

2011

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Recommended Citation

Felix E. Mezzanotte, *Government's Misuse of Competition Laws: Discussing the Telecom Italia Case in Argentina*, 17 LAW & BUS. REV. AM. 181 (2011)
<https://scholar.smu.edu/lbra/vol17/iss2/3>

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GOVERNMENT'S MISUSE OF COMPETITION LAWS: DISCUSSING THE TELECOM ITALIA CASE IN ARGENTINA

Félix E. Mezzanotte*

ABSTRACT

An increasing number of countries around the world have enacted competition laws on the premise that competitive markets can deliver substantial benefits to their economies. But there are risks, for these very laws can be used not to protect but rather to suppress competition. The goal of this article is to illustrate how governments can misuse competition laws. To this effect, I discuss the Telecom Italia case. In this case, the Argentine Competition Authority (CNDC) investigated a foreign transaction by which Telefónica de España indirectly acquired shares in Telecom Italia. Although this transaction had taken place in Europe, it nonetheless created competition concerns in Argentina because these two telecoms operated as major rivals in the Argentine telecommunications market. The CNDC found that this deal was a concentration that lessened competition and made its approval conditional on Telecom Italia divesting all of its assets in the relevant markets. I argue that the CNDC's decision was arbitrary and inclined to discriminate against Telecom Italia and in favor of local investors. This article shows how easily disingenuous politics can derail the enforcement of competition laws and why competition authorities ought to function independently and under strict judicial control.

I. INTRODUCTION

AN increasing number of countries are adopting a regime of competition. In the 1980s, about forty countries had competition laws and agencies in charge of enforcing such laws; today this number is at least a hundred.¹ Most of this expansion took place as coun-

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1. U.N. Conference on Trade and Dev., World Inv. Rep. 1997: Transnational Corporations, Market Structure & Competition Policy, 189, U.N. Doc. UNCTAD/ITE/IIT/5, U.N. Sales No. E.97.II.D.10 (1997); Keith N. Hylton & Fei Deng, *Anti-trust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 *ANTI-TRUST L. J.* 271, 272-73, 315 (2007); Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 *ANTI-TRUST BULL.* 105, 109 (1998); *Competition Law Toolkit*, ASIAN DEV. BANK, <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw030000.asp> (last visited Nov. 7, 2010).

tries underwent economic reform and recognized the benefits of competition.² A competition regime sets a level playing field upon which firms can surpass each other in the race for more clients, sales, and profits. This market rivalry creates efficiencies that feed into the economy and benefit society and consumers with better deals and more choices.³ Competition laws protect this process by punishing conduct that harms competition. In the context of globalization, these laws restrict the conduct of not only local firms but also multinational firms operating in domestic economies.⁴

But a competition regime may fall short of its promises and may work ineffectively.⁵ Moreover, firms that want to protect their rents may deploy competition laws as a tool to subvert competition.⁶ They may want to stop a more efficient rival from pricing lower by accusing it of predatory conduct; or challenge as anticompetitive a merger that brings in vast efficiencies because it threatens to diminish their rents.⁷ Governments can also misuse competition laws to control prices or—acting alone or in collusion with friendly business groups—to protect vested interests.⁸ The goal of this article is to illustrate some misconduct by government in enforcing competition law. More particularly, I will discuss the recent Telecom Italia case in Argentina as an example of how a government can utilize competition laws to protect not competition, but competitors instead.

In this case, the Argentine Competition Commission (CNDC) investigated a foreign transaction by which Telefónica de España indirectly acquired shares in Telecom Italia.⁹ Although this transaction took place in Europe, the CNDC worried that it could affect competition locally because these two telecom operators were rivals in the Argentine telecommunications market.¹⁰ The CNDC deemed this transaction to be a concentration, found that it restricted competition, and made its approval conditional on Telecom Italia divesting all its assets in this market.¹¹ As I

2. Palim, *supra* note 1, at 111.

3. MASSIMO Motta, COMPETITION POLICY: THEORY AND PRACTICE 25, 26, 30, 51 (2004).

4. PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 411 (1997); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 199-203 (2006).

5. Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17(4) J. ECON. PERSP. 3, 3-4, 13, 23 (2003); Hylton & Deng, *supra* note 1, at 315.

6. Crandall & Winston, *supra* note 5, at 23.

7. William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247, 247-48 (1985); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 591-596 (1991).

8. Palim, *supra* note 1, at 139-41.

9. Ministerio de Economía y Finanzas Públicas, *Telefónica de España Olimpia y Otros s/ Diligencia Preliminar Art. 8 De La Ley 25.156*, 1-42, available at <http://www.iprofesional.com/notas/76987-Resolucion-Telefonica-de-Espana.html> [hereinafter *Telefónica de España*].

10. *Id.*

11. *Id.* at 39-42; Ministerio de Economía y Finanzas Públicas, *Dictamen 744 of 25 Aug. 2009*, ¶¶ 74-75, available at http://www.cndc.gov.ar/dictamenes/dictamen_telefonica_telecom.pdf.

will argue, however, the arbitrariness of the CNDC's decision is so apparent that suspicions of discrimination against Telecom Italia (a foreign investor) in favor of local investors are inevitable.

Section B of this article presents the facts of the Telecom Italia case, while sections C and D outline the relevant CNDC decisions and court ruling. Section E offers a critical discussion of the case. It identifies the errors made by the CNDC and uncovers possible political motivations driving the outcome of this case. In conclusion, this article warns us that a policy of competition is far less likely to meet its conventional objectives when politicians dismiss the rigorous enforcement of competition laws and competition agencies fall prey to this political influence.

II. THE TELECOM CASE: FACTS AND PROBLEM OF COMPETITION

In May 2007, Telco S.p.A. (the buyer) purchased the firm Olimpia S.p.A from Pirelli & C. S.p.A., Sintonia S.p.A y Sintonia S.A. (the sellers).¹² Both the buyer and seller were Italian firms, and the transaction ("the Telco transaction") took place in Italy.¹³

The Telco transaction is relevant to competition because it created a close relationship between two major rival telecoms, namely Telecom Italia (TI) and Telefónica de España S.A (TE). It did so because TE owns 42.3% of Telco.¹⁴ Telco purchased Olimpia, which owned shares in TI (Telco ended up holding a total of 24.5% of the shares with voting rights in TI).¹⁵ Therefore, through the Telco transaction TE gained influence in TI.

Although the European Commission found no reason to intervene, other competition authorities—notably those in Brazil and Argentina, where TE and TI are sizable market players, and rivals—found sufficient reasons to act.¹⁶ We will concentrate on how the Telco transaction affected competition in the telecommunications market in Argentina.

Two features define the problem of competition in the Argentine telecommunications market. The first one is that TE is of itself a strong actor in this market where it operates through its subsidiaries including Telefónica de Argentina S.A. (fixed phone and internet) and Telefónica Móviles Argentina S.A. (mobile phones), among other local firms (for the purpose of simplicity I will denote the group of subsidiaries of TE in

12. *Telefónica de España*, *supra* note 9, at 1-4.

13. Ministerio de Economía y Finanzas Públicas, *supra* note 11, ¶¶ 1-75; *Telefónica de España*, *supra* note 9, at 1-42.

14. Five firms hold shares in Telco: Intesa SanPaolo S.p.A (10.6%); Mediobanca S.p.A. (10.6%); Assicurazioni Generali S.p.A (28.1%); Sintonia S.p.A (8.4%); and Telefónica S.A. (43.2%). Ministerio de Economía y Finanzas Públicas, *supra* note 11, ¶¶ 6, 52.

15. *Id.* ¶¶ 1-5.

16. Marco Botta, *Multi-Jurisdiction Mergers and Acquisitions in an Era of Globalisation: The Telecom Italia-Telefónica Case*, 1 GLOBAL ANTITRUST REV. 97, 102-116 (2008).

Argentina as TELA).¹⁷ The second feature is that TE not only controls TELA but also gained influence, through the Telco transaction, in TELA's major competitor in Argentina, which is Telecom Argentina S.A. (TA).¹⁸

TI owns 50% of the shares in the Argentine holding company Sofora Telecomunicaciones S.A (TI owns 32.5% of the shares directly and the other 17.5% indirectly through Telecom International N.V. [TIN]); and Sofora indirectly controls TA, which is a major player in the telecommunication market (Sofora owns 67.78% of Nortel Inversora S.A., which in turn holds 64.74% of shares in TA).¹⁹ In brief, TE, through Telco and Telco's purchase of Olimpia, acquired influence in both TI and TA.

This dual position of TE (controlling TELA and influencing TA) worried the CNDC, which decided to investigate to what extent the Telco transaction could lessen the competition between TELA and TA.²⁰

III. THE INVESTIGATION BY THE COMPETITION COMMISSION OF ARGENTINA (CNDC)

After the Telco transaction became public, the CNDC started a preliminary investigation in order to find out whether the transaction was a concentration and whether the parties were obligated to notify the CNDC under Article 6 and Article 8 of the Argentine Competition Act (LDC).²¹ In Decision CNDC 4/09 it concluded that the acquisition by Telco of 100 percent of the shares in Olimpia constituted an economic concentration pursuant to Article 6(c) of the LDC because it caused a change of control in both TI and TA.²² It also ordered notification insofar as the turnover of the merging firms was sufficiently high and because no exceptions to the notification requirement applied.²³

The parties to the Telco transaction disagreed with the CNDC's findings. They argued that the transaction was not a concentration under the LDC and, to this extent, that the CNDC could not restrict it using the merger regime nor could it sanction the parties for failing to notify.²⁴ On this basis, they challenged the Decision CNDC 4/09 before the Court of Appeals (Cámara Nacional en lo Civil y Comercial Federal).²⁵ But the CNDC paid little attention to this legal challenge—the resolution of which is still pending as of June 2010—and moved to investigate the Telco transaction's effects on competition using the legal rules that apply to

17. Ministerio de Economía y Finanzas Públicas, *supra* note 11, ¶¶ 31-51.

18. *Id.*

19. *Id.* ¶¶ 63-71.

20. *Id.* ¶¶ 202-03.

21. Law No. 25156, Aug. 25, 1999, B.O. 5 (Arg.), available at <http://www.calp.org.ar/Instituc/Institutos/Consum/Ley%2025156.doc>.

22. *Telefónica de España, supra* note 9, at 143-47.

23. *Id.*

24. Ministerio de Economía y Finanzas Públicas, *supra* note 11, ¶¶ 187, 191, 192-94, 197, 200-03, 1021.

25. *Id.*

concentrations.²⁶

In Decision CNDC 744, the CNDC concluded that the concentration, if approved without conditions, would substantially lessen competition in the relevant markets.²⁷ This finding drew from the information provided by the parties through notification (that the CNDC ordered them to do in Decision CNDC 4/09), interviews conducted by the CNDC, reports from the Secretary of Communications (SECOM), and the CNDC's own economic analysis.²⁸ In the latter analysis, the CNDC followed ordinary procedures: it defined the relevant markets and then evaluated the levels of market concentration, the conditions of market entry, and the possible efficiencies that the concentration may introduce.²⁹

The CNDC found that the Telco transaction would increase market concentration dramatically at both the retail and wholesale levels in Argentina.³⁰ It also found that TELA and TA would act as a single firm and supply sixty-seven percent of all telecommunication services in the country.³¹ In some individual markets they would acquire significant market shares, such as in local fixed phone (90%), internet access (72%), national calls (58%), international calls (70%), mobile phones (64%) and wholesale internet access (100%), among others.³² It was also determined that new entry was unlikely due to high entry barriers³³ and that no clear efficiency gains would follow from the transaction.³⁴

On this basis, the CNDC concluded that the Telco transaction would increase the market power of TELA and TA in Argentina significantly, which may lead to abuse in the form of high prices and/or market foreclosure.³⁵ Yet the CNDC did not recommend a full rejection of the concentration. Instead it advised the Secretary of Internal Commerce (SCI—the government agency to which the CNDC belongs) to approve it with conditions (pursuant to Article 13[b] LDC).³⁶ More particularly, the SCI would approve the merger only if TI and TIN divested all their assets in Sofora within a one-year period.³⁷ Only this measure, the CNDC concluded, would assure that the pre-merger conditions of competition in the relevant markets would remain post-merger.³⁸

The SCI acted accordingly, and in decision SCI 483/09, it ordered TI

26. See Ministerio de Economía y Finanzas Públicas, *supra* note 11.

27. *Id.* ¶¶ 258-60.

28. *Id.* ¶¶ 257-1004.

29. *Id.*

30. *Id.* ¶¶ 286-954.

31. *Id.*

32. *Id.*

33. *Id.* ¶¶ 955-93 (including economies of scale, high-investment costs, vertical integration, and essential facilities).

34. *Id.* ¶¶ 994-1003.

35. *Id.* ¶¶ 1004-18.

36. *Id.* ¶¶ 1043-44.

37. *Id.* ¶¶ 203-04.

38. *Id.*

and TIN to divest their assets in Sofora.³⁹ This decision generated a great deal of controversy, and each of the parties to the Telco transaction, as well as TI and TIN, decided to challenge it in court.

IV. COURT REVISION

On February 1, 2010, the Federal Court of Appeals for Economic Crime annulled the Decision SCI 483/09 by a majority vote.⁴⁰ The judges, Hendler and Repetto, held that the CNDC's investigation violated the rights of TI and TIN to due process and defense.⁴¹ According to these judges, the divestiture order amounted to a sanction depriving TI and TIN of their property rights in Sofora.⁴² Such a grave measure, the judges went on, was illegitimate, for the CNDC did not give TI and TIN direct participation in the antitrust administrative proceedings; nor did the CNDC explain why the divestiture order fell on TI and TIN when these two firms played no role in the Telco transaction.⁴³

In the dissenting vote, Judge Bonzón validated the actions of the CNDC and the contested Decision SCI 483/09.⁴⁴ The judge rejected the notion that the CNDC violated the rights of TI and TIN to due process and defense by arguing that the rules of procedures for concentrations are less stringent than those governing the more general framework of anticompetitive conduct.⁴⁵

Unlike the majority vote—that had annulled the decision on grounds of procedure without entering to consider the substantive issues of competition—Judge Bonzón conducted an extensive evaluation of the effects of the Telco transaction on competition and relied on it to confirm the Decision CNDC 744.⁴⁶ The judge deemed the order to divest against TI and TIN as legitimate, adequate, and proportionate.⁴⁷

TE had committed in Article 5 of Telco's Shareholders Agreement that its representatives, including its appointed directors in TI, would neither vote nor participate in meetings discussing policies, management, or operations concerning the firms that TI controls directly or indirectly. By self-limiting its conduct contractually, TE had sought to assure compliance

39. *Interim Report at March 31, 2010*, TELECOM ITALIA, 87, (2010), http://firstquarter2010report.telecomitalia.it/sites/all/files/telecom1q2009/Interim_Report_1Q2010.pdf.

40. Cámara Nacional de Apelaciones en lo Penal Económico de la Capital Federal [CNPenal Económico] [National Court of Economic Criminal Appeals of the Federal Capital: Court of Appeals in Economic Criminal Matters], 1/2/2010, "Incidente de Apelacion S.A. Y Otros Contra Resolucion Sci No 483/09 (En Autos Principales: Pirelli & CS.P.A. Y Otros S/Notificacion Art. 8 Ley 25.156)" Fallos (2010-10-12), available at <http://www.cij.gov.ar/adj/fallos/0.782119001265296449.pdf> [hereinafter *Incidente*].

41. *Id.* § 3.1.

42. *Id.*

43. *Id.* ¶¶ 16-18.

44. *Id.* ¶¶ 7-16.

45. *Id.* § 3.1.

46. *Id.* ¶¶ 7-16.

47. *Id.*

with competition laws. But Judge Bonzón concluded that such clauses were ineffective and could not defeat the fact that, as a result of the Telco transaction, TE had gained control over TI and TA.⁴⁸

V. ANALYSIS OF THE CASE

A. EXTRATERRITORIAL APPLICATION OF THE ARGENTINE COMPETITION LAW

The notion of extraterritoriality means that a State can apply and enforce its own national law over foreign conduct, that is, conduct committed in another State.⁴⁹ This concept is critical to our discussion, for in the Telecom Italia case, the CNDC applied the LDC extraterritorially.⁵⁰ According to Article 3 LDC, the scope of the LDC encompasses foreign conduct that may reduce competition in the Argentine markets.⁵¹ Although the Telco transaction was initiated and completed by firms in Europe, the CNDC concluded that the LDC governs it because this transaction affected the local telecommunications market.⁵²

To this extent, the LDC adheres to the so-called 'effects doctrine.' This doctrine was first adopted in U.S. antitrust law.⁵³ According to the Foreign Trade Antitrust Improvements Act of 1982, the Sherman Act does not apply to foreign conduct unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.⁵⁴ In *Hartford Fire Insurance Co. v. California* the U.S. Supreme Court said that the Sherman Act applies to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States.⁵⁵ The U.S. enforcement agencies also consider international comity when evaluating the costs of taking jurisdiction, in the sense that they assess the potential for conflict with foreign States.⁵⁶ The principles above also apply to merger cases under the U.S. Clayton Act.⁵⁷

Although both the LDC and the U.S. antitrust laws adopt the 'effects doctrine', the former does it far more broadly. The LDC makes no reference to limiting factors that constrain the meaning of 'effects' such as

48. *Id.* § 3.2.3.

49. RICHARD WHISH, *COMPETITION LAW* 470-74 (6th ed. 2009).

50. Incidente, *supra* note 40, ¶ 4.

51. aw No. 25156, art. 3.

52. *Telefónica de España*, *supra* note 9, at 143-47.

53. David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 *Emory L.J.* 201, 222 (2007).

54. Antitrust Enforcement Guidelines for International Operations, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, § 3.12, (1995), <http://www.justice.gov/atr/public/guidelines/internat.htm>.

55. *Id.* § 3.11 (with respect to foreign import commerce).

56. *Id.* § 3.2.

57. *Id.* § 3.14 (with respect to foreign firms having or not having operations, assets and/or subsidiaries in the United States); Diane P. Wood, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address at the ABA Antitrust Section Spring Meeting, (C)(4), (Apr. 5, 1995), available at <http://www.justice.gov/atr/public/speeches/0166.pdf>.

'intended' or 'substantial;' nor does it account for the notion of comity. Rather, the LDC refers only to 'potential effects.'⁵⁸ It suffices that the foreign conduct *may* produce effects in the national markets for the Argentine authorities and courts to gain jurisdiction.⁵⁹

With this broad conception of the 'effects doctrine,' it is not surprising that the Argentine court of appeals did not object to the CNDC applying the LDC extraterritorially to this case.

B. LEGAL CHARACTERIZATION OF THE TELCO TRANSACTION: CONCENTRATION VERSUS ANTICOMPETITIVE CONDUCT

When looking at this case through the lens of competition law and through the legal characterization of the Telco transaction, the question of corporate control, namely to what extent TE controls Telco, TI, and TA, plays a key role.

Consider first a situation where, as a result of the Telco transaction, TE controls Telco, TI, and TA. Here, the Telco transaction is a concentration under the LDC, and the CNDC will thus scrutinize it using merger law. TELA and TA constitute one single firm (TE controlling both of them) and rivalry between them disappears. This is worrisome from the vantage point of competition because it leads to substantial market power and, hence, greater potential for abusive conduct. Moreover, in assessing mergers, the CNDC must comply with a less stringent set of rules of procedure when compared to the case of anticompetitive conduct.⁶⁰

Consider now a situation in which the control (or substantial influence) by Telco on TI and TA is absent or cannot be established sufficiently. Here, the Telco transaction cannot be characterized as a concentration under the LDC, and the CNDC can only scrutinize the effects of the transaction in the local telecommunications market using the more general rules of anticompetitive conduct.⁶¹ These rules apply regardless of the question of control, use a different set of economic assumptions, and require more stringent procedures.

They assume that TE, on the one side, and TI, on the other side, are independent firms that may engage in collusive conduct. Here, the Telco transaction can facilitate collusion between TELA and TA (if TE, through Telco, acquires shares in TI, TE and TI can exchange sensitive information more easily and in this way facilitate collusion between TELA and TA). A more serious concern is that, following the Telco transaction, TELA and TA may have effectively engaged in collusion through secret agreements or concerted actions.

58. Law No. 25156, art. 3.

59. *Id.*

60. Germán Coloma, *¿Concentración Monopólica o de Conglomerado?*, LA LEY, Feb. 17, 2010, <http://www.ucema.edu.ar/~gcoloma/telecom-italia.pdf>. The topic can also be discussed from the perspective of conglomerate mergers.

61. Antitrust Issues Involving Minority Shareholding and Interlocking Directorates, ORG. OF ECON. COOPERATION AND DEV., 9-10, (2009), <http://www.oecd.org/dataoecd/40/38/41774055.pdf>; Botta, *supra* note 16, at 8-9.

A finding of anticompetitive conduct entails illegal conduct and grave sanctions may follow. For this reason, the legal proceedings dealing with anticompetitive conduct afford strong protections to the parties in order to ensure their rights to due process and defense. In addition, the competition authority must typically discharge a higher burden of proof to establish a violation of the law.

The analysis above suggests that the issue of corporate control matters a great deal for the treatment and resolution of the Telecom Italia case under the LDC. In the presence of control, the economic analysis assumes that TELA and TA are a single firm; the legal characterization of the Telco transaction is concentration; and less strict procedural rules apply. In the absence of control, or of sufficient proof of it, the economic analysis assumes that TELA and TA are independent groups that can eventually coordinate their conduct, instead of competing, by entering into collusive agreements; the legal characterization of the transaction may fall under the legal rules of anticompetitive conduct, and stricter procedural rules, which afford greater protection to the rights of the parties, apply. Said this way, the problem is that this critical question of control was very complex in this case and could not be clearly resolved.

As noted in section C of this article, the issue of corporate control has proved highly controversial in this case. The Decision CNDC 4/09 depicts a chain of corporate control between TE, Telco, TI, and TA which has been fiercely contested in court by all parties and remains, thus far, unsettled pending a court ruling.⁶² With the key issue of corporate control being unresolved, one would have expected that the CNDC would have decided to either stop the investigation until the court resolved this issue or, in the alternative, continue the investigation using the rules of anticompetitive conduct. Instead, the CNDC took neither of these steps. It stuck to its position as set out in the Decision CNDC 4/09 and escalated the investigation using the legal rules of concentration.⁶³

The CNDC's strategy was puzzling. The CNDC knew that the issue of corporate control was critical as demonstrated by its analysis in the Decision CNDC 4/09.⁶⁴ It also knew that its findings on this issue had created a great deal of opposition and sparked a sour legal dispute.⁶⁵ It was also evident to the CNDC that an investigation built upon a disputed key fact of control is more likely to end up in error. Nor could the CNDC have ignored the fact that sanctioning TI, as the decision SCI 483/09 ultimately did, for the actions of TE would appear arbitrary absent an undisputed finding of control.

62. *Incidente*, *supra* note 40, § IV.

63. *Id.*

64. *Telefónica de España*, *supra* note 9, at 143-47.

65. See Shane Romig, *Telecom Argentina Battle Gets Nasty as Top Shareholders Spar*, CELLULAR NEWS, Sept. 25, 2008, <http://www.cellular-news.com/story/33830.php>; see also Mary Lennighan, *Latin America: Telco Troubles in Argentina*, TOTAL TELECOM, May 18, 2009, <http://www.totaltele.com/view.aspx?ID=445710>.

The reasons why the CNDC acted the way it did are, therefore, not obvious. As I will discuss in the next section, one plausible explanation is that it was a deliberate strategy by the Argentine government directed at forcing TI out of the Argentine telecommunication market for the benefit of local rivals.

C. PROTECTING COMPETITORS INSTEAD OF COMPETITION

A widely cited principle in the literature is that competition law ought to protect competition but not competitors.⁶⁶ In stark contrast with this rule, there are reasons to believe that the investigation into the Telecom Italia case was a deliberate attempt by the local government to protect local firms from foreign rivals. More precisely, the government conducted a dubious, if not abusive, enforcement of competition laws in an effort to get TI to exit the market.

The Telecom Italia case emerged against the backdrop of an internal fight between the two shareholders of Sofora, namely TI and the local group Werthein de Argentina (each firm holding fifty percent of the shares in Sofora).⁶⁷ TI owned a call option by which it could choose to buy the whole of Werthein's participation in Sofora, and TI had publicly announced that it wanted to exercise this option.⁶⁸ But the CNDC's investigation into the Telco transaction frustrated TI's plans.

In December 2008, the CNDC blocked the exercise of TI's option to buy pending its investigation into the competition effects of the Telco transaction in Argentina.⁶⁹ In April 2009, the CNDC went further and suspended the voting rights of TI's directors in TA.⁷⁰ All this created not only tensions between TI and Werthein but also a great opportunity for the latter to strengthen its position in Sofora and TA.

As some commentators reported, the troubles arising from the CNDC investigation might have caused TI to sell its assets in Sofora voluntarily.⁷¹ Because TI did not sell, the CNDC ordered TI to divest its Argentine assets on the basis of a breach of competition law.⁷² Eventually, TI's exit would benefit both Werthein and the government.⁷³ The former could retain or even increase its share in Sofora, which continues to be a

66. Jennifer Jo Snider Smith, *Competition and Transparency: What Works for Public Procurement Reform*, 38 PUB. CONT. L.J. 85, 112 (2008).

67. Shane Romig, *Argentina's IRSA Says Bidding for Stake in Telecom Argentina*, ADVFN, May 26, 2010, <http://www.advfn.com/nyse/StockNews.asp?stocknews=IRS&article=42983411&headline=argentinas-irsa-says-bidding-for-stake-in-telecom-argentina>.

68. Romig, *supra* note 65. It made economic sense for TI to exercise the call option. Werthein's share in Sofora is worth an estimated \$800 million, whereas the option's price was about \$400 million (in U.S. dollars). *Id.*

69. Lennighan, *supra* note 65.

70. *Id.*

71. Romig, *supra* note 67.

72. Shane Romig, *Six Companies Bid for Telecom Italia's Stake*, TOTAL TELECOM, Nov. 26, 2009, <http://www.totaltele.com/view.aspx?ID=451099>.

73. Coloma, *supra* note 60, at 10.

very profitable business.⁷⁴ The latter would benefit from having Werthein and other friendly local investors as allies in its bid to gain political muscle.⁷⁵

It is not surprising then that Werthein watched closely and spurred on the CNDC investigation,⁷⁶ efforts that the Argentine government supported.⁷⁷ Two factors facilitated political maneuvering in this case. First, the CNDC functions under the authority of the SCI, which is a highly political agency. Second, the creation of an independent competition law tribunal is long overdue.⁷⁸

If viewed through the lens of political plot, the actions of the CNDC make more sense. That the CNDC decided not to wait for a court resolution of the controversial question of corporate control may have been a response to political pressure.

That the CNDC sanctioned TI using the law of concentration rather than anticompetitive conduct, even when the legitimacy of using the former was not obvious but rather highly controversial, could be seen as a functional way to achieve the government's goals. In the merger regime the CNDC enjoys not only greater discretion, for procedures are less formal and the standard of proof lower,⁷⁹ but also extensive remedy powers that include asset divestiture.

That the CNDC directed its power against TI for the conduct of TE appears to be a deliberate attempt to drive TI out of the Argentine telecommunications market. The CNDC's failure to notify TI during the administrative process can only nourish this suspicion.⁸⁰

In annulling the Decisions CNDC 744 y SCI 483/09, the national courts protected the rights of TI.⁸¹ Yet following this judgment many speculations emerged as to the future steps of TI in Argentina.

74. Note that Telecom Argentina is still a very profitable business. It reported a 46.2% increase in profits in 2009 compared to the previous year. *Telecom Argentina's Earnings Rose 46.2% in 2009*, *ÁMBITO*, Mar. 10, 2010, <http://www.ambito.com/noticia.asp?id=511721&seccion=Empresas&fecha=10/03/2010>.

75. Carlos Pagni, *Kirchner va por Telecom (otra vez)*, *LA NACIÓN*, May 10, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1263118; Adrian Ventura, *El nuevo apriete K contra los medios privados*, *LA NACIÓN*, May 14, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1264480; Michael Casey, *Telecom Argentina Warns Telefonica of Potential Legal Action*, *CELLULAR NEWS*, Nov. 10, 2007, <http://www.cellular-news.com/story/27306.php>; Coloma, *supra* note 60, at 10.

76. *En la guerra por Telecom, Werthein acepta una leve tregua con los italianos*, *iEco*, Apr. 9, 2010, http://www.ieco.clarin.com/empresas/Telecom-Werthein-acepta-tregua-italianos_0_120300020.html.

77. Romig, *supra* note 72; Romig, *supra* note 65.

78. Incidente, *supra* note 40, ¶¶ 9, 10, 18.

79. *Id.* § 3.1.

80. *Half-Year Financial Report at June 30, 2010*, *TELECOM ITALIA*, 151-52, (2009), http://www.telecomitalia.it/content/dam/telecomitalia/en/archive/documents/investors/First_Half_Report/2010/Relazione_finanziaria_semestrale_30giugno2010_ENG.pdf.

81. *Merger Control: The International Regulation of Mergers and Joint Ventures in 65 Jurisdictions Worldwide*, *GLOBAL COMPETITION REV.*, 30, 32, (2010), <http://www.bomchil.com/files/publicaciones/mdt-MC2011%20Argentina%20chapter.pdf>.

Given the frictions that this case created between TI and the local government, this favorable court judgment might not be sufficient for TI to stay in the country. In this sense, reports had indicated that TI planned to sell its assets in spite of winning this first legal battle as a way to avert high political risk.⁸² Other reports suggested that TI and TE would soon adopt a global business strategy and fully merge their businesses,⁸³ a hypothesis that would support the position of the Argentine government. Yet recent events delivered an outcome that only a few could have anticipated. With the rumors of merger at a global scale between TI and TE dissipating, and with the relationship between Werthein and the government worsening, TI and Werthein struck a deal by which they agreed to cease hostilities, reassume their partnership, reform the governance of Sofora and TA, and withdraw existing legal disputes.⁸⁴

This TI-Werthein deal was a significant first step towards resolving the problem of competition because it set aside the obstacles of governance and politics that have hindered an objective solution for so long. The CNDC would finally validate this deal and approve the Telco transaction, yet not before negotiating with TE, TI, and Werthein a number of measures meant to remedy existing competition concerns.⁸⁵ Among others, TE agreed not to participate in the making of decisions over TI's assets in Argentina, and to allow the CNDC to monitor this by gaining access to its files and records in Europe.⁸⁶ Moreover, while the TI-Werthein deal enabled TI to augment its participation in Sofora to fifty-eight percent, Werthein obtained the management of TA, which further curtails any possible influence of TE in TI and TA.⁸⁷

In light of the events and circumstances that influenced the Telecom case all along the process, one could reasonably argue that this more reliable solution to the problem of competition would have not been possible had the government not been forced to relinquish its political ambitions over this case.

82. *Telecom Italia anunció que la venta de Telecom será 'dentro de poco'*, *IECO*, Apr. 13, 2010, http://www.ieco.clarin.com/empresas/Telecom-Italia-anuncio-venta-dentro_0_121500025.html.

83. *E.g., Telecom Italia: Call Waiting*, *ECONOMIST*, Mar. 4, 2010, <http://www.economist.com/node/15612237>.

84. Carlos Pagni, *Notorio fracaso de Kirchner en su objetivo de poner un pie en Telecom*, *LA NACIÓN*, Aug. 6, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1291885; José Crettaz, *Traspié para Kirchner: Telecom Italia selló la paz con Werthein*, *LA NACIÓN*, Aug. 6, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1291915; *Telecom Italia llegó a un acuerdo con los Werthein para poner fin a la disputa judicial*, *ÁMBITO*, Aug. 5, 2010, <http://www.ambito.com/noticia.asp?id=536040&seccion=Econom%EDa&fecha=05/08/2010>.

85. Ministerio de Economía y Finanzas Públicas, Dictamen 835 of 12 Oct. 2010, § XIV.b, available at http://www.cndc.gov.ar/biblioteca/documentos/A2010_D835_Conc741.pdf.

86. *Id.*

87. José Crettaz, *El Gobierno aprobó el ingreso de Telefónica en Telecom Argentina*, *LA NACIÓN*, Oct. 14, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1314753.

VI. CONCLUSION

The Telecom Italia case tells us that governments can profit from competition laws to pursue goals other than fostering competition. More precisely, they can enforce these laws abusively in order to favor local investors at the detriment of foreign ones. To this purpose, most competition authorities have powers to remedy concerns of competition ordering firms to divest assets. Remedies of this type are very powerful, and if misused (*i.e.* through arbitrary actions), they can harm firms severely.

Institutionally, this case also reminds us that the independence of the competition authority as well as the close judicial control of its decisions matter. Absent these factors, the whole purpose of competition law and policy may miscarry.

In a context of globalization, this article warns us that, although national competition laws can play a legitimate role in the global economy, there can also be a downside. While the explosive expansion of competition laws worldwide can restrain the conduct of powerful multinational firms operating in local economies, there is a danger that governments may utilize these very laws to mistreat foreign investors.

