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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Argentina

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES¹

-- Argentina --

1. Introduction

1. Independence of competition authorities is considered a highly desirable institutional characteristic for enforcing competition law.

2. An independent competition authority exercises its powers and applies, interprets and enforces competition rules on the basis of legal and economic arguments, grounded in sound competition policy principles, free from political influence or pressure. This enhances the consistency and predictability of decisions and creates an environment where market players and the general public have confidence in the process by which the authority selects, investigates and decides its case².

3. Notwithstanding, there is no one-size-fits-all single model of a competition authority. In addition, no system can guarantee full independence in practice, but it is possible to put safeguards in place to protect against most forms of undue or inappropriate influence³.

4. Argentina has had antitrust legislation for almost a century, although it has had a long debt related with the real independence of its authority. Argentine competition law is, in this regard, a very significant example of how important it is not only to have good legislation but also to have a strong enforcement and application of such rules.

2. Historical Background (1920's – 1980's)

5. Act 11,210 was the first Argentine legislative precedent, which was enacted on 1923 and restrained "*speculation and trusts*". Act 11,201 was passed with the Deputies' Chamber express intention to restrain banks from making transactions with "*colluded corporations or businessmen*".

6. Act 12,906 was enacted on December 1946 and repealed Act 11,201. It's first section stated an offence of "every settlement, arrangement, combination or capital merger aimed at establishing or sustaining monopolies and turning them profitable in one or more forms on the production of ground, aerial or maritime traffic, or of domestic or external trade, in one or more locations or on the whole national territory".

¹ This work was done jointly by Pablo Trevisán, Federico Volujewicz and Lucila Dell'Anno Yrigoyen. We would like to thank the important contributions made by Esteban Greco and Lucía Quesada. Contribution from the National Commission for the Defense of Competition, Argentina.

² OECD, "Key points of the Roundtables on Changes in Institutional Design", Annex to the Summary Record of the 123rd Meeting of the Competition Committee, 23rd June, 2015, Paris, France.

³ Italianer, Alexander, "The Independence of National Competition Authorities", Competition Conference – Best Practice in Investigations, Vienna, 12/12/2014.

7. No competition authority was created or established under these precedents.

3. Contemporary Era (1980's – 2016)

3.1. *The creation of the CNDC*

8. In 1980 Argentina adopted Act 22,262, which mirrored some European concepts of competition law contained in the Treaty of Rome. Act 22,262 made violations of competition law a criminal offence that would be tried before a criminal court.

9. One of the most relevant aspects of Act 22,262 was the creation of the National Commission for the Defense of Competition (the “CNDC”, for its Spanish acronym), as the administrative body in charge of the enforcement of the Argentine competition law. The CNDC was created within the scope of the then Secretary of State for Trade and International Economic Negotiations.

10. As a consequence of being under the scope of said Secretary, the CNDC didn't have autonomy in order to perform as an independent body. Its role was restricted to the issuance of a non-binding opinion of the case under study, being the Secretariat of State for Trade and International Economic Negotiations the one who was in charge of issuing final rulings.

11. CNDC's basic role was to investigate cases initiated *ex officio* or after a complaint; to perform market studies, reports and standards of law interpretation; to promote a better acknowledgment of competition in general; and to assist in the prevention of anticompetitive practices.⁴

12. Since its creation in 1980, the CNDC is composed of a Chairman⁵ and four Commissioners, of which two must be lawyers and the other two, economists. By the time of CNDC's creation, the Chairman was ranked as Undersecretary within the Secretariat of Industry, Trade and Mining,⁶ and the Commissioners had similar status to that of Federal Judges.

3.2. *The enactment of Act 25,156 – Wishes of Independence*

13. In 1999, Act 22,262 was replaced by Act 25,156 (the “LDC”, for its Spanish acronym), which became the main regulation over competition issues in Argentina, after the 1994 amendment of the Argentine Constitution.⁷

⁴ International Antitrust Law & Policy: Fordham Corporate Law; 1998 – Chapter 5 “Competition Policy in Argentina”, Marcelo J. Garriga; p., 75.

⁵ Although until 1996, CNDC's President was an Undersecretariat.

⁶ At present, the Chairman is ranked as an Undersecretary within the Secretariat of Commerce. Since January 2016's amendment of Decree 357/2002 the Secretariat of Commerce of the Ministry of Production shall act as the enforcement Authority of Act 25,156. Decree 718/2016, enacted in May 2016 established that the CNDC shall act as a decentralized body under the purview of the Secretariat of Commerce of the Ministry of Production.

⁷ 1994's Constitutional reform was one of the main aspects that influenced the enactment of the LDC. Article 42 of the Argentine Constitution establishes the right to effective competition that was incorporated by the LDC in 1999: “*The Federal Authorities shall provide for the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quantity and efficiency of public services and the creation of consumer and user associations. The legislation shall set forth efficient procedures to prevent and resolve conflicts.*”

14. The LDC emerged as a way of facing new economic and political changes the country was going through as a result of market-orientated reforms within the framework of economic deregulation, privatization of state-owned companies and a fixed exchange rate that the country experienced during Menem's administration (1989-1999).

15. The subject matter of the LDC was to give the government an effective instrument to look after the "*general economic interest*", a concept that has been generally used to make reference to economic efficiency with special attention to impact on consumers.⁸

16. Among other reforms, the LDC⁹ created a new administrative agency, the National Tribunal for the Defense of Competition (the "TDC", for its Spanish acronym), which was supposed to replace the CNDC as the national competition authority.

17. The TDC was created as a decentralized body within the scope of the then Argentine Ministry of Economy, Works and Public Services. Its major role was supposed to be to authorize relevant economic transactions through the monitoring of economic concentrations, with the power to veto corporate mergers; to verify whether there is abuse, or not, from any existing dominant position; and to enforce sanctions established by law. The LDC also gave the TDC the faculty of administering its own budget, and establishing a filing fee dedicated to bear its ordinary expenses.

18. The TDC was supposed to be composed by seven members appointed by the Executive Power, following a public competition based on candidates' experience before a jury integrated by (i) the Attorney General of the National Treasury; (ii) the Secretariat of Industry, Commerce and Mining of the Ministry of Economy, Public Works and Services; (iii) the President of the Deputies' Chamber Commerce Commission; (iv) the President of the Senators' Chamber Commerce Commission; (v) the President of the National Law Academy; (vi) the President of the National Economics Academy.

19. As mentioned, the TDC was meant to replace the CNDC, provided, however, that until the TDC was appointed, antitrust matters should be temporarily handled by the CNDC.

20. The theory of an independent enforcement authority was considered a relevant step towards minimizing political interference over the agency in charge of antitrust policies.

21. However, since the enactment of the LDC in 1999, the TDC was never put in place. Scholars and practitioners indicate that the political control over the CNDC has been tightened during -at least- the last 10 years.

22. In fact, due to certain administrative rulings enacted during Kirchner's administrations (2003-2015), the CNDC ended up being under the direct political control of the Secretariat of Commerce.

⁸ Although "general economic interest" could be a vague concept, precedents at the CNDC understood, from an economic standpoint, pursuing economic efficiency, considering total surplus of economic agents, with particular weight in consumer surplus.

⁹ The LDC also introduced a merger control system in compliance with the antitrust legislation in force in most countries around the world and eliminated criminal charges among the sanctions for violations of competition laws and replaced the judicial courts that would review the decisions rendered by the new competition agency.

3.3. *The enactment of Act 26,993 – Independence is Dead*

23. In September 2014, Act 26,993 modified certain aspects of the LDC, empowering the Executive to determining competition law enforcement authorities, and establishing that all provisions referring to the TDC shall be understood as referring to such enforcement authorities (to be named by the Executive).

24. As a consequence, Act 26,993 has been seen as the “death certificate” of the TDC as it put an end to any hope of an independent body in charge of the enforcement of antitrust laws in Argentina. By the time Act 26,993 was passed, media referred to such law, saying it was sought to provide the Executive with additional coercion tools against the private sector.¹⁰

25. Act 26,993 was seen as a backward step concerning the creation of the TDC, and the existence of an independent authority, which would have consolidated the idea of a specialized body with autonomy and capacity to deliver.

3.4. *Current legal framework*

26. In December 2015, Kirchner’s administration came to an end. During the first months of Macri’s administration, new rules have been put in place in order to normalizing the enforcement of competition law in Argentina.

27. Decree 718/2016 was issued in May 2016. Acting under the powers conferred by Act 26,993, the Executive established the Secretariat of Commerce of the Ministry of Production as the enforcement authority of the LDC, stipulating that the CNDC shall act under the purview of the Secretariat of Commerce of the Ministry of Production.¹¹

28. In July 2016, the Chief of the Cabinet of Ministers, issued Administrative Decision 756/2016, by means of which the organizational structure of the first operational level of the CNDC was approved, incorporating to its structure four National Directorates, in charge of Anticompetitive Conducts, Economic Concentrations, Studies and Advocacy. For the first time in its almost a century, the Argentine competition authority has special task forces to provide specific studies and make advocacy on competition law related issues.

29. Under this framework, the CNDC acts as an “assistant” body of the Secretariat of Commerce, within the powers granted by Resolution 190-E/2016, issued on 28th July 2016 by said Secretariat. Among its powers, the CNDC shall conduct the investigation stage and the committal proceedings under way or to be filed pursuant to the LDC, being the final ruling in charge of the Secretariat of Commerce¹².

30. Resolution 190-E/2016, also empowered the CNDC to undertake market studies and research; maintaining the Secretary of Commerce the power to request the CNDC the investigation of those sectors it considers to be relevant.

31. Regarding budget and human resources, being under the scope of the Secretariat of Commerce, the CNDC shall require the Secretary’s approval in order to obtain resources or to recruit staff.

¹⁰ Huici, Héctor, “Requiem Para el Tribunal de Defensa de la Competencia” CLARIN, 25/09/2014; Trevisán, Pablo, “Competencia: Otra Oportunidad Perdida”, EL CRONISTA, 1/10/2014.

¹¹ Previously the CNDC acted in the área of the Under-Secretariat of Domestic Commerce.

¹² The criteria under the Secretariat’s Resolution 190-E/2016 follows the National Supreme Court’s criteria established under various recent leading cases.

32. As seen, although recent Macri's administration resolutions have started to prepare the field for a more independent and technical competition authority, the current legal framework is very limited and needs a comprehensive reform, in order to –among other goals- recover the idea of the need of an independent competition authority.

4. Future challenges – Getting Back to Normal

33. Achieving independence of the competition enforcement authority is Argentina's current major challenge. Amending the current law in order to achieve such goal is one of the main priorities of Macri's economic agenda. With this in mind, the CNDC was given the most important challenge and responsibility of drafting a new competition bill (the "Draft Bill").

34. The Draft Bill was drafted between January and September of this year. During these months, the CNDC also opened a public national and international consultation to receive comments and proposals to the Draft Bill. On 27 September 2016, there was a public announcement of the Draft Bill's submission to the Congress.

35. The Draft Bill was drafted following both Argentine reality and experience as well as antitrust international best practices. One of the main objectives of the Draft Bill is the creation of an independent authority, the National Competition Authority (the "NCA"), with sufficient powers to adopt its own decisions, control its own budget, and function without interference from political authorities.

36. According to the Draft Bill, a new Competition Tribunal shall act within the NCA and such Tribunal shall be formed by five (5) members that will be designated by the Executive Power, from a shortlist that shall be the result of a public contest that will be decided by an independent jury of six persons (two from the Executive, two from the Congress, and two from the legal and economic academia). Every candidate shall have a suitable technical record, sufficient experience in competition issues, as well as a well-known moral character.

37. With the aim of avoiding that the Tribunal both resolves and investigates competition cases, the Draft Bill also sets forth the creation of a Secretariat of Anticompetitive Conducts Investigation and a Secretariat of Economic Concentrations. Both Secretariats shall be in charge of the investigation phase of conducts and merger control proceedings, respectively, acting within the scope of the NCA, and designated by the Executive Power, following the same technical and independent procedure established for the members of the Tribunal.

38. Pursuant to the Draft Bill, during the public contest of candidates, citizens, non-governmental organizations, professional and consumer protection associations, academic and human rights entities, may submit their observations or comments regarding the candidates to be selected for said positions.

39. Members of the Tribunal and both Secretariats shall be in office for a period of five (5) years and may be re-elected once. The length of their periods was established for five (5) years, in order for it to be independent of the Executive Power's mandate length (i.e., four (4) years and of up to two consecutive mandates).

40. The Chairman of the Tribunal, shall have administrative powers of both the Tribunal and the NCA as a whole, and may retain personnel to conduct specific or extraordinary works, which the permanent staff may not be able to perform.

41. The members of the Tribunal and both Secretariats may be dismissed on objective grounds such as: a) inappropriate performance of duties; b) recurrent negligence delaying the substantiation of proceedings; c) supervening incapacity; d) sentence for wilful offenses; e) breach of incompatibility rules; f) failure to excuse themselves under the circumstances envisaged in the Code of Civil and Commercial National Procedures.

42. Finally, the Draft Bill also creates the Competition Advocacy Under-Secretariat. Among other tasks, this Under-Secretariat will be the formal channel through which the central administration would be able to propose specific market investigations and political initiatives related with competition law. This shall prevent the NCA from any other informal pressures from the Executive Power, contributing at the same time to foster the independence of the competition authority.

5. Conclusions

43. As we said, there is no one-size-fits-all single model for the independence of a competition authority.

44. Following Argentine centennial story of competition law and enforcement, as well as considering the difficulties that Argentina has found in guaranteeing the independence of its competition agency, a long path is still to be undergone.

45. The safeguards that CNDC's Draft Bill has proposed to put in place to protect the future NCA against forms of undue or inappropriate influence of central administrations are a significant starting point both to reach the long acclaimed independence as well as the technical capabilities of the members of the Argentine competition authorities.

46. History has shown that ideal solutions are far from being optimal on the field of Argentine competition law. Possible seems to be better than ideal at this stage of the development of antitrust law in Argentina.

47. We hope the Draft Bill principles reach the status of law soon, so as to –finally- have an independent authority that shall enforce a sound and clear competition policy in Argentina.

