
THE CARTELS AND LENIENCY REVIEW

FIFTH EDITION

EDITORS

CHRISTINE A VARNEY AND JOHN TERZAKEN

LAW BUSINESS RESEARCH

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Editors

CHRISTINE A VARNEY AND JOHN TERZAKEN

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EDITORS' PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 30 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the fifth edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2017

Chapter 2

ARGENTINA

*Camila Corvalán*¹

I ENFORCEMENT POLICIES AND GUIDANCE

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, inspired by the provisions of the United States antitrust law. This Act was replaced by Act No. 12,906, which was in turn replaced by Act No. 22,262 in 1980.

The enforcement of Act No. 22,262 resulted in the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC), which focuses on targeting and sanctioning anticompetitive conduct.² Finally, on 25 August 1999, this Act was abrogated and new antitrust regulations were enacted through Act No. 25,156 (the Competition Act), which is the current law. One of the key provisions of the Competition Act is the merger and acquisitions control procedure.

The Antitrust Act was complemented by Decree No. 89/2011. The law and the named decree were complemented with regulations regarding the procedures established in them.³ Some of the sections of Act No. 25,156 were modified in September 2014 under Act No. 26,993.

Further to the aforementioned specific regulation, the Argentine Constitution promotes effective competition and efficiency among markets in Argentina and intends to protect consumers' welfare.

Currently, the authority that enforces the Competition Act and its complementary regulations is the Secretariat of Trade (the Secretariat), led by Mr Miguel Braun, which formally depends on the Ministry of Production, led by Mr Francisco Cabrera, and is assisted

1 Camila Corvalán is a senior associate at Estudio Beccar Varela.

2 First Antitrust Agency constituted in Argentina by Act No. 22,262; Section 6.

3 Resolution No. 40/2001; Resolution 26/2006; Resolution 164/2001.

in this matter by the CNDC⁴ (principally formed of economists and lawyers). The agencies responsible for enforcing prohibitions on anticompetitive conduct are the CNDC and the Secretariat (collectively, the antitrust authorities).

The CNDC is still the agency that performs the investigation of both anticompetitive conduct and merger and acquisition procedures by formal requirement of the Secretariat, which has full power to investigate and decide on the existence of anticompetitive conduct either at the request of a party or *ex officio*.⁵

The investigation of anticompetitive conduct or the analysis of mergers and acquisitions made by the CNDC results in a non-binding recommendation to the Secretariat, which will have the final decision in the case subject to analysis (this applies for both merger and acquisition reviews and investigation procedures). The decisions of the Secretariat may be appealed by parties to the judicial courts.

Section 1 of the Competition Act establishes that acts or behaviours related to the production or trade of goods and services that limit, restrict or distort competition or constitute abuse of a dominant position in a market in a way that may result in (potential or actual) damage to the general economic interest,⁶ are prohibited and shall be sanctioned pursuant to the rules of the law.

Further, Section 2 of the Competition Act provides a detailed list of anticompetitive conduct that could be considered unlawful by the competition authorities. In Argentina, all cases will be analysed by the rule of reason criteria on a case-by-case basis.

In particular, Section 2, subsections (c) to (h) of the Competition Act provide for different types of anticompetitive conduct that can be interpreted by the antitrust authorities as a cartel case. To be considered a cartel case, the conduct must also comply with the description that is given in Section 1 of the Act. The aforementioned types of conduct are listed below:

- a* to fix, agree or manipulate, directly or indirectly, the price for the sale or purchase of goods and services for which they are tendered or asked in the market, as well as to exchange information for the same purpose or to the same effect;
- b* to allocate, in a horizontal manner, zones, markets, customers and supply sources;
- c* to agree upon or coordinate positions in bids or tenders;
- d* to agree upon the limitation or control of the technical development or investments bound to the production or commercialisation of goods and services;
- e* to prevent, render difficult or preclude third parties entering or staying in, or to exclude them, from a market.
- f* to fix, impose or practice, directly or indirectly, in agreement with competitors or individually, or otherwise, prices and conditions for the purchase or sale of goods, the rendering of services or production; and
- g* to regulate goods or service markets, by agreements to limit or control research and technological development, the production of goods or the rendering of services, or to render difficult the investments bound to the production or distribution of goods or services;

4 Section 17, Act No. 25,156.

5 Section 20, Act No. 25,156.

6 The general economic interest is the interest protected by the Competition Act, understood by doctrinaires as 'the consumers welfare'.

One of the first cartel cases investigated in Argentina, in 1986, was *Silos Areneros de Buenos Aires v. Arenera Argentina and others*. In the history of Argentine antitrust cartel investigations there are two huge cases regarding the following markets: cement and liquid oxygen.⁷ Both cases ended with fines of approximately US\$130 million. Both cases were appealed to judicial courts and to the Supreme Court of Justice, and the sanctions imposed by the competition authority were confirmed by both.

Cartels are considered by the Argentine antitrust authorities (as well as by antitrust authorities worldwide) as serious infringements to the Competition Act because, as previously stated, they constitute one of the practices that are the most severely punished by the antitrust authorities.

It is important to state that there is no definition of a cartel or its equivalent in the Competition Act. Nonetheless, the CNDC has stated, in one of its last precedents,⁸ that the following are the principal characteristics of collusive practices: prices agreements; quantity agreements; and market segmentation. Further, the CNDC has concluded – after several cartel investigations – that there are some factors that facilitate collusion, namely: buyer power, product homogeneity, symmetry, oligopolistic markets, and multi-market contacts.

As regards the enforcement of the Competition Act, the cartel must be proven to have an effect on the Argentine market. Specifically, Section 3 of the Competition Act establishes that:

all natural or legal, public or private, profit or non-profit persons performing economic activities outside the country are subject to the provisions of this law to the extent that their acts, activities or agreements affect the national market. For the purpose of this law, in order to determine the real nature of the acts, conducts or agreements, the authorities will take into account situations and economic relations that are actually carried out, pursued or established.

Further, it is important to highlight that the Competition Act has adopted the effects doctrine, which implies, in practice, that any act or conduct performed, or any agreement signed abroad, that has an effect in Argentine territory could be challenged by the antitrust authorities.

II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to Section 18, subsection (g) of the Competition Act, the antitrust authorities have, by law, the following functions and faculties: to ‘act with the competent agencies in the negotiation of international treaties, agreements or regulation or competition policies and free competition’.

The Antitrust Act does not contain any statement of cooperation with other jurisdictions regarding international cooperation in cartel cases. This notwithstanding, informal international cooperation could be expected on cross-border cartel cases.

7 *CNDC v. Loma Negra and others* (2005), Resolution 124/05 from the former Secretary of Technical Coordination. *CNDC v. Air Liquide and others* (2005), Resolution 119/05 from the former Secretary of Technical Coordination.

8 ‘Oficina anticorrupción s/ solicitud de intervención CNDC (C. 1142) expediente N° S01:0320435/2006’, 4 December 2015.

Currently, Argentina has signed three documents concerning cooperation with worldwide authorities in antitrust matters:

- a* A cooperation agreement with Brazil, entered in October 2003, ratified by Law No. 26,662, and entered into force in October 2010: Agreement of Cooperation between the Argentine Republic and the Federal Republic of Brazil regarding cooperation between its authorities of the Defence of Competition in the application of its laws of Competence.
- b* A Protocol for the Defence of Competition and an Agreement for the Defence of Competition within the Mercosur were approved in December 1996 and in December 2010.
- c* A document signed with Spain: Collaboration Agreement between the National Commission of Markets and Competition and the National Commission for the Defence of Competition.

Further, in November 2015, the Organisation for Economic Co-operation and Development reincorporated Argentina as an observer in its Competition Committee, which is in charge of monitoring the worldwide fight against, *inter alia*, cartel cases and transparency. It is worth mentioning that one of the objectives of the current president of the CNDC is to state international policies as regards antitrust matters so as to promote transparency and efficiency in the Argentine market.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

As mentioned in Section I, *supra*, the Competition Act establishes (in Section 1) that acts or behaviours related to the production or trade of goods and services that limit, restrict or distort competition or constitute an abuse of a dominant position in a market in a way that may result in a (potential or actual) damage to the general economic interest,⁹ are prohibited and shall be sanctioned pursuant to the rules of the law.

Further, Section 2 of the Act provides a list of anticompetitive conducts that could be considered unlawful by the Argentine antitrust authorities. All cases will be analysed by the rule of reason criteria. Specifically, Section 3 of the Competition Act establishes that: ‘all natural or legal, public or private, profit or non-profit persons performing economic activities outside the country are subject to the provisions of this law to the extent that their acts, activities or agreements affect the national market’.

Additionally, it is important to highlight that the Competition Act has adopted the effects doctrine, which implies that any act performed or agreement signed abroad that has an effect in Argentine territory can be challenged by the Argentine antitrust authorities. With regard to collusive practices, there does not need to be a formal and express agreement in place for the Competition Act to be applicable, only an informal understanding between the parties involved in a cartel case is necessary. The antitrust authorities will consider cartel cases using the economic reality principle, by which they will take into consideration the true nature of the conduct regardless of its manifestation.

⁹ The general economic interest is the interest protective by the Competition Act, understood by doctrinaires as ‘the consumers welfare’.

There are no exceptions expressly included in the Competition Act regarding cartel cases. It should be noted, however, that pursuant to Section 1 of the Act, the law does not forbid conduct that involves parties that do not have sufficient market power to damage (potentially or actually) the general economic interest.

IV LENIENCY PROGRAMMES

The Antitrust Act does not, at present, provide for leniency programmes. However, a proposed amendment to the antitrust law was submitted to Congress. This amendment is now under consideration.

The proposed amendment, among other things, suggests the establishment and application of leniency programmes in Argentina. The current authorities support the application and enforcement of leniency programmes, and emphasise that this kind of programme helps to encourage efficiency and transparency among markets and competition.

V PENALTIES

Penalties for anticompetitive conduct are detailed in Section 46 of the Competition Act, and can be imposed by the Secretariat.

Infringements of the Competition Act regarding a cartel case may result in harsh consequences both for the infringing company (or companies) and any employees that took part in the conduct. Under current Argentine legislation, fines for infringing the Competition Act range from 10,000 to 150 million Argentine pesos.

To determine the sanctions, the antitrust authorities takes into account, among other things:

- a* the loss suffered by all the individuals and companies that were affected by the unlawful activity;
- b* the benefit obtained by all the individuals and companies that were involved in the activity;
- c* the position of the companies in the market that are involved in the investigation;
- d* the accounts of the companies involved in the investigation;
- e* the duration of the conduct subject to investigation;
- f* an estimation of the inflated prices generated by the conduct subject to investigation;
- g* the characteristics of the products involved and their contribution to the welfare of society; and
- h* the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The CNDC has stated in one of its recent precedents,¹⁰ that when sanctioning collusive conduct, penalties should be established for an amount that: may compensate society for the damage caused; and be superior to the benefits obtained by the companies involved in the case.

10 'Oficina anticorrupción s/ solicitud de intervención CNDC (C. 1142) expediente N° S01:0320435/2006', 4 December 2015.

To determine the amount of the fine, the criteria used by the authorities takes into account the following:

- a* the loss suffered by all the individuals who were affected by the unlawful activity;
- b* the benefit obtained by all the individuals who were involved in such activity;
- c* the responsibility of the infringing companies;
- d* the 'antitrust background' of the companies involved; and
- e* the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The logic behind the pecuniary fine is that the imposition and the amount of the fine act as disincentives for those considering engaging in anticompetitive conduct.

In case of relapse of the unlawful activity the fine could be double. Without prejudice to other penalties that may correspond to the activity, when verified acts that constitute a cartel case or where it is noted that it has been acquired or consolidated a monopolistic or oligopolistic position in violation of the provisions of the Competition Act, the authority, currently the Secretariat, may enforce conditions that have the aim of neutralising the distortional effects that the activity has had on competition or appeal to a judge to have the offending companies dissolved, liquidated, decentralised or divided.

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of the surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

In addition to all the sanctions described above, the individuals or legal entities who are injured by the acts and behaviours forbidden by the Competition Act may sue for damages in a court of competent jurisdiction in accordance with the laws of Argentina.

Finally, any agreements or terms and conditions that infringe the Competition Act might be declared void and null.

VI 'DAY ONE' RESPONSE

The antitrust authorities have very broad investigative powers to enforce the prohibition and investigation of cartel cases.

In practice, the antitrust authorities request, in the first instance, either the parties involved or third parties that may have knowledge or information regarding the collusion to provide documents or information they deem necessary to pursue the investigation. For example, and usually they request information regarding general information of the market and product involved in the investigation, shares of the players involved, competitors, barriers to entry in the market, capacity, distribution channels, among other things.

The antitrust authorities usually, in the second instance, call the parties they believe are involved in the cartel case, or third parties, to hearings. Usually, the hearings are held in the antitrust commission offices within the lawyers and economist that are in charge of the case.

The antitrust authorities may also request a judicial order to inspect the companies that they believe are involved in the cartel case with the aim of obtaining evidence.

In the framework of inspections the authorities review emails, calendars and documentation that they understand could have information or constitute evidence regarding the cartel case.

In addition, the antitrust authorities usually review all communications made within competitors in associations.

VII PRIVATE ENFORCEMENT

With regard to private enforcement, Section 50 of the Competition Act provides that ‘any person damaged by anticompetitive practices may bring an action for damages in accordance with civil law before a judge having jurisdiction over the matter.’

Recently, two relevant cases, which involved claiming for damages and that were previously sanctioned by the CNDC, were initiated as a consequence of anticompetitive conduct. One was a cartel case and the other focused on an abuse of dominant position.

The first case, *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA y otros s/ ordinario*, was rejected by the judge for lack of legitimacy.

In the second case, *Auto Gas SA v. YPF SA y otros s/ ordinario*, the judge estimated that the damages were worth 13,094,457 Argentine pesos, together with the cost of the process.

VIII CURRENT DEVELOPMENTS

In February 2016, Mr Esteban Greco took office as the President of the CNDC. Mr Greco, as a first step, made internal audits. He has also released the results of internal audits that have been performed with regard to anticompetitive conduct (including but not limited to cartel cases). Mr Greco acknowledged that the antitrust authorities, in past years, have failed to comply with the terms established in the Competition Act as regards conduct cases. He stated that conduct cases that were initiated with an aim that differs to the protection of market competition will be dismissed and closed.

With regard to current developments in cartel cases, it is important to point out that in December 2015, the antitrust authorities imposed a large fine on four important laboratories (B Braun Medical SA, Gobbi Novag SA, Fresenius Kabi SA and CSL Behring SA) and to some of their representatives. The fines imposed on the companies amounted to 10 million Argentine pesos for each company and the fine imposed to the representatives amounted to 200,000 Argentine pesos.

This case was initiated by a claim made by a consumer that stated the existence of a cartel between the named companies in the market of provision of gelatin for hospitals. The antitrust authorities started the investigation with some information requests to the hospitals and subsequently asked for a judicial order to review the companies in situ and to take the information that they deemed necessary to proceed with the cartel investigation. As a second step, the CNDC called the representatives of the companies and of the hospitals for hearings.

In its analysis, the CNDC highlighted the following, as regards the definition and the characteristics of a cartel: ‘an agreement within competitors with the object of increasing benefits and prices of the companies involved without obtaining any objective compensatory

advantage. In practice this last, is made by stating prices, limiting production, spreading markets, assigning clients or territories, colluding in bidding process or combining all this practices'.¹¹

It is worth mentioning that the most valuable evidence used by the antitrust authorities to sanction the companies was email exchanges between representatives of the companies. In this case, the authorities highlighted that another factor to consider when evaluating the possibilities of collusion in an oligopolistic market is transparency, as it is an efficient tool that allows companies to reveal the actions of their competitors.

Also of note is a case in which the former Secretary of Trade, through Resolution No. 271/2014, imposed fines on eight automobile companies in December 2014. The fines were imposed on the grounds of what was thought to be a collusive agreement between the companies on the sale of automobiles in Tierra del Fuego, Buenos Aires. The fines were imposed to the following companies: Volkswagen Argentina SA, Honda Motor de Argentina SA, Toyota Argentina SA, General Motors Argentina SRL, Renault Argentina SA, Ford Argentina SCA, Fiat Auto Argentina SA and Peugeot-Citroën Argentina SA.

The sanction was appealed and finally revoked by the Court of Appeals of Comodoro Rivadavia.¹² This was the first large sanction to be revoked by a court of appeals regarding cartel cases. One of the arguments that the Court used to revoke the fines was that the evidence used by the antitrust authorities to sanction the companies was not sufficient to prove the existence of a cartel and specifically stated that 'there is no evidence that proves voluntary agreements that had as a consequence homogeneous conducts'.

11 'Oficina anticorrupción s/ solicitud de intervención CNDC (C. 1142) expediente N° S01:0320435/2006', 4 December 2015.

12 *Honda Motors Argentina S.A. y otros c/ Estado Nacional- Secretaria de comercio s/ Recurso directo ley 25156.*

Appendix 1

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Camila Corvalán is based in Estudio Beccar Varela's Argentina office in Buenos Aires, and practises in a broad range of antitrust matters, including investigations of anticompetitive conduct as well as merger and acquisition control. She is also involved in antitrust litigation cases before judicial courts.

Ms Corvalán received her college degree from the Catholic University of Argentina and graduated with honours. Ms Corvalán performed her postgraduate studies at the same university and specialised in competition law in Madrid, Spain. She also worked as an editor for the Argentine journal *El Derecho* alongside her office work. Camila is active in professional women's forums.

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