entering into contracts with other medical companies.

[88] According to draft Article 89: "For the purposes of this law, the Mobile Unit is to be defined as the unit of account. The initial value of the Mobile Unit is set at fifteen (15) Pesos and will be updated automatically every year using the change in the consumer price index (CPI) published by INDEC (National Institute of Statistics and Censuses) or the future replacement official indicator. The update will be carried out on the last working day of each year, and will come into effect at the time of its publication. The National Competition Authority will publish the updated value of the Mobile Unit on its website". In accordance with this draft provision, if approved in the terms provided, the threshold for notification will increase from the current two hundred million pesos to two thousand two hundred and fifty million pesos, which will prevent the processing - and the consequent use of

public resources - of concentration operation control cases which, due to their smaller size, can have no impact on competition conditions.

89 In accordance with the provisions of Article 38 of the draft bill, all time periods will be counted in administrative working days.

90 And subject to judicial control.

91 "The organisation should also set up a leniency programme which provides for the lifting of sanctions against the first cartel member that offers its collaboration". Since 2001, the OECD has recommended the approval of leniency programmes.

92 The application of the leniency programme to vertical restraints is not a common example in other legislations, although this is planned in some cases (in Colombia, for example).

93 The CNDC was nominated for the international Antitrust Writing Awards organised by the journal Concurrences and the Institute of Competition Law and George Washington University Law School, Competition Law Center.

Layout and Printing at United Nations, Geneva – 1711952 **(E)** – June 2017 – 436 – **UNCTAD/DITC/CLP/2017/1**