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by Argentina****6 December 2017**

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Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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*Argentina*¹

1. Introduction

1. In recent years, institutional investors have become relevant actors around the world by holding a significant share of the equity issued by enterprises. It is well-established that these relevant actors usually hold minority positions in different companies that compete against each other in the same market. This frequent strategy of taking positions in multiple firms in a same industry responds to a diversification strategy of portfolios to retail investors at low transaction costs. However, a shareholder of a firm that also holds equity in a rival firm may find enough incentives to reduce competition with its rival in order to protect his or her interests. Consequently, common ownership has the potential to reduce firm's incentives to compete in a particular market and therefore raise prices, leading to a substantial harm on consumers.

2. Although passive investors, such as institutional investors, usually lack the possibility to exercise control in a firm, the primal concern rests in cases where firm's managers may internalize the interests of these common shareholders in their competitive decisions. It is important to say that institutional investors do not necessarily lessen competition, but they do represent a novel challenge for antitrust agencies. Given the potential harm that this kind of practice may trigger, it becomes necessary to overhaul antitrust policies in this matter.

3. In Argentina, institutional investors became relevant players in local markets in the early 1990s, when structural reforms provided the appropriate legal framework for the development of capital markets. These reforms laid the foundations for the development of local institutional investors and stimulated the participation of foreign investors. As a consequence, the number of institutional investors and their participation in local capital markets increased throughout the years. Unfortunately, local markets in Argentina are still relatively underdeveloped, even when compared to other emerging countries in Asia and Latin America.

4. In these cases, the main concern for the Argentine antitrust agency arises when trying to assess whether the decision-making of a firm is truly independent of the influence of minority shareholders. Independent directors are nominated by the controlling shareholder, but in some cases the presence of this kind of investors could be considered as a source of substantial influence. In fact, in transactions where institutional investors hold sufficient voting rights so as to notably influence director's nomination and appointments or to pilot the commercial policy of the firm, the transaction must be evaluated under the merger control procedure to assess its effects on competition.

5. The Argentine Competition Act (Act 25,156, from 1999) does not explicitly contemplate ownership by institutional investors as a specific antitrust issue. Nevertheless, there is a certain amount of local case law that can be used to make a comprehensive interpretation of the current legal provisions, in order to assess the effects of institutional investors on competition, on possible anticompetitive conduct, and also on potential anticompetitive effects of mergers.

¹ This contribution was prepared by Guido Etcheverry and received comments from Germán Coloma, Florencia Bogo, Martín Ataefe, Eduardo Stordeur and Esteban Greco.

2. Legal Framework for Merger Control Procedure

6. In Argentina the merger control procedure is conducted by the Argentine Antitrust Agency (Comisión Nacional de Defensa de la Competencia, hereinafter “The Antitrust Agency” or “CNDC”),² body that issues a recommendation to the Secretary of Commerce, who holds the final decision in this type of procedures.

7. In a nutshell, economic concentrations that need to be notified for proper evaluation are always, in one way or another, transactions where control of one or more firms or assets is acquired.³

8. When it comes to merger control (and especially when institutional investors are involved), the Antitrust Agency should examine primarily if a transaction may result in a change of control provided that the acquiring party is able to exercise substantial influence over the acquired firm or asset. Therefore, in transactions that imply a mere corporate reorganization, the requisite to notify becomes unnecessary. The same rule applies in cases where the last controller of a firm does not change. The CNDC has also performed some case-by-case evaluations when family ties are present (as controllers of an organization), depending on the particular circumstances of the control under study. The CNDC has said that “...*insofar as the act does not alter the previous legal-economic status of a firm, the transaction will not be included in Section 6 of the Antitrust Law as an economic concentration*”.⁴

9. The Antitrust Agency has concluded that the notion of merger is bound to the notion of change of control.⁵ In this regard, the Agency follows the principle of “economic reality” in order to establish the existence of a change of control. Under this premise, the Antitrust Agency evaluates specific considerations such as who the final owners of an economic group or an enterprise are, and the characteristics of the terms and conditions of the contract concluded by the parties to a transaction.⁶

10. In order to evaluate the control acquired through a transaction between parties, it is important to identify in the first place the kind of control that is achieved. An exclusive control takes place, in most cases, when a single shareholder holds the majority of the

² Decree 718/2016 establishes the Secretary of Commerce of the Ministry of Production as the enforcement authority of Argentina’s Competition Law N° 25,156, acting under the powers conferred by Law 26, 993. Said Decree also stipulated that the CNDC shall act as a technical body under the purview of the Secretary of Commerce of the Ministry of Production.

³ Section 6 of the Argentine Competition Act refers to both the notion of control as well as the notion of substantive influence. It should be noted that the CNDC has followed the definition of control adopted by the European Commission, which refers to the possibility to exercise decisive influence over the strategic commercial behaviour of an undertaking

⁴ Advisory Opinion No. 1, 1999 (“BBVA BANCO FRANCES S.A., CORP BANCA S.A. Y ATUEL FIDEICOMISO S.A.”, EXPTE.MECON N° 064-014934/99) and Advisory Opinion No. 220 (“PETROBRAS ARGENTINA S.A. Y PETROBRAS PARTICIPACIONES SL. S/ CONSULTA INTERPRETACIÓN LEY N° 25.156 -OPI N° 220-”, Expte MECON N° S01:0209156/2012 Expte. CNDC- OPI N° 220, Resolución SCI N°108 de fecha 22/10/11; Dictamen CNDC N° 959, 15/10/12).

⁵ Advisory Opinion No. 124, 6/07/01 (“ENTE PROVINCIAL REGULADOR ELECTRICO DE MENDOZA”, Expte. MECON N° 064-010372/2000).

⁶ Advisory Opinion N°40, 27/04/00 (“YPF GAS S.A.”).

capital share and voting rights of a firm. Nevertheless, the CNDC has noted that an exclusive control can also be acquired through a qualified minority, which it could be identified in a legal or factual basis.^{7,8} On the other hand, a joint control takes place when two shareholders must reach an agreement regarding the relevant decisions of the controlled firm. Likewise, a joint control occurs when two or more undertakings have the possibility to exercise a decisive influence over other firm. As an example of this, the CNDC analysed the economic effects of a merger in which a group of investors acquired participations over several firms in the energy industry, acquiring joint control of such firms. Although the purchasers held, in addition, positions over several companies in Argentina, the CNDC interpreted that there were neither vertical nor horizontal overlaps of the activities of such companies and, therefore, no competitive harm was identified.⁹

11. The Argentine Antitrust Agency has determined, by means of several advisory opinions, that transactions that imply a change in the nature of control (from joint control to exclusive control or vice versa) are also deemed mergers.¹⁰

12. Therefore, taking into account the above and in order to identify the kind of control that results from a transaction, it is necessary to assess, among other factors:

- the existence of preferred shares that give the majority of the voting rights;
- the existence of shareholder agreements;
- the veto rights settled on the shareholder agreements or on the statute of the firm;
- how to administrate the firm;
- how decisions are taken regarding commercial policy;
- the approval of the budget;
- investments;
- the appointment of directors.

13. Hence, when analysing the presence of institutional investors as a qualified minority in a transaction, the CNDC typically assesses the substantial influence of these players on such matters, in order to determine if a change of control took place. If so, the merger control procedure will conduct a proper evaluation of its economic effects. For example, the CNDC studied the effects of a merger in which investors played a decisive role in the acquisition of participations in the energy industry. While vertical overlaps

⁷ Ibid.

⁸ In one case, the CNDC has also expressed that exclusive control can exist when a group of people acts jointly in a regular basis. When a group of investors establishes the control of a firm, all co-controllers are object of the analysis because they decide the competition commercial policy of the undertaking. See Advisory Opinion No. 201 (“MARIO EUGENIO QUINTANA Y GEO EMPRENDIMIENTOS S.A.”, Expte MECON N° S01: 0485990/2010, OPI N° 201, Dictamen Opinión Consultiva N° 879, 23/05/11, Resolución SCI N° 79, 31/05/11.

⁹ Expte. N° S01:0157855/2014 (Conc. 1155): “ENI S.p.a., E. ON ESPAÑA S.L., FEDERICO TOMASEVICH, MAGNA INVERSIONES S.A., RPBC GAS S.A., RONALDO EMILIO STRAZZOLINI, GUILLERMO PABLO RECA, NICOLAS MARTIN CAPUTO, JORGE BLEDEL, GONZALO PÉRÉS MOORE y CENTRAL PUERTO S.A. S/ NOTIFICACIÓN ART. 8 DE LA LEY N° 25.156 (CONC. 1155)”.

¹⁰ Advisory Opinion No. 143 (“RICARDO RAFAEL D AMATO Y FAURECIA INVESTMENT”, Expte. MECON N° S01:0275921/2007, Expte. CNDC-OPI N° 143, Dictamen N° 619, 05/09/07, Resolución N° 168, 14/09/2007) and Advisory Opinion no. 189, 19/07/04 (Exp. MECON N°: SO 1:0090925/2004, Expte. CNDC-OPI N° 83).

were present in the activities of both parties of the transaction, the CNDC's assessment found no anti-competitive effects.¹¹

14. The CNDC has also stated that the rights that grant common control usually refer to budget decisions, the activity of the undertaking, investments, the appointment of directors and, in general, all issues that allow shareholders to influence the competitive strategy of the firm. In this manner, the CNDC established that holding one or more of such veto rights is sufficient to confer control. However, as long as the veto rights do not affect the firm's commercial policies and competitive strategy, they will not be deemed sufficient to exert control of a firm.¹²

15. In conclusion, mergers that are subject to economic analysis should only include changes of control; therefore, acquisition of minority shareholdings would be excluded from merger control.

16. However, under special circumstances, the acquisition of a minority shareholding would be subject to notification, as the Telefónica/Telecom case illustrates.¹³ The CNDC interpreted that the acquisition of a minority shareholder that entailed less than control had to be notified to assess its effects. On January 2009, the Antitrust Agency issued a preliminary decision stipulating that the main shareholder of the acquiring party (Telefónica), by means of its minority shareholding, would be privy to confidential information regarding the activities of its rival firm (Telecom). It is important to highlight that, in this particular case, the technical characteristics of the controller could be decisive to the access of sensitive information. Hence, the Antitrust Agency considered that such access to information would allow the controller of the acquiring party to coordinate the competitive strategy with the rival firm. In doing so, the transaction could cause the same effects as an economic concentration.

17. Another case worth sharing is the Advisory Opinion No. 245, in which a group of investment funds, as creditors of the firm SAN ANTONIO OIL & GAS SERVICES LTD, consulted the Antitrust Agency if the acquisition of restructured loans over such company should be notified. The CNDC inquired if these funds also held participations in other Argentine companies in order to determine if their positions in local markets could be enhanced. Although some of the investors held indeed minority participations in several Argentine companies, the CNDC stated that their lack of substantial influence over SAN ANTONIO OIL & GAS SERVICES LTD's commercial decisions was not sufficient to cause competitive harm. As such, there was no shareholder agreement that could be interpreted as substantial influence at all; therefore, the transaction was not subject to the merger control procedure.¹⁴

¹¹ Expte. N° S:010206284/2001 (Conc. N° 908): "COMPAÑÍA DE INVERSIONES DE ENERGÍA S.A., TRANSPORTADORA GAS DEL SUR S.A. Y OTROS S/NOTIFICACIÓN ART. 8 DE LA LEY N° 25.156 (CONC. 908)".

¹² Advisory Opinion No. 199 ("CRESUD SACIFYA Y PROVEMEX HOLDINGS LLC S/ CONSULTA INTERPRETACIÓN LEY 25.156 -OPI 199-", Expte MECON N° S01: 0481402/2010, Expte. CNDC-OPI N° 199 Dictamen CNDC N°910, 17/10/11, Resolución SCI N° 158, 10/11/11).

¹³ Expte. S01:0014652/2009 (Conc. 741), "PIRELLI & C S.P.A. Y OTROS S/ NOTIFICACIÓN ARTÍCULO 8 LEY 25156 (CONC. 741)".

¹⁴ Expte. N° S01:0143107/2014: "VR GLOBAL PARTNERS LP, QUINTESSENCE FUND LP AND QVT FUND LP Y OTROS S/ CONSULTA INTERPRETACIÓN LEY 25.156 (OPI 245)".

18. Finally, CNDC could take into account in their analysis the influence of minority shareholders in key decisions that would play a decisive role in the commercial policy of a firm, even in merger cases where substantial influence has not been identified or in antitrust cases where there are collusive theories of harm. The existence of common ownership, especially when institutional investors hold positions in multiple firms of the same market, is a recognized collusion facilitator factor that has to be considered. Common ownership has the potential to increase the likelihood of collusion by making it easier for firms to form or monitor a collusive agreement.

19. Consequently, the presence of minority shareholders could have consequences for the direction of a firm, and even affect a given market; as a result, it becomes necessary for the Antitrust Agency to follow the principle of “economic reality” in order to identify the real controllers of such firm and the kind of control that is exerted. In particular, institutional investors with substantial influence in enterprises force the CNDC to conduct an exhaustive analysis in these matters. Likewise, in cases where minority shareholders have no substantial influence at all, it becomes important to inquire if such passive control could represent a collusive conduct.

3. Conclusion

20. Although the presence of institutional investors in multiple firms does not necessarily imply that common ownership will cause competitive harm, antitrust enforcement should not remain oblivious to the possible negative effects of common ownership.

21. Whenever substantial influence has the potential to interfere in a firm’s decision-making process, a thorough analysis should be addressed. Even though institutional investors represent a major challenge for antitrust agencies, a change in antitrust policies towards control of common minority shareholder could have significant negative consequences. As such, common ownership should continue to be evaluated on a case-by-case basis rather than an antitrust legal restriction.

22. The available case law that the CNDC has developed in recent years shows that institutional investors have generally been considered as minority shareholders that, nevertheless, are likely to be economic agents that exercise some kind of control or substantial influence on key decisions of several companies.

Case index

- Advisory Opinion No. 1, 1999 (“BBV BANCO FRANCES S.A., CORP BANCA S.A. Y ATUEL FIDEICOMISO S.A.”, EXPTE.MECON N° 064-014934/99).
- Advisory Opinion N°40, 27/04/00 (“YPF GAS S.A.”).
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