

COMPETITION LAW IN ARGENTINA

MARCELO DEN TOOM



Wolters Kluwer
Law & Business

Competition Law in Argentina

Marcelo den Toom

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Competition Law.

General Editor: Roger Blanpain

Associate General Editor: Michele Colucci

Volume Editors: Francesco Denozza, Alberto Toffoletto



Wolters Kluwer

Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-4098-2

This title is available on www.kluwerlawonline.com

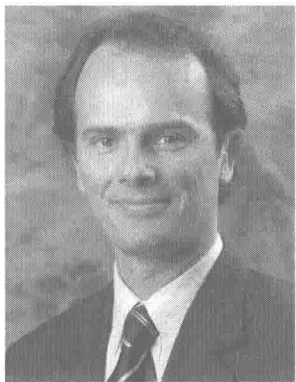
© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Author



Prof. Dr Marcelo den Toom (born 19 November 1968) obtained a degree in law (1993) from the University of Belgrano in Buenos Aires. He attended the University of Illinois in 1992 and graduated as Master of Laws from the University of Michigan in 1997. He has been professor of corporate law at the National University of Buenos Aires (Argentina) and is currently professor of competition law at Universidad Austral (Argentina). He is current Vice-Chair and past Chair of the Competition Law Commission of *Colegio de Abogados de la Ciudad de Buenos Aires* and is current Vice-Chair of the Anti-trust Committee of the Section of International Law of the American Bar Association. He is admitted to practice by the bars of the cities of Buenos Aires (1994) and

New York (2000). He is currently a partner at M. & M. Bomchil in Buenos Aires, where he heads the Competition Law practice. He is a former foreign associate at Haynes & Boone (Houston office) and Skadden, Arps, Slate, Meagher & Flom (New York office).

He has published different works on corporate, commercial and antitrust issues, and is the author of the Argentine chapters of *Getting the Deal Through: Merger Control* (2000-), *Getting the Fine Down: Cartels 2001* (both works published by Global Competition Review), *International Mergers: the Antitrust Process* (Sweet & Maxwell, 2001-), *Merger Control Worldwide and Anti-Cartel Enforcement* (Cambridge University Press, 2004- and 2009-, respectively) and *Antitrust Issues in International Intellectual Property Licensing Transactions* (American Bar Association, 2012).

The author wishes to thank Agustina Laboureau, Lucía Grima Wencelblat, Agustina Morán and Cecilia del Barrio Arleo for their cooperation in the research required for this work.

Table of Contents

The Author	3
List of Abbreviations	11
General Introduction	13
§1. GENERAL BACKGROUND	13
I. Geography	13
II. Population and Economy	13
III. Languages	14
IV. Political System	14
V. Judicial System	15
§2. ECONOMIC SYSTEM	16
§3. LEGAL SYSTEM	16
§4. HISTORICAL BACKGROUND OF ANTITRUST LAW	18
Selected Bibliography	25
Part I. Structure of Antitrust Law and its Enforcement	27
Chapter 1. Sources of Antitrust Law	27
§1. NATIONAL SOURCES	27
§2. INTERNATIONAL SOURCES	28
§3. SECONDARY SOURCES	30
I. Regulations and Guidelines	30
§4. SOURCES' RELATION AND HIERARCHY	32
§5. ROLE AND AUTHORITY OF PRECEDENTS	32

Table of Contents

Chapter 2. Scope of Application	33
§1. TERRITORIAL REACH	33
§2. SPECIAL SECTORS	34
§3. STATE-OWNED ENTERPRISES AND PUBLIC UTILITIES	35
§4. SENSIBLE EFFECT AND <i>DE MINIMIS</i>	35
Chapter 3. Overview of Substantive Provisions	37
§1. RESTRICTIVE AGREEMENTS	37
§2. DOMINANT UNDERTAKINGS	37
§3. CONCENTRATIONS	39
§4. OTHER PROHIBITIONS	43
§5. TESTS OF ILLEGALITY	43
I. Per Se Prohibitions and Naked Restraints	43
II. Balancing Tests	44
III. Merger Tests	44
Chapter 4. Overview of Main Notions	47
§1. UNDERTAKING	47
§2. RELEVANT MARKET	48
§3. MARKET POWER / DOMINANT POSITION	49
§4. AGREEMENTS AND CONCERTED PRACTICES	50
§5. RESTRICTION OF COMPETITION	51
§6. MONOPOLIZATION AND ABUSE OF DOMINANCE	52
§7. CONCENTRATIONS	54
§8. JOINT VENTURES	55
Chapter 5. Consequences of Violations and Enforcement Institutions	57

Table of Contents

§1. ADMINISTRATIVE ENFORCEMENT	57
I. The Antitrust Authorities	57
A. Formation, Composition	57
B. Investigating Powers	59
C. Adjudicating Powers (Ascertaining and Sanctioning)	60
D. Other institutional tasks (Consultancy to Parliament/ Government)	60
II. Government Direct Enforcement Activities	62
III. Other Administrative Agencies Applying Antitrust Rules	63
IV. Administrative Fines	63
V. Administrative Injunctions and Other Restrictive Orders	65
VI. Interim Measures	68
§2. CIVIL ENFORCEMENT	68
I. Competent Civil Courts	68
II. Sanctions	72
A. Nullity	72
B. Damages	72
C. Interim Measures	74
§3. CRIMINAL ENFORCEMENT	75
I. Criminal Sanctions for Antitrust Violations	75
II. Other Application of Criminal Law to Relevant Conducts	76
III. Role of Prosecutors	77
IV. Competent Criminal Courts	78
Part II. The Application of the Prohibitions	79
Chapter 1. Restrictive Agreements	79
§1. HORIZONTAL AGREEMENTS	79
I. Cartels	79
A. Price fixing	79
B. Market/Client Allocation	83
C. Production/Innovation Limitation	87
D. Group Boycott	89
E. Collusion on Other Objects	92
II. Information Exchange Practices	93
III. Cooperation agreements	94
A. Research and Development	94
B. Specialization	95
C. Standardization	95
D. Joint Production	95
E. Joint Purchasing	95
F. Joint Selling	95

Table of Contents

§2. VERTICAL AGREEMENTS	97
I. Distribution	97
A. Exclusive Distributorship	97
B. Exclusive Dealing	100
C. Selective Distribution	101
D. Franchising	101
II. Technology Licensing	102
A. Patent Licensing	102
B. Trademark licensing, Know-how and Trade Secret licensing	104
Chapter 2. Dominant Undertakings' Prohibited Practices	105
§1. EXPLOITATIVE PRACTICES	105
I. Excessive/Unfair Pricing	105
II. Discrimination	107
§2. EXCLUSIONARY PRACTICES	108
I. Predation	108
II. Tying	110
III. Rebates	113
IV. Refusal to Deal	115
V. Price Squeeze	118
Chapter 3. Concentrations	119
§1. HORIZONTAL MERGERS	119
§2. VERTICAL MERGERS	132
§3. MARKET/PRODUCT EXTENSION MERGERS	133
§4. PURE CONGLOMERATE MERGERS	133
§5. JOINT VENTURES	135
Part III. Administrative Procedure	137
Chapter 1. Administrative Investigations before the Antitrust Authority	137
§1. INITIATIVE	137
I. General Sectors Inquiries	137
II. Ex Officio Investigations	144
III. Complaints	145
§2. POWERS	145

Table of Contents

I. Requests for Information	145
II. Investigating and Search Powers	146
III. Cooperation with Other State Institutions	147
§3. RIGHT OF DEFENCE	147
I. Content and Notification of Opening Decisions	147
II. The Proceedings: Hearings, Access to File, Briefs	148
III. Statement of Objections	149
IV. Final Hearing and Decision	150
 Chapter 2. Voluntary Notifications and Clearance Decisions	
<u>Merger Control</u>	152
§1. PRELIMINARY FILING OBLIGATIONS	152
I. Criteria and Thresholds	152
II. Turnover Calculation	152
III. Market Share Calculation	155
IV. Other Relevant Notions	157
§2. STRUCTURE OF PROCEEDINGS	157
I. Preliminary Assessments and Full Investigation	157
II. Time Framework	158
III. Right of Defence	162
§3. CLEARANCE AND CONDITIONAL CLEARANCE	163
I. Conditions and Undertakings	163
A. Content	163
B. Timing	166
§4. RELATIONS WITH OTHER MERGER CONTROL AUTHORITIES	167
I. Other Authorities within the Local Jurisdiction	167
II. International Coordination	167
 Chapter 3. Challenging of the Administrative Decision	168
§1. COMPETENT COURTS	168
§2. TIME LIMITS	170
§3. SCOPE OF JUDICIAL REVIEW	172
 Index	173

Competition Law in Argentina

Marcelo den Toom

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Competition Law.

General Editor: Roger Blanpain

Associate General Editor: Michele Colucci

Volume Editors: Francesco Denozza, Alberto Toffoletto



Wolters Kluwer

Law & Business

The Author



Prof. Dr Marcelo den Toom (born 19 November 1968) obtained a degree in law (1993) from the University of Belgrano in Buenos Aires. He attended the University of Illinois in 1992 and graduated as Master of Laws from the University of Michigan in 1997. He has been professor of corporate law at the National University of Buenos Aires (Argentina) and is currently professor of competition law at Universidad Austral (Argentina). He is current Vice-Chair and past Chair of the Competition Law Commission of *Colegio de Abogados de la Ciudad de Buenos Aires* and is current Vice-Chair of the Anti-trust Committee of the Section of International Law of the American Bar Association. He is admitted to practice by the bars of the cities of Buenos Aires (1994) and

New York (2000). He is currently a partner at M. & M. Bomchil in Buenos Aires, where he heads the Competition Law practice. He is a former foreign associate at Haynes & Boone (Houston office) and Skadden, Arps, Slate, Meagher & Flom (New York office).

He has published different works on corporate, commercial and antitrust issues, and is the author of the Argentine chapters of *Getting the Deal Through: Merger Control* (2000-), *Getting the Fine Down: Cartels* 2001 (both works published by Global Competition Review), *International Mergers: the Antitrust Process* (Sweet & Maxwell, 2001-), *Merger Control Worldwide and Anti-Cartel Enforcement* (Cambridge University Press, 2004- and 2009-, respectively) and *Antitrust Issues in International Intellectual Property Licensing Transactions* (American Bar Association, 2012).

The author wishes to thank Agustina Laboureau, Lucía Grima Wencelblat, Agustina Morán and Cecilia del Barrio Arleo for their cooperation in the research required for this work.

The Author

Table of Contents

The Author	3
List of Abbreviations	11
General Introduction	13
§1. GENERAL BACKGROUND	13
I. Geography	13
II. Population and Economy	13
III. Languages	14
IV. Political System	14
V. Judicial System	15
§2. ECONOMIC SYSTEM	16
§3. LEGAL SYSTEM	16
§4. HISTORICAL BACKGROUND OF ANTITRUST LAW	18
Selected Bibliography	25
Part I. Structure of Antitrust Law and its Enforcement	27
Chapter 1. Sources of Antitrust Law	27
§1. NATIONAL SOURCES	27
§2. INTERNATIONAL SOURCES	28
§3. SECONDARY SOURCES	30
I. Regulations and Guidelines	30
§4. SOURCES' RELATION AND HIERARCHY	32
§5. ROLE AND AUTHORITY OF PRECEDENTS	32

Table of Contents

Chapter 2. Scope of Application	33
§1. TERRITORIAL REACH	33
§2. SPECIAL SECTORS	34
§3. STATE-OWNED ENTERPRISES AND PUBLIC UTILITIES	35
§4. SENSIBLE EFFECT AND <i>DE MINIMIS</i>	35
Chapter 3. Overview of Substantive Provisions	37
§1. RESTRICTIVE AGREEMENTS	37
§2. DOMINANT UNDERTAKINGS	37
§3. CONCENTRATIONS	39
§4. OTHER PROHIBITIONS	43
§5. TESTS OF ILLEGALITY	43
I. Per Se Prohibitions and Naked Restraints	43
II. Balancing Tests	44
III. Merger Tests	44
Chapter 4. Overview of Main Notions	47
§1. UNDERTAKING	47
§2. RELEVANT MARKET	48
§3. MARKET POWER / DOMINANT POSITION	49
§4. AGREEMENTS AND CONCERTED PRACTICES	50
§5. RESTRICTION OF COMPETITION	51
§6. MONOPOLIZATION AND ABUSE OF DOMINANCE	52
§7. CONCENTRATIONS	54
§8. JOINT VENTURES	55
Chapter 5. Consequences of Violations and Enforcement Institutions	57

Table of Contents

§1. ADMINISTRATIVE ENFORCEMENT	57
I. The Antitrust Authorities	57
A. Formation, Composition	57
B. Investigating Powers	59
C. Adjudicating Powers (Ascertaining and Sanctioning)	60
D. Other institutional tasks (Consultancy to Parliament/ Government)	60
II. Government Direct Enforcement Activities	62
III. Other Administrative Agencies Applying Antitrust Rules	63
IV. Administrative Fines	63
V. Administrative Injunctions and Other Restrictive Orders	65
VI. Interim Measures	68
§2. CIVIL ENFORCEMENT	68
I. Competent Civil Courts	68
II. Sanctions	72
A. Nullity	72
B. Damages	72
C. Interim Measures	74
§3. CRIMINAL ENFORCEMENT	75
I. Criminal Sanctions for Antitrust Violations	75
II. Other Application of Criminal Law to Relevant Conducts	76
III. Role of Prosecutors	77
IV. Competent Criminal Courts	78
Part II. The Application of the Prohibitions	79
Chapter 1. Restrictive Agreements	79
§1. HORIZONTAL AGREEMENTS	79
I. Cartels	79
A. Price fixing	79
B. Market/Client Allocation	83
C. Production/Innovation Limitation	87
D. Group Boycott	89
E. Collusion on Other Objects	92
II. Information Exchange Practices	93
III. Cooperation agreements	94
A. Research and Development	94
B. Specialization	95
C. Standardization	95
D. Joint Production	95
E. Joint Purchasing	95
F. Joint Selling	95

Table of Contents

§2. VERTICAL AGREEMENTS	97
I. Distribution	97
A. Exclusive Distributorship	97
B. Exclusive Dealing	100
C. Selective Distribution	101
D. Franchising	101
II. Technology Licensing	102
A. Patent Licensing	102
B. Trademark licensing, Know-how and Trade Secret licensing	104
Chapter 2. Dominant Undertakings' Prohibited Practices	105
§1. EXPLOITATIVE PRACTICES	105
I. Excessive/Unfair Pricing	105
II. Discrimination	107
§2. EXCLUSIONARY PRACTICES	108
I. Predation	108
II. Tying	110
III. Rebates	113
IV. Refusal to Deal	115
V. Price Squeeze	118
Chapter 3. Concentrations	119
§1. HORIZONTAL MERGERS	119
§2. VERTICAL MERGERS	132
§3. MARKET/PRODUCT EXTENSION MERGERS	133
§4. PURE CONGLOMERATE MERGERS	133
§5. JOINT VENTURES	135
Part III. Administrative Procedure	137
Chapter 1. Administrative Investigations before the Antitrust Authority	137
§1. INITIATIVE	137
I. General Sectors Inquiries	137
II. Ex Officio Investigations	144
III. Complaints	145
§2. POWERS	145