

## Multi-jurisdiction mergers and acquisitions in an era of globalisation: The Telecom Italia- Telefónica case

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*The article offers a case study concerning the effects of the entrance of Telefónica among the shareholders of Telecom Italia in the Brazilian and Argentinean telecom markets. Through this case study, the article aims at showing that the competition authorities of the emerging economies have a limited range of remedies available when reviewing multi-jurisdictional transactions and that more international cooperation is, thus, needed in this area.*

### 1. INTRODUCTION

During the last fifteen years new competition law regimes have 'bloomed' around the world. In several countries in transition the introduction of competition law has gone hand in hand with the privatization of former State-owned companies, liberalization of several economic sectors formerly reserved to the State economic activity, and the abolition of export and import barriers.<sup>1</sup> As a consequence nowadays, competition law can no longer be considered an exclusive business of Western Europe and of the USA.<sup>2</sup> To give an overview of this phenomenon, it is sufficient to mention that, according to the online database of the International Bar Association, 17 countries in Africa, 23 in Asia, 23 in Eastern Europe and 19 in Central and South America have already adopted competition legislations.<sup>3</sup>

The new competition legislations often include a merger control regime. The latter intervenes *ex-ante* on the market, by preventing or by imposing structural or behavioural remedies on the transactions which cause excessive market concentrations and which may lead in the long term to forms of abuse of dominance. The basic question discussed in this article is whether a system of merger control may be effectively enforced by the newly established competition authority of an emerging economy when the concentration is the result of a cross-border transaction. The competition authorities of the developing countries may, in fact, easily intervene in the concentrations involving local companies, while they face difficulties in enforcing their legislation when a cross-border transaction takes place. From the point of view of competition law, a cross-border merger and acquisition (M&A) is a multi-jurisdictional concentration. In fact, cross-border mergers are often reviewed by a number of competition authorities in different countries. The transaction, actually, has to be notified to all competition authorities of the countries where the concentration has an impact on the market. The problem is that during the process of multi-jurisdictional review, each competition authority analyses the transaction only from the point of view of its impact on the relevant market within its jurisdiction. One competition agency is often not

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<sup>1</sup>Lande R. 'Creating Competition Policy for Transition Economies' (1997-1998) Vol. 23 Brooklyn Journal of International Law 341.

<sup>2</sup>Roshanian A. 'Modelli di Tutela della Concorrenza nelle Economie Emergenti: il Caso dell'America Latina' (2002) Vol. 14 Boletín Latinoamericano de Competencia 163.

<sup>3</sup><http://www.globalcompetitionforum.org/> (24.04.2008).

aware either of the effect of the transaction in other countries or the remedies that foreign agencies have applied to the concentration. Moreover, the merging parties are often not required to provide information concerning the notification process in the different competition law jurisdictions involved.

It is important to point out that during the last years both the Organisation for the Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have worked on the issue of the multi-jurisdictional mergers within the Committee on Competition Law and Policy<sup>4</sup> and the Merger Review Working Group.<sup>5</sup> For instance, one OECD's Recommendation of 1995 provides a framework for the bilateral agreements of cooperation between different competition authorities, in order to exchange information and to coordinate their action in cross-border cases.<sup>6</sup> Moreover, in 1999 the OECD Competition Law and Policy adopted a report on the notification of transnational mergers.<sup>7</sup> On the other hand, the ICN Working Group on Merger Review adopted a number of guidelines concerning the notification of mergers and their analysis, encouraging a harmonization of the national mechanisms of merger review, in order to increase the legal certainty for the merging parties and to improve the degree of understanding and cooperation between different competition authorities involved in cross-border transactions.<sup>8</sup> Finally, the companies involved in cross-border cases, even if not legally required, often have the interest to include in the notification form information concerning to which other competition law jurisdictions the cross-border transaction has also been notified. In fact, companies involved in multi-jurisdictional mergers are often better off if the different competition authorities cooperate.

However, as it will be shown in the following pages, the degree of cooperation between different competition authorities involved in the same merger review is sometimes quite

<sup>4</sup>The OECD Committee on Competition Law and Policy organizes every year meetings, seminars and roundtables among the national representatives of the OECD Member States, who are usually officers of the national competition authorities. The Committee issues recommendations and guidelines on different issues concerning competition law and periodically it undertakes peer reviews of the national competition laws and of their enforcement record. It also organizes once per year a Global Competition Forum and a Latin American Competition Forum, where non OECD members are invited to participate. Information concerning the work of the OECD Committee on Competition Law and Policy is available at [http://www.oecd.org/topic/0,3373,en\\_2649\\_37463\\_1\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/topic/0,3373,en_2649_37463_1_1_1_1_37463,00.html) (1.5.2008).

<sup>5</sup>The International Competition Network (ICN) is a network of competition authorities which gather since 2002 in order to discuss different topics related to competition law. The ICN organizes once per year a conference where the representatives of the competition authorities meet and where the work of the different working groups composed by a certain number of countries is presented. Since its establishment, merger control has been one of the key aspects of the work of the ICN. The ICN has, in fact, a Working Group on Merger Control, divided in two Subgroups on Notification and Procedures and Merger Investigation and Analysis. For further information see: <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers> (1.5.2008).

<sup>6</sup>OECD Council, 'Revised recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade'. Recommendation published in 1995. The text of the recommendation is available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf> (24.4.2008).

<sup>7</sup>OECD Committee On Competition Law And Policy, 'Report on Notification of Transnational Mergers'. Adopted on 23rd February 1999. Document number DAFFE/CLP(99)2/FINAL. The text of the report is available at [http://www.oecd.org/findDocument/0,3354,en\\_2649\\_34715\\_1\\_119666\\_1\\_1\\_1,00.html](http://www.oecd.org/findDocument/0,3354,en_2649_34715_1_119666_1_1_1,00.html) (1.5.2008).

<sup>8</sup>See for instance: ICN Subgroup Notification & Procedures, 'Recommended Practices on Remedies and Competition Agency Powers'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005). ICN Subgroup Investigative Techniques, 'Investigative Techniques Handbook for Merger Review'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).

ICN Subgroup Notification & Procedures, 'Implementation of the ICN Recommended Practices'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).

ICN Subgroup Notification & Procedures, 'Waivers of Confidentiality in Merger Investigations'. Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).

ICN Subgroup Notification & Procedures, 'Merger Notification Filing Fees'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).

ICN Investigative Techniques Subgroup, 'Planning a Merger Investigation'. Third Annual ICN Conference, Seoul, Korea (21-22 April, 2004).

ICN Notification and Procedures Subgroup, 'Recommended Practices for Merger Notification Procedures'. Adopted during the Second Annual ICN Conference, Mérida, Mexico (June 23-25, 2003).

ICN Working Group on Merger Control, 'Report on the Costs and Burdens of Multi-jurisdictional Merger Review'. Adopted during the First Annual ICN Conference, Naples, Italy (September 28-29, 2002).

All the reports and guidelines drawn by the ICN Working Group on Merger Control are available at <http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group/17> (1.5.2008).

limited, and the competition authorities of the emerging markets are those which are mostly affected by this lack of international cooperation.

The problems described above may seem to the reader rather theoretical. It has already been claimed by a number of authors that the competition authorities of the developing countries suffer from a lack of international cooperation in the field of competition law.<sup>9</sup> However, so far there have been few attempts to follow the process of multiple notifications of a cross-border M&A, in order to study the effects of the transaction in the different competition jurisdictions where the transaction has been notified. The goal of this article is to undertake this kind of analysis for a recent cross-border transaction, the case Telecom Italia-Telefónica. This case study shows that a transaction which had its origins in Italy also had an indirect impact on the level of competition in the Brazilian and Argentinean telecommunications markets. The Telecom Italia-Telefónica case is interesting because it shows the difficulties faced by the competition authorities of the developing countries in enforcing their merger control legislations in cases of cross-border M&As and the low degree of cooperation between the competition authorities of the developed and the developing countries.

In relation to the methodology of the analysis, the case study will rely on the articles of the press to understand the different steps of the transaction. Moreover, the decision of the Brazilian telecom regulatory authority concerning the transaction will also be analysed. Finally, the Shareholders' Agreement which is the basis of the acquisition will also be a useful source of information. The case study takes into consideration both, the competition and the corporate law perspective of the transaction. The article discusses, in fact, the shareholding structure which connects Telecom Italia and Telefónica with their local subsidiaries in Brazil and Argentina; structure summarized in the Annex 1 and 2 attached to this article.

## 2. THE INVESTMENTS OF TELECOM ITALIA AND TELEFÓNICA IN LATIN AMERICA

The two actors of this case study are the Spanish telecommunications company, Telefónica, and the former Italian State-owned telephone monopoly, Telecom Italia. These two companies are active in the same product markets, due to the fact that both of them provide a full range of telecommunications services, including fixed and mobile phone connections and Internet access services. Another point that they have in common is that during the past years they have been investing outside of their country of origin. In particular, they have targeted through their investments Latin America, where they have acquired the control of a number of former State-owned companies, mostly privatized during the 1990s.<sup>10</sup> Overall, the Spanish telecom operator is present in all Latin American countries.<sup>11</sup> In this area of the world Telefónica counts 126 out of its 210 million clients.<sup>12</sup>

<sup>9</sup>See for instance: Bhattacharjya A. 'The Case for a Multilateral Agreement on Competition Policy: a Developing Country Perspective' (2006) Vol. 9(2) Journal of International Economic Law 293-323. Bhattacharjya A. 'Export Cartels - A Developing Country Perspective' (2004) Vol. 32(2) Journal of World Trade 331-359. Fox E.M. 'Desarrollo Económico, Pobreza y Antimonopolio: El Otro Sendero' (2007) Vol. 8 Revista Jurídica de la Universidad de Palermo, 167. Fox E.M. 'International Antitrust and the Doha-Dome' (2003) Vol. 43 Virginia Journal of International Law 911. Fox E.M. 'World Competition Law' 224-248 in (Dhall V. ed.) *Competition Law Today*, 2007.

<sup>10</sup>A description of the Telecom Italia's foreign direct investments in Latin America is available at <http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=1&pageTypeId=-8661&LANG=EN&channelId=-9749&channelPage=/ep/channel/default.jsp> (24.04.2008).

<sup>11</sup>Telefónica is present through its local subsidiaries in the following Latin American countries: Argentina, Brazil, Chile, Perú, Colombia, Mexico, Venezuela, Guatemala, Panamá, El Salvador, Nicaragua, Ecuador, Uruguay. <http://www.telefonica.es/investors/> (24.04.2008).

<sup>12</sup>*Above*.

On the other hand, Telecom Italia has almost 90 million clients in the world, less than half of Telefónica.<sup>13</sup>

In Argentina, the former State-owned telecommunications monopoly, Entel, was privatized in 1990. Entel was split in two companies, Telecom Argentina<sup>14</sup> providing local land line services in the northern part of the country, and Telefónica de Argentina serving the south of the country.<sup>15</sup> A joint venture between Telecom and Telefónica Argentina was initially established to provide long distance services.<sup>16</sup> At the moment, Telecom Italia provides Internet and fixed phone services in the country through its subsidiary Telecom Argentina<sup>17</sup> and mobile phone services through one of the four mobile phone operators of the country, Personal Telecom S.A.<sup>18</sup> On the other hand, Telefónica provides fixed and Internet access services through its subsidiary Telefónica Argentina.<sup>19</sup> Furthermore, it also operates in the mobile phone sector through its subsidiary Telefónica Moviles Argentina S.A., known under the brand name Movistar.<sup>20</sup> Movistar has 35.5% market share in the Argentinean mobile phone market.<sup>21</sup>

In Brazil, Telecom Italia is present in the mobile phone market through Tim Brazil, the second mobile phone operator in the country with 25.4% market share.<sup>22</sup> Telefónica is also present in the same sector through Vivo Brazil, which is a joint venture established in 2002 with Portugal Telecom, and is now the main mobile phone operator in the country.<sup>23</sup>

During the last years, both Telefónica and Telecom Italia decided to invest in Latin America because, like in other emerging economies, the demand for mobile phone and Internet access services is rapidly increasing in this area of the world. For instance, in 2006 the Argentinean market for mobile phone services grew 30% for voice related services, and

<sup>13</sup>InfoBAE Professional, 'Telefónica Obtuvo los Mayores Beneficios del Mundo'. Article published on 1.8.2007. InfoBAE Professional is an Argentina online newspaper specialised in economy issues. The articles are available online at <http://www.infobaeprofesional.com/interior/index?cookie> (24.04.2008).

<sup>14</sup>Telecom Argentina was sold to Nortel Inversora, a holding company where the initial main shareholder was France Telephone, which later sold its shares to Telecom Italia.

<sup>15</sup>OECD Secretariat, 'Competition Law and Policy in Argentina, a Peer Review'. Report published in 2006. The text of the report is available at <http://www.oecd.org/dataoecd/36/57/37970045.pdf> (24.04.08) page 40.

<sup>16</sup>Above.

<sup>17</sup><http://www.telecom.com.ar/hogares/prodyserv.htm> (18.4.07).

A description of the shareholding structure which connects Telecom Italia s.p.a. to Telecom Argentina s.a. is available at <http://www.telecom.com.ar/institucionales/estructura/estructura.html> (18.04.08).

Telecom Argentina has 4.2 million fixed telephone lines active and 783.000 ADSL clients in Argentina. Further information concerning Telecom Argentina's presence in the country is available at: Telecom Argentina S.A., 'Memoria y Estados Contables al 31 de Diciembre 2007'. The report is available at <http://www.telecom.com.ar/prensa/pdf/teco1207.pdf> (18.04.08) page 7.

<sup>18</sup><http://www.personal.com.ar/> (23.04.08).

<sup>19</sup>The shareholding structure which links Telefónica S.A. to Telefónica Argentina S.A. is described in: Telefónica de Argentina S.A., 'Memoria, Estado Contables y Reseña Informativa al 31 diciembre 2007'. The text of the report is available at <http://www.telefonica.com.ar/inversor/> (18.04.2008) page 9.

At 31st December 2007, Telefónica S.A. provided fixed phone connection to 4.9 million clients in Argentina and provided ADSL connection to 816.000 clients in the country. See financial report 2007, page 110.

<sup>20</sup><http://www.movistar.com.ar/> (18.4.07).

<sup>21</sup>Telefónica Moviles Argentina S.A., 'Memoria, Estado Contables y Reseña Informativa al 31 diciembre 2007'. The text of the report is available at [http://www.movistar.com.ar/empresa/inversores/documentos/07-12\\_moviles\\_esp.pdf](http://www.movistar.com.ar/empresa/inversores/documentos/07-12_moviles_esp.pdf) (18.4.2008) page 92. 35.5% market share is equivalent to 13.6 million clients in Argentina.

Movistar was established in 2005, following the acquisition in 2004 by Telefónica of the Argentinean subsidiaries of Bellsouth, Compañía de Radiocomunicaciones Moviles S.A. (Movicom) and Compañía de Teléfonos de la Plata S.A.

<sup>22</sup><http://www.mzweb.com.br/tim/rao2006/interna.asp?i=1&pag=01&secao=1> (18.04.08).

<sup>23</sup>For further information concerning the shareholding structure of Vivo see <http://vivo.mediagroup.com.br/RAO/2006/en/corporateRestructuring.asp> (18.04.08).

52% for transfer of data related services. The market of fast Internet access grew in the country with an increase of 32% in the number of ADSL users in comparison to the previous year.<sup>24</sup> According to 2006 Vivo's annual financial report, the Brazilian market for mobile phone services increased 15% and the same result is expected in the following year, due to the fact that there is '...still a growth potential, particularly in the lower income classes....'.<sup>25</sup> Due to this growing demand in the region, César Alierta, the chief executive officer (CEO) of Telefónica, in November 2007 stated that Telefónica will invest 16,000 million in Latin America by 2010; its goal being to increase its clients in the area to 170 million by that date.<sup>26</sup> In particular, the CEO added that Telefónica will focus its investments in the sector of mobile phones and Internet access services.<sup>27</sup>

### 3. THE STEPS OF THE TRANSACTION IN EUROPE

Through a press release on 28th April 2007, Telefónica S.A. announced to have achieved an agreement with Pirelli Co. S.p.A. for the purchase of its stakes in Olimpia S.p.A., the main shareholder of Telecom Italia S.p.A.<sup>28</sup>

Technically, the acquisition took place through the registration in Milan of a new company, Centotrenta 4/6 S.r.l., which was subsequently transformed and renamed into Telco S.p.A.. The latter was a joint stock company with five shareholders: Telefónica (the major shareholder, with 42.3% of the shares), Benetton (8.2%), two Italian banks Mediobanca (10.7%) and Intesa San Paolo (10.7%), and one Italian insurance company, Generali (28.1%). After its establishment, Telco had to acquire the entire capital of Olimpia from Pirelli.<sup>29</sup> Olimpia was previously the major shareholder of Telecom Italia having 18% of its shares. Moreover, Telco planned to acquire directly 5, 6% of the Telecom Italia's shares. As a result, Telco would acquire totally 23.6% of Telecom Italia's shares. Telecom Italia is a public company, where the shares are dispersed among several small shareholders.<sup>30</sup> Thus, Telefónica indirectly became one of the major shareholders in Telecom Italia, though its direct participation in the latter counted only for 6.9% of the shares, equivalent to 10% of the voting rights.<sup>31</sup>

Article 5 of the Shareholders' Agreement signed by Telco's shareholders stated that the parties of the agreement 'acknowledge, without prejudice of the independence and the autonomy of any of the Telecom Italia's management decisions, that the investment in

<sup>24</sup>InfoBae Professional, 'Mercado de Telecomunicaciones Crecerá un 23 por Ciento'. Article published on 11.11.2007.

<sup>25</sup><http://vivo.mediagroup.com.br/RAC/2006/en/phoneMarket.asp> (18.04.08).

<sup>26</sup>Invertia, 'Telefónica Anuncia Inversiones en Latinoamérica Hasta 2010'. Article published on 21.11.2007. Invertia is an Argentina online newspaper providing information concerning financial markets. Invertia is part of Terra, Telefónica's subsidiary in Argentina. Invertia articles are available at <http://ar.invertia.com/> (24.4.2008).

<sup>27</sup>InfoBAE Professional, 'Inversiones de Telefónica en Brasil superarán los 2.000 M. \$'. Article published on 13.12.2007.

<sup>28</sup>Telefónica's press release, 'Telefónica, Mediobanca, Generali, Intesa San Paolo y Benetton se Unen para Entrar en Telecom Italia'. 28th April 2008. The text of the press release is available at <http://www.telefonica.es/accionistaseinversores/esp/pdf/hr/hr070429.pdf> (24.4.2008).

<sup>29</sup>Further information concerning the financing of the transaction is available at <http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=5&pageTypeId=-8662&LANG=EN&channelId=-12842&channelPage=/ep/channel/default.jsp> (19.04.08).

<sup>30</sup>The shareholding structure of Telecom Italia updated to 31st March 2008 is the following one: Telco (24.5%), Telecom Italia (0.94%), Italian institutional investors (17.41%), foreign institutional investors (23.72%), Italian legal persons (8.32%), foreign legal persons (1.92%), Italian natural persons (23.12%), foreign natural persons (0.07%).

The shareholding structure of Telecom Italia is available at <http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=5&pageTypeId=-8662&LANG=EN&channelId=-12819&channelPage=/ep/TIinvestitori/TIazionisti.jsp> (19.04.08).

<sup>31</sup>Telefónica S.A., 'Communication to the Comisión Nacional del Mercado de Valores', Madrid, 8th May 2007. The text of the communication is available at <http://www.telefonica.es/accionistaseinversores/esp/pdf/hr/hr08052007.pdf> (31.1.2008).

Newco (later renamed Telco) implies a strategic vision and perspective. Therefore, the parties will favourably regard any strategic initiative that the Telecom Italia's and Telefónica's respective managements may jointly carry out, in their autonomy and independence.<sup>32</sup> This paragraph is a generic provision, which recognizes the potential benefits of the strategic partnership between Telecom Italia and Telefónica. According to the Shareholders' Agreement, each shareholder will appoint a number of Directors in Telco and Olimpia Boards of Directors proportional to their number of shares.<sup>33</sup> In particular, among the ten Directors of Telco Board, four of them would be appointed by Telefónica and the remaining six by the other shareholders.<sup>34</sup> Moreover, according to Article 5 of the Shareholders' Agreement, Telefónica had the right to appoint directly two of the Directors that Olimpia would present in the list of candidate Directors for the Telecom Italia's Board, which counts in total 17 Directors<sup>35</sup> and 1 secretary. Meanwhile, the other Telco's shareholders had the right jointly to present the names of three Directors. Finally, the Shareholders' Agreement granted to Telefónica the right to ask a de-merger of Telco in case another telecom operator purchases more than 10% of Telecom Italia's shares or if the latter sold its assets for a value of more than 4 billion.<sup>36</sup>

Following the conclusion of the agreement at the end of April 2007, the establishment of Telco and the acquisition of Olimpia's shares took place only at the end of October 2007.<sup>37</sup> In November 2007, Telco's Board was gathered and Telefónica appointed two Directors in the new Board of Telecom Italia. César Alierta, Telefónica's CEO, and Julio Linares were appointed as Directors in Telecom Italia's Board. The fact that Telefónica's CEO decided to sit personally in Telecom Italia's Board<sup>38</sup> is a clear sign of the interest of the Spanish telecom operator for the Italian partner.

The last step of the transaction took place at the end of November 2007, when Telco's Board of Directors decided to merge Telco and Olimpia into one company.<sup>39</sup> This last transaction shortened the ownership chain which connected Telefónica to Telecom Italia.

The six months period of implementation of the agreement (from the end of April until the end of October 2007) was necessary due to the need to ask authorization from the competition authorities of the countries where Telecom Italia and Telefónica operated directly or through their local subsidiaries. On 11th May 2007, the transaction was informally notified to the European Commission. The lawyers representing Telco asked the Directorate General (DG) for Competition if the transaction fulfilled the conditions to be considered a real concentration, and thus being formally notified under Article 4(1) of the Regulation 139/2004 EC.<sup>40</sup> Telco's lawyers argued that the number of shares of Telefónica

<sup>32</sup>Above.

<sup>33</sup>Shareholders Agreement signed on 28th April 2007 between Telefónica S.A., Assicurazioni Generali S.p.A., Sintonia S.A., Intesa San Paolo S.p.A. and Mediobanca S.p.A. Article 1(1). The text of the agreement is available at [http://www.telefonica.es/accionistaseinversores/ing/pdf/070507\\_shareholders\\_agreement.pdf](http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_shareholders_agreement.pdf) (24.4.2008).

In relation to the conclusion of the agreement for the establishment of Telco, see also the By-Laws and the Co-Investment Agreements among Telco shareholders. The text of the agreements is available at [http://www.telefonica.es/accionistaseinversores/ing/pdf/070507\\_by-laws.pdf](http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_by-laws.pdf) (24.4.2008; By-Laws Agreement); [http://www.telefonica.es/accionistaseinversores/ing/pdf/070507\\_co-investment\\_agreement.pdf](http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_co-investment_agreement.pdf) (24.4.2008; Co-Investment Agreement).

<sup>34</sup>Above Article 1 (1) (b).

<sup>35</sup>Above Article 5.

<sup>36</sup>Above Article 6.

<sup>37</sup>Invertia, 'Telefónica Sienta Quatro Directivos en el Consejo que Controla Telecom Italia'. Article published on 25.10.2007.

<sup>38</sup>Invertia, 'Allerta Anuncia que Sentará en el Consejo de Telecom Italia'. Article published on 30.10.2007.

<sup>39</sup>InfoBAE Professional, 'Aprueban Fusión de Telefónica con Telecom Italia'. Published on 29.11.2007.

<sup>40</sup>Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24, 29.1.2004, pages 1–22. Article 4 (1).

in Telecom Italia was limited and therefore, the transaction did not lead to change of control on a lasting basis under Article 3 (1) (b) Regulation 139/2004 EC.<sup>41</sup> The Commission analysed the case according to the Commission Notice on the Concept of Concentration.<sup>42</sup> In a letter sent to the parties on 12 June 2007, the Commission stated that in its opinion the acquisition by Telco of Olimpia did not trigger a notification under Regulation EC 139/2004.<sup>43</sup> The Commission concluded that the number of shares of Telefónica in Telecom Italia was too limited to create sole control of the Spanish telecom operator in the Italian company.<sup>44</sup> Furthermore, the Commission also excluded the hypothesis of the acquisition of joint control by Telco shareholders in Telecom Italia. Telco, in fact, did not enjoy particular veto rights on important decisions concerning the budget or the management of the shares of Telecom Italia<sup>45</sup> and it was argued that the 23.6% of Telco's shares in Telecom Italia was not sufficient to allow Telco to exercise a decisive influence on the management of Telecom Italia.

In Europe the transaction was almost unnoticed,<sup>46</sup> not only due to the informal decision of the European Commission, but also due to the low impact of this acquisition on the level of competition in the European telecom markets. Telefónica and Telecom Italia are in fact, direct competitors in Europe in only a few relevant markets. For instance, they both operate in Germany in the market for Internet access services, where Telefónica is present through the subsidiary O2,<sup>47</sup> while Telecom Italia provides ADSL services in some German cities through its subsidiary Hansenet, under the brand name of Alice.<sup>48</sup> However, due to the low market share of Telefónica and Telecom Italia in these few relevant markets where they are direct competitors, the transaction did not create particular horizontal overlaps between the two companies in Europe. As a consequence, even if the European Commission had required from the parties a formal notification under Regulation 139/2004 EC, it would have hardly applied any remedy to the transaction.

#### 4. BRAZIL: DIVESTITURES OR BEHAVIOURAL REMEDIES?

While in Europe the transaction passed almost unnoticed, the situation was different on the other side of the Atlantic where, as mentioned in the previous section, both companies invested heavily in the past years. In Brazil, Telecom Italia was the second mobile phone operator in the country through Tim Brazil. The latter, through its national network, had 25.8% market share in the market of services for mobile phones. On the other hand, Telefónica was active in the country through the joint venture Vivo, jointly controlled with Portugal Telecom. Vivo was the main mobile phone operator in the country with 28.4% market share. The acquisition of Olimpia by Telco created indirectly a shareholding link between Tim Brazil and Vivo, which jointly had 53% market share in

<sup>41</sup>Telephone discussion held on 10th April 2008 with the officer of the European Commission, DG Competition, Information, Communication and Media unit, who was in charge of the Telecom Italia-Telefónica case. The officer asked to remain anonymous.

<sup>42</sup>Commission Notice on the Concept of Concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ C 66, 2.3.1998, pages 5–13

<sup>43</sup>The letter is not publicly available. Access to the letter has been obtained by the author through the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. OJ L 145, 31.5.2001, pages 43–48.

<sup>44</sup>Above Commission Notice on the Concept of Concentration, paragraph 14.

<sup>45</sup>Above Commission Notice on the Concept of Concentration, paragraph 21.

<sup>46</sup>One of the few articles written on this topic in the European press is the following one: Olivieri A. 'Telco, il Riassetto Entro Luglio'. Article published on Il Sole 24 Ore on 14.06.2007. The articles of Il Sole 24 Ore are available at <http://www.ilsole24ore.com/> (24.4.2007).

<sup>47</sup><http://www.o2online.de/> (24.4.2008).

<sup>48</sup><http://www.hansenet.de/index.html> (24.4.2008).

ADSL Alice is available in Hamburg, Munich, Berlin, Stuttgart, Frankfurt, Lübeck. The company has only 684.000 subscribers in the country  
<http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=1&pageTypeId=8661&LANG=EN&channelId=-9749&channelPage=/ep/channel/default.jsp> (24.4.2008).

the Brazilian mobile phone market. Only the third mobile phone operator in Brazil, Claro, with 24% market share would have remained fully separated from Tim Brazil and Vivo.<sup>49</sup>

The Brazilian Competition Law of 8884/94 provides a regime of merger control.<sup>50</sup> According to Article 54 (3), 'any form of economic concentration' has to be notified to the Secretariat for Economic Law (*Secretaria de Direito Econômico*, SDE), part of the Ministry of Justice, at least fifteen days after the completion of the transaction (a post-merger notification). The notification threshold provides that the total market share of the merging parties should account for at least 20% of the relevant market or the total annual turnover of the participants in the transaction being equivalent to 400 million of Reais.<sup>51</sup> The SDE sends afterwards the file to the Brazilian competition authority, the Administrative Council of Competition Protection (*Conselho Administrativo de Defesa Econômica*, CADE) and to the Secretariat of Economic Surveillance (*Secretaria de Acompanhamento Econômico*, SEAE), part of the Ministry of Finance. <sup>52</sup>SEAE and SDE give an opinion to CADE about the concentration from economic and legal perspective. Nevertheless, the final decision concerning the concentration has to be taken by CADE.

An exception from the system described above exists in the field of telecommunications, where according to Article 7 Lei 9472/97 it is the National Agency for Telecommunications (*Agência Nacional de Telecomunicações*, ANATEL) to have jurisdiction over concentrations involving telecom operators<sup>53</sup>. However, ANATEL will have to notify later its decision to CADE.<sup>54</sup> In the past, this provision was considered ambiguous because it was unclear whether ANATEL's decision was simply an opinion for CADE, or it should be considered as the final decision concerning the concentration. This conflict of jurisdiction was solved in 2000, when the two institutions established a system of internal cooperation.<sup>55</sup> According to that system, ANATEL conducts an investigation of the concentration concerning telecom operators and it forwards an opinion to CADE, which takes the final decision. However, usually CADE follows ANATEL's opinion.

According to Article 7 Lei 9472/97, 'the general rules governing the protection of the economic order shall apply to the telecommunications industry when they do not conflict with the provisions of this act'.<sup>56</sup> This implies that ANATEL will have to analyse the concentration in accordance with the principles of the Competition Law 8884/94, part of the 'rules governing the protection of the economic order.' ANATEL will be able to impose all the required remedies on the concentration, in order to preserve the level of competition

<sup>49</sup><http://www.claro.com.br/portal/home.do?method=showHome&cidlocal=50#> (24.04.2008).

<sup>50</sup>Brazilian competition law, Law n.8884/94, adopted on 6th June 1994. A translation in English of the law is available at [http://www.globalcompetitionforum.org/regions/s\\_america/Brazil/Legisla%E7%E3o%20Antitruste%20em%20ingl%EAs.PDF](http://www.globalcompetitionforum.org/regions/s_america/Brazil/Legisla%E7%E3o%20Antitruste%20em%20ingl%EAs.PDF) (18.04.2008). For a comment of the Law 8884/94 see Dallal S. 'Competition Law in Brazil', (1995) Vol. 16 *European Competition Law Review* 255-261.

<sup>51</sup>Originally, the turnover taken in consideration for the threshold of notification was the worldwide turnover. As a consequence, a huge number of M&A which did not have a direct impact on the Brazilian market had to be notified to the SDE. However, on 19th January 2005 CADE changed its understanding on the notification thresholds. It decided that the turnover could be calculated only in relation to the sales on the Brazilian market.

<sup>52</sup>Above Law 8884/94, Article 54 (4).

<sup>53</sup>Lei n. 9472, de 16 de Julho de 1997, *Dispõe Sobre a Organização dos Serviços de Telecomunicações, a Criação e Funcionamento de um Órgão Regulador e Outros Aspectos Institucionais, Nos Termos da Emenda Constitucional n° 8, de 1995*. Article 7 (1). The text of the legislation is available at [http://www.planalto.gov.br/ccivil\\_03/Leis/L9472.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9472.htm) (24.4.2008).

<sup>54</sup>Above Law 9472/97, Article 7 (3).

<sup>55</sup>OECD Secretariat, Brazil – Peer Review of Competition Law and Policy. Study published in 2005. The text of the report is available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf> (18.04.08).

<sup>56</sup>'As normas gerais de proteção à ordem econômica são aplicáveis ao setor de telecomunicações, quando não conflituarem com o disposto nesta Lei'.

in the telecom market, including the imposition of limits on the acquisition and transfer of transmission rights for the telecom operators.<sup>57</sup> One specificity of the system of merger control provided by *Lei 9472/97* is that its scope of application is broader than that one included in the Brazilian competition Law of 1994. In fact, it does not contain specific turnover thresholds of notifications; every kind of economic concentration (*'qualquer forma de concentração econômica'*) among telecom operators needs to be notified to ANATEL.<sup>58</sup> In particular, every kind of modification in the shareholding structure of the telecommunications companies operating in Brazil (*'qualquer forma de agrupamento societário'*) has to be notified. The existence of this specific system of merger control in the field of telecommunications explains why the acquisition of Olimpia by Telco was notified to ANATEL. The argument that the transaction did not trigger a formal notification, because there was no change of control in Telecom Italia, was not valid in Brazil.

ANATEL authorized the acquisition of Olimpia by Telco on 23rd October 2007. It is important to point out this date, because the transaction was implemented through the transfer of Olimpia's shares from Pirelli to Telco few days after ANATEL's decision. ANATEL was, thus, the last competition authority to which the acquisition of Olimpia by Telco was notified. ANATEL imposed 28 restrictions to the transaction which aimed at keeping Tim Brazil and Vivo legally separated, and thus competitors on the market.<sup>59</sup> According to Antonio Domingos Teixeira Bedran, the *Conselheiro* in charge of elaborating the draft resolution for the ANATEL's *Conselho Diretor*, 'such as approved, the transaction preserves the level of competition in the Brazilian market (*'tal como aprovada, a anuência prévia preserva o Mercado concorrencial no Brasil'*).<sup>60</sup> However, the question is whether these 28 remedies are sufficient to prevent any potential anti-competitive effect caused by this indirect structural link established between Tim Brazil and Vivo. The 28 conditions imposed by ANATEL may be summarized as follows:<sup>61</sup>

- Prohibition for the Directors appointed by Telefónica in the Boards of Telco, Olimpia and Telecom Italia to take part in decisions concerning the Brazilian telephone market are taken.
- Prohibition for Telefónica to appoint any Director in the Boards of any of Telecom Italia's subsidiaries in Brazil.
- Prohibition for Tim Brazil and Vivo to start business relations in a manner different from the normal business relations between the two competitors. In particular, it was forbidden to finance, to provide loans, to transfer assets, technologies, human resources to each other. Moreover, it was forbidden to undertake common advertising campaigns.
- Prohibition for Telefónica to increase the number of its shares in Tim Brazil.
- Obligation to indicate in the agenda of the Boards of Directors of Telco, Olimpia and Telecom Italia the topics that were related to the Brazilian market (on which the Directors appointed by Telefónica could not vote).
- By 30 days after the decision, the companies were required to submit to ANATEL proof that the prohibitions and obligations mentioned above had been implemented in their corporate structure.

Finally, ANATEL's *Conselho Diretor* decided to review the case six months after the decision, monitoring how Telefónica and Telecom Italia had implemented the remedies imposed in the meantime.<sup>62</sup>

<sup>57</sup> Above *Lei 9472/1997*, Article 7(1).

<sup>58</sup> Above *Lei 9472/1997*, Article 7 (1).

<sup>59</sup> Invertia, 'Brasil impone restricciones a Telefónica para entrar en Telecom Italia'. Article published on 23.10.2007.

<sup>60</sup> ANATEL's press release, 'ANATEL Concede Anuência Prévia a Acordo Societário entre Tim e Vivo'. Press release of 23.10.2007. The text of the press release is available at [http://www.anatel.gov.br/Portal/exibirPortalInternet.do#\(24.4.2008\)](http://www.anatel.gov.br/Portal/exibirPortalInternet.do#(24.4.2008)).

<sup>61</sup> Above ANATEL's press release.

<sup>62</sup> ANATEL, *Ata da 457ª Reunião do Conselho Diretor*, 23.10.2007. Paragraph 3.8, *Anuência Prévia; Interessados: TIM e TELEFÔNICA; Processo n.º 53500.014598/2007*. The text of the document is available at <http://www.anatel.gov.br/Portal/documentos/207496.pdf?numeroPublicacao=207496&assuntoPublicacao=Ata%20da%20457%AA%20reuni%20do%20do%20Conselho%20Diretor&caminhoRel=Cidadao-Sobre%20a%20Anatel-Sobre%20o%20Conselho%20Diretor> (24.4.2008).

The 28 conditions introduced a legal separation between Tim Brazil and Vivo. Their common goal was to ensure that the companies would be managed separately. On the other hand, no divestiture aiming at decreasing Tim Brazil/Vivo market power in the Brazilian mobile phones market was imposed. It should be noticed that the majority of the remedies imposed by ANATEL had a behavioural nature.

One of the most important behavioural remedies was the obligation for the Directors appointed by Telefónica in the Boards of Telco, Olimpia and Telecom Italia, not to vote when the topic of discussion was related to the Brazilian telecom market. That obligation was already included in Article 5 of the Telco Shareholders' Agreement.<sup>63</sup> According to that article, the Directors appointed by Telefónica in Telco, Olimpia and Telecom Italia were required neither to vote any resolution nor to participate in discussions related to 'the policies, management and operations of companies directly or indirectly controlled by Telecom Italia providing their services in countries where regulatory and legal restrictions or limitations for the exercise of voting rights by Telefónica (as indirect and ultimate shareholder of such companies) are in force'. Due to the focus of Telecom Italia and Telefónica's investments in Latin American countries it is obvious that this provision was inserted in the Shareholders' Agreement in order to face preventively the concerns which were expected to be raised by some competition authorities in South America, like ANATEL. The question is whether this obligation would be sufficient to keep the management of the two companies separate. It is a generic obligation and there is no form of control ensuring that this obligation will be enforced.<sup>64</sup> In fact, ANATEL will not have any power to control the fulfilment of this obligation, due to the fact that Telecom Italia's Board meetings take place in Italy, outside of ANATEL's jurisdiction.

Another risk is that the Directors appointed by Telefónica in the Board of Telecom Italia may transmit confidential business information to their mother company. The latter in fact, by sitting in the Board of Telecom Italia, will have access to the business strategy plans of the company. The fact that César Alierta, Telefónica's CEO, sits in Telecom Italia Board since November 2007 makes this not only a theoretical danger.

ANATEL's decision not to impose any divestiture can be explained in the light of the pressure to which ANATEL was probably subject to by Telefónica and Telecom Italia during the merger review. ANATEL was in fact, the last regulatory authority to which the acquisition was notified. The transaction was implemented on 30th October 2007, a few days after ANATEL's resolution. What would have happened if ANATEL had decided to impose tougher remedies on the transaction? In any case, ANATEL could not block the acquisition. In fact, the only real acquisition took place in the Milan stock exchange market, when Telco acquired Olimpia's shares from Pirelli on 30th October 2007. However, the acquisition in Italy could not be prevented, because it took place outside of ANATEL's jurisdiction. Perhaps, ANATEL could impose structural remedies at a local level, on Tim Brazil/Vivo. For instance, it could ask Tim Brazil/Vivo to sell some of their transmission licenses or part of their assets to third operators, in order to decrease their market power. However, in real terms, this could not be an option because it would not be acceptable for the merging parties. In fact, during the entire notification process Telefónica has clearly stated that it would never accept to divest any of its assets in Latin America in order to satisfy

<sup>63</sup> Above Telco Shareholders' Agreement, Article 5

<sup>64</sup> InfoBAE Professional, 'Telefónica toma recaudos para ingresar en Telecom'. Article published on 12.11.2007.

the concerns of the local competition authorities.<sup>65</sup> In case of divestiture, Telefónica would leave the country where such structural remedies were imposed.<sup>66</sup> From a business perspective this position is understandable, due to the fact that any divestiture imposed by a regulatory authority risks to undermine the business rationale of the transaction. Although this threat probably would never be implemented in practice, it shows the bargaining power that corporations have with the local competition authorities.

In conclusion, the Brazilian case shows the difficult situation in which the competition authorities of the emerging markets are often placed in when they have to review a cross-border merger. Due to the pressure from the merging parties and the lack of jurisdiction in the transaction's country of origin, the competition agencies of the developing countries are often unable to enforce effectively their merger control systems.

##### 5. ARGENTINA: MERGER CONTROL OR PROBLEM OF MINORITY SHAREHOLDING?

As explained in the previous section, the acquisition of Olimpia by Telco was notified to ANATEL. If in Brazil the main issue was which remedies could be imposed on the transaction by ANATEL, in Argentina the issue was the lack of notification of the acquisition to the *Comisión Nacional de Defensa de la Competencia* (CNDC), the Argentina competition authority.

There are two criteria to trigger a merger notification according to the Argentinean Competition Law 25.156/99: the change of control in the acquired company<sup>67</sup> and the turnover of the merging parties in Argentina in the previous financial year has to be above 200 million pesos.<sup>68</sup> The time-limit of notification is unclear. According to the Decreto 89/2001, which contains some rules concerning the enforcement of the Law 25.156/99, the notification has to take place by one week after the signing the merger agreement or one week after the transfer of the share in case of an acquisition (one week after the acquisition is '*perfeccionada*').<sup>69</sup> This creates a complex system, which requires an *ex-ante* notification for mergers, while an *ex-post* notification for acquisitions. Unlike Brazil, in Argentina the competition authority has clearly a full jurisdiction over all concentrations concerning companies operating in the network industries. The competition authority is required to ask for an opinion to the regulatory authority, but the opinion is not binding and the case is analysed according to the standard merger control procedure.<sup>70</sup>

The time frame of notification is not the only ambiguous point of this legislation. The Law 25.156/99 established a new and independent Competition Tribunal (*Tribunal de Defensa de la Competencia*).<sup>71</sup> The latter should be an independent body with its own budget,

<sup>65</sup>InfoBAE Professional, 'Telefónica sigue a la espera de la decisión de Argentina y Brasil'. Article published on 8.10.2007.

<sup>66</sup>Above article of InfoBAE Professional on 8.10.2007.

<sup>67</sup>*Ley 25.156 de Defensa de la Competencia*, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm> (18.04.2008), Article 6.

<sup>68</sup>Above Article 8. This Article was amended by Decreto N° 396/2001 of 5.4.2001, Article 1. The text of the decree is available at

[http://infoleg.mecon.gov.ar/infolegInternet/buscarNormas.do?tipo=Decreto&nro=396%2F2001&INFOLEG\\_OL\\_D\\_QUERY=true](http://infoleg.mecon.gov.ar/infolegInternet/buscarNormas.do?tipo=Decreto&nro=396%2F2001&INFOLEG_OL_D_QUERY=true) (24.4.2008).

Originally Article 8 contained a worldwide turnover threshold, but it triggered too many notifications which did not have an impact on the Argentinean market. The decree 396/2001 modified the turnover threshold from worldwide to a national one.

<sup>69</sup>*Decreto 89/2001, Apruébase la Reglamentación de la Ley N° 25.156*, Annex. The text of the decree is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm> (18.04.2008).

<sup>70</sup>Above Law 25.156/99, Article 16.

<sup>71</sup>Above Law 25.156/99, Article 17.

without political influence from the other ministries. However, up to now, nine years after the adoption of the Law, the Competition Tribunal has not been established. The Law 25.156/99 is enforced by the National Commission for the Protection of the Competition (*Comisión Nacional de Defensa de la Competencia*, CNDC) which was established by the previous competition Law 22.280/80.<sup>72</sup> The CNDC is part of the Ministry of Economy. It conducts the investigations concerning conduct cases and the merger review and it provides an opinion to the Secretary for Internal Market (*Secretario del Comercio Interior*), who takes the final decision.<sup>73</sup> This institutional structure leads easily to a politicization of the competition law cases. This aspect should be taken in consideration when analyzing the Telecom Italia-Telefónica case.

As mentioned in the previous section, Telecom Italia operates in Argentina through its subsidiaries Telecom Argentina and Personal Telecom, while Telefónica is present in the country through Movistar and Telefónica Argentina. From a substantive point of view, the indirect horizontal overlap between the local subsidiaries of Telecom Italia and Telefónica involved a number of different telecom markets, including one for mobile phone and ADSL services. The fact that two main telecom operators established a structural link in Europe was perceived by part of the public opinion and by the Argentinean Government as a threat to the level of competition in the telecom sector in the country. Since April 2007, there has been a broad debate in Argentina concerning the effect of the transaction on the telecom sector in the country. The two positions which emerged among the different stakeholders can be summarized in the words of Federico Pinedo, former Director of the National Commission for Communications (*Comisión Nacional de Comunicaciones*, CNC), and Joel Romero, consultant for Llena y Asociados.<sup>74</sup> While according to the first one the acquisition strengthened a monopoly in Argentina (*'consolida un monopolio en Argentina'*), the second one argued that the holding of Telefónica in Telecom Argentina was indirect. In fact, Telecom Italia controls Telecom Argentina through two holding companies, Sofora and Nortel Inversora S.A. It owns 50% of the shares of Sofora, while the remaining 48% are controlled by the Werthein Group, an Argentinean family of investors. Sofora controls 67% of Nortel Inversora, while the latter controls 54.74% of the Telecom Argentina's shares.<sup>75</sup> Therefore, strictly speaking, Telecom Italia has the control both of Sofora and Nortel Inversora, but its percentage of shares is only slightly above 50%. According to Telefónica, its number of shares in Telecom Argentina, due to this long chain of ownership, would be limited to 1.5%.<sup>76</sup> Therefore, if the European Commission did not have a reason to consider that the acquisition of Olimpia by Telco could lead to change of control in Telecom Italia, the CNDC had even less reasons to argue that there was a change of control in Telecom Argentina, under the conditions provided by Article 6 Law 25.156/99. For that reason, the acquisition should not be notified to the CNDC.

At the end of August 2007, when it became clear that Telefónica would not notify the transaction to the CNDC, the latter opened an investigation to verify whether Telefónica had breached its duty to notify the acquisition under Article 8 Law 25.156/99.<sup>77</sup> During the month of September 2007, the CNDC organised a number of oral hearings, inviting the key stakeholders involved in the transaction to submit their opinion. According to Gerardo Werthein, vice-president of Telecom Argentina and representative of Werthein Group, who

<sup>72</sup>Ley 22.262, *Ley de Defensa de la Competencia*, adopted in 1980. The text of the law is available at <http://www.poderdelconsumidor.com.ar/legislacion/ley22262.htm> (18.04.2008).

<sup>73</sup><http://www.mecon.gov.ar/secdef/default1.htm> (18.4.2008).

<sup>74</sup>Invertia, 'Divide Opiniones Entrada de Telefónica a Telecom'. Article published on 2.5.2007.

<sup>75</sup>InfoBAE Professional, 'Inminente definición por ingreso de Telefónica en Telecom'. Article published on 24.9.08.

<sup>76</sup>InfoBAE Professional, 'Crece la Discusión por el Ingreso de Telefónica en Telecom'. Article published on 15.10.07.

<sup>77</sup>InfoBAE Professional, 'Defensa de la Competencia investiga a Telefónica'. Article published on 24.8.2007.

was against the acquisition due to his holding in Sofora together with Telecom Italia, the transaction would have brought a change of control in Telecom Argentina.<sup>78</sup> Third parties were also involved to participate in this debate. For instance, on 20th October 2007 five Argentinean consumers' associations submitted a petition to the CNDC, pointing out the risk that the indirect merger between Telecom Argentina and Telefónica Argentina/Movistar in the long term would cause an increase in the telecom tariffs in Argentina.<sup>79</sup> On 23rd October 2007, Claro, a competitor of Telecom Personal and Movistar in the market of mobile phone services,<sup>80</sup> submitted a petition to the CNDC against the acquisition.

Before imposing any fine on the merging parties under Article 46 (d) Law 25.156/99 for not having notified the concentration, the Argentinean Government decided to send two observers to Telecom Argentina with the task to study whether the acquisition of Olimpia by Telco had caused a change of control in Telecom Argentina. On 16th October 2007, the Minister for Economy, Miguel Peirano, and the Minister of State Planning (*de Planificación*), Julio de Vido, announced to the press the names of the two observers: Marcelo Goldberg, from the CNDC and Guillermo Banegas, officer in the CNC. Their task was to study the long term industrial plans of the company and to analyse the contractual arrangements between Telecom Argentina and Telefónica Argentina/Movistar. Their mission was originally scheduled to last two months.<sup>81</sup> The Government's decision to send the two observers marked the beginning of the politicization of the Telecom Italia-Telefónica case. It became unclear whether the CNDC would have evaluated the case only in the light of the change of control in Telecom Argentina or if the issue of the change of control would be exploited to justify a political decision concerning the transaction. As mentioned above, the observers were supposed to complete their investigation by the end of December 2007.<sup>82</sup> However, in December the period of investigation has been prolonged for another two months.<sup>83</sup> In the meantime, there have been political elections in Argentina, in which the winner was Cristina Kirchner, the wife of the former President Néstor Kirchner.<sup>84</sup> One of the last acts of Néstor Kirchner as a President of Argentina was to meet César Alierta on 7th December 2007, to discuss the Telecom Italia-Telefónica case.<sup>85</sup> However, Kirchner preferred to leave his wife to take the political decision on the issue.

At the beginning of March 2008 the two observers submitted their report. The report is not public but, according to the Argentinean press, the report apparently concluded that there had been a change of control in Telecom Argentina and that the transaction should have been notified.<sup>86</sup> The main elements on which the observers based their evaluation were the public statements of César Alierta during the previous months concerning the strategic importance of the transaction and, the functioning of the Board of Directors of Telecom Argentina after the transaction. The report is not binding and at the moment it is unclear how the Argentinean Government will decide to act. The entire process has been non transparent. According to a number of commentators active as competition lawyers in Argentina,<sup>87</sup> it is obvious that the report was based more on political, rather than on competition law considerations. On the other hand, the market overlap caused by the transaction is also evident, like in the Brazilian case.

<sup>79</sup>InfoBAE Professional, 'Asociaciones, en alerta por monopolio Telefónica-Telecom'. Article published on 20.10.2007.

<sup>80</sup><http://www.telmex.com/ar/esto/index.html> (04.02.2008).

<sup>81</sup>InfoBAE Professional, 'Gobierno interviene para evitar monopolio en Telefónicas'. Article published on 16.10.07. Invertia, Argentina Analiza 'Riesgo de Monopolio por Avance de Telefónica Sobre Telecom'. Article published on 16.10.2007.

<sup>82</sup>InfoBAE Professional, 'Atrasan Definición Sobre Ingreso de Telefónica en Telecom'. Article published on 21.12.2007.

<sup>83</sup>Above article of InfoBAE Professional published on 21.12.2007.

<sup>84</sup>InfoBAE Professional, 'Telcos: Cristina Hereda una Agenda de Temas Pendientes'. Article published on 10.12.2007.

<sup>85</sup>Invertia, 'Kirchner-Telefónica, el Presidente Está Reunido con Titular de Telefónica'. Article published on 7.12.2007.

<sup>86</sup>InfoBAE Professional, 'Veedores avalan postura de Wertheim por Telecom'. Article published on 8.3.2008.

<sup>87</sup>This is the result of two interviews held by the author with two competition lawyers practising in Buenos Aires, who prefer to remain anonymous.

According to Sebastian García Menéndez, a lawyer in the law firm García Menéndez Abogados in Buenos Aires, even if the transaction did not create a change of control in Telecom Argentina to trigger a merger notification, there is a danger of transferring business information from Telecom Italia to Telefónica, due to the minority shareholding of the latter in the Italian telecom operator.<sup>88</sup> The minority shareholding may lead in the long term to anti-competitive practices (e.g. forms of tacit collusion between the tariffs applied by Telecom Argentina and Telefónica Argentina).<sup>89</sup> The Argentina Competition Law does not include any specific provision concerning minority shareholding. On the other side of the Atlantic, the European Court of Justice (ECJ) recognized in the *British-American Tobacco*<sup>90</sup> case, that the acquisition of a minority shareholding by a company in a competitor is not per se an infringement of Article 81 Treaty of the European Community (TEC).<sup>91</sup> However, the minority shareholding could have a negative impact on the level of competition between the two companies if it creates a structure which facilitates the form of cooperation between the two companies.<sup>92</sup> Furthermore, the minority shareholding may have an anti-competitive effect where the agreement gives the possibility to the acquiring company to reinforce its position in a later stage; when the acquisition of the minority shareholding is a first stage towards the full control of the company.<sup>93</sup> The ECJ recognized that there are no standard solutions in this area; every case should be analysed on an *ad hoc* basis. In its analysis, the European Commission should take into consideration especially the structure of the relevant market. In oligopolistic markets with high entry barriers, companies will be more likely to cooperate and exchange information exploiting the structural link created by the minority shareholding, rather than competing with each other.<sup>94</sup> According to Ezrachi and Gilo, a minority shareholding in a competitor may encourage forms of tacit collusion.<sup>95</sup> The latter is usually not sustainable for a long period of time; in fact, 'it is enough that for at least one firm the short-term profit during a price cut outweighs the long-term losses from a price war in order for tacit collusion to cease.'<sup>96</sup> However, when a firm invests in a rival in an oligopolistic market, '...the investing firm may become less eager to price-cut on a collusive price. This is because it would absorb a portion of the rival's losses from this price-cut.'<sup>97</sup>

In the past, the European Commission relied on this case law to sanction a number of minority shareholdings under Article 81(1) EC, by imposing either behavioural or structural remedies (e.g. asking the divestiture of the minority shareholding).<sup>98</sup> Though Argentina Competition Law does not contain an explicit provision concerning minority shareholding, this practice could fall under the general terms of Article 1 of the Law 25.156, which prohibits every agreement which has the effect or the intention to limit or restrict the level of competition in the relevant market, by creating a prejudice to the 'general economic interest' ('pueda resultar perjuicio para el interés económico general'). Article 2 of the Law lists a number of practices which are considered anti-competitive, but the list is not exhaustive. A practice not listed in Article 2 may still fall in the broader category

<sup>88</sup>InfoBAE Professional, 'Telefónica, Telecom y el Minority Shareholdings'. Article published on 7.11.2007.

<sup>89</sup>Interview held by the author with Sebastian Garcia Menendez on 23.04.2008 in Buenos Aires.

<sup>90</sup>Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities* [1987] ECR 04487.

<sup>91</sup>Above Joined Cases 142 and 156/84, paragraph 37.

<sup>92</sup>Above Joined Cases 142 and 156/84, paragraph 38.

<sup>93</sup>Above Joined Cases 142 and 156/84, paragraph 39.

<sup>94</sup>Above Joined Cases 142 and 156/84, paragraph 40.

<sup>95</sup>Ezrachi A. Gilo D, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006) Vol. 26(2) Oxford Journal of Legal Studies 327-349.

<sup>96</sup>Above page 332.

<sup>97</sup>Above page 333.

<sup>98</sup>Moavero Milanese E., Winterstein A. 'Minority Shareholdings, Interlocking Directorships and the EC Competition Rules – Recent Commission Practice' (2002) Vol. 1 Competition Policy Newsletter 15-18. The Competition Policy Newsletter is published by the European Commission. It is available at <http://ec.europa.eu/comm/competition/publications/cpn/> (24.4.2008).

of anti-competitive practices provided by Article 1. The fact that the relevant markets in the telecom sector in Argentina are oligopolistic and the fact that Telefónica has the right under Telco Shareholders' Agreement to appoint two Directors in Telecom Italia, could be good reasons for considering the minority shareholding of Telefónica in Telecom Italia prohibited under Article 1 Law 25.156/99. However, even if in the future the CNDC decided to follow this approach and to challenge the minority shareholding of Telefónica in Telecom Italia, the question would be which remedies the CNDC could advise the *Secretario del Comercio Interior* to adopt under the Law 25.156/99. In theory, every kind of remedy would be applicable under Article 35 of the Law 25.156/99, both behavioural and structural remedies. However in practice, like in the Brazilian case, the range of remedies would be very limited. As we saw in the preceding paragraphs, the transfer of Olimpia's shares from Pirelli to Telco took place at the end of October; after the acquisition has already been implemented. How could the Argentinean competition authorities ask Telefónica to divest its minority shareholding in Telco? Neither Telefónica nor Telecom Italia directly operates in Argentina. Their subsidiaries in the country are not directly linked by any cross-shareholding. Perhaps, behavioural remedies could be imposed as well, but they would be limited to the activities of Telecom Argentina and Telefónica/Movistar. Like in the case of Brazil, the enforcement of behavioural remedies imposed on Telco, Olimpia and Telecom Italia could not be effectively checked, due to the geographical limits of the competition authority's jurisdiction.

At the moment, the case is still open in Argentina. Probably, there will be a Government final decision on the case. However, every remedy imposed will have limited scope, because it will only concern the subsidiaries of Telecom Italia and Telefónica in Argentina, the last rings of the long chain.

## 6. CONCLUSIONS

In the previous pages the Telecom Italia-Telefónica case was analysed, with a particular focus on the effects of the transaction in the telecom markets of two emerging markets, Brazil and Argentina. A number of conclusions can be drawn from this case study. First of all, in multi-jurisdictional mergers the competition agencies of the developing countries are usually the last ones to which the transaction is notified by the merging parties (like the case of Brazil). The cross-border transactions are usually notified first in Europe or in the USA, and then in the other countries of the world.

The remedies imposed by ANATEL in Brazil show how limited the range of measures that the competition agencies of the emerging markets may adopt when cross-border mergers are involved. They do not have any territorial jurisdiction on the holding companies; thus, they cannot solve the competition concerns at the roots of the problem. They can just intervene at the local level, by imposing remedies on the local subsidiaries. However, as we saw in the case of Brazil, these competition authorities usually cannot impose divestitures or other structural remedies aiming at decreasing the market power of the subsidiaries. Such measures would not be tolerated by the merging parties and the latter

could threaten the local authorities to withdraw their investment from the country. Divestitures, if imposed, could discourage other foreign investors to enter in that market. In conclusion, the competition agencies of the emerging markets, even when they want to intervene, they often do not have any other choice, from a political rather than legal point of view, than imposing behavioural remedies on the merging parties. However, as explained above, behavioural remedies do not prevent the transfer of confidential business information between the merging parties at the level of the holding companies. Such transfer may lead in the long term to forms of tacit collusion between the merging parties.

One of the points on which there was more disagreement between the different competition authorities involved in this transaction concerned the change of control of Telecom Italia and, thereby, the need of notification of the acquisition. This transaction probably did not justify a notification under the Argentinean merger control system. However, as we saw in the analysis above, the transaction in this country could create a problem of minority shareholding; an issue to be analysed as an anti-competitive agreement, rather than under the merger control. As recognized by the ECJ judgement in the case *British-Tobacco*, the issue of minority shareholding is relevant when cross-border transactions take place. In fact, '...where the companies concerned are multinational corporations which carry out business on a world-wide scale, their relationships outside the Community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are party to it'.<sup>99</sup> In this case, the acquisition of a limited number of shares by Telefónica in Telecom Italia did not cause any concern of minority shareholding within the European Union, but it could lead to forms of coordination and exchange of information between the subsidiaries in Argentina of Telecom Italia and Telefónica. As mentioned in the previous section, like in the case of Brazil, the remedies available to the anti-competitive effects caused by the minority shareholding have limited geographical scope.

It is also important to recognize that the case of Argentina shows how sensitive a case may be when it is analysed from a political rather than from a legal perspective, and when the competition authority is not sufficiently autonomous from the executive branch. A political intervention is not a solution to the anti-competitive concerns that the transaction may cause. In fact, despite the Government's intervention, in Argentina at the moment there is no solution to this case.

A second category of conclusions concerns the lack of cooperation among the different competition authorities involved in the review of this world-wide transaction. It is clear from the case study that cooperation among the different authorities involved in a multi-jurisdictional merger is necessary. In the merger review, such cooperation mainly involves the exchange of information concerning the data related to the case and the remedies imposed by each other. However, as mentioned in the introduction to the case study, the degree of cooperation among different competition authorities is sometimes limited, like in this case. For instance, the observers sent by the Argentinean Government to Telecom Argentina concluded that there was a change of control in the company, without taking in consideration that the European Commission had achieved ten months before an opposite

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<sup>99</sup>Above Joined Cases 142 and 156/84, paragraph 40.

conclusion. Despite each competition authority may be free to interpret its own national legislation, it is important to point out that the conditions provided by Article 6 Law 25.156/99, in relation to the change of control, are very similar to those ones provided by Article 3 Regulation 139/2004 EC. As mentioned before, the two Argentinean observers probably carried out their evaluation more on the basis of political, rather than competition considerations. However, the officers of the European Commission who dealt with the case in May 2007 were also not aware that the transaction would be notified to ANATEL a few months later.<sup>100</sup> The European Commission has a number of agreements of bilateral cooperation with different competition authorities, but it does not have such kind of agreement neither with Brazil nor with Argentina. CADE, the Brazilian competition authority, has a cooperation agreement with the US Department of Justice/Federal Trade Commission.<sup>101</sup> However it does not have any agreement with any European competition authorities, neither with the European Commission nor with the national competition agencies of the single Member States.

The general problem is that at the moment there are few bilateral agreements between the competition authorities of the developed and developing countries. These bilateral agreements usually exist between the major competition jurisdictions of the world (e.g. USA, EC, Japan, Australia, and Canada).<sup>102</sup> On the other hand, these 'mature' competition agencies are reluctant to conclude similar agreements of cooperation with the newly established competition authorities of the developing countries, due to the uncertainty concerning the treatment of the information transferred to the latter. The European Commission signed cooperation agreements with the competition authorities of a number of developing countries. However, such agreements, unlike those ones mentioned above, do not contain provisions concerning the exchange of information and the application of positive and negative comity. They simply establish a framework for a dialogue between the two competition agencies. In a number of cases the agreement is used by the European Commission to provide technical assistance to the competition authorities of the partner country.

<sup>100</sup>Telephone discussion held on 10th April 2008 with the officer of the European Commission, DG Competition, Information, Communication and Media unit, who was in charge of the Telecom Italia-Telefónica case. The officer asked to remain anonymous.

<sup>101</sup>Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of their Competition Laws. The agreement exists since October 1999. The text of the agreement is available at <http://www.ftc.gov/os/1999/10/BrazilUSTreaty.htm> (24.4.2008).

<sup>102</sup>The EC cooperation agreements in the enforcement of competition law are the following ones:

- Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws. Published on the OJ L-95/47-52 of 27.04.1995. The text of the agreement is available at [http://ec.europa.eu/comm/competition/international/bilateral/us\\_agreement\\_1995\\_en.pdf](http://ec.europa.eu/comm/competition/international/bilateral/us_agreement_1995_en.pdf) (24.4.2008).

- Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws. Published on the OJ L-173/28-31 of 18.06.1998. The text of the agreement is available at

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0618\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0618(01):EN:NOT) (24.4.2008).

- Agreement between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws. Published on the OJ L-175/50 of 10.07.1999. The text of the agreement is available at [http://ec.europa.eu/comm/competition/international/bilateral/ca2a\\_en.pdf](http://ec.europa.eu/comm/competition/international/bilateral/ca2a_en.pdf) (04.02.2008).

- Agreement between the European Communities and the Government of Japan Concerning Cooperation in Anti-Competitive Activities. Published on OJ L-183/12-17 of 22.07.2003. The text of the agreement is available at

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22003A0722\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22003A0722(01):EN:NOT) (24.4.2008).

The US Federal Trade Commission and the US Department of Justice have cooperation agreements with the competition agencies of following countries: Australia, Brazil, Germany, European Communities, Germany, Japan, and Mexico. Further information is available at <http://www.ftc.gov/oia/agreements.shtml> (24.4.2008).

Finally, it does not seem that CNDC and the Brazilian competition authorities effectively cooperated in this case, despite their bilateral cooperation agreement of 2003.<sup>103</sup> According to Diego Povolo, CNDC Commissioner, the Argentinean competition authority exchanges information with CADE/SEAE/SDE when cross-border cases are at stake.<sup>104</sup> On the other hand, the CNDC does not cooperate with the other Brazilian regulatory bodies, like ANATEL, which are not parties of the agreement.<sup>105</sup> In this case, according to the Commissioner, the CNDC got to know the Brazilian decision from the press, but there was no exchange of views with the Brazilian authorities on the Telecom Italia-Telefónica case.

One statement from Ronaldo Mota Sardenberg, ANATEL's President, at the Congress of Regional Telecommunications (*Congreso de Telecomunicaciones Regional*) at the beginning of October 2007 concerning Telecom Italia-Telefónica case, perfectly summarizes the essence of this problem: 'we have the intention to work jointly with the Argentina regulatory authorities, but first of all we have to analyse the situation in the local Brazilian market' (*'tenemos toda la intención de trabajar en conjunto con los reguladores de la Argentina, pero primero necesitamos analizar bien la situación en el mercado local'*). The key problem of enforcement in multi-jurisdictional mergers is that each competition authority reviews the transaction at the national level, without taking into account the effect of the transaction in other jurisdictions or of the remedies imposed by other competition agencies. Only when there will be a full cooperation between the competition authorities of the developed and of the developing countries, the latter will be able to effectively enforce their national legislations in cross-border cases. In fact, in cross-border competition cases, such agreements would allow the competition authorities of the developing countries to be better informed about the case and to receive the opinion of their 'colleagues' who also review the case.

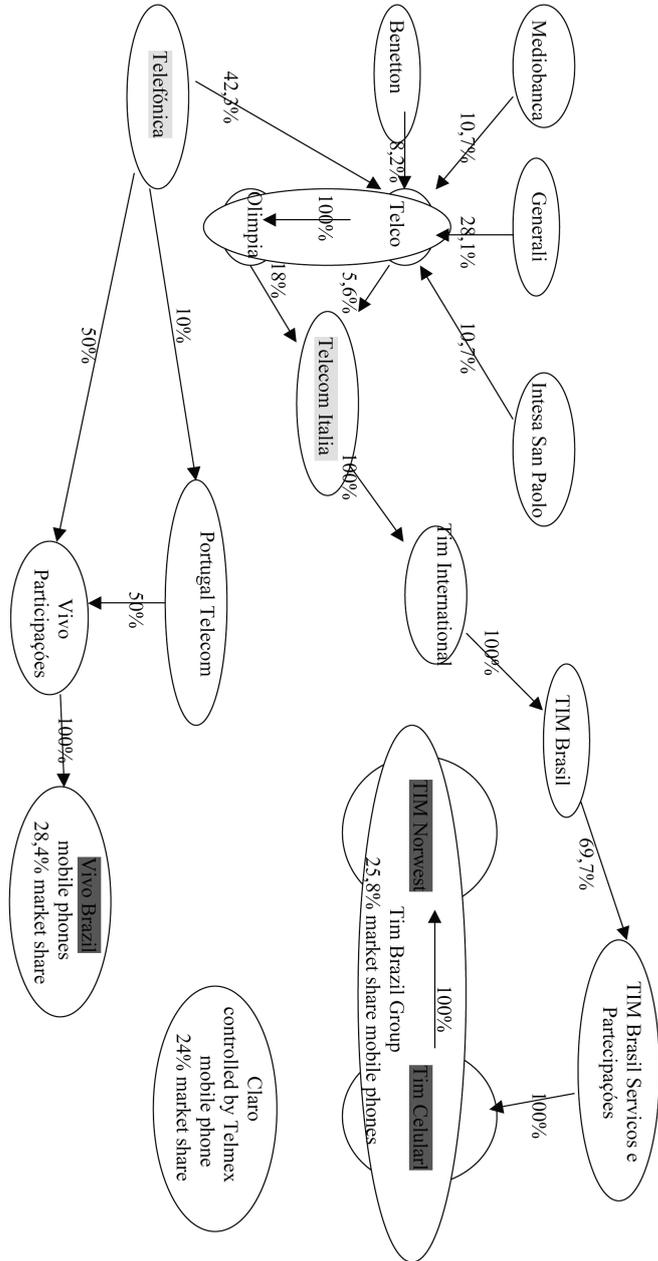
<sup>103</sup> *Acordo de Cooperação entre a República Federativa do Brasil e a República Argentina relativo à Cooperação entre Suas Autoridades de Defesa da Concorrência na Aplicação de Suas Leis de Concorrência*. Agreement signed in Buenos Aires on 16.10.2003. The text of the agreement is available at

[http://www.cade.gov.br/internacional/Acordo\\_Cooperacao\\_Brasil\\_Argentina.pdf](http://www.cade.gov.br/internacional/Acordo_Cooperacao_Brasil_Argentina.pdf) (24.4.2008).

<sup>104</sup> Interview held by the author with Commissioner Povolo on 30.4.2008 at the CNDC in Buenos Aires.

<sup>105</sup> According to Article 1.b of the cooperation agreement, the parties of the agreement are: for Argentina the *Secretaría de Coordinación Técnica* (today replaced by the *Secretaría del Comercio Interior*) and the CNDC until the final establishment of the *Tribunal Nacional de Defensa de la Competencia*. For Brazil, CADE, SDE, SEAE.

Annex 1: Telecom Italia-Telefónica shareholding's structure in Brazil



Annex 2: Telecom Italia-Telefónica shareholding's structure in Argentina

