

LATINLAWYER

LATINLAWYER Reference – TRADE AND ANTITRUST 2009

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VENEZUELA

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1. What is the relevant antitrust legislation?

The Venezuelan antitrust legal framework consists of the following body of laws, which are listed in hierarchical order:

- the Law for the Promotion and Protection of Free Competition (*Ley para Promover y Proteger el Ejercicio de la Libre Competencia*) published in Official Gazette No. 34,880 dated 13 January 1992 (the Antitrust Law);
- the Regulation for the internal organisation of the antitrust agency published in Official Gazette No. 36,329 dated 7 November 1997;
- Regulation No. 2 published in Official Gazette No. 35,963 dated 21 May 1996;
- Regulation No. 1 published in Official Gazette No. 35,202 dated 3 May 1993;
- Resolution SPPLC/14-96 dated 24 May 1996, published in Official Gazette No. 36,000;
- Resolution No. SPPLC/036-95 dated 28 August 1995, published in Official Gazette No. 35,801 dated 21 September 1995;
- Resolutions No. 0004-93 and 0005-93 dated 18 June 1993, published in Extraordinary Official Gazette No. 4,601 dated 1 July 1993;
- Instructive No. 3, Economic Concentrations, published in Official Gazette No. 36,209 dated 20 May 1997 (Instructive No. 2 was abrogated by this Instructive No. 3);
- Instructive No. 1, Authorisation Request Forms, published in Official Gazette No. 32,257 dated 21 July 1993;
- Guidelines to Evaluate Economic Concentrations published in Official Gazette No. 36,819 dated 1 November 1999; and
- Guidelines to Evaluate Franchise Agreements published in Extraordinary Official Gazette No. 5.431 dated 7 January 2000.

2. Which authorities enforce antitrust legislation?

The Superintendency for the Promotion and Protection of Free Competition is the Venezuelan authority empowered to enforce antitrust laws, which is best known in Venezuela as Procompetencia. Procompetencia is an autonomous government agency established by the Antitrust Law, and attached to the Ministry of the Light Industry and Commerce, formerly known as Ministry of Development. The objective of Procompetencia is to enforce the Antitrust Law and investigate and control harmful anti-competitive practices within the Venezuelan territory.

3. Are decisions of the antitrust authorities subject to administrative or judicial review?

The resolutions adopted by Procompetencia are not subject to administrative review, but may only be reviewed by a judicial court (known as *Corte Primera* or *Segunda de lo Contencioso Administrativo*) and on appeal by the Supreme Court.

4. What practices can be deemed anti-competitive under the legislation?

In Venezuela, any kind of conducts, practices, acts, contracts or decisions that prevent, restrict or limit the entrance and permanence of competitors, products or services (or both) into the market (such as exclusionary practices), are considered to be anti-competitive. Cartelisation, boycotts and abuse of dominant position are also considered as anti-competitive practices. Vertical and horizontal integrations that are intended to reduce or eliminate competition, and mergers that produce or strengthen

LATIN LAWYER

a dominant position in all or part of the market or that may generate effects that are contrary to free competition and prohibited under the Venezuelan legislation.

5. Do antitrust violations incur administrative, civil or criminal liability?

Antitrust violators are not criminally liable for their antitrust practices but are subject to administrative sanctions and, in case that damages are proven, civil damages.

6. What are the penalties for antitrust violations?

Antitrust violators will be subject to penalties of up to 10 per cent of the violator's gross sales in the preceding fiscal year, which may be increased up to 20 per cent of such sales. In the case of a second violation, penalties may be increased up to 40 per cent.

Antitrust penalties will be calculated based on the seriousness of the violation. For that purpose, Procompetencia will take into account the type of violation, the dimension of the affected market, the effect on competition, the period of duration and second violations. If the antitrust violator does not comply with the administrative sanctions imposed by Procompetencia, the latter is empowered to impose new monetary sanctions that may be increased to up to 50 per cent of the original penalty.

7. How are investigations initiated and what are the procedural steps?

Proceedings shall be initiated at the request of an affected party or by the initiative of Procompetencia. Once Procompetencia has enough evidence to presume that antitrust violations have occurred, it shall order the bureau of proceeding and initiate investigations against the alleged violator.

The bureau of proceedings shall perform the necessary investigations to clarify the facts and determine responsibility, during which Procompetencia may grant preventive measures, such as an order to cease the alleged illegal practice or measures to avoid damages that could be caused by the alleged illegal practice.

If there is enough evidence regarding the antitrust violations, the bureau of proceedings will serve process on the alleged violators. Defendants shall file a response to the antitrust claim along with the relevant evidence within a 15-day period of the service of process. Please note that this period may be extended for an additional 15-day period. Immediately after the expiration of the abovementioned period, Procompetencia will decide the matter within a 30-day period, in which it will adopt a resolution declaring the illegality of the practice or not, and, if a violation is found, ordering the following:

- cessation of the prohibited practices for certain period of time;
- imposition of certain conditions and obligations to the violator;
- suppression of the effects of the prohibited practices; and
- imposition of the administrative penalties provided for by the Antitrust Law.

8. What are the possible mitigating factors of anti-competitive practices?

The factors that are taken into account are the seriousness of the violation, the dimension of the affected market, and the effect on the restriction of free competition on other competitors or potential competitors, including users, consumers and other parties involved in the economic process.

9. Is there a leniency programme?

No, there is no leniency programme in Venezuelan under antitrust laws.

10. Is there a provision for merger control in the antitrust legislation? What kinds of transactions are caught?

Merger control provisions are found in the Antitrust Law, Regulation No. 2, Instructive No. 3, the Guidelines to Evaluate Economic Concentrations, and Resolution SPPLC/14-96.

Pursuant to Regulation No. 2, the following transactions are subject to merger control regulations:

LATIN LAWYER

- mergers of two or more unrelated entities;
- joint ventures between two or more unrelated entities, when the resulting company would act as an independent business entity on a permanent basis;
- transactions where one or more entities directly or indirectly gain control over other unrelated entities or parts thereof through the acquisition of shares or capital investments, or any other means;
- bulk acquisitions or acquisitions of productive assets; or
- any other act or contractual arrangement, including judicial adjudications, voluntary or compulsory liquidation proceedings, or inheritances or legacies of corporations, or divisions of parts of corporations, ongoing concerns or productive assets.

11. What are the thresholds (turnover, etc) for filing and is it voluntary or mandatory?

The thresholds to apply the merger control regulations was set forth by Procompetencia at a combined turnover of the parties in excess of 120,000 tax units (at present, a tax unit is equal to 46,000 bolivars), which is approximately US\$2.58 million. Pre-merger notifications are voluntary.

12. What are the deadlines for filing and is there any mandatory waiting period?

Since pre-merger notifications are voluntary, there are no deadlines for filing. In addition, there is no obligation to suspend a merger transaction while a decision by Procompetencia on the transaction is pending.

13. What is the substantive test for clearance and overall timetable for the analysis?

The test used by Procompetencia for clearance of mergers can be found in the Guidelines to Evaluate Economic Concentrations. Pursuant to these Guidelines, Procompetencia shall conduct a substantive analysis of the proposed merger by determining the relevant market, both product and geographical, and the market share of the competitors therein. The degree of concentration before and after the merger is determined by Procompetencia using the Herfindhal-Hirschman Index.

Afterwards, Procompetencia will analyse the dynamics of competition and the barriers to entry into the relevant market, for which the following factors, among others, are taken into account:

- the level of concentration in the relevant market before and after the transaction;
- the barriers to entry for new competitors;
- the availability of substitute products;
- the possibility of collusion between competitors;
- the efficiencies that may be created; and
- the economic benefits that may result from the merger.

Procompetencia has up to four months to determine whether the transaction will have any adverse or negative effect on competition in the relevant Venezuelan market and, therefore, approve or deny the merger.

14. To what extent do merger control rules apply to regulated sectors?

There are special merger control rules for the following regulated sectors:

- The banking sector: according to the General Law of Banking and other Financial Institutions, any person that wishes to acquire an interest of 10 per cent or more in the capital stock of or the voting power in a banking, financial institution or related entities, must file a request for authorisation with the Superintendency of Banking and other Financial Institutions.
- The oil and gas sector: neither the Organic Law of Hydrocarbons nor the Organic Law of Gaseous Hydrocarbons provide for specific merger control rules; however, the Gaseous Hydrocarbons Law prohibits vertical integration, even in the form of merger, for entities that perform or control two or more of the production, transportation or distribution activities.
- The electric energy sector: the Organic Law of the Electric Service does not provides for specific merger control rules; however, the performance, generation, transmission, distribution and management activities by the same company is prohibited. Hence, vertical integration, even in the form of merger, is also prohibited.

LATIN LAWYER

- The telecommunications sector: according to the Organic Law of Telecommunications, mergers between telecommunications operating companies must be authorised by the National Commission of Telecommunications (known as CONATEL). Such merger will be also analysed by Procompetencia, whose opinion will be binding on CONATEL.
- The public companies sector: although the Securities Law does not expressly provide for merger control rules, the acquisition of a significant number of shares of a public company must be notified to the Securities National Commission. Thus, acquisitions of shares in public companies through public offerings or tender offers must be notified to the Securities National Commission.

Trade remedies

15. What are the main laws and regulations related to trade remedies?

Venezuelan trade remedies rules are contained in the Law of Unfair Practices in the International Trade published in the Extraordinary Official Gazette No. 4,441, dated 18 June 1992 (Trade Remedies Law), and the Regulation of the Law of Unfair Practices in the International Trade published in the Extraordinary Official Gazette No. 4,567, dated 5 April 1993 (Trade Remedies Regulation).

16. Which are the investigating authorities? Who takes the final decision on the application of trade remedies?

The authority that investigates trade remedy cases is the Antidumping and Subsidies Commission (known in Venezuela as CASS), which is a government agency attached to the Ministry of Light Industry and Commerce. As part of CASS, there is a technical secretariat in charge of the investigation proceedings. Final decisions are taken by CASS, which comprises a president and four members.

17. How long does a trade investigation last?

Investigation proceedings may take up to one year.

18. What is the recent record of the authorities regarding the imposition trade remedies?

The Commission has not decided on any cases during the past two years.

19. Are information and documents provided during a trade remedies investigation treated confidentially?

The Commission and the Technical Secretariat shall not disclose any information or documentation filed by a party that had previously requested the confidentiality of such information or documents. For that purpose, however, the interested party shall indicate the reasons why that information shall be treated as confidential, and shall attach a non-confidential summary of the request.

20. Are verification visits permitted and are they carried out in practice?

Verification visits in foreign countries are permitted only if the party under investigation approves such visit and the foreign government does not challenge such visit. The technical secretariat has conducted verification visits in the past, but it has been inactive for the past two years.

21. Are provisional measures permitted under the anti-dumping laws and regulations?

Provisional anti-dumping and compensatory rights are permitted if there is evidence of the seriousness of the unfair trade practice that is causing damages to the local industry. In the case of agricultural products for which the country of origin has published the form, quantity and effect of its subsidies, the Commission may impose provisional compensatory rights upon receipt of the file.

LATIN LAWYER

22. Is China considered a market economy for the purposes of anti-dumping investigations? If so, is it possible to argue otherwise?

There is no official information of the Commission regarding the status of China for purposes of anti-dumping investigations, but it should be noted that the Commission has imposed anti-dumping measures on China in most of the cases.

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