

International Antitrust

I. Developments in Argentina*

A. LEGISLATIVE DEVELOPMENTS

A bill was submitted to the Argentine Congress on March 29, 2007, proposing amendments to the statute organizing the Tribunal Nacional de Defensa de la Competencia (TNDC) and to Argentina's merger control procedure.¹ In terms of organizational matters, the bill provides that the TNDC will be situated in Buenos Aires, although it will be able to hold meetings anywhere in the Argentine Republic.² The TNDC's seven members will be appointed by the Argentine Executive Branch for a term of six years, following completion of a public selection process involving examination by a special jury.³

With respect to merger control, the bill provides that the TNDC will be required to issue its decision on a proposed merger within forty days of receipt of a completed application⁴ (the current waiting period for CNDC review is forty-five days). If no decision is issued within this forty-day period, the transaction will be deemed authorized. The forty-day review period may be suspended if the TNDC requests additional documentation, but only on one occasion.⁵

The bill also provides that the TNDC's merger decisions will be communicated to the Secretary of Domestic Trade of the Ministry of Economy and Production.⁶ In cases where approval has been granted, the Secretary will have three days within which to recommend to the Ministry that the TNDC's decision be overruled and that proceedings be commenced. Circumstances in which such a recommendation can be made are limited to where the transaction involves specific sectors (public utilities, defense, energy, or mining) or where the transaction would result in a "significant" impact on employment and investment in Argentina.

B. MERGERS

The CNDC rendered decisions approving a variety of transactions in 2007, including in the telephone, food, media, cable, and electric power sectors. Of particular interest was a

* The contribution for Argentina was written by Alfredo Rovira and María José Rodríguez Macías of Brons & Salas.

1. Proyecto de Ley No. S-611/07, Mar. 29, 2007 (Arg.), http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=611/07&nro_comision=&tConsulta=3. The TNDC will replace the current Argentinean antitrust authority, known as the Comisión Nacional de Defensa de la Competencia (CNDC).

2. *Id.* art. 4.

3. *Id.* art. 5-6.

4. *Id.* art. 2.

5. *Id.*

6. *Id.*

because it marks the first time that SDE used sophisticated investigative procedures, such as search and seizures.

V. Developments In Canada*

A. COMPETITION POLICY UNDER REVIEW

In July 2007, the Canadian government announced the establishment of a Competition Policy Review Panel (the “Panel”) to examine the impact of Canada’s competition and foreign investment laws on the country’s domestic and international competitiveness.⁴² The specific issues the Panel intends to address in its report (due by June 30, 2008) are set out in a consultation paper that was released in October 2007.⁴³ The key competition-related questions in the Panel’s consultation paper include: (i) how does Canada’s competition policy affect Canadian competitiveness in an environment of globalization and free trade; (ii) what international best practices would strengthen Canadian competitiveness as a destination for foreign investment; and (iii) does Canada’s approach to mergers strike the right balance between consumers’ interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?

B. OTHER LEGISLATIVE DEVELOPMENTS

On June 22, 2007, amendments to Canada’s principal federal transportation legislation, the Canada Transportation Act (CTA), came into force.⁴⁴ Among other things, the amendments establish a new “public interest” review process for mergers involving transportation undertakings falling under federal jurisdiction.⁴⁵ This new process supplements—and to some degree supersedes—the generally applicable merger review process conducted by the Competition Bureau (the “Bureau”) under the Competition Act.⁴⁶ In brief, competition mergers that are considered to raise public interest issues will now be reviewed by the federal transportation regulatory body (the Canada Transportation Agency) as well as the Bureau, and the merger will require approval of the Federal Cabinet in order to proceed.

C. MERGERS

In March 2007, the Competition Tribunal (the “Tribunal”) denied an application by the Bureau for an interim injunction to temporarily prohibit the acquisition by Labatt Brew-

* The contribution for Canada was written by Mark Katz and Elisa Kearney of Davies Ward Phillips & Vineberg LLP.

42. See Press Release, Industry Canada, Canada’s New Government Creates Competition Policy Review Panel (July 12, 2007), *available at* <http://www.ic.gc.ca/cmb/welcomeic.nsf/261ce500dfcd7259852564820068dc6d/c44dbc35890c40ef852573cc006ca6e0!OpenDocument>.

43. See Competition Policy Review Panel, *Sharpening Canada’s Competitive Edge* (2007), *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html.

44. Canada Transportation Act, 2007 S.C., ch. 19 (Can.), *available at* http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-11/C-11_4/C-11_4.pdf.

45. Generally speaking, Canada’s federal Parliament has jurisdiction over transportation undertakings that operate interprovincially as well as those entities that provide integrally related ancillary services.

46. Competition Act, R.S.C., ch. C-34 (1985) (Can.).

ing Company Ltd. of Lakeport Brewing, another Canadian brewery.⁴⁷ The Bureau argued that it required additional time (prescribed by statute) to complete its investigation into whether the proposed merger would prevent or lessen competition substantially. The Tribunal ruled that a temporary injunction was not appropriate given the circumstances. In particular, the Tribunal held that permitting the transaction to proceed would not “substantially impair” its ability to remedy any negative effects on competition should the Bureau successfully challenge the merger at a later date.⁴⁸ The Bureau has appealed the Tribunal’s decision even though the transaction was completed in August 2007.⁴⁹

D. CARTELS

On October 10, 2007, the Bureau released a revised version of its Information Bulletin on the granting of immunity from prosecution for criminal offenses under the Competition Act.⁵⁰ The purpose of the revisions is to clarify certain aspects of the Bureau’s immunity program and to achieve, where possible, consistency with the programs of other enforcement agencies. The Bureau’s immunity program, like amnesty/leniency programs in other jurisdictions, has been an effective tool in uncovering and prosecuting criminal anti-competitive conduct in Canada, particularly cartel activity.

E. ABUSE OF A DOMINANT POSITION

The last several years have witnessed ongoing litigation involving an application brought by the Bureau under the Competition Act’s abuse of dominance provisions to challenge a “loyalty program” offered by Canada Pipe Ltd. (Canada Pipe) to its customers. Canada Pipe, which manufactures cast iron drain, waste, and vent (DWV) products, succeeded at first instance before the Tribunal.⁵¹ The Tribunal’s decision was subsequently reversed by Canada’s Federal Court of Appeal and remanded to the Tribunal for re-determination.⁵² On May 10, 2007, the Supreme Court of Canada denied Canada Pipe’s application for leave to appeal the Federal Court of Appeal’s decision.⁵³ As a result, the matter will be re-heard by the Tribunal starting in February 2008.

47. *Comm’r of Competition v. Labatt Brewing Co. Ltd., et al.*, [Mar. 28, 2007] Competition. Tribunal Dec. No. 2007-003, *available at* <http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=67&CaseID=282#387>.

48. The Bureau has the authority to challenge a merger within three years of closing. *See* Competition Act, *supra* note 45, § 2.

49. *See* Competition Bureau, Competition Bureau Appeals Decision in Labatt-Lakeport Merger (April 11, 2007), *available at* <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02297e.html>.

50. Competition Bureau, Information Bulletin, Immunity Program Under the Competition Act (Oct. 2007), *available at* <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02297e.html>.

51. *Comm’r of Competition v. Canada Pipe Company Ltd.*, [2005] 40 C.P.R. 453; Competition. Tribunal Dec. No. 2002-006, *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_0079b_38KCZ-9272006-4715.pdf?windowSize=popup.

52. *Comm’r of Competition v. Canada Pipe Company Ltd.*, [2006] F.C. 233, *available at* <http://reports.fja.gc.ca/en/2006/2006fca233/2006fca233.html>

53. *See* Press Release, Competition Bureau, *Supreme Court Confirms Approach to Abuse of Dominance Cases* (May 10, 2007), *available at* <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02328e.html>.