

# **B**est practices in defence of competition in Argentina and Brazil: useful aspects for Central America

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## Abstract

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Developing countries with a relatively long expertise in competition policy, such as Argentina and Brazil, may provide a very valuable point of reference for developing countries that have acquired more recently a competition legal and institutional framework. Among the recommendations that can be derived from Argentina and Brazil for other more recent comers to the competition institutional arena are: i) the importance of having a single and independent body in charge of applying the competition law; ii) the need for competition policy and the judiciary system to coordinate their actions; iii) the complementarity of competition and regulatory institutions for the exchange of information and the definition of common objectives; iv) the promotion of an effective competition culture within the community is also an important task of the competition agency; v) the regional agreements for mutual support in competition problems has been very important for Argentina and Brazil and seem even more relevant for smaller economies.



## Introduction

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This paper studies recent legislation on defence of competition and its enforcement in Argentina and Brazil, based on an assessment of such experiences and, in the light of these, makes certain recommendations for the Central American countries whose legal frameworks are in the process of being drawn up or under review, while others are just beginning to operate.

Significant headway was made in the defence of competition in Argentina and Brazil during the nineties. It should be pointed out, however, that some of these measures have had to adapt to the political and economic context typical of developing countries. It is therefore interesting to examine these experiences with a view to identifying their strengths and weaknesses as background material for competition policy in other countries.

The aims of this chapter are as follows:

- 1) Analyse the salient traits of legislation on defence of competition in the countries under study and give an account of their evolution over time: this will give an idea of the favourable political and economic context for applying particular measures.
- 2) Identify the institutional structures in charge of applying competition policies, underscoring the differences between them.
- 3) Assess the effectiveness of the agencies as authorities for the application of competition policies with the aim of preventing or remedying possible anticompetitive conduct.

4) Determine the relationship between the competition agency and regulatory bodies, in view of the importance of policy coordination.

5) Assess the degree of regional collaboration with regard to defence of competition, particularly among Mercosur countries.

Thus, Section I explains the legislation in Argentina and Brazil and how enforcement<sup>1</sup> by the competition agencies has evolved, and Section II explains the relationship between these countries' competition agencies and the regulatory bodies, as well as international cooperation efforts. The conclusions set forth an analysis of the strengths and weaknesses of laws for the defence of competition and their application in Argentina and Brazil with the aim of contributing to the progress of legislation and policies for the defence of competition in the countries of Central America.<sup>2</sup>

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<sup>1</sup> Enforcement, in English, means application of the law. Both terms will be used without distinction.

<sup>2</sup> Although they are smaller economies, the political, institutional and economic context in which policies, particularly competition policies, are developing, share common traits with the context in Argentina and Brazil.



## I. Legislation

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### 1. Objectives of the legislation on defence of competition

In recent years there has been growing interest in policies aimed at protecting competition and emphasis has been placed on the importance of markets as efficient resource-allocation mechanisms. The threat of practices that could be harmful to competition and the forming of significantly large economic groups in specific markets lead to the possibility of market power being exercised. The concept of market power could be interpreted as a price increase by one of the participants by means of supply restrictions. The result of such a practice is the redistribution of profits and inefficiency in allocation. Thus, one of the participants in the market finds it profitable to increase its prices, which results in a transfer of income from consumers to producers and gives rise to a net loss (unrecoverable loss of well-being) which is harmful to society as a whole.<sup>3</sup>

The Argentine law for the defence of competition, Law N° 25,156, passed in 1999, establishes in Article 1 that: “Acts or types of conduct, whatever form they may take, related to the production and exchange of goods and services, whose purpose or effect is to limit,

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<sup>3</sup> This concept may easily be visualized by comparing the equilibrium that economic theory describes for a perfectly competitive market in comparison to the equilibrium of a monopolistic market. Passage from the first to the second implies a transfer from consumers to producers in terms of surpluses and a reduction in the surplus for the consumer that is not compensated by the profit of any of the sectors.

restrict, misrepresent or distort competition or market access, or which constitute abuse of a dominant position in a market, and which may result in harm to the general economic interest, are prohibited and shall be sanctioned in accordance with the regulations of the present law.”<sup>4</sup>

Furthermore, Argentina’s Guidelines for the Control of Economic Concentrations (2001)<sup>5</sup> state that an analysis should be made of the impact of the concentration on the general economic interest, the gains in efficiency stemming from the operation and the benefits these may entail for Argentine consumers.

Brazilian legislation, for its part, establishes in the 1988 Constitution as explicit grounds for the defence of competition policy that *“the law shall restrict any abuse of economic power that attempts to dominate the market, eliminate competition and cause an arbitrary increase in profits.”* The Constitution explicitly lays down that Brazil’s *“economic order”* should operate on the basis of certain principles such as *“free competition”*, the *“social role of property”*, *“consumer protection”* and *“private property.”* Article 1 of Brazil’s law on the defence of competition, Law N° 8,884 of 1994, states that its objective is to establish measures for defence of competition aligned with these constitutional principles. The Brazilian agencies in charge of enforcing the law have interpreted the principle of *“social role of property”* in the sense that the owners of private property shall not necessarily withhold the totality of its profits but must in some way share them with the rest of society.

Moreover, Brazil’s Guidelines on Horizontal Mergers (2001) state that any economic concentration operation shall be rejected if, after considering the gains in efficiency arising from same, the economic surplus diminishes. In cases in which the economic surplus increases –gains in efficiency greater than negative effects on competition– a defence of the operation is accepted as long as the profits of the operation are equitably distributed among the parties, including consumers.

Brazil’s legislation underscores that the *“economic order”* should be safeguarded by protecting competition and emphasizes the *“social role of property”*. This latter concept is subject to broad interpretation, which provides the antitrust agency with greater flexibility. Nevertheless, its interpretation has been based on sharing the economic benefits of entrepreneurial activities with the rest of society. This concept is clearly expressed in the guidelines, in which the profits of the operation are recognized as long as they are equitably distributed. This, in Brazil’s case the weighting factor for the function of well-being would, on principle, accord a similar weight to the consumer’s surplus and to the producer’s.

## 2. Historical analysis and application of the legislation

### a) Brazil

The intention of developing policies aimed at defending market mechanisms was initially reflected by Law N° 4,137 of 1962, which established the Administrative Council on Economic Protection (CADE).<sup>6</sup> This agency emerged during a period characterized by protectionist policies on the part of the State, somehow contrasting with defence of the free market. At that time the most important companies in industry, transport and finance were controlled by the State or were private monopolies approved by the State through public tenders. Similarly, there was strong government

<sup>4</sup> Law 25.156/99, Senate and Chamber of Deputies of the Argentine Nation.

<sup>5</sup> Resolution 164/2001.

<sup>6</sup> The 1962 law had its origins in a bill submitted by Minister Agamemnon Magalhães to the National Congress in 1948. This was based on Article 148 of the Constitution enacted in 1946, which established the need to restrict abuse of economic power, the aim of which was to dominate markets, eliminate competition and arbitrarily increase profits. The 1962 law was passed, but then Brazil entered a period of military government which ushered in a highly interventionist policy, price controls and import substitution.

intervention in markets and price controls, but by law CADE could not act in the public enterprise sector, and therefore its impact was marginal during its first years of operation.

The modern era of competition began in 1994 in Brazil, in a context of a “new economic order” with privatizations and less barriers to international trade. That year the new law on defence of competition, Law N° 8,884 was passed as part of the reforms that sought to control inflation and maintain a real exchange rate against the high dollar. This law introduced two important changes in the legislation on defence of competition:

i) The design of CADE as an independent agency, along with the delegation of certain powers for abidance by the law to another two agencies: the Secretariat of Economic Management (SDE) of the Ministry of Justice and the Secretariat of Economic Monitoring (SEAE), attached to the Ministry of Finance.

ii) Prior control of mergers and acquisitions. Towards the year 2000, the privatizations in the telecommunications, civil aviation and overland bus transport had been completed, whereas partial privatizations had taken place in the electric power, petroleum, gas, railway transport, ports and banking sectors. Between 2000 and 2002 privatization moved forward in these sectors, with emphasis on the sale of shares of the principal state hydrocarbon enterprise, Petrobras.

Since 1994 two important amendments have been incorporated into the legislation on defence of competition. In 1999 Law N° 9,781 imposed a charge for notification of mergers. In 2000 Law N° 10,149 granted the competition agency significant new investigation instruments, increased the notification charge and established the program of appeal for leniency. We will now distinguish two types of proceedings in Brazil’s legislation.

1) Conducts. Article 20 of the law on defence of competition specifies that “any act that attempts or makes it possible to produce the effects listed below, even though such effects are not realized, shall be classified as a violation of the economic order.” Such effects are as follows: a) to limit, restrict or harm free competition; b) to control the relevant market for any product or service; c) to increase profits on a discretionary basis, and d) to abuse market control.

Article 21 contains a list of non-exclusive types of conduct considered contrary to the law. Among the types of horizontal conduct are collusion between competitors, including agreements to set prices or sales conditions, distribution of markets, agreements on bidding and limitation of research and development. Vertical agreements include resale price setting and other restrictions affecting sales to third parties, including limits on sales volumes and third parties’ profit margins, price discrimination and tied sales. Unilateral conducts listed are those related to the exclusion of new entrants or existing competitors, including denial of sales, limitations on access to inputs markets or distribution channels and other conducts imposing contractual conditions that restrict the use of proprietary rights or result in unreasonable below-cost sales. Finally, it lists unilateral conduct tending towards discontinuing particular activities without just cause, such as affecting third parties’ prices by imposing fictitious prices, destruction of inputs or finished goods, requiring or granting exclusive publicity in the press, imposing abusive prices or unreasonable price increases for goods or services.

CADE’s Resolution 20 regulates compliance with Articles 20 and 21. It defines standard restrictive practices and lists four categories of anticompetitive horizontal practices:

a) Cartels which imply agreements between competitors to control a significant portion of the market (related to prices, goods, quotas and distribution territory) with the aim of increasing prices and profits to levels similar to a monopoly.

b) Other temporary horizontal agreements between competitors, even though their purpose may be to corner part of the market in order to increase efficiency levels.

c) Illicit practices and professional associations that limit competition among professionals and set prices.

d) Predatory prices that establish prices below the variable cost in order to eliminate competitors, thus achieving a market condition such that they can then increase prices.

This resolution also puts forward six examples of vertical anticompetitive practices:

- Maintenance of resale prices
- Customer and territorial restrictions imposed in certain distribution channels
- Exclusivity agreements
- Denial of sales
- Tied sales
- Price discrimination

It also points out that vertical practices can have anticompetitive effects either in the market of origin or in the target market as long as they make exclusion possible or facilitate “upstream” or “downstream” market agreements.

It is important to clarify that for horizontal and vertical restrictions to be considered illegal, a previous condition must be to check the existence of market power in the market of origin or determine whether the effect on the market quota or market share in the target market will be significant. The steps to be taken in analysing types of conduct include identification of same, determining the existence of dominant position and measuring the economic effects.

Thus, the types of conduct established in this resolution are not anticompetitive per se, but rather the procedure for analysing the cases follows the “rule of reason” which means studying each case in particular, once it has been demonstrated that market power actually exists. Although there is no established limit on market share, in practice it is considered that there can be market power when the share of the company under analysis exceeds 20%.

The law on defence of competition does not establish that small firms should be given special treatment. Nonetheless, Article 170 of the Constitution states that to maintain the “economic order” small firms organized under Brazilian legislation and with their head office in Brazil should receive special treatment. As mentioned, CADE does not apply analysis per se, so it should study this type of cases in particular, although rarely do small companies gain sufficient market power.

2) Fines: Anticompetitive conducts that are in violation of Article 20 shall have a minimum fine of 1% of gross earnings, after tax, computed in the preceding years, whereas the maximum fine is 30% of gross earnings. Corporate managers responsible for the violation of the law can be fined an amount equivalent to between 10% and 50% of the fine imposed on the company. Associations and other non-profit institutions for which their earnings are not important may be fined from 60,000 to 6 million tax units (2,460 dollars to 2.46 million dollars). Fines for recurrent violations can double.

No observance of an order, preventive measure or failure to comply with a commitment with CADE can result in the imposition of a daily fine between 5,000 to 100,000 (USD 2,050 to 41,000), cumulative for 90 days. The same amounts of 90-day daily fines can be set for not providing documents required in the investigation (Article 26). The annexes approved in 2000 establish a fine of between 500 and 10,700 reales (USD 195 to USD 4,175) for those who do not show up to give oral testimony. Finally, Article 35 establishes that a fine of 21,200 to 425,000 reales (USD 8,270 to USD 166,000) may be imposed for preventing an official search with warrant in a company on its premises.

iii) Mergers. Article 54 of Law N° 8,884 (1994) establishes conditions applicable to mergers. This Article begins by stating that “any act that may limit or in any way restrict free competition or that results in control of relevant markets for specific goods or services should be submitted to review by CADE.” This condition of notification refers to “acts” and can therefore be applied not only to mergers, but also to horizontal agreements (this concept is confirmed in the Guidelines for Horizontal Mergers). Although the majority of the operations notified under Article 54 are mergers and acquisitions, there are also some notifications of agreements such as those mentioned above.

Article 54 does not establish specific standards to be used to analyse the “acts” notified, although it does establish four conditions for approving the operations notified.

- They should seek to increase productivity, improve the quality of the good or service, raise efficiency or generate economic or technological development.
- Produce profits that are equitably distributed among the parties involved in the operation and consumers.
- Not eliminate a substantial part of the relevant market for a good or service.
- In case of contractual provisions, not be more restrictive than necessary in obtaining the positive effects of the operation.

The Guidelines for Horizontal Mergers (2001) explicitly establish that the “rule of reason” is fundamental in the control of mergers. Together with the points mentioned in the preceding paragraph, it could be interpreted as a demand for the companies involved that they show the benefits of the operation for the latter to be approved. In practice, CADE has in no case imposed this requirement. Likewise, Article 54 establishes that in the case of operations that could harm competition it is possible for the parties to submit a defence based on improved efficiency.

The Guidelines for Horizontal Mergers establish the standard steps for analysing concentration operations:

1) Definition of relevant and geographical market for the product. Test for the hypothetical monopolist which should determine the smallest size of market for which a hypothetical monopolist can establish a small, but significant and not transitory price increase.

2) Market share of companies involved. There are two contexts in which a merger could be of concern: one of them is when the merger makes it possible for the company to increase its market share to 20% or more, which also increases the risk of a unilateral price rise. The merger is also considered problematical if it allows coordinated actions by competitors. The concentration of the first four firms (C4) above 75%, added to an increase of more than 10% in the market share resulting from the operation, gives rise to an investigation by the competition agency.

3) Possibility of exercising market power after the merger. This possibility is considered once the above-mentioned limits are surpassed. Abuse of market power is less likely to occur when there are significant imports to remedy it, entry into the market of new companies is possible without major obstacles and with sufficient presence, or the rest of the competitors in the market have the capacity and the motivation to resist the possible exercise of market power.

4) Efficiency gains resulting from the operation.

5) Assessment of the rest of the effects of the operation. As mentioned, the operation will be rejected if, after taking efficiency gains into account, the net effect is a reduction in the economic surplus. If the gains in efficiency surpass the harm to competition, the benefits should be shared with consumers in order for the operation to be approved. Thus, price reductions should be expected in the goods or services produced by the companies involved in the operation, or their quality should increase, so that the efficiency gains (lower costs) are transferred to the consumers.

Concentration operations should either be approved, conditioned or rejected. The conditioning may be: structural, involving disinvestment of assets or auxiliaries, which are usually commitments or requirements for the elimination of non-competition clauses.

1) Notification: Article 54 states that the transaction must be notified within fifteen days after being carried out. When there is a delay in notification this article enables CADE to impose a fine of 60,000 to 6 million tax units (USD 24,900 to USD 2.49 million). Although notification is compulsory, notification prior to the operation is not required, which obviously creates a problem in dealing with anticompetitive transactions. The harmful effects of economic operations begin to accumulate as of the time they are concluded and also the decision “not to authorize” an operation already closed poses difficulties, since this implies undoing the operation.

2) Proceeding (Article 54): Operations are notified to SDE, which immediately sends copies to SEAE and to CADE. SEAE must send SDE a technical report on the operation within the following 30 days, then SDE has to make a recommendation to CADE within the 30 days following receipt of the SEAE report. As soon as the report is sent to CADE, the latter has 60 days in which to assess the recommendation and take the pertinent decision. If CADE does not declare within that time the operation is tacitly approved. Although the maximum limit for resolving an operation is 120 days, each of the agencies can ask for additional information that suspends the set terms. CADE is not obligated to follow the recommendations of SDE or SEAE, because it is an independent entity.

In early 2002, SDE and SEAE informally developed a proceeding according to which they prepare each of the reports within 15 days of submitting the operation. In 2003 this Fast Track<sup>7</sup> proceeding was formalized, applied to the following transactions: i) sale of franchises by the administrators themselves; ii) cooperative joint ventures created to enter a new market; iii) corporate restructuring within one same economic group which does not imply change of control; iv) acquisition of a Brazilian firm by a foreign firm that has no activity in the country; v) replacement of an economic agent as long as the company has not previously carried out activities in the target market or in vertically related markets, and vi) acquisition of a firm that has an insignificant market share and therefore the operation is not questionable from the point of view of competition.

In 2004, SDE and SEAE devised a “Joint proceeding for reviewing mergers” which stepped up the process of analysis even more since both secretariats study the operation at the same time and send a joint recommendation to CADE.

3) Limit. Article 54 establishes a special limit for notification of economic concentrations, that is, ones that result in 20% of the relevant market or if any of the participants invoiced a total of 400 million reales (USD 156 million) in the year prior to the notification.

4) Fines. In 1999 a rate of 15,000 reales (USD 5,850) was set, to be paid for notification of economic operations. This rate was increased in 2001 to 45,000 reales (USD 17,550). For not complying with a behaviour commitment with CADE or refusing to provide information or make an oral statement, the same fines are applied as those established for the conducts described previously.

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<sup>7</sup> Joint ordinance of SDE and SEAE, February 2003.

## b) Argentina

The National Commission on Defense of Competition (CNDC) is the public agency in charge of enforcing the anti-monopoly law. Its main aim is investigation of conducts that could restrict competition in the markets or result in abusive practices on the part of companies that have a dominant market position.

The law on defence of competition N° 22,622 entered into effect in Argentina in 1980. However, as in Brazil, it did not begin to be implemented significantly until the nineties, during a period of reform of the State and privatization of public enterprises.<sup>8</sup>

The reform process began in 1989 with the passing of two very important laws, the Law on the Reform of the State and the Economic Emergency Law. In order to achieve macroeconomic stabilization, in 1990 the government implemented a plan which included: i) opening up to foreign trade and capital movements; ii) deregulation of the economy and privatization of public enterprises; iii) reduction of the State bureaucracy and reconstruction of the tax system, and iv) creation of a new monetary regime – currency convertibility through a fixed exchange rate which established the value of 1 Argentine peso at 1 USD. Between 2000 and 2003 the electric power, gas, transportation, communications and mail sectors were largely privatized. The water sector is where in the middle 2000 decade the government continued to hold a significant share and private capital managed only 30% of the sector.

Prior to the process of restructuring the economy, CNDC's failure to intervene can be explained by the lack of political will to defend competition. Thus, during the eighties CNDC registered a significant shortage of materials and human resources to function properly. Since 1996, competition policy gained an increasingly important place on the government's agenda.

In 1999 Law N° 22,262 was replaced by Law N° 25,156, which basically completed and improved the former law. This new law incorporated fundamental reforms: i) it introduced ex-ante review of mergers and acquisitions; ii) it granted the competition authority full jurisdiction over defence of competition for all sectors (previously certain regulatory agencies could intervene in these matters through their specific regulatory frameworks, as was the case with electric power), and iii) it ordered the establishment of the National Court for the Defense of Competition (TNDC) as an independent organ.

In 2001 a few additional innovations were made to the legislation on defence of competition. The law was complemented by decree 89/2001 which defines the necessary proceeding for the incorporation of TNDC, regulates aspects relative to notification of mergers and acquisitions and permits the intervention of the Secretary of Defense of Competition, Deregulation and Consumer Affairs (which comes under the Ministry of Economy) during the whole of the investigation process carried out by CNDC. The latter contradicts TNDC's intention of independence when it was created, since the original idea was to create a Court independent of the political power in office. This contradiction leads us to thinking that the creation of TNDC was not planned to be concluded in the short or medium terms, and therefore the Secretariat of Defense of Competition, Deregulation and Consumer Affairs broadened its intervention in the process to ensure its follow-up and control, since it is the institution that makes the final decision on anticompetitive practices.

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<sup>8</sup> During the eighties, with Martinez de Hoz as Minister of Economy of a military government, the law on defense of competition was passed in Argentina. The context in which this law was approved was one of opening up of the economy and deregulation, which mainly pursued the objective of controlling inflation. This law was applied between 1980 and 1983 for investigation of anticompetitive practices. Then, when the democratic government took office, the course of economic policy changed, making light of the policy of defense of competition, which regained its importance in the mid-nineties.

Decree 396/2001 approved during the same period regulates the amounts corresponding to notifications of mergers and acquisitions. The decree left without effect control of mergers of more than 2.5 million pesos in volume of business worldwide, since it was considered too low a limit and a large number of economic concentration operations had to be analysed. Therefore the minimum amount for mergers requiring an analysis of the operation by the competition agency, was raised to 20 million pesos, unless operations had taken place in the preceding twelve months which, together, exceeded said amount, or sixty million pesos in the last thirty-three months, assuming that the case involved the same market.

i) Conducts. As mentioned, in accordance with Article 1 of Law 25,156, any acts or conducts whose objective is to restrict competition or constitute an abuse of dominant position to the detriment of the general economic interest are prohibited. The next article in the law sets forth the conducts, both horizontal and vertical considered restrictive of competition:

1) Abuse of market power. Unilaterally fix sale or purchase prices for products or services.

2) Cartels. Set sale or purchase prices for goods and services, bidding in tenders or competitions, coordinate the technical development or the investments aimed at producing or marketing goods and services.

3) Supply restrictions. Establish obligations to produce, process, distribute, purchase or market only a restricted amount of goods, or lend a restricted or limited number, volume or frequency of services. Prevent, hamper or obstruct the entry or permanence of third parties in a market or exclude them from it. Suspend provision of a dominant monopolistic service in the market to a supplier of public services.

4) Sharing out of markets. Share out horizontally zones, markets, clients and sources of provisioning.

5) Tied sales. subordinate the sale of a good to the acquisition of another. subordinate an economic transaction to the condition of not using, acquiring, selling or supplying goods or services provided by third parties.

6) Discrimination. Impose discriminatory conditions for the acquisition or transfer of goods or services without valid reasons.

7) Denial of sales. Unjustifiably deny providing specific orders for the purchase or sale of goods that are within the market conditions.

8) Predatory prices. Sale of goods at below-cost prices with the aim of displacing competition in the market or producing damage to the image, assets or value of its suppliers' brands.

Article 1 of the law indicates that the criterion applicable in Argentina for the analysis of conducts is the "rule of reason." Supposedly the conducts listed do not result in harm to the competition per se unless the enterprise has a dominant market position. CNDC must prove the dominant position of the firm in question so as to continue with the proof of conduct in the different cases resolved.

The circumstances to be considered in order to establish a unilateral dominant position, if it is a question of one firm, or joint dominant position, if more than one firm is involved, are described in Article 5 of the Law. Thus, the following should be observed: i) the degree of replacement of the product in particular by domestic or foreign products; ii) legal market restrictions, and iii) the degree of influence of the party allegedly responsible on market prices or the possibility of restricting supply or demand, as well as the degree of response of its competitors.



The investigation proceeding for an anticompetitive conduct can be initiated ex officio or as a result of a complaint filed by any individual or legal person, public or private. The maximum period the CNDC has for the resolution of conducts is 5 years, after which violations of the law prescribe (Article 55).

ii) Fines. Fines for acts or conducts prohibited by Law N° 25,156 may be sanctioned by a fine ranging from 10,000 to 150,000,000 Argentine pesos (equivalent to USD 3,400 and USD 51,020,400 respectively in 2006), which will be established considering, on the one hand, the loss and the profit of the persons affected by the prohibited activity, and on the other, the value of the assets of the persons involved in the violation of the law at the time of the conduct. In case of a second offence, the amounts of the fine will double.

If the offences are committed by a body corporate<sup>9</sup> the fine will be applied jointly and severally to the directors, managers or other legally responsible representatives, although the law does not specify the amount to be imposed in these cases. Furthermore, these people can be disqualified from exercising their trade for a period of 1 to 10 years. Finally, fines of up to 500 Argentine pesos a day (USD 170) may be applied to people who obstruct or hinder the investigation or do not comply with CNDC requirements.

At any time in the investigation process CNDC can impose compliance with conditions or order the ceasing of conducts harmful to competition and the party allegedly responsible can pledge to cease the actions under investigation (Article 35 and 36). In case of failure to comply with the commitments agreed to between the enterprises and CNDC during the period of investigation or after its resolution, CNDC may impose a fine of up to 1,000,000 Argentine pesos a day (USD 340,136).

iii) Mergers. Article 7 of the law on defence of competition establishes that “economic concentrations whose purpose or effect is or may be to restrict or distort competition in such a way as may be harmful to the general economic interest, are prohibited.”

In 2001 the Secretariat for Defense of Competition, Deregulation and Consumer Protection formalized the Guidelines for the Control of Economic Concentrations (Resolution 164/2001) which function as a non-binding guide for analysing mergers. The guidelines establish that during assessment of the economic concentration operation the possibility of the companies involved exercising market power should be determined. To that end an analysis should be made mainly of competition reflected in prices, specifically whether the latter are increased once the operation is concluded. Two hypothetical situations follow: i) when the market power of the firms involved is unilaterally strengthened, and ii) when favourable conditions are created for coordination of the companies involved with the remaining participants in the market.

The guidelines’ main role is to establish the steps to be taken in analysing mergers and acquisitions, which are similar to those established by Brazil, since both follow the example of developed countries with a longer antitrust history, as is the case of the United States.

The first step is the definition of the product and geographical market, also based on the test of the hypothetical monopolist. Then the market share of the companies involved and the market concentration are determined. To that end both domestic competitors and importers of the goods in question should be identified. Argentina uses the Herfindahl – Hirschmann Index (HHI)<sup>10</sup> instead of the C4 used by Brazil as a measure of concentration.

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<sup>9</sup> Bodies corporate or juridical persons are corporations, cooperatives or other type of firm in contrast to individuals. This is why in cases in which an individual cannot be made directly responsible fines may be applied to the senior management of these corporations.

<sup>10</sup> This index is defined as the sum of the square of market shares and has the advantage of placing greater relative weight on the shares of larger companies. The values of the HHI can range between 0 (perfectly competitive market) and 10,000 (monopolistic market).

The next step is to consider the rest of the conditions in which the company operates: 1) the characteristics of the other competitors in the relevant market and their possibilities for counteracting the exercise of market power; 2) whether the operation eliminates a vigorous, effective competitor; 3) the possibility that the concentration operation makes concerted practices possible; 4) the level of use of installed capacity – the excess of same in the hands of competitors of the merged firms can restrict market power if it turns out to be a credible threat of response in the face of price increases. In the hands of the companies involved in the operation it can act as an incentive to respect a horizontal agreement because the consequences of the possible punishment would be more burdensome, and 5) the relative size of the firms.

In Argentina, after taking these considerations into account in cases in which concentrations are potentially harmful, the barriers to entry to the relevant market are analysed. The threat of entry of new competitors can curb the capacity to increase the prices of existing companies, as long as the entry can be made in a quick, probable and significant manner. Three aspects in particular are assessed: 1) the time required to enter the market; 2) the probability of entry into the market, in terms of profitability of the decision in the post-operation situation, and 3) the relative importance of earnings, in the sense that they will be sufficiently significant to exert influence on the prices of the relevant market.

Finally, it should consider any efficiency gains whose impact on consumers determines that despite the possibility of exercise of market power, the concentration is not harmful to the general economic interest. The guidelines indicate that the efficiency gains should arise directly from the concentration and not be attained without it. Cost reductions implied by a transfer between two or more economic agents cannot be invoked as efficiency gains.

Resolution of economic concentration operations may be classified into approval, conditioning and prohibition of same.

1) Notification. The law on defence of competition (Article 8) states that notification of economic concentration operations should be made previously or else within a period of one week as of the date of conclusion of the agreement, the publication of the offer to buy or to exchange, or the acquisition of a controlling share. The law establishes that the operations can be notified to CNDC once they have been agreed upon between the parties.

2) Limit. The minimum amount for notifying a concentration operation corresponds to a total volume of business of 200,000,000 Argentine pesos (USD 68,027,211), below which the companies involved do not have to notify the operation. In order to determine the volume of business of the companies merging, the respective volumes of business are added, as well as that of the companies controlled by them and of the companies which, in turn, control the companies merging (if any).

There are additional criteria for requiring notification of mergers and acquisitions. This applies under any of the following situations: a) the assets acquired, located in Argentina, individually exceed 20,000,000 Argentine pesos (USD 6,802,721); b) the sum of the operations carried out within one year prior to notification is greater than 20,000,000 Argentine pesos (USD 6,802,721), as long as these were carried out in the same market, or c) the operations carried out in the last three years should total, together, an amount greater than 60,000,000 Argentine pesos (USD 20,408,163) when the same market is involved (Decree 396/2001).

3) Procedure (Article 54). In cases subject to notification, CNDC should rule within 45 days after the presentation of the request. There is the possibility of such terms being interrupted by requests for further information on the operation. After that term, CNDC should decide on the operation, whether conditioning the merger or denying it. After that time span, if CNDC does not resolve, the operation will be tacitly authorized.

In 2001, Resolution 40/2001 approved a fast-track proceeding to streamline analysis and resolution of economic concentration operations. The stages of resolution of operations were established taking into account the forms for information that the companies involved should submit, since they reflect the degree of complexity of the operation.<sup>11</sup>

Thus, three time-spans are established for their resolution, depending on the degree of complexity of the concentrations: 15, 35 and 45 days following notification. In any of the cases CNDC can request the information in the forms to be completed or complement them with additional data, which can prolong the proceedings beyond the established periods.

In addition to these proceedings to speed up resolution of mergers and acquisitions, Law 25,156 (Article 10) establishes that the following operations are exempt from compulsory notification: i) acquisitions of companies in which the buyer already possessed more than 50% of the shares; ii) acquisition of bonds, debentures and shares without the right to vote or companies' debt securities; iii) acquisitions of a single company by a single foreign company that did not previously possess assets or shares of other companies in Argentina; iv) acquisition of companies liquidated without activity in the past year, and v) operations whose amount does not exceed the limits mentioned in the above point. Point iii) makes reference to the acquisition of domestic or foreign companies by a foreign company without activity in the national territory or that has direct or indirect control over related companies. Thus, the operation would simply involve the entry of a new competitor into the relevant market and the departure of another, without market shares or concentration being modified.

Finally, the assessment proceedings for economic concentration operations (Art. 16 of Law 25,156) provides that in cases in which some involve State-regulated companies, CNDC should require of the regulating agency a report with a well-founded opinion on the economic concentration proposal. This report, not binding for CNDC, should indicate the impact on competition in the respective market and on compliance with the regulatory framework.

4) Fines. Failure to notify the operations provided for by the law could be sanctioned with a fine of up to 1,000,000 Argentine pesos a day (USD 340,136) counted as of expiry of the obligation to notify.

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<sup>11</sup> The first stage of the proceeding begins with the compulsory presentation of form F1. Within 15 days following notification, CNDC should resolve whether (i) it authorizes the operation or (ii) requires the information contained in form F2 should the information in form F1 be insufficient to decide on the operation. The second stage consists of the presentation of form F2, in which case CNDC should resolve within 35 days following notification of the operation whether (i) it authorizes the operation, (ii) prohibits or conditions the operation or (iii) requires presentation of form F3. Finally, after having presented form F3 and within 45 days following notification of the operation, CNDC should resolve whether it authorizes, prohibits or conditions the merger. Lastly, if the parties consider it advisable, they may opt for beginning the notification by jointly presenting forms F1 and F2 if the operation shows some complexity. For example, if the merger will amount to a high share of the relevant market.

### 3. Institutional structure in charge of application of competition policies

#### a) Brazil

As we have mentioned, in the context of the economic reforms undertaken in 1994, the new Competition Law (Law N° 8,884) introduced prior control of mergers and acquisitions, as well as significant institutional changes. Thus, CADE was created as an independent agency, although certain powers in regard to competition were delegated to another two State agencies: the Secretariat of Economic Law under the Ministry of Justice (SDE) and the Secretariat of Economic Monitoring (SEAE). Together, these three agencies make up what is called the Brazilian Economic Policy System. Within the framework of the privatizations process carried out in Brazil in subsequent years, independent regulatory agencies were created in sectors such as telecommunications, petroleum and natural gas, electric power, etc.

#### b) Argentina

The National Commission on Defense of Competition (CNDC) is the State agency in charge of enforcing the 1999 Competition Law (N° 25,156). It should therefore investigate and identify practices that constitute possible restrictions to free competition in markets, as well as abusive practices carried out by companies having market power.

CNDC is made up of one President and four members who are counselled by an economist-in-chief and a lawyer-in-chief, as well as by a team of approximately 30 to 40 professionals (economists and lawyers). Since 1996 the CNDC's importance gradually increased. The best evidence of the intensification of its activities is the increase in the number of cases or conducts investigated. In fact, this increase reveals the growing importance and impact that the structural changes had on competition policy. Thus, between 1981 and 1983 CNDC resolved an average of 10.3 cases per year; this rate dropped to 7.3 during the period 1984-1989 and to 3.8 in 1990-1995. However, between 1996 and 1997 the average rose considerably to reach a rate of 16 cases per year.

### 4. Application of competition policies

In complement to the study of the legislation it is important to analyse and present certain indicators that reflect effectiveness in the application of the competition law and its evolution over time. Thus, in this section we will present performance indicators on the work of the competition authorities in relation to time and the number of conducts and mergers resolved. Without detriment to the above, we will also comment on the agencies' role as authorities in charge of applying the legal framework on competition and their effectiveness in fulfilling said objective. We will begin the study by considering Brazil and distinguishing between conducts and cases.

#### a) Brazil

i) Conducts. Competition policy in Brazil is based on the "rule of reason", as no practices are considered anticompetitive per se. In order for an anticompetitive practice to exist, it is necessary to verify the existence of dominant position.

One of the alternatives for analysing application or enforcement of the law is the evolution of the number of cases dealt with and the nature of the decisions adopted by CADE, bearing in mind the distinction between horizontal-type agreements and abuse of dominant power.

**Table 1**  
**BRAZIL: EVOLUTION AND DISTRIBUTION OF THE NUMBER OF CONDUCTS: 2000-2004**

	2000	2001	2002	2003	2004
Cases analysed	39	34	34	23	42
Horizontal Agreements	2	16	11	9	16
Dismissed	26	18	22	13	24
Abuse of Dominant Position	11	0	1	1	2

Source: Own preparation based on OECD (2005).

Although so far CADE has analysed and resolved a small number of cases that could typically be classified as cartel, it should be pointed out that recently the three agencies have concentrated on increasing their efforts to improve effectiveness in this regard.

ii) Mergers and acquisitions. The provisions of Law 8,884 regarding prior control are contained in Article 54, as has been mentioned.

In practice, most of the penalties for failure to comply with notification according to Article 54 have been applied to operations that include some structural adjustment clause between the parties. In fact it should be pointed out that in practice CADE has not imposed fines only for failure to comply with notification periods.

Concentration operations notified to CADE may be resolved in three possible ways, namely: authorized without conditioning, conditioned or rejected. If an operation is rejected, Article 54 grants CADE powers so that it takes all the actions deemed necessary for the purpose of undoing the harm to competition and to the economic order that same would have done until then, including the obligation of dissolution, sale of assets and/or (partial/total) ceasing of activities.

In general terms, the conditioning can be classified into structural conditioning and behavioural conditioning. The former is when the Competition Agency orders the disinvestment of particular assets of the companies involved with the aim of reducing their share or the entry of a new company. Behavioural conditioning may be related to the elimination or temporary reduction of a non-competition clause or with orders concerning behaviour for the companies involved. These may include ordering free access to the distribution network of the companies involved to ensure favourable conditions to a new entrant, and not discriminate against certain groups of complainants, among others.

In Brazil these conditionings may be classified according to the type of contractual clause imposed. In this regard, we can distinguish:

1) Conditionings that involve a once-only act, such as the obligation to disinvest or the elimination of some non-competition clause that is considered to be affecting the economic order (Article 54).

2) Conditionings that require a procedure that has continuity in time, although in a limited manner, such as, for example, the temporary obligation for the purchasing company to provide a license or continue employing the workers for a specific amount of time. Article 58 of the law gives powers to CADE to require one or more of the parties to restrict its operation in the market in some way and/or some performance obligation.

**Table 2**  
**BRAZIL: EVOLUTION AND DISTRIBUTION OF THE NUMBER OF MERGERS: 2000-2004**

	2000	2001	2002	2003	2004
Total Mergers	507	571	485	491	618
Authorized	490	559	474	484	574
Rejected	1	0	0	0	2
Conditioned	15	12	11	7	43
Structural Cond.	1	0	0	1	2
Auxiliary Cond.	14	12	11	6	41

Source: Own preparation based on OECD (2005).

In the last 5 years, CADE has reviewed 2,802 concentration operations in accordance with Article 54, totally rejecting only 3 of them and approving 88 more with conditionings, 7 of which have included performance obligations.

Although CADE has imposed conditionings in approximately 3.4% of the total of operations analysed during the period in question, obligations of a structural nature referring to availability and use of assets were imposed in only four cases. The low rate of conditioning in comparison to the total of notifications was also registered in 1998 and 1999. From a comparison with the rates attained by competition agencies from other countries, it would seem that the number is similar to that obtained by CADE.

As has been mentioned, in Brazil mergers that result in a market share of more than 20% or where total sales of the companies involved exceed 400 million reales (USD 156 million) have to be notified. This last limit has been established worldwide, which could be too low, giving rise to too many mergers of large companies being analysed, which, in practice, do not harm national competition.

Based on the recommendations proposed by OECD in 2000 with regard to adapting the limit worldwide of the criteria for notifying concentration operations, in January 2005 CADE introduced a change in this regard. In the operation between ADC Telecommunications Inc./Krone International Holding Inc., it was determined that the annual income of the participating companies would be measured in relation to the domestic market. Of the cases presented subsequently, in a sample of 161 operations, approximately 68 (42%) did not reach the market share limit or the total of sales at national level.

An important aspect of the process of notification of operations in Brazil (which has already been mentioned) is that although compulsory, it is not required to be carried out prior to the operation being concluded. That, in fact, is a serious defect of the system. CADE's Resolution 15, which was the standard implementing prior control in 1998, specified the "trigger date" that began the period of 15 days. According to this resolution the period began when: i) the parties signed the first compulsory document, and ii) when in fact there was a modification in the relations of competition between the parties, or at least one of them and a third agent.

As can be seen, the rule is fairly vague in this regard. At the same time, the fact that the parties are free to notify the operation to CADE before or after the operation is concluded is clearly a mistake and in fact poses the difficulty for CADE of having to analyse the effects on competition of operations already closed. In this regard there are two additional problems, referring to the effects on the market(s) should the operation be considered harmful to competition. Secondly, from CADE's point of view it is obviously even more difficult to undo the effects of an operation already concluded.

Despite these problems, CADE has succeeded in strengthening its role. This agency has made major efforts to ensure that companies notify operations as soon as possible, which has resulted in a systematic drop in the number of cases that do not comply with notification periods according to Article 54, as can be seen in the following table.

**Table 3**  
**BRAZIL: NOTIFICATIONS THAT DO NOT COMPLY WITH NOTIFICATION PERIODS: 2000-2004**

	2000	2001	2002	2003	2004
Operations reviewed	523	584	518	526	651
Non-compliance with Periods (No.)	107	57	39	16	18
% of Total Reviewed.	20,5	10,9	7,5	3,1	3,4

Source: Own preparation based on OECD (2005).

At the same time, the difficulties in undoing operations already concluded have led CADE to using other means to prevent complete economic integration of the companies prior to the operation being authorized, if presumption of damage exists. This institution can adopt measures of a temporary nature by means of which it can suspend implementation of the operation for preventive purposes until the competition authority decides on the case.<sup>12</sup> Two cases can be cited as examples (AmBerv and WorldCom/Sprint) where CADE has intervened by ordering preventive measures during the investigations of the operations. In these cases CADE, basing itself on the Civil Procedural Code, ordered the closure of certain production units, prohibited the exchange of sensitive commercial information for the business and required the companies' equity to be kept in separate accounts.

Finally, in order to specify the criteria of the "precautionary order", in August 2002 CADE drafted Resolution 28, which defines the procedure whereby if it should consider it pertinent, it will issue with 5 days' notice the suspension of the course of the operation, allowing the parties to present arguments contrary to CADE's, which the latter should assess prior to issuing the decision. These precautionary orders are subject to appeal before the courts. There is an additional mechanism, the Agreement to Preserve the Reversibility of the Operation (APRO), which allows a voluntary agreement between the parties for a transitory suspension of the implementation of the operation. During the period 2002-2004, CADE issued 1 precautionary order and 9 APROs.

## **b) Argentina**

Argentina's institutional framework for applying its competition law has serious limitations. Although the purpose of the amendment to the 1994 Competition Law was to increase the powers and authority of the agency to apply the law, the evidence considered shows that so far many of these objectives have not been satisfactorily fulfilled.

First of all, by mid-2006 TNDC had not yet been established and CNDC continued to be the authority in charge of its application. Furthermore, CNDC's structure of powers and functions suffers from a series of deficiencies that must be remedied in the short term to avoid a decline in reliability and damage to the reputation of the competition authority.

Secondly, the successive amendments to the Law have reduced its effectiveness. Among these amendments are: the introduction of greater powers to the Secretariat of Defense of Competition and Consumers during the investigation process and changes in the notification limits for concentration operations, which have become laxer.

<sup>12</sup> Article 83 of Law 8,884.

Once again we will segment the analysis between cases and mergers.

i) Conducts. Table 4 below shows the evolution of the number of conducts, distinguishing by type of resolution issued for the period 1990-2003.

**Table 4**  
**ARGENTINA: EVOLUTION OF THE NUMBER OF CONDUCTS: 1990-2003**

	1990-1995	1996	1997	1998	1999	2000	2001	2002	2003
Conducts analysed	23	23	24	32	17	15	20	32	39
Fined	7	2	3	3	3	2	3	2	4
Dismissed	13	20	20	26	13	12	17	30	34
Agreement between parties	3	1	1	3	1	1	0	0	1

Source: Own preparation based on CNDC.

As can be seen in the table above, the number of conducts resolved shows a stop-and-go cycle: in the early years of the nineties decade the number of cases was reduced and then increased notably as of the second half, a trend that repeats itself as of 1999. The number of dismissals and agreements showed a behaviour pattern similar to the number of cases throughout the period, whereas the number of fines imposed by CNDC remained low.

Likewise, we show the distribution of conducts analysed, where we can see that of the total of 168 conducts, 50% corresponds to horizontal and vertical agreements and the other half to monopolistic conducts.

**Table 5**  
**ARGENTINA: DISTRIBUTION OF CONDUCTS: 1990-2001**

	No.	Share (%)
Horizontal Agreements	30	17,9
Vertical Agreements	21	12,5
Other Monopol. Cond.	73	43,5
Abuse Dominant Position	29	17,3
Others	15	8,9
Total	168	100,0

Source: Own preparation based on CNDC.

Finally, with regard to the efficiency of the fines applied by CNDC, it is important to mention some quantitative measures. One of them considers the coefficient between the fines applied by CNDC and companies' profits and the other measure considers the coefficient between the fines applied and the maximum possible fines. These measures vary according to the case considered, but as an example it can be cited that in the YPF-Repsol case the maximum fine was applied and this represented some 6% of the company's profits. In the TRISA-TSCSA case the penalty applied was the equivalent of 80% of the maximum fine (Margaretic, Martínez and Petrecolla, 2005).

ii) Mergers and Acquisitions. Since the 1999 reform, CNDC has analysed a significant number of mergers, most of which were authorized, since it was not considered that these could affect competition in the respective markets. In fact, 96% of the operations analysed were authorized in the period of analysis. The number of operations rejected is minimal and shows stable behaviour throughout the period, and the operations approved with conditionings were also very scarce, with a maximum of 6 cases in 2000 (see Table 6).



**Table 6**  
**ARGENTINA: DISTRIBUTION OF MERGERS: 1990-2003**

	1990-1995	1996	1997	1998	1999	2000	2001	2002	2003
Total Mergers	0	0	0	0	39	157	37	26	32
Rejected	0	0	0	0	0	1	0	1	1
Conditioned	0	0	0	0	1	6	0	1	2
Authorized	0	0	0	0	38	150	37	24	29

Source: Own preparation based on CNDC.

The raising of the minimum value of mergers required to notify as of 2001 is reflected in a notable drop in the mergers notified in subsequent years.

## 5. Comparative summary between Argentina and Brazil

The main differences and similarities between competition policies and their application in Argentina and Brazil can be appreciated in Table 7.

**Table 7**  
**COMPARATIVE TABLE LEGISLATION ARGENTINA/BRAZIL**

Items	Brazil	Argentina
Objectives of the law	Defence of the economic order and principle of the social role of property	Defence of the general economic interest
Reform of the law on defence of competition	Law 8,884 (1994)	Law 25,156 (1999)
Authority for application of the law	CADE, SDE, SEAE.	CNDC (Current) and TNDC (when formed)
Scope of the Authority	All sectors except Banks	All sectors of the economy
Independence of the agencies	Yes (CADE)	No (in the future TNDC)
Nature of decisions	CADE, Administrative institution. Decisions appealable before the Courts	TNDC: Administrative institution. Decisions appealable before the Courts. CNDC: Issues recommendations to the Secretary of State.
Functionally Answerable to	CADE and SDE: Ministry of Justice and SEAE Ministry of Finance.	CNDC under the Secretariat of Technical Coordination, Ministry of Economy. TNDC: Ministry of Economy
Instruments of Investigation	Experts, Searches and Leniency Program for Witnesses	Experts, Searches, Public Hearings
Criterion for the analysis of conducts	Case by case	Case by case
Market power as prior condition to the analysis of conducts	Yes	Yes
Limits for the analysis of conducts	Not regulated (in practice Market share greater than 20%)	Not regulated
Special treatment for small firms	Yes	No
Fines for anticompetitive practices	From 1% to 30% of gross profits	From USD 3,400 to USD 51,020,400

/Continue

Table 8 (Conclusion)

Items	Brazil	Argentina
Daily fine for failure to comply with commitments	From USD 2,050 to 41,000 daily, cumulative for 90 days	USD 340,136 daily
Prior control of economic concentrations	Yes (since 1994)	Yes (since 1999)
Rate for the notification of concentrations	Yes (since 1999)	No
Definition of the relevant market in mergers	Test of the hypothetical monopolist	Test of the hypothetical monopolist
Limits on market share for concentrations	Unilaterally: 20% and jointly: 75% resulting from the operation of more than 10%.	Not regulated
Concentration index used	C4	HHI
Obligation of prior notification in concentrations	No (within 15 days after the transaction has taken place)	No (within 7 days after the transaction has taken place)
Limit for resolving a concentration	120 days	45 days
Limit for notification of concentrations	20% of the relevant market or total invoicing of USD 156 million the previous year	Total business volume of USD 68,027,211 and amount of the operation or operations in the same market carried out the previous year greater than USD 6,802,721; operations in the same relevant market in the past three years greater than USD 20,408,163.
Fast Track for concentrations	For operations that comply with certain requirements, this analysis is carried out jointly by SDE and SEAE.	Depending on complexity of the operation three periods are established: 15 (F1), 35 (F2) and 45 (F3) days after notification

Source: Own preparation based on the competition laws of Argentina and Brazil.

## **II. Main cases analysed**

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This section presents some of the main operations resolved by the agencies for defence of competition in Argentina and Brazil, selected not only for their importance but also for their diversity.

### **1. Background to mergers**

#### **a) Brazil**

Conditioning of a structural nature, that is, those aimed at the utilization and disposition of assets, were present in only four of ten cases conditioned in Brazil. One of these cases was the merger of AmBer in the beer market in the year 2000, in which CADE demanded the disinvestment of a brand and five beer producing plants. In 2003 a structural conditioning was demanded in the acquisition of the supermarket chain G. Barbosa by Grupo Adhold (owner of Bompreço, the largest supermarket chain in the northern area of Brazil). CADE ordered Grupo Adhold to disinvest 16 of the 32 branches of G. Barbosa. In 2004 another two economic concentrations were conditioned in the supermarkets market: in one CADE imposed the sale of a branch and in another, the Pepsico-Gatorade case, AmBer was required to disinvest its best known tonic drink in the market.

Below we will deal in greater depth with two cases in which CADE conditioned company mergers:

i) The AmBer (Antártica-Brahma) Case. It is interesting to note that the concentration of the international beer market increased significantly. A number of mergers and acquisitions had transformed a deconcentrated sector in Brazil into one that could be characterized as an oligopoly of international origin dominated by less than 20 companies.

In 1999 CADE was presented the merger of two important beer producing companies in Brazil, Antártica and Brahma, which would form a new firm called AmBer. The companies' share of the domestic beer market, prior to the merger, was as follows:

Skol approximately 33%, Brahma 22%, Antártica 15%, Kaiser 14%, Schincariol 9% and the remainder were smaller competitors. The beer market was characterized by CADE as an oligopoly of separate products, with a reasonable level of rivalry in prices and publicity, added to high entry barriers. These barriers were in place due to difficult access to distribution channels and to the low advertising costs necessary to develop a brand.

The study made by CADE of this case led to the conclusion that despite the competitive earnings stemming from the increase in quantity and quality of the beer produced and technological development, the operation increased the market power of the companies involved. The agency also took into account that these negative effects would not be counteracted by the entry of new companies due to the above-mentioned market barriers.

CADE established a structural conditioning in which it ordered the disinvestment of some of the companies' assets together with a behaviour clause. These conditionings were as follows: i) sale of the Bavaria brand; ii) that the distribution system be shared for a period of 4 to 6 years, and iii) disinvestment of a producing plant in each of the country's five regions. The main objective of these conditionings was to make possible the entry of a new competitor into the beer production market without having to incur in the cost of creating its own distribution and brand.

These measures left the companies' market share relatively unaltered. In 2004, the shares were: Skol 31%, Brahma 22%, Nova Schin 15%, Antártica 14%, Kaiser 12% and the rest was distributed among other competitors. Market concentration was maintained, since the HHI was 5153 points in 2001 and 4908 points in 2004.

ii) The Nestlé-Garoto Case. Nestlé Brazil is a subsidiary company of the Swiss Group Nestlé, an important producer of food and beverages, among them chocolates. Garoto, for its part, a Brazilian food company, was a producer of candies and chocolates. Given that Garoto was the third company in the market after Nestlé and Alimentos Kraft (Lacta), the merger between Garoto and Nestlé significantly altered market leadership conditions. One important concern that arose in this operation was whether one should establish as the relevant market the market for all chocolates or smaller-sized markets such as tablets, boxes, snacks and Easter eggs. However, the concentration reached in each of these markets after the operation was equally significant.

In 2001, the companies' market shares for chocolates were as follows: Nestlé had approximately 34%, Lacta 33%, Garoto 24% and the rest of the companies had shares of less than 5%. Thus, after the economic concentration operation the Nestlé-Garoto group would have a share of approximately 58%.

This was the first case of mergers in which the threatened companies, including its main competitor, Kraft, presented quantitative studies. These studies aimed to predict the post-merger effect on prices and quantities, as well as the necessary reduction in marginal cost to counteract the

increase in market power of the company involved.<sup>13</sup> Likewise, the companies involved in the merger submitted a detailed study of the efficiency gains arising from the operation.

The major differences between the results of the different studies submitted led CADE to make a criticism of the methodologies used in them, such as identification of the function of relevant demand, the uncertainty associated with demand elasticity estimates and the potential defects that arise from using a Bertrand-Nash<sup>14</sup> definition of separate products.

Finally, CADE concluded that the econometric studies showed high cross-elasticity between the different market segments for chocolates as well as between the different brands, which led it to conclude that the relevant market was the domestic chocolate market in all its forms. The antitrust agency considered that imports were not important in the market and the distribution of these products represented a barrier to entry. It was therefore resolved that the transaction should be rejected, given that: i) neither the cost reductions that would arise from the transaction nor the competition that would survive in the market were sufficient to counteract possible price rises, and ii) there were no remedial measures that could counteract the effects of such a high concentration.

In February 2004, the majority of the members voted in favour of blocking the operation and ordered the sale of Garoto chocolates to a competitor with a market share of less than 20%.

## **b) Argentina**

As in Brazil's case, the percentage of conditioned and prohibited economic concentration operations is insignificant (4% throughout the period). The two most important operations rejected by CNDC were one vertical and one horizontal operation. The horizontal operation arose in 1999 between the two main providers of postal services, Correo-Argentino (CASA) and Oca. This placed the companies involved in a position of almost exclusive competitors in the majority of the relevant markets analysed, given that Oca, the strong competitor that faced Correo Argentino, would disappear. In this case certain quantitative exercises were practiced to estimate the impact of possible price increases and these estimates showed potential harm for consumers (through loss of surplus for the consumer), despite the fact that some services were regulated. The other prohibited operation (Aeropuertos Argentina 2000-LAPA) concluded in 2002. This will be described in this chapter and is a vertical concentration operation since the main licensee of airport services wanted to acquire an airline.

The conditionings imposed by CNDC have been of a structural nature and related to behaviour. The latter were mostly clauses prohibiting the competitors leaving the market from becoming reincorporated into it for a specific period of time. Generally, CNDC's opinion has been that the periods for this type of prohibitions should be shortened. The structural conditionings arose in various markets, both regulated and not regulated. An important operation conditioned in 2000 was in the supermarkets market (Carrefour-Supermercados Norte) in which the acquiring company was ordered to abstain from increasing its total surface area for a period of a year in the geographic area where its share increased significantly. After that period the company had to submit a report on the evolution of the market and at that time CNDC could order the transfer of assets.

Below we will present in greater detail one of the most important cases of mergers conditioned by CNDC.

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<sup>13</sup> These studies tried to contribute to the definition of relevant market by measuring consumers' reaction to changes in the price of chocolate products, as well as in the different brands (estimates of price elasticity of demand). The companies involved also presented econometric estimates based on Nielsen's data.

<sup>14</sup> Bertrand-Nash is a model of oligopoly in which the companies choose prices independently to maximize their profits and rivals' prices are taken as given.

**Bimbo-Fargo Case.** This operation was concluded in 2004 and consisted of the acquisition of Compañía de Alimentos Fargo by Grupo Bimbo.

In this case the parties involved in the operation submitted various studies to defend a market for the product which included traditionally-made bread together with industrial bread. In view of the large size of the market for traditional bread, the share of these companies was relatively insignificant in a wide-ranging market (traditional and industrial bread). Among the studies submitted was an econometric study estimating the elasticity of demand for industrial bread which concluded, after applying the hypothetical monopolist test, that an increase in prices would not be profitable for the parties involved in the operation. However, the Commission concluded that the results of this study were dubious, since the methodology used did not consider significant variables to model the economic crisis of the period considered nor analysed the adjustment of residues.

In view of the characteristics of the products, consumers' decisions and price correlations, three relevant markets were defined on the demand side, and two markets on the supply side. The markets for the product were the market for white and whole wheat industrial bread and the market for industrial bakery. The extent of the distribution system led to defining the geographical market as national.

With regard to the shares of the companies involved it was observed that Fargo's in the production of white and whole wheat industrial bread was 58% whereas Grupo Bimbo's was 21% (the HHI resulting from the operation rose from 4072 to 6477 points. In the bakery market Fargo's share was 47% and Grupo Bimbo's 15% (the HHI went from 2588 to 3999 points).

The conclusion was that the competition between the firms participating in the market would be seriously harmed by the operation if Fargo, the market's leading company, disappeared as such and a "mega" company was formed. This company would not face any strong competitor, given the characteristics of the rest of the companies in the market.

Furthermore, this market was characterized as a market for separate products. The most important brands of each company, Bimbo and Fargo, were the consumers' first and second choice, which after the operation were controlled by Grupo Bimbo: The increase in price of any of these brands would be profitable, since a significant percentage of consumers would be absorbed by the brand that did not increase its price and both would belong to the same group.

CNDC also considered that the existence of idle capacity in the companies involved (approximately 50%) stood as a significant barrier to entry. This capacity would make it possible to respond strategically to the entry of a new competitor by increasing production rapidly and at low cost.

Finally, the efficiency gains shown by the parties were considered. These were dismissed because the relatively uncompetitive and concentrated environment resulting from the operation would not provide incentives for the companies involved to transfer the efficiency gains to consumers through lower prices.

CNDC decided to condition the operation but the proceeding (ex ante) was different from that established previously (which was ex post) in order to ensure its enforcement. CNDC negotiated a "commitment" of sale of assets with the parties, following the European model (also frequently applied in the United States). The commitment had to be prior to approval of the operation and only after having complied with it would the agency give its consent. The commitment demanded of Bimbo and Fargo consisted in a disinvestment between the parties (See Box 1).

**BOX 1****DISINVESTMENT COMMITMENT ESTABLISHED IN THE BIMBO-FARGO CASE**

Given that CNDC considered that the purchase of Fargo by Bimbo would result in serious harm to competition in the industrial bread market, the parties involved presented a Disinvestment Commitment prior to authorization of the operation. Although the parties made the commitment their own, it had been previously negotiated with CNDC and the Secretary.

The Commitment consisted in the transfer of a business unit consisting of the brand "Lactal", the industrial bread production plant and an appropriate distribution system for the marketing of "Lactal" brand products. According to the terms of the commitment, the buyer could choose not to acquire the distribution system but inevitably had to acquire the "Lactal" brand and the production plant.

CNDC considered that the transfer of the business to be disinvested to a vigorous, independent competitor would maintain current conditions of competition in the markets for white and whole wheat bread and bakery prior to the operation.

The buyer of the business to be disinvested would have to be a third party that did not maintain business links nor strategic alliances with the parties involved in the operation at the time of the transfer. Moreover, it would have to have sufficient financial resources, attest to its suitability and have incentives to develop as an effective competitor in the industrial bread market.

A special case arose in this operation since the purchased company, Fargo, was in a meeting of creditors, a situation that had to be considered at the time of establishing the disinvestment commitment.

The Commitment provided for a First Disinvestment Period lasting eighteen months counted as of the date of the Resolution. This period could be extended by CNDC at the request of the parties should they not obtain authorization from Fargo's Competition Judge to enter into the Sales Contract. Subsequently, the Commitment provided for an extended period of twelve months counted as of the end of the First Disinvestment Period or the granting of mandate to a Sales Agent, whichever should occur first. This Commitment incorporated the figure of Sales Agent to whom the parties involved would grant a mandate to transfer the business to be disinvested. It was established that this agent should be independent of the parties involved and his appointment approved by CNDC.

Furthermore, the Commitment established that the parties involved could not integrate their businesses until the date of approval by CNDC of the Sales Contract of the business to be disinvested, or until, with prior approval of CNDC, the Sales Agent began his duties. Once the sale of the business to be disinvested was closed and implemented in the Sales Contract, CNDC would then recommend to the Secretary to authorize the operation notified.

**2. Background to conducts****a) Brazil**

This country does not have a long tradition in analysis of anticompetitive conduct. In fact, until 2003 an average of 33 cases a year were resolved. Furthermore, Brazil was characterized by analysing relatively unimportant cases in terms of their impact on competition. Taking the period 2000-2003 into account, CADE resolved to close 103 out of a total of 172 cases since no violation of the competition law was found. Added to this were excessively long administrative procedures which further reduced the effectiveness of the policy, with the risk that the harm to competition had already been done, in addition to low quality in case analyses and little advantage taken of the discussion or importance of prior jurisprudence of the agencies themselves in similar cases.

Nevertheless, it should be pointed out that in recent years efforts have been made to improve the system's performance as regards cases and thus increase its effectiveness. Abbreviated administrative procedures have been introduced in order to free up resources to resolve the most significant cases and at the same time to reduce the average time for resolving a conduct.

In 1999, CADE resolved the first anticompetitive case of company cartels under Law 8,884. The conduct analysed consisted of a price agreement among companies producing steel plates. Thus the Agency's trajectory in the fight against monopolistic and anticompetitive practices began.

In a series of cases that began in 2002, CADE analysed the conduct of anticompetitive fixing of excessive prices on the part of a group of service station owners and associations of fuel sellers in different Brazilian states, which derived in the imposition of fines both on the former individually and on the officials of the associations and the associations that grouped the sector's different companies.

In March 2005 CADE concluded a case against Rio de Janeiro's four main newspapers for a coordinated increase of around 20%. On the day of the price rise, the four newspapers published identical editorial articles in which they justified the increase and mentioned the association that grouped them together as the organizing agent. Thus, based on the above, CADE decided to fine the companies with an amount equivalent to 1% of their annual earnings because it considered that the practice described constituted a violation of the competition law.

A similar case occurred when in 1999 various local newspapers complained that after a meeting between the directors of the four main airlines the fares for the section Rio de Janeiro-Sao Paulo, which is highly in demand, had been increased by 10%. This gave rise to an investigation by SEAE, which concluded that the price increase was indeed not merely a case of conscious parallelism but of a price agreement. In addition to proof of the meeting between the presidents of the companies five days before the coordinated price increase, the evidence analysed showed that there was a system of exchange of information between the companies through ATPCO, the computerized information system that concentrated the airlines' data through the company that published air fares. Apparently the companies could make price changes which for the first three days could only be seen by the companies and not by consumers or tourist agencies. Thus, the company that published the information allowed the companies to coordinate themselves and in the face of a decision to increase prices by one of them, the others could imitate it. Conversely, if the rest refused to increase prices, the fact of being able to undo the initial increase on the part of the company that had started the increase, it was possible to undo the action without suffering a drop in demand.

Thus, in September 2004, CADE determined that the four airlines had colluded to increase fare prices, for which reason it imposed fines on the order of 1% on the earnings received by the companies during 1999. The conduct sanctioned was fixing and adjusting prices through the fare notification system.

It should be pointed out that Brazil has not only analysed price agreements as examples of horizontal practices but has also resolved cases in which the anticompetitive conduct consisted of exclusivity contracts or creation of entry barriers in order to dissuade or prohibit entry to potential competitors that could enter the market and eventually reduce prices through the competition mechanism (Unimeds, 2002; Varig-TAM, 2005). Generally in these cases fines of different magnitudes were also imposed, depending on the scope and seriousness of the conducts under analysis.

In reference to the jurisprudence on abuse of dominant position, it should be pointed out that most of the cases considered by the Brazilian system involved forms of vertical restriction, in particular practices of exclusion to close the market or prevent the entry of horizontal competition. In this regard the most recent example and at the same time one of the most important is the case of Microsoft, which consisted of restrictions against intra-brand competition. We will also consider the hewn stone case, which in addition to being interesting from the point of view of defence of competition, is the first antecedent in which the search procedure was used.<sup>15</sup>

i) Microsoft Case. In August 2004 CADE determined that Microsoft restricted distribution of its own brand's software, as well as the provision of related services. The anticompetitive practice was that Microsoft had created a system of large-scale resellers (LAR) of its products for sales to corporate clients. Thus, each of the LARs was restricted to a given area, although for a particular area there could be more than one LAR, depending on how many distributors in that area fulfilled the requirements defined by the company to be considered LARs.

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<sup>15</sup> Other excluding anticompetitive practices analysed by CADE include Iguatemi Shopping Center, 2004 and White Martins Corporation and Ultrafertil in the fertilizers sector, 2002.



For instance, for the area of the Federal District of Brasilia there was a single firm, TBA Informática, which complied with said requirements. Microsoft had expressed to the federal government that TBA was the only firm authorized to sell the company's software and related services in the region, as a result of which the typical bidding procedures for government procurement were in this case left in the hands of TBA.

CADE examined the agreements between TBA and Microsoft and defined as the market for the product the sale or license of software and computer services associated with the federal government, while the relevant geographical market was of a national nature. In this market, Microsoft had a dominant share of 90%. In CADE's opinion, Microsoft's practice of granting TBA exclusivity was abusive and therefore anticompetitive. The effect was that by eliminating competition between suppliers of Microsoft in federal government bidding, which led to a loss for consumers, who were not compensated by efficiency gains generated by competition between brands, which in any case did not exist. Thus, the official agents in charge of government procurement were restricted in the possibility of choosing between different suppliers, not only of the product but also the associated computer and assistance services.

CADE considered that when a monopolist sold its products through a single distributor, the effect on competition of this practice was a rise in price levels and hence a drop in the amounts supplied, compared to the situation in which the monopolist sold directly to the end consumer.

Microsoft put forward two explanations based on the argument of efficiency, which were dismissed by CADE. The first, that territorial restrictions were a stimulus for resellers to invest in analysis and understanding of clients' needs in that particular area, which if verified would improve market efficiency and would benefit consumers in general. CADE rejected this argument, considering that although TBA operated in that area, it was forced to sell sub-products to federal agencies in other districts. The second argument set forth by Microsoft was that exclusivity prompted the free riding behaviour of other resellers' marketing efforts. Once again CADE opposed this argument since the party that settled marketing efforts throughout Brazil was Microsoft and not TBA, which would only have incentives to promote its own brand if it had it. Furthermore it was added that Microsoft allowed many LARs in charge of operating in other areas. Thus, CADE concluded that Microsoft's true objective was to establish a distribution system with TBA as exclusive distributor, only for the purpose of avoiding competition in government biddings.

CADE's negative view of the justifications of efficiency was aggravated by Microsoft's argument that TBA's exclusivity status had not been deliberately intentioned, but had been a natural consequence of the neutral application of the restrictions to be a LAR, established by Microsoft: However, CADE considered that on the contrary, Microsoft had defined the requirements in such a way as to ensure that only TBA could comply with them. Thus, in CADE's opinion although any producer is free to determine the most appropriate distribution system and to choose its distributors, this did not include the prerogative of doing so in a discriminatory manner.

CADE concluded that the conduct developed by Microsoft and TBA restricted competition and constituted an abuse of dominant position, and also involved an anticompetitive agreement that sought to ensure an artificially advantageous situation in bidding for federal procurement. As a result, Microsoft was fined an amount equivalent to 10% of the earnings received from the licensing of Microsoft products to the federal government, whereas TBA was fined 7% of earnings from Microsoft products and auxiliary services that it had obtained from the government.

ii) Case of Hewn Stone Producers. This is an interesting case for analysis, since it involved the first search made by the competition authority, which was carried out by SDE in July 2003. This action was effected in the Stone Industries Association located in Sao Paolo, for the purpose of gathering evidence of collusion in the hewn stone market, an essential input in civil construction.

Twenty-one producing companies participated in the conduct investigated, which were grouped together in this association and, together, represented 70% of the market for production of this input in Sao Paolo. The anticompetitive conduct under analysis consisted of a cartel which had been operating for two years

Based on the material seized in the proceeding, SDE began an administrative proceeding in order to investigate the mechanisms to determine prices in the market, its segmentation, the existence of restrictions on production and the auction process in public biddings in which the companies in the market participated.

The investigation was concluded in November 2004 and the result was that SDE found sufficient evidence of the existence of an anticompetitive cartel on the part of 18 of the 21 companies in question.

The evidence used to arrive at said conclusion was based on the fact that during the period in question the companies carried out the following practices: i) centralization of information on prices and daily sales, ii) meetings to determine the cartel's policies; iii) sharing out of markets and clients, including the sharing of market quotas in public biddings; iv) establishment of fines for members that did not comply with the cartel's decisions, and v) demand for a remission in earnings from sales when these were owed to clients assigned to any of the association's other companies.

CADE handed down its decision in July 2005, coinciding fully with SDE's statement, in such a way that it found the companies accused responsible for the conduct, and it therefore imposed fines ranging between 15% and 20% of gross earnings received by them during 2001, depending on the level of participation in the cartel.

## **b) Argentina**

In this section we will analyse two of the most significant cases in CNDC's work, which are interesting due to the scope of the decisions taken by the competition agency and the impact they had on the markets in question. The two cases involved significant fines for the companies denounced. Within this framework, we will consider a first conduct carried out in the liquid oxygen market, which is particularly interesting due to the procedures used in collecting the necessary evidence to sanction the anticompetitive conduct. The second case is the conduct of forming cartels in the Portland cement industry through a concerted agreement on quotas and exchange of competitively sensitive information carried out by the main producing companies in the market. This case is important due to the seriousness of the conduct sanctioned, its scope, the length of time of the conduct (almost 20 years) and the sophistication of the agreement, among other aspects.

It is also interesting to analyse CNDC's experience in formulating pro-competitive recommendations in particular sectors aimed at correcting or introducing greater competition in the markets. In this context, we will consider the recommendation on end charges for mobile telephony. Finally, we will make brief mention of the comprehensive investigation of the Liquefied Petroleum Gas market, which covered all the stages of the marketing chain, from production to the final marketing of the product on the domestic market, as well as production intended for export.

i) Liquid oxygen case. The conduct under analysis arose after an ex officio investigation started in 2005 of the companies Praxair Argentina, S.A., Air Liquide Argentina, S.A., Messer Argentina, S.A. (acquired by Air Liquide), AGA, S.A. and Indura Argentina, S.A. The conduct investigated was concerted actions between 1997 and 2002 to share out clients and fix prices in the market for medicinal liquid oxygen and the market for medicinal oxygen gas. In both cases the market's geographical dimension was national.

For the case under analysis, an ex officio investigation was made, ordered by the ex-Secretariat of Competition, Deregulation and Consumer Protection on the presumption that a collusive agreement could be at work between the companies providing medicinal oxygen to hospitals and clinics, both public and private.

In reference to the characteristics of the product and the market, it should be pointed out that medicinal oxygen can be acquired in liquid state (available in tanks and flasks) or as gas (tubes) and its provision is awarded through bidding processes or by means of procurement.

CNDC considered that the liquid oxygen market was highly concentrated, in which access for new suppliers encountered significant barriers to entry. These barriers are the consequence of fulfilment of specific regulations to become a supplier, as well as investments and necessary know-how to supply the product. The very characteristics of its provision, which consist of the installation of expensive cryogenic tanks which must be replaced upon a change of supplier also contribute to raising barriers to entry to new suppliers in the market.

In this context, an investigation was carried out which included requests for information from different hospitals, testimonial hearings and searches in the offices of the firms investigated.

The evidence gathered from the information requested of 63 health-care establishments was that 65% of cases continued to have the same supplier through successive contracts, whereas only 23% of them had changed their supplier. Furthermore, there was a small number of firms that took part in the bidding processes (in biddings the average was two suppliers and in direct contracting by public hospitals, one), which seemed to be consistent with the hypothesis of concerted anticompetitive practices.

In this context, as evidenced in testimonial hearings with the heads or those in charge of purchases in hospitals and clinics, there were mechanisms to simulate competition among the companies investigated in order to avoid competition with those that already offered the product in a particular hospital (the incumbents). In this regard they detected reluctance to quote, presentation of offers with formal errors or very high quotes with respect to the price offered by the incumbents.

Evidence of a similar nature as regards simulation of competition was obtained by means of the searches carried out, as shown in documents such as memos, emails and internal notes. This same documentation also furnished valuable proof of sharing out of clients and price agreements between the firms investigated.

In sum, according to the evidence obtained through the investigation, it is possible to establish that the firms supplying medicinal oxygen systematically coordinated their positions in procurement processes of public and private hospitals, shared out clients and agreed on prices during the period 1997/2002 in the markets for liquid oxygen and oxygen gas on a national scale.

On the basis of the above, the sanctions applied were as follows: Praxair Argentina, S.A. \$26,100,000 (USD 8,700,000); Air Liquide Argentina, S.A. \$24,900,000 (USD 8,300,000); AGA, S.A. \$14,200,000 (USD 4,733,333) and Indura Argentina, S.A. \$5,100,000 (USD 1,700,000).

ii) Case of Loma Negra-Minetti and others, Portland cement. The conduct investigated was limited to the national Portland cement market during the period between 1981 and 1999, since there was presumption of the existence of a conduct of dividing up the industry into cartels by means of agreeing on quotas and exchange of competitively sensitive information by the main companies in the market.

The companies investigated were the following: Loma Negra, Juan Minetti (in its own capacity and also as successor to Corcemar), Cementos Avellaneda, Cemento San Martín and the Association of Portland Cement Manufacturers (AFCP).

This led to an investigation through which it was determined that there was sufficient evidence to sanction the companies denounced.

The conducts sanctioned were the following:

- 1) Agreement on quotas and shares on a national scale in the Portland cement market, monitored through AFCP.
- 2) Agreement on prices and other commercial conditions in certain areas and localities of the country.
- 3) Agreement to exchange competitively sensitive information on the Portland cement market, implemented through AFCP's Statistical System.

The agreement on quotas and market shares carried out by the accused cement companies and by AFCP consisted of an anticompetitive conduct which distorted, restricted and limited competition, with the consequent harm to the general economic interest.

The implementation of a system of exchange of competitively sensitive information through AFCP, designed and perfected over time by AFCP itself and the accused companies, nourished with information from the latter's offices and production at a level of detail which was disproportionate for merely statistical purposes and with reciprocal access to information from the other companies, was a crucial instrument that allowed the accused companies to carry on the agreement reproached in these proceedings, with the consequent harm to the general economic interest.

The design and perfecting of the above-mentioned highly detailed information system brought out, in CNDC's opinion, the existence of a mechanism that made coordination in the market more feasible. This mechanism facilitated tacit or explicit agreements between the cement companies and therefore distorted competition by revealing competitively sensitive information. The companies became more interdependent entities when they carried out their commercial and competitive strategies, with sufficient capability to cause harm to the general economic interest.

As a result of all the above, CNDC determined that the companies denounced should be fined, the fine being raised up to the amount of the profits illicitly obtained by the infringing companies (20% of the value of their assets (earnings?)).

In order to determine the profit illicitly obtained by the cement companies through the alleged anticompetitive conducts, CNDC considered the total amount transferred by the consumers to the aforementioned companies as a consequence of the anticompetitive conducts. In other words, the extra earnings obtained by the infringing cement companies as a consequence of the anticompetitive conducts in which they incurred.

In this context, the competition authority determined that the harm to the general economic interest caused as a result of the conduct under analysis could be broken down into two parts.

One part was made up of the deprivation of economic well-being for the consumers that ceased to acquire the product as a result of the price alteration. This portion of the harm to the general economic interest was not appropriate for the infringing cement companies.

The other component or portion of the harm to the general economic interest consisted of the amount transferred by the consumers who did not cease to acquire the product despite the price alteration in relation to the situation in the absence of the conduct. This portion of the harm to the general economic interest was the profit obtained illicitly.

The justification to raise the fine in this case was based on the following considerations:

1) Dissuade the companies from continuing with anticompetitive conducts, given that if it were lower than the profit obtained from the anticompetitive action, it would be economically profitable even bearing in mind the application of said sanction.

2) Concerted actions or horizontal agreements among competitors are the conducts that directly violate the system of defence of competition.

3) The alleged conducts were carried out by the cement companies and AFCP in a conscious and systematic manner, making the Statistical System of the above-mentioned association an increasingly sophisticated mechanism for control and support of agreed quotas and market shares.

4) The infringing cement companies have undertaken actions as a warning to other companies in the market that belonged to the Association.

5) The companies were perfectly aware of the illicitness of the set of actions that made up the concerted anticompetitive conducts, for example they gave confidential and restricted treatment to the competitively sensitive documentation and information produced by AFCP's Statistical System.

6) Due to the importance of the product used as an input in the construction industry, the extent of the geographical market covered –the entire country– and the extent of the period investigated –practically twenty years– attest to the magnitude of the commerce affected by the anticompetitive conducts.

Thus the CNDC determined the following fines, which include the profits illicitly obtained: Loma Negra \$138,700,000 (USD 46,233,333), Minetti \$100,100,000 (USD 33,366,667). Cementos Avellaneda \$34,600,000 (USD 11,533,333), Petroquímica Comodoro Rivadavia \$7,300,000 (USD 2,433,333) and \$28,500,000 (USD 9,500,000).



### **III. Relations between regulatory bodies and the competition agency and international cooperation**

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#### **1. Relations between the competition agency and regulatory bodies**

##### **a) Brazil**

The Competition Law (N° 8,884) applies to individuals, public and private enterprises, and individual and corporate associations. Thus, the interpretation of the bodies in charge of competition policy is that the law applies to federal governments and their agencies. So far the opportunity has not arisen to test the supremacy of the competition agency, since the latter has interacted with state governments only to resolve issues related to competition law.

Commercial enterprises controlled by the state government are clearly covered by CADE's authority. In fact, this agency has participated in various cases and mergers involving Petrobras, the national hydrocarbon company.

Likewise, given that the law applies to all companies, these include regulated enterprises. As will be seen further ahead, the only exception is the banking sector. CADE apparently tries to avoid

conflicts with regulatory agencies, and therefore, although it reviews mergers and addresses cases of horizontal conducts between competitors, no case has arisen in which regulated enterprises are pursued for unilateral price-increase conducts.

In general, the regulatory frameworks establish certain principles on competition but they are more of a sectoral nature than Law 8,884. The only regulatory frameworks that expressly refer to the competition law are those for hydrocarbons and telecommunications.

The hydrocarbons law (1997) requires that the regulatory agency, the National Petroleum Agency (regulates gas and fuels) notify both CADE and SDE if it observes conducts that violate the law on defence of competition. Likewise, CADE is required to inform this regulatory agency of sanctions applied to the sector's enterprises.

At present the regulatory agency monitors fuel prices and informs SDE of any irregularities it detects. Although SDE reached agreements with the agency on the investigation of anticompetitive conducts, it was unable to reach agreements to act jointly.

In the natural gas sector federal jurisdiction is different from any other sector since it extends to interstate trade. Prices of interstate transportation have been deregulated since 2002. Thus, some of these states continue to provide the service, whereas others have privatized it or have decided to license it. CADE has constantly intervened in reviewing concession agreements in this market.

In the telecommunications sector the regulatory framework (1997) explicitly establishes the application of the competition law to enterprises and grants a specific role to the regulatory agency –National Telecommunications Agency– to enforce the law. This regulatory framework explicitly establishes that the regulatory agency has the legal authority to control and prevent any alteration of the economic order in the telecommunications sector. The consequence is that this sector's mergers and conducts are analysed by CADE, by the regulatory agency or by both. In practice CADE and the National Telecommunications Agency have set up a working group to avoid overlapping of functions. In the sector's mergers the regulatory agency assumes the role of SDE and SEAE, since it carries out the technical investigation whereas CADE takes the final decision. In anticompetitive conducts, the regulator shares this jurisdiction with SDE and SEAE, which is why one of the three agencies carries out the investigation and CADE decides. In recent years a number of cases of mergers and conducts have arisen in which the regulatory agency has taken part. In some mergers CADE requests complementary technical opinions from SDE and SEAE although the regulatory agency has jurisdiction.

The banking sector is a special case in jurisdiction of the agency for the defence of competition. Brazil's Central Bank is responsible for supervising the activities of the banks and other financial institutions. "Prudential" regulations are applied in relation to capital requirements, investments, reserves, internal accounting, etc., which require more specialized knowledge than the rest of the sectors of the economy. In 2001 the General Office of the Fiscal Inspector came to the conclusion that the bank law precedes the general language of Law 8,884 and thus it would be the Central Bank that would have jurisdiction over the banks for any purpose. But CADE did not agree with that position and considered that on the contrary, by being an autonomous agency, it should apply the competition law to all commercial enterprises. Two courts of first instance have issued opinions on which institution should be the one to sanction banking sector mergers, one of them in favour of CADE's jurisdiction and another in favour of the Central Bank. In both cases the appeals have yet to be resolved. At present CADE and the Central Bank are negotiating an agreement on cooperation and joint work in resolving the sector's mergers.

In general, the normal proceedings to enforce Law 8,884 are among the tasks to be performed by the regulatory agencies. Each sector's regulators should constantly supervise the industry's activities and review compliance with the competition law at sectoral level, that is, inform of violations detected and provide CADE with any technical reports requested to enforce the



conditionings imposed by this agency. CADE, for its part, should notify the regulators of decisions on conducts and mergers in regulated sectors so that the regulator can take the appropriate measures.

## **b) Argentina**

The law on defence of competition 25,156 of 1999 modified the powers of the regulatory bodies in the area of competition in regulated markets. Prior to this law some regulatory bodies had powers in defence of competition granted by their regulatory frameworks.

However, Law 25,156 states that the National Court on Defense of Competition (TNDC) would be an autonomous agency whose purpose would be to apply and monitor compliance with this law. Until the court is created, CNDC will be the agency in charge of enforcing the law with the approval of the Technical Coordination Secretary.<sup>16</sup>

Article 59 of this law specifically indicates “any powers of competition related to the object of this law granted to other agencies or state entities are hereby annulled.” That is, that TNDC, or CNDC in its place, is the only agency authorized to resolve competition issues. In contrast to Brazil, in Argentina greater authority is granted to the antitrust agency, since although this agency can consult the regulatory entities to resolve certain cases, it has the final decision.

In cases in which economic concentration operations involving regulated activities arise, CNDC should require from the pertinent regulatory agency a report or well-grounded opinion on the operation in relation to the impact on competition in the respective market or on compliance with the regulatory framework. This opinion is considered by CNDC although it is not of a binding nature.

CNDC has not followed the opinion of the regulatory agencies in every case but has undertaken investigations in greater depth on the concentrations, since the above-mentioned opinions have not always been duly grounded on reasons of defence of competition.

## **2. Legal provisions and collaboration among the countries of MERCOSUR<sup>17</sup>**

International coordination on issues related to defence of competition is important for developing countries such as Argentina and Brazil. The contribution that can be made by international organizations in training of personnel and consultation on cases resolved in countries with greater antitrust experience is essential to progress in the development of more competitive markets. The agencies for defence of competition of Argentina and Brazil constantly make consultations on cases resolved in countries with greater experience although it has not always been possible to conclude formal cooperation commitments.

In addition, close relations between neighbouring countries of the region are important. Various economic concentration operations arise at international level and affect more than one country in the region. In view of the presence of some companies which exceeds the limit of the national territory, emphasis should be placed on the importance of analysing conducts at regional level, for example, in the Mercosur region.

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<sup>16</sup> At present the Technical Coordination Secretary is in charge of taking the decision regarding the reports drafted by CNDC, but previously this was the authority of the Secretary of Defense of Competition and Consumers. This change of responsibilities is related to a change of structure in the Ministry of Economy.

<sup>17</sup> Mercosur is defined as a Customs Union between four member countries: Argentina, Brazil, Paraguay and Uruguay.

Technical Committee N°5 (CT5) on Defense of Competition has been formed in Mercosur, technically coordinated by CNDC of Argentina. This Committee comes under the Trade Commission, made up of technical bodies of the states parties. Its main function is to design the regulatory instruments necessary for the implementation of Mercosur's defence of competition regime.

In 2002, CT5 implemented the "Protocol on Defense of Competition of Mercosur" (also known as the "Protocol of Strength") signed in 1996. These Regulations were approved by the higher bodies of Mercosur in the second half of 2002, but for these instruments to enter into effect they need the approval of each country's Congress.

The purpose of this protocol is to ensure the free passage of goods, as well as competition between the member states to strengthen the Customs Union. The aim is to establish guidelines to orient the states parties in the defence of competition at Mercosur level in order to "*ensure free access to the market and balanced distribution of the benefits of the economic integration process.*"

The protocol, in a manner analogous to the laws of the different countries, establishes that individual or concerted acts constitute infringements if their object or effect is to limit, restrict, misrepresent or distort competition or market access or constitute an abuse of dominant position in the relevant market for goods or services within the scope of Mercosur and affect trade between the states parties. Thus a series of restrictive practices for competition are set forth in detail. It is also provided that contracts that could restrict free competition or result in dominion over the regional market should be regulated.

The authorities in charge of applying this protocol are the Mercosur Trade Commission and the Committee on Defense of Competition, the latter being an intergovernmental body made up of the antitrust agencies of the member countries.

Investigations may be initiated ex officio by any of the member states or by affected third parties. Complaints should be filed with the Committee, which decides on the opening of the corresponding investigation. The Committee may also adopt preventive measures such as ordering the ceasing of the conduct if it deems appropriate and applying fines in case of failure to comply.

However, the national agency of the country in which the anticompetitive conduct is carried out is in charge of making the investigation according to the guidelines of the protocol. The rest of the agencies of the states parties may collaborate in the investigation. Moreover, the proposals of the Committee on Defense of Competition related to the investigation of cases or application of fines should always be endorsed by the Mercosur Trade Commission. Thus, the national agency will submit a report to Mercosur's Committee on Defense of Competition, which will determine the infringing practice and establish the pertinent sanctions. Should consensus not be reached the case will be submitted to the Mercosur Trade Commission. Finally, it could be taken to the Common Market Group and if the case is not resolved there, recourse will be taken directly to the proceeding provided for in Chapter IV of the Brasilia Dispute Settlement Protocol.

In case of violation of the standards established by the protocol, the Committee, with the approval of the Mercosur Trade Commission, may apply sanctions. Possible sanctions are: i) fines based on the profit obtained from the anticompetitive conduct; ii) prohibit participation in public procurement systems of the states parties for a specific period, and iii) prohibit contracting with public financial institutions of the states parties also for a period to be determined.

Progress has even been made in the establishment of the fine to be applied. The Annex to the Protocol on Defense of Competition of Mercosur (1998) establishes that fines could be for up to 150% of the earnings obtained from infringement of the protocol, up to 100% of the assets involved or up to 30% of the value of gross invoicing of the companies involved (Article 1). Article 2 of this Annex establishes that in case of failure to comply with the commitments or orders to cease a daily fine of up to 1% of invoicing could be imposed.

It is interesting that in the sphere of enforcement related to Mercosur's Committee on Defense of Competition it is not limited to the application of fines and orders to cease the conduct but can also punish companies by preventing their participation in public biddings and access to public credit.

We can see that important progress has been made in relation to the regulations to be applied at Mercosur level for the defense of competition. However, as has been stated, this set of regulations is not in force at present. Some of the problems that have arisen in putting the agreement into effect are related to the resistance of national antitrust agencies in the face of the loss of their own authority in favour of the regional body once it comes into effect. The entry into force of these regulations would make possible coordinated actions in cases that go beyond the national territory, as well as joint investigation of such cases which could result in a savings of resources for the member countries of Mercosur. These advantages could also be obtained by countries with regional integration agreements, such as the Central American countries if they decided to pursue certain cases, since they have a regional impact in a coordinated and joint manner. This would be particularly beneficial for countries with a scarcity of economic resources and specialized personnel.

However, another impediment to entry into force of the protocol is the slow progress of legislation on defence of competition in Uruguay and Paraguay and the lack of independence of antitrust agencies in all the states parties except Brazil. In Uruguay's case, its law on defence of competition (Law 17,243-2000) was recently approved, whereas Paraguay still lacks such a law. These two countries do not have a well developed policy of defence of competition. In Uruguay the agency in charge of applying the law is the Directorate of Commerce, which comes under the Ministry of Economy. Moreover, in Argentina, although more important progress has been made in terms of legislation and the intention to create an independent TNDC, at present the antitrust agency is not autonomous and also comes under the Ministry of Economy. This disparity in the application and design of national laws and the difficulties this creates in the implementation of coordinated policies in Mercosur can be a point of reference to be considered by other regional groups such as Central America.



## **IV. Conclusions**

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The aim of this paper was to analyse legislation on defence of competition and its application in Argentina and Brazil since the 80s decade, as well as to formulate, based on the assessment of said experiences, some recommendations for Latin American countries, and more specifically the Central American countries, which are currently adopting competition policies.

In this regard, it should be stressed that although Argentina and Brazil are economies of greater relative size, the political, institutional and economic context in which policies are developing and, in particular, competition policies, they share common traits with the countries of Central America. Thus, without detriment to their differences, the experiences of Argentina and Brazil are enriching for countries such as those of Central America.

The experiences of Argentina and Brazil enabled us to identify the following recommendations on competition policy for the Central American countries:

### **1) Sphere of application of the law**

One aspect linked to the scope of the Law is related to the need for the legal framework to include the application of competition policy in a generalized manner, that is, embracing all sectors of the economy and public and private agents, without exception. Although in Argentina and Brazil the competition law applies to all spheres and all sectors (except for banking in Brazil), and that in Argentina's case the legal

framework annuls all the powers related to competition current in other institutions, in practice its application has not been so generalized, since conflicts have arisen between the competition authorities and the regulatory agencies.

## **2) The competition agency should have independence and suitability**

There is a relative consensus at international level on the desirable characteristics that a competition agency should have in order to strengthen the capacity to guarantee proper application of the competition framework in an efficient and effective manner.

Some of these are:

- a) That the entity should have due autonomy in the face of political and economic power.
- b) That it should have sufficient and stable budgetary sources
- c) Suitability of the officials in charge of applying the regulatory framework, with objective appointments based on former criteria and for specific terms of office.

In Argentina and Brazil one of the main weaknesses of the competition agencies lies in interference by the political power in their decisions. In Argentina it is necessary for TNDC to be established, at the same time as the division of work should be reorganized between the political power, in the figure of the Secretariat, and the authority for application of the competition law, in order to avoid an excess of interference by the former. By contrast, in Brazil, CADE's decisions exhaust the administrative entity, for which reason these can only be appealed before the Courts.

A second aspect that should be mentioned, which is intimately related to that of independence and autonomy of decisions, refers to the way in which the members of the agencies are elected. In Argentina, the law provides that the members of TNDC should have "sufficient background", "suitability for performing the post" and "exclusive dedication", being appointed on a public competitive basis of qualifications and with stability in their posts (6 years). However, the fact is that at present the members of CNDC are appointed by the Minister of Economy. In any case, it is recommendable to introduce a due meritocracy in public office, as well as stability in said office. In Brazil, the members of the Commission are appointed by the President of the Nation in agreement with the Senate, that is, not on a competitive basis of qualification or suitability. The political decision of the latter reduces independence in the decisions they take. At the same time, they remain in their posts for two years, too short a time to give continuity to a sustainable competition policy.

## **3) Relations with other branches of government, the judicial branch and regulators**

It is worth asking what experience do Argentina and Brazil have regarding the confirmation or annulment on the part of the Courts of the decisions taken by the respective agencies. In Argentina's case it should be pointed out that, in general, few operations or conducts have been appealed before the courts (less than 5%). Also, most of these have been resolved favourably for CNDC. One example has been the appeal of CNDC's decision in the YPF case. Counting on a judicial system aligned with the objective of protection of the free functioning of markets guarantees effectiveness in the application of this law. Without detriment to this, it is possible through an appropriate exercise of competition law to increase the probabilities of success and even improve enforcement.

One point related to the above one and which in the final analysis enables us to assess the degree of integration and importance of competition policies in State policies as a whole refers to the relationship between competition policy and sectoral regulations. In this regard, the first consideration is the transversal nature of competition, which affects all segments and markets in an economy. This contrasts with the specificity and specialization of sectoral economic regulation. The above should point up the necessary complementarities that should exist between both.

In Argentina's case, the degree of coordination and cooperation of the competition policy with sectoral regulatory bodies is by no means homogeneous: There is a certain overlapping of responsibilities, even though Law 25,156 in fact annuls all the powers in the field of competition that other State agencies might have had prior to the above-mentioned law.

In Brazil, for its part, it is necessary to annul all the powers regarding competition currently in effect in other legal bodies or sectoral regulations, in such a way that the Competition Agency is the only authority in charge of safeguarding the good functioning of markets. Without detriment to this, greater interaction, coordination and cooperation should be promoted between CADE and each of the sectoral regulatory bodies. When Brazil's situation is compared to Argentina's it would actually seem that Brazil has greater interaction with sectoral regulatory bodies. The risk of this option is overlapping of functions that compromises effective decision-making in the sectors in question.

#### **4) Competition law**

Intimately linked to the interrelation between competition policy and the judicial branch is the role of the competition authority in competition law, which covers many dimensions, although it is possible to classify it with the following taxonomy.

On one hand, the role of the authority is to promote an effective culture of competition in the community in general, both on the consumers' side and on the producers' side. Helping to raise the population's awareness of the basic principles of competition would allow the different players to identify acts contrary to the latter and to take action aimed at remedying them or avoiding them. Thus consumers can contribute to monitoring the actions of producers and companies and so avoid the harmful effects of anticompetitive practices on the markets and on their well-being. Producers which have a pro-competition awareness can avoid anticompetitive practices from being carried out through ignorance. In this regard, promotion of competition in the community requires a dissemination and training policy. One way of carrying this out is through greater linkage of the agencies with consumers' and producers' associations, business chambers, etc.

#### **5) Powers of the competition authority and control of concentrations**

The experiences of Argentina and Brazil are illustrative in this regard: in recent years, Brazil has made significant improvements in this area, since some of the main problems arising from rather imprecise notification criteria were reinterpreted, thus improving the effectiveness of the law, although certain elements that need to be modified persist. In Argentina, on the other hand, the notification criteria are clearer since they are directly linked to specific amounts of sales in the country or worldwide, although some of these amounts are related to the relevant market, a subjective concept.

Control of concentrations in Brazil is *ex post* and this should be changed. Although it is obligatory to notify, notification prior to the operation is not required. This obviously poses a problem for the treatment of anticompetitive transactions, since it is difficult to reverse the negative

effects on competition of an operation the longer the time that elapses between the operation and the time when CADE rules on it. Finally it creates incentives for companies to delay notification to CADE insofar as they consider that this time-lag can favour them. The Argentine law on defence of competition makes it obligatory for economic concentration operations to be notified previously or within a period of one week as of the date of their conclusion.

Brazil does not have an explicit standard on the basis of which to assess the legality of the mergers under analysis, for which reason it is necessary for said standard to be defined. In this regard, at present the limit for notification of mergers consists of the entity formed as of the operation in question controlling 20% or more of the relevant market, or that any of the participating enterprises possesses a total invoicing of 400 million (or USD 156 million) in the year prior to the notification. Note that this 20% threshold also applies to conducts. To assess the invoicing it is not established whether it should be measured on the basis of sales in Brazil or abroad.

Argentina, by contrast, has clear limits for the notification of economic concentration operations. In this case, although the criteria for notification are linked to specific amounts, the subjectivity of the criterion is related to the definition of relevant market in which the operations should have taken place.

To sum up, both in Argentina and in Brazil, the competition agencies carry out control of economic concentrations. Based on these experiences it would seem recommendable that the notification criterion applied for the control of concentrations be *ex ante*, based on objective and explicit guidelines provided by companies' invoicing and/or volume of the operation. On principle this is desirable, since it does not require the market to be defined and is a measure that is not subject to discretionary authority.

It is interesting to note that despite the limitations in the law to address the subject of notifications, the competition agencies have found means to avoid mergers before the agency has issued a judgment in this respect. For certain cases CADE has imposed a prohibition on exchange of information and keeping separate accounts between the companies seeking to merge, among other measures, while the investigation is carried out. They have also applied precautionary measures that make it possible to hold up the merger process for a few days while the investigation is concluded. Finally, they have applied a strategy used especially in Europe, in which the parties are required to sign a commitment of sale of assets (if the competition authority deems it necessary) prior to approval of the operation. These measures could prove interesting for the agencies of other countries that do not have a prior notification requirement in their competition laws.

Finally, in reference to investigation tools it is important to make some clarifications. On comparing Argentina and Brazil, it would seem that Brazil has an advantage since the law takes into account the witness protection program while Argentina does not directly have such a program.

However, this mechanism of Brazil's has a series of shortcomings that need to be studied in depth in order to be overcome, so that it is a reference for other countries planning to adopt this procedure:

a) Prevent protected witnesses from facing other penal charges other than those connected with the application of the competition law, and provide them with protection against possible civil charges they could face as a result of their role as witnesses or even as participants in the anticompetitive conduct.



b) Guarantee that the evidence presented is confidential and is not used against protected witnesses.

For countries in the process of proposing anti-monopoly laws and creating the pertinent competition authorities, it is important to bear in mind the above-mentioned experiences.

Finally, it is important to emphasize the potential role of regional cooperation in resolving cases of abuse of market power and resolving on possible company mergers and acquisitions. MERCOSUR, however, although it has a Technical Committee for Defense of Competition, the latter does not operate in practice due to a series of difficulties. In any event this experience is a good reference point for other regions, precisely to help them overcome obstacles. These arise from the zeal of national agencies, which fear losing their independence to the regional body; from the differences between national laws and their manner of addressing cases, which can hinder their joint resolution; the fact that not all the countries in the region have a national legislation (the case of Paraguay in MERCOSUR, of Guatemala and Nicaragua in the Central American Isthmus or of Bolivia in the Andean Community). The Andean Community is the one that has made the most progress in regional competition policies.



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