

Argentina

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Argentine legislation regulates economic concentrations and merger operations. The Antitrust Law (*Law No. 25.156*) sets out the procedure to follow in relation to the notification requirements and authorisation for an economic concentration (*sections 6 to 16, Chapter III*).

Decreets 1019/99 and 89/2001 and the resolutions from the Antitrust and Consumer Office (*Secretaría de la Competencia y del Consumidor*) set out the procedures, terms and guidelines to follow for the approval. These decrees and resolutions are only meant to clarify the provisions included in the Antitrust Law.

In the long-term, it is intended that the competition law enforcement authority will be the Antitrust Court (*Tribunal de Defensa de la Competencia*) but, as it has not been created yet, the National Antitrust Commission (*Comisión Nacional de Defensa de la Competencia*) remains the regulatory authority (Enforcement Authority). There are no plans to make the transition to the Antitrust Court in the near future (*see box, The regulatory authority*).

2. What are the relevant thresholds/triggering events?

Notification is triggered for an economic concentration where the total turnover in Argentina of the group of companies affected exceeds ARS200 million (about US\$67 million).

An economic concentration is defined as any of the following:

- A merger between companies.
- A transfer of a going concern.
- The acquisition of any of the following, which gives the acquirer control or substantial influence over the issuer:
 - property;
 - any rights over shares;
 - interest in capital;

- debt titles granting any kind of right to be converted into shares; or
- interest in capital;
- Any other agreement or act transferring *de jure* or *de facto* assets of a company to a person or economic group, or granting a decisive influence in the adoption of ordinary or extraordinary resolutions in a company.

(*Section 6, Antitrust Act*.)

The following are exempt from notification:

- Acquisitions where the buyer already owns more than 50% of the shares of the target company.
- Acquisitions of bonds, debentures, shares not carrying voting rights or debt titles from companies.
- Acquisitions of a single company by a single foreign company which had not previously owned goods or shares of other companies in Argentina.
- Acquisitions of liquidated companies (which have not registered any activity in Argentina during the previous year).
- Operations which would usually require notification, but the amount of the operation (that is, the value or price of the merger agreement) and the value of the assets located in Argentina absorbed, acquired, or controlled does not exceed either:
 - ARS20 million (about US\$6.7 million), unless during the previous 12 months, operations were carried out which jointly exceeded that amount; or
 - ARS60 million (about US\$20.2 million) during the last 36 months.

For an overview of the notification process, see *Argentina: merger notifications flowchart*.

3. Please give a broad overview of notification requirements. In particular:

- Is notification mandatory or voluntary?
- When should a transaction be notified?

- Is it possible to obtain formal or informal guidance prior to notification?
- Who should notify?
- To which authority should notification be made?
- What is the form of notification?
- Is there a filing fee? If so, how much?
- Is there an obligation to suspend the transaction pending the outcome of an investigation?

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- **Mandatory or voluntary.** Once the notification threshold is met, notification is mandatory (*see Question 2*).
 - **Timing.** The transfer must be notified within one week of the date of the earliest of the following:
 - conclusion of the agreement;
 - publication of the purchase or exchange offer; or
 - acquisition of a controlling interest.
 - **Informal guidance.** It is possible to request an advisory opinion from the Enforcement Authority on whether an operation should be notified.
 - **Responsibility for notification.** All the parties taking part in the operation are jointly responsible for notification.
 - **Relevant authority.** Until the Antitrust Court is established, the National Antitrust Commission will continue to act as the law enforcement authority (*see Question 1*).
 - **Form of notification.** Notification is served through the filing of form F1. Forms F2 and F3 may also need to be filed if required by the Enforcement Authority (*see Question 4*).
 - **Filing fee.** No fees are currently payable, but fees are expected to be collected on the establishment of the Antitrust Court (*see Question 1*).
 - **Obligation to suspend.** Although the Antitrust Law does not provide for the suspension of the transaction, it does provide that the acts requiring authorisation will only be effective between the parties or as against third parties after the Enforcement Authority has approved the operation (*section 8*).

4. Please outline the procedure and timetable.

The procedure for notification commences with the filing of form F1 by all the parties taking part in the operation. Within 15 days of notification, the Enforcement Authority must decide whether:

- To authorise the operation;

- It requires further information covered by form F1 (*see above*); or
- It requires the information contained in form F2 (*see below*).

If it requests form F2, the Enforcement Authority must decide within 35 days of notification, whether it:

- Authorises the operation;
- Prohibits or places conditions on the operation; or
- It requires the information contained in form F3 (*see below*).

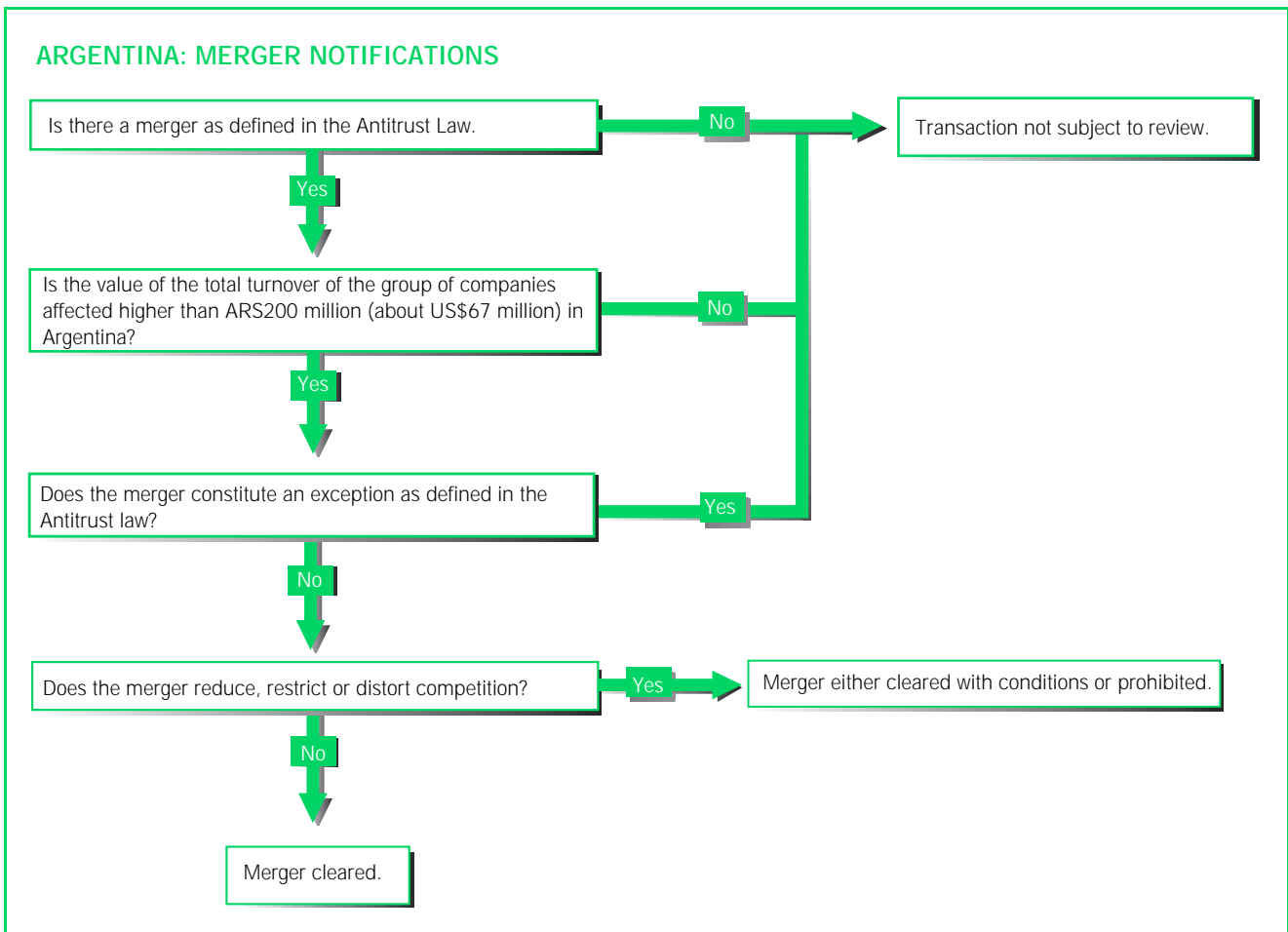
If it requests form F3, the Enforcement Authority must decide within 45 days following notification, whether it:

- Authorises the operation; or
- Prohibits or places conditions on the operation. (The Enforcement Authority may request further information at any stage.)

All the Enforcement Authority's time limits referred to above are suspended until requests for forms or any other additional information are complied with.

The forms must include the following information:

- **Form F1.** The information contained in the form must include:
 - information on the notifying parties;
 - information on the parties involved (that is, all the parties which are included when calculating the turnover of the businesses) and general aspects of the economic concentration;
 - a description of the relevant product market;
 - a description of the relevant geographical market;
 - quantitative information on the market (this includes a description of the total turnover and value of the products and the substitute products in each of the relevant geographical markets, as well as the market shares of the parties that produce those products); and
 - background information (it must be mentioned here if the notifying parties have ever been investigated for anti-trust violations or if the merger has been notified abroad).
- **Form F2.** The information contained in the form must include:
 - a description of the product's relevant market;
 - a description of the relevant geographical market;
 - a description of the manufacturing process;



- qualitative and quantitative information on the market (this is an extension to the same question in form F1, requiring information about, among other things, the development of the market for the product and substitute products during the previous three years, as well as sales volumes and imports and exports);
- differentiated products;
- production costs;
- efficiency gains (that is, whether the merger will cause a positive or negative result for consumerism).
- **Form F3.** The information to be provided on form F3 will be specified by the Enforcement Authority on a case-by-case basis.

5. How much publicity is given about merger enquiries? Can the parties request that certain information is kept confidential?

The parties making notification can request that the file or certain documentation within it be treated as confidential. Similarly, if witnesses are requested to provide information, they can require that it remains confidential. In such case, other parties may not access the information, but it may be taken into account by the Enforcement Authority.

The Enforcement Authority does not publish details of the notification or the proposed merger and the only part of the file that becomes public is the decision. However, the existence of the notification can become public.

6. Can third parties make representations and, if so, how?

Third parties (that is, competitors, suppliers, consumers or associations linking any of these) may only take part in a notification process if summoned by the Enforcement Authority. As part of the ordinary proceedings, the Enforcement Authority will conduct hearings to which competitors, suppliers, consumers and associations may be called to appear.

7. What is the substantive test?

Section 7 of the Antitrust Law prohibits economic concentrations, whose purpose or effect is or may be to reduce, restrict, or distort competition, resulting in damage to the general economic interest.

The key test which the Enforcement Authority applies regarding concentrations is that the resulting company must not have the power to unilaterally restrict the supply of goods and increase prices.

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8. What remedies are available to the regulator and what powers of enforcement does it have?

The Enforcement Authority is authorised to approve, conditionally approve or reject merger notifications. If merger notifications are conditionally approved, or rejected, the Enforcement Authority has the power to impose sanctions (see *Question 10*) on non-compliance by the notifying parties.

The conditions can be both structural and behavioural. The notifying parties can be made to sell part of the company and/or perform certain acts.

9. Is there a right of appeal against a decision?

A decision to conditionally approve or reject a merger may be appealed against, but such appeal does not automatically suspend the initial decision. The appeal must be filed before the Federal Court of Appeals in Civil and Commercial Matters. The appeal must be made within 15 days of the notice of the decision.

10. What are the penalties for:

- **Failure to notify or a delay in notifying?**
- **Failure to observe a decision of the regulator?**
- **Failure to notify.** A failure or delay in notifying a concentration may result in the application of a daily fine of up to ARS1 million (about US\$337,029) for each day of delay of the notification.
- **Failure to observe.** Non-compliance with the decisions and/or conditions imposed by the Enforcement Authority to authorise a merger may result in a fine of between ARS10,000 (about US\$3,370) and ARS150 million (about US\$51 million), to be assessed on the basis of the:
 - losses incurred by the persons affected by the prohibited activity;
 - benefit obtained by all the persons involved in the prohibited activity; and
 - the value of the assets owned by persons involved in the prohibited activity and involved in committing the violation.

Repeated failure to comply will result in duplication of the fine.

11. If a merger is cleared, are any restrictive provisions in the agreements (such as non-compete covenants) automatically cleared?

In principle, restrictive provisions in the agreement are cleared. However, the Enforcement Authority will consider whether any of the restrictive provisions limit competition or infringe the law, and can impose conditions or render a clause ineffective if deemed necessary.

12. Are any industries specifically regulated?

Some industries, such as the communications industry, are specifically regulated by a state authority. If considering a notification in a regulated industry, the Enforcement Authority will request a report and opinion on a proposed economic concentration from the relevant state authority.

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

Section 1 of the Antitrust Law provides that any act or conduct, however expressed, related to the manufacturing and exchange of goods and services, is prohibited and punishable if:

- Its purpose or effect is to limit, restrict, falsify or distort competition or entry into a market; or
- It constitutes an abuse of a dominant position in a market, in a manner such as to damage the general economic interest. The general economic interest means the proper performance of the market (that is, the market is performing in a correct manner or the restrictions do not effect an important percentage of the market).

This includes, providing the conditions set out in the paragraph above are complied with, the procurement of substantial competitive advantages by means of the infringement of other legal provisions declared through an administrative act or final court judgment (such as non-payment of taxes).

Section 2 of the Antitrust Law provides a non-exhaustive list of infringing actions:

- Fixing, concerting or manipulating, whether directly or indirectly, the selling or buying price of goods or services, as well as the exchange of information with the same purpose or effect.
- Establishing obligations to produce, distribute, acquire or market a limited amount of goods, or provide a certain amount, volume or frequency of services.
- Horizontally distributing areas, markets, clients and sources of supply (that is, agreements that result in the creation of market sharing agreements).

- To arrange or co-ordinate positions in public bidding or in public contests.
- Limiting or controlling the technical development, or the further investment in the production or marketing, of goods and services.
- Preventing, hindering or excluding entry into (or continuation in) the market.
- Fixing, imposing or practising, whether directly or indirectly, in agreement with competitors or individually, in any manner, prices and buying or selling conditions of goods or services.
- Agreeing to limit or control the research and technological development or manufacture of goods or the provision of services, or to hindering investment in the manufacture of goods or the provision of services or their distribution.
- Making the sale of a product conditional on the acquisition of another product or the use of a service, or making the provision of a service conditional on the use of another service or the acquisition of a product (tying).
- Making an acquisition or sale conditional on not using, acquiring, or supplying goods or services produced, processed, distributed or marketed by a third person.
- Imposing discriminatory conditions on the acquisition or sale of goods or services outside usual commercial practices.
- Unreasonably refusing to comply with specific requests for the acquisition or sale of goods or services, under ongoing market conditions.
- The interruption of supply by a monopolistic or dominant service provider to public services.
- Selling goods or providing services at prices lower than their cost for the purpose of affecting competition in the market or damaging its goods or services suppliers.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The law punishes any conduct which may prejudice the general economic interest, irrespective of the manner in which it is performed (*section 1, Antitrust Law*). Therefore, the regulations can apply to informal practices.

15. Please summarise any exclusions or exemptions.

The law does not provide any exceptions or exclusions.

16. Is there any formal guidance on product and geographic market definition?

Since there is no specific market definition for the case of restrictive agreements and practices, the guidelines used for mergers are applicable. Resolution 164/2001 from the Antitrust, Deregulation and Consumer Defence Office (*Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor*), sets out guidelines for determining the relevant product and geographic markets:

- **Product market.** The product market comprises those goods and/or services considered substitutes by the consumer, given:
 - the characteristics of the products;
 - their prices; and
 - the purpose of their consumption.
- **Geographic market.** The relevant geographic market is the smallest region within which a sole supplier of the relevant product would benefit from imposing a small increase, although significant and not temporary, to the price of the product.

The analysis of the existence of substitutes is particularly important for the definition of the relevant geographic market. If consumers within the area in which the parties participating in the concentration operate may acquire the product in a nearby geographic area, then both zones will be considered as part of the same market.

17. Is there a formal notification requirement? In particular:

- Is it possible/advisable to notify?
- Is it possible to obtain informal guidance?
- Who should notify?
- To which authority should notification be made?
- What is the form of notification?
- Is there a filing fee? If so, how much?

- **Notification.** There is no notification process for restrictive agreements and practices.
- **Informal guidance.** Informal queries concerning restrictive agreements and practices cannot be made.
- **Responsibility for notification.** Not applicable.
- **Relevant authority.** Not applicable.
- **Form of notification.** Not applicable.
- **Filing fee.** Not applicable.

18. Please outline the procedure and timetable.

The Enforcement Authority may start an investigation on its own initiative or on request from a third party (the Enforcement Authority will decide whether a third party request is relevant).

If it decides to start an investigation, the Enforcement Authority is responsible for gathering evidence concerning the alleged infringement. The Enforcement Authority must serve a notice on the accused, within ten days of beginning an investigation, to inform him of the investigation and request an explanation for his conduct.

After the accused has provided an explanation for his conduct, the Enforcement Authority must decide whether it is necessary to proceed with preliminary summary proceedings or stop the investigation.

If it starts preliminary summary proceedings, the Enforcement Authority must provide the accused, within ten days of the start of the proceedings, with the information it has relied on to justify starting the preliminary summary proceedings. During preliminary summary proceedings, the Enforcement Authority collects all the evidence necessary to determine if there has been a violation of the Antitrust Law. There is no time limit for preliminary summary proceedings.

Once preliminary summary proceedings have been concluded, the summary proceedings commence and the accused will be notified of this, after which he has 15 days to offer any evidence he deems appropriate to the Enforcement Authority. After all the evidence is produced, the accused may present his own comments on the evidence within six days.

The Enforcement Authority must provide a final judgment on the accused within 60 days of the end of the summary proceedings.

The accused may appeal against the final judgement of the Enforcement Authority, within 15 days of being notified of the decision.

19. Are details of any potentially restrictive agreement or practice made public during the investigation? If so, can the parties request that any information is kept confidential?

Although the Enforcement Authority has previously made public announcements concerning investigations, it is not common practice for it to do so.

A party under investigation can request that documents filed or kept by the Enforcement Authority, following searches and seizures, be kept confidential. If the Enforcement Authority accepts this request, third parties will not have access to them, but the Enforcement Authority may consider them in the investigation.

20. Can third parties initiate an investigation by making a complaint or representations during the course of an investigation? If so, how?

Any third party may file a complaint. The complaint must contain:

- The name and domicile of the complainant.
- A description, as specific as possible, of the subject matter of the complaint.
- The facts on which the complaint is based.
- A brief description of the applicable law.

21. What are the regulator's enforcement powers and what are the other consequences of implementing a prohibited restrictive agreement or engaging in a prohibited practice? In particular:

- **What orders can be made and fines imposed?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**
- **Can personal liability (civil or criminal) attach to individual directors or managers?**
- **Can third parties bring claims for damages?**

■ **Orders and fines.** The Enforcement Authority can order the cessation of any agreement and practice which is restrictive of competition. In addition, it can impose fines from ARS10,000 (about US\$3,370) to ARS150 million (about US\$51 million), to be assessed on the basis of the:

- losses incurred by the persons affected by the prohibited activity;
- benefit obtained by all the persons involved in the prohibited activity; and
- value of the assets owned by persons involved in the prohibited activity and involved in committing the violation.

Repeated failure to comply will result in duplication of the fine.

Non-compliance with a cessation order will result in a daily fine of up to ARS1 million (about US\$337,029), from the moment the order is breached.

- **Impact on agreements.** If an agreement or conduct is restrictive of competition, the Enforcement Authority can declare the whole agreement void.
- **Personal liability.** When an offence is committed by an undertaking, the fine will also be applied jointly and sever-

ally to the directors, managers, administrators, statutory auditors or members of the Statutory Audit Committee, agents or legal representatives of the undertaking, who, by act or omission of their duty of control or supervision contributed, encouraged or allowed the infringement.

- **Third party claims.** Third parties whose rights have been prejudiced as a result of the unlawful acts of another person may file complaints for the damage suffered before the competent civil or commercial court.

22. Is there a right of appeal against a decision of the regulator?

Any decisions by the Enforcement Authority may be appealed in the Federal Court of Appeals in Civil and Commercial matters. The appeal must be made within 15 days of notice of the decision.

23. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The Enforcement Authority can order precautionary measures, including searching the accused parties' premises and seizing information. In addition, in order to ascertain whether a certain conduct infringes the Antitrust Law, it can:

- Commission expert witness reports.
- Request testimonies from relevant parties.
- Summon witnesses to appear for questioning.

The Enforcement Authority can order the immediate cessation of all conduct which infringes the Antitrust Law, and may impose daily fines for non-compliance with the order to cease the infringing conduct (*see Question 21*).

24. How is Article 81 enforced by your jurisdiction's national competition authority and courts in accordance with EC Regulation 1/2003 (EU member states only)? Are there any differences between the enforcement of Article 81 and the enforcement of your jurisdiction's national competition laws?

Not applicable.

MONOPOLIES AND ABUSE OF MARKET POWER

25. Are monopolies and abuses of market power regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The abuse of a dominant position is forbidden under section 1 of the Antitrust Law.

A dominant position exists where a person is:

- The sole offeror or claimant within the domestic market, or in one or more places worldwide, for a certain kind of product or service; and
- Not exposed to substantial competition or, due to the level of vertical or horizontal integration, is in a position to determine the economic viability of a competitor to its detriment.

(Chapter II, Antitrust Law.)

In determining whether there is a dominant position, the Enforcement Authority will consider:

- The substitutability of other products.
- Restrictions on new entries into the market.
- Whether a person holding a dominant position may unilaterally influence prices.

The existence of a dominant position is not forbidden, only the abuse of such a position. Abuse exists where the conduct of the person having a dominant position may prejudice the general economic interest.

26. Are there any specific tests for dominance?

Although no specific test is provided for dominance, the provisions of the Herfindahl-Hirschman Index are taken into account.

27. Are there any broad categories of behaviour that may constitute abusive conduct?

The Antitrust Law does not provide examples of abuses.

28. Are there any exclusions or exemptions?

There are no exclusions or exceptions.

29. Can pre-notification guidance be obtained? If so, please outline the procedure.

Pre-notification guidance cannot be given.

30. Please summarise the regulator's powers of investigation.

The Enforcement Authority has same powers of investigation as for restrictive agreements and practices (*see Question 23*).

THE REGULATORY AUTHORITY

Name. National Antitrust Commission (*Comisión Nacional de Defensa de la Competencia*)

Head. Dr. Ismael Malis (President)

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Outline structure. The National Antitrust Commission is currently the law enforcement authority and will remain so until the Antitrust Court is created. The National Antitrust Commission is managed by a President and a board of four members.

Responsibilities. The National Antitrust Commission is responsible for investigating any possible violation of the law. This includes investigating individuals who perform acts that may be considered unlawful and controlling mergers and acquisitions.

Procedure for obtaining documents. Only some decisions on mergers may be downloaded from the National Antitrust Commission's website. However, copies of the rest of the decisions, whether on mergers or on unlawful practices, may be requested at the National Antitrust Commission's offices.

31. What are the penalties for abuse of market power?

Where there is an abuse of a dominant position, or where a monopoly has been developed or consolidated (in violation of the provisions of the Antitrust Law), the Enforcement Authority may:

- Enforce conditions (structural and behavioural) to prevent the distortion of competition by the monopoly; or
- Request the competent judge to dissolve, liquidate, or divide the infringing companies. In addition, a fine may be imposed under the same terms described in cases of agreements or conducts restrictive of competition (*see Question 21*).

32. How is Article 82 enforced by your jurisdiction's national competition authority and courts in accordance with EC Regulation 1/2003 (EU member states only)? Are there any differences between the enforcement of Article 82 and the enforcement of your jurisdiction's national competition laws?

Not applicable.

JOINT VENTURES**33. Please explain how joint ventures are analysed under competition law.**

The provision for mergers apply to joint ventures (*see Questions 1 to 13*).

PROPOSALS FOR REFORM**34. Please summarise any proposals for reform.**

There are currently no proposals for reform.

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Firm Profile

Established in 1869, and traditionally recognized for its IP and Antitrust practice *G. BREUER* has grown in the last years to become one of the leading Full Corporate Services Law Firms in the market, expanding its areas of practice to effectively respond to the scale and complexity of the present business environment. Besides its highly qualified group of attorneys -most of whom have been trained, educated or received their law degree abroad- the firm has technical staff that includes chemical and electronic engineers, patent and trademark agents, economy and physics experts and accountants. Due to their background *G. BREUER* attorneys have the expertise necessary to understand today's global transactions for the purpose of meeting the expectations and needs of local and international clients. Today, after 138 years in business, the firm serves well-known local and international clients throughout the Americas, Europe and Asia, providing a full range of legal services to businesses and individuals.

Statement of Practice

Corporate Law, Intellectual Property, Licensing Agreements, Antitrust and Trade Regulation, Consumer Protection Rights, Business Combinations, Competition, Unfair Trade, International Law and International Trade, Foreign Investments, International Business Transactions, Corporate Finance, Mergers & Acquisitions, Contracts, Securities, Capital Markets, Banking, Project Finance, Bankruptcy and Corporate Debt Restructuring, Distribution Agreements, Franchising, Taxation, Labor and Employment, Copyrights, Advertising and Marketing, Internet Law, Telecommunications, Administrative Law, Real Estate, Litigation, International Arbitration and Dispute Resolution, Mediation and General Practice.