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Argentina: Development and enforcement of the competition regime in its first century of existence

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ABSTRACT

The article provides a brief summary of the evolution of Argentine competition law on the occasion of its 100th anniversary in 1923, highlighting the challenges faced in institutionalizing and maturing the discipline within a context of macroeconomic instability and shifting government policies.

L'article propose un bref résumé de l'évolution du droit de la concurrence en Argentine à l'occasion de son 100e anniversaire en 1923, en mettant en lumière les défis rencontrés pour institutionnaliser et faire mûrir cette discipline dans un contexte d'instabilité macroéconomique et de changements de politiques gouvernementales.

I. Introduction

1. The year 2023 marked a century since the first passing of a competition bill in Argentina. Much has changed and evolved in 100 years in this field in Argentina. Yet, what is clear from its legislative and regulatory development is that the country's ever-changing political and economic scenario affected its proper enforcement and institutional framework. The purpose of this article is to put both factors into perspective, by providing a brief overview of the evolution of the Argentine competition regime a hundred years since its foundation.

II. First period: Underenforcement (1923-1980)*

2. Congressional discussion in Argentina for the passing of an antitrust law dates to the early 20th century. The first bill was introduced in 1909 and prohibited trusts and concerted actions regarding cattle-raising activities. It was inspired by the Sherman Act and cited specific US cases on related markets.[1]

* This section follows a description of the history of competition law in Argentina made by one of the authors, *see* M. den Toom, *Competition Law in Argentina*, 4th ed., Wolters Kluwer, Alphen aan den Rijn, 2022.

1 H. A. Pessagno, *Experiencia de la Ley Nº 11.210 sobre Represión de la Especulación y Monopolios*, Ideas, Buenos Aires, 1944, and E. Gil, *Represión de la Especulación y Trusts*, Talleres Gráficos de la Penitenciaria Nacional, Buenos Aires, 1929.

3. In 1913, triggered by the existence of a meat trust, a congressional debate took place in the House of Representatives and several antitrust bills were submitted, some directly referring to the meat problem and others of a more general scope. To review and improve them, a special commission was named, which ultimately presented three bills, one of which prohibited any contract or combination having the object of artificially altering the prices of items of mass consumption and essential goods, and another one related to cattle-raising and agricultural markets. The first of such bills was approved by the House of Representatives, but not the Senate.

4. In 1918, on the occasion of the discussion of an export tariff bill, several members of the House of Representatives once again proposed the appointment of a commission to (i) investigate the then-existing trusts of, inter alia, flour, sugar, wine, oil and meat, and (ii) draft one or more antitrust bills.

5. One of four such bills was formally presented before the House of Representatives, which approved it in July 1921. The bill was considered by the Senate in May 1922 and, with some amendments, reverted to the House of Representatives, which accepted only a few of those amendments and passed a new bill in April 1923. In July of the same year, the Senate insisted on its original amendments by the vote of two thirds of its members, but the House of Representatives, with a similar majority, insisted on its wording, and the law was finally passed with the number 11,210 and named Law for the Repression of Speculation and Trusts.[2]

6. With the passing of Law 11,210, Argentina became one of the first Latin American countries to legislate on antitrust law. It was a purely criminal law and exclusively enforced by the courts, its first two sections being heavily influenced by the wording of the Sherman Act.

7. In this connection, Section 1 ruled that "*shall be a crime every agreement, pact, combination or concentration or merger of capitals leading to the establishment or aid of a monopoly and its profits in one or more branches of production, land, or water transport, or domestic or foreign commerce, in one or several cities or in the entire national territory*" while Section 2 provided a comprehensive list of the "acts of monopoly," an extensive description of specific prohibited conduct that was to a large part due to the results of the investigative commission.[3]

8. The enforcement of Law 11,210 proved to be a failure. In fact, in almost half of the period in which the law was in force, the courts debated the scope of prohibited acts.

9. By 1946, under the first administration of President Juan Perón, discussions for the abrogation of Law 11,210 ensued. The congressional debate for its abrogation pointed out to the main focus of the reform, which was consistent with the weaknesses of Law 11,210: a very brief statute of limitations (two years) that prevented most courts from passing timely judgments, the lack of interim measures and the fact that courts were sometimes ill-prepared to investigate economic crimes.

10. A new piece of legislation passed in September 1946 under the number 12,906 and the name Law for the Repression of Monopolies and Trusts.[4] It was structured with a handful of purposes, mainly establishing the true meaning of the crimes set forth in Sections 1 and 2 of Law 11,210, distinguishing local from interstate monopoly, empowering a new administrative agency to control and investigate monopoly practices and extending the statute of limitations.

11. As its predecessor, Law 12,906 was a criminal law by nature, and still included a list of practices that were considered "acts of monopoly" or "leading to a monopoly," which, for the most part, replicated those of Section 2 of Law 11,210, with the notable exception of the inclusion of tying practices (section f) and, remarkably, business combinations (section m). But perhaps the most notable change that this new law brought about was the creation of the National Office of Antitrust Investigations (Oficina Nacional de Investigaciones Antimonopolistas), as a prosecutor aimed at presenting the case before the courts.

12. Law 12,906 remained in force for thirty-four years until its abrogation by Law 22,262 in 1980. Despite its improved institutional framework, it had a similar or poorer enforcement track record than its predecessor. Legal authors are of the view that this was mainly due to a lack of: (i) conviction by the new agency of the illegality of the practices prohibited by the law; (ii) proficiency of the judiciary in the investigation of economic crimes; and (iii) an active role granted to the plaintiff in the administrative proceeding.

13. In addition, and this has been a constant in the history of Argentinean antitrust law, the recurrent economic crisis that has hit the country led to the application of interventionist measures such as price controls, which obviously directly opposed the principles of competition.

2 Law 11,210 (1923), available in Spanish at https://www4.hcdn.gob.ar/dependencias/dip/wdebates/Ley.11210.Debate.Represion.de.Especulacion.y.Trusts.pdf.

3 For instance, Section 2a) intended to tackle situations like the willful destruction of grapes in the province of Mendoza in order to sustain high wine prices; the prohibition to close a competing business in exchange for an indemnification was included to deal with cases such as those in the lime business in the province of Córdoba, etc.

4 Law 12,906 (1946), available in Spanish at https://www4.hcdn.gob.ar/dependencias/dip/wdebates/Ley.12906.Debate.Represion.de.Monopolios.y.Trusts.pdf.

III. Second period: The institutionalization of competition law (1980-1999)

14. The second period is divided into two parts: from 1980 to 1995 (1.) and from 1996 to 1999 (2.).

1. Further attempts for institutionalization—Increase in the number of investigations for anticompetitive conduct (1980–1995)

15. Law 22,262 entered into force in 1980,[5] under three fundamental objectives: (i) to define more precisely the conduct to be repressed; (ii) to implement an administrative procedure aimed at the investigation and prevention of such conduct; and (iii) to develop the legal framework to ensure the proper functioning of the Argentine economic market.

16. The new legislation was mostly influenced by the provisions of the Treaty establishing the European Economic Community dealing with general anticompetitive acts and abuses of dominant position. This last prohibition replaced the existing prohibition of "acts of monopoly," sometimes loosely used by Laws 11,210 and 12,906.

17. An important innovation incorporated by Law 22,262 was the creation of a new administrative agency, named the National Commission for the Defense of Competition (Comisión Nacional de Defensa de la Competencia or CNDC), which was entrusted with the carrying out of administrative proceedings which, unlike those of Law 12,906, were directed not only to the filing of a criminal action (in certain cases) but also to the application by a secretary of state of separate administrative sanctions, following the recommendation of the CNDC.

18. Under Law 22,262, the criminal perspective of competition law coexisted—in principle—with the administrative one, considering that all kinds of concerted actions were considered crimes and thus subject to potential criminal sanctions. As in the case of Law 12,906, once the administrative proceeding that declared the existence of a concerted action had closed, the secretary of state was empowered to file a criminal action before a criminal court.

19. During this period, it is also worth mentioning that the 1994 Constitutional Reform included references to competition law within the Constitution.[6]

20. In particular, the new Section 42[7] enounced the "*defense of competition against all forms of market distortion*" and "*the control of natural and legal monopolies*" as state policies. Legal authors are of the view the inclusion of competition law in the same section of the Constitution that referred to consumers' rights was intended to "*ensure a transparent market, in which the consumer can have a variety of options, and ensure that the State complies with this obligation by enacting laws containing clear and defined rules of the game*"[8] and highlighted the necessary interplay between consumer protection and competition laws.

21. Even when no criminal sanctions were applied under Law 22,262, numerous investigations were closed by the CNDC in the nineteen years of its enforcement.[9] According to the agency, however, the enforcement during such a long period was not uniform as, for different reasons, neither the military government that was in power until the end of 1983 nor the democratic government elected thereafter included competition law in their priorities.

22. In 1989, Carlos Menem was elected president, and his two administrations spanned the entire decade of the 1990s. His government endorsed free-market economic policies that favored the privatization of many formerly state-owned companies, market deregulation, tax and government agency reductions, and a unilateral opening to world trade and foreign direct investment.

23. Even when the privatization program and a wave of private mergers and acquisitions (M&As) created during that period new market players with substantial market power, investigations into anticompetitive conduct did not rise significantly until the later part of the period, as will be seen in the following section.

5 Law 22,262 (1980), available in Spanish at http://www.saij.gob.ar/22262-nacional-ley-defensa-competencia-lns0001273-%201980-08-01/123456789-0abc-defg-g37-21000scanyel.

6 National Constitution of Argentina (as amended and in force since 1994), Section 42.

7 Referred to third-generation constitutional rights such as, inter alia, consumer, competition and environmental laws.

8 M. Basterra, La Defensa de la Competencia en la Constitución Argentina, *Derecho PUCP*, No. 53, 2000 pp. 837–861, https://dialnet.unirioja.es/descarga/articulo/5085008.pdf.

9 As a reference, between 1981 and 1997. the CNDC closed 130 investigations for anticompetitive conduct, of which 52 closed with the imposition of fines, 68 were dismissed, and 10 closed with the acceptance of undertakings. *See* CNDC, *Memoria Anual – 1997*, 1997.

2. From a renewed outlook to the need for a merger control regime (1996–1999)

24. Between 1996 and 1998, under new leadership, the CNDC shifted its institutional architecture by upgrading the technical quality of its decisions and reports, which from then on were more based on sound economic principles.

25. In 1997, the CNDC started to perform market monitoring practices as a way to be better prepared to provide economic support to its decisions. To this end, it entered into a cooperation agreement with a local think-tank.[10] This market research practice—which later turned into the current market investigations—comprised a wide range of economic sectors of greatest interest from an antitrust perspective, concentrating on the areas producing the main intermediate inputs, both industrial and agricultural.[11]

26. As anticipated, by the second half of the 1990s, the privatization process of state-owned enterprises had generated a transfer of substantial market shares previously held by the state to the private sector. Therefore, discussions ensued to establish a merger control regime, and in 1994, a new bill to amend Law 22,262 to this effect was approved by the House of Representatives. However, it was not considered by the Senate and thus lost parliamentary status. Similar bills were introduced in the House in 1996 and 1998, without success. New bills introduced in 1998 were finally seriously considered the following year, a few months before the presidential elections.

27. From the review of the parliamentary debate of the 1998 bills, it stems that the main driving force underlying its approval by the House of Representatives and its swift consideration by the Senate was to control the sale of oil and gas company YPF—the then-largest company in Argentina—to Repsol, by making the application of the law retroactive. As Repsol's tender offer for the shares of YPF was launched on the same day, the bill was considered by the Senate and its approval became a matter of national interest.

28. The second reason most cited by members of Congress in support of the new law was the need to create an independent antitrust agency, in view of what was perceived as an excessive dependence of the CNDC on the federal government, given the fact that CNDC had only investigative powers but ultimately issued non-binding recommendations to a secretary of state.

29. There was also behind the attempts to reform a clear intention to subject competition laws to the review of commercial rather than criminal courts, and to prioritize the application of fines instead of criminal sentences, which in any event had not been applied so far.

30. One such bills ultimately made its way to become the Competition Defense Law 25,156, with effects as from 1 October 1999.

31. As a synthesis of this period, it can be asserted that (i) a new competition agency was created, but subject to political control; (ii) competition law was incorporated into the federal Constitution, thus confirming it as a matter of state policy; and (iii) the establishment of a merger control regime achieved by Law 25,156 was more a response to the privatization process of the 1990s than a competition policy in itself.

IV. Third period: The rise of merger control (1999-2018)

1. Key developments of Law 25,156

32. The main changes brought by Law 25,156 to the Argentine competition regime were the following:

- Inclusion of a mandatory merger control mechanism: As stated above, this was the main driver underlying the passing of the Law, which established a mandatory merger notification system. A substantial lessening of competition (SLC) test was adopted to guide the substantive analysis.
- Elimination of criminal penalties for collusive practices: Law 25,156 culminated the shift to an administrative enforcement of competition law in Argentina initiated by its predecessor, by eliminating sanctions of imprisonment and changing the election of appeal courts to civil and commercial rather than criminal.
- Creation of a competition agency: Another important change was the creation of a single, independent competition agency to replace the CNDC and the Secretariat of Trade, named the National Tribunal for the Defense of Competition (the "Tribunal").

2. Enforcement of Law 25,156

33. In January 2001, Decree No. 89/2001 regulating Law 25,156 was passed. One of the provisions of this new piece of legislation was to interpret the triggering events for a merger filing obligation included in the law, which provided that a notification could be made before

10 Instituto Torcuato Di Tella, a prestigious economic research institute that later turned into the University of Torcuato Di Tella.

11 Flat rolled steels, non-flat rolled steels and seamless tubes, aluminum, electric cables, cement, liquid fuels, leather, tinplate containers, liquefied gas, wheat flour, construction materials, tires, paper, petrochemicals, heavy chemicals, cotton textiles, and flat glass. *See* CNDC, *supra* note 9.

their occurrence, or up to one week after them. Even when the law suggested that the system was post- rather than pre-closing, some uncertainty remained as the law also contemplated that reported transactions could not have effects until they were approved by the agencies. However, the Decree ratified that the system was truly post-closing, which prompted the development of a working dynamic—which is very much alive today—in which both the agencies and the filing parties engage in a formalistic ritual where decisions are ultimately well-founded, but late in time and thus ineffective.

34. The enforcement of anticompetitive conduct continued, heading in the direction pointed out by the CNDC's leadership since 1997. However, merger control absorbed most of the agencies' resources, which caused investigations to span for several years, many of them eventually being closed by application of the statute of limitations. Also, the fact that the merger thresholds were fixed, coupled with a spiraling inflation process, caused a greater number of mergers with little or no substantive impact being filed, reinforcing the situation that was just described.

35. The creation of the Tribunal was never achieved during the term of Law 25,156, as the government failed to appoint the independent jury who was entrusted with the task of selecting the list of candidates. As a result, both the CNDC and the adjudicatory agency, the Secretariat of Trade, maintained their functions with regard to competition. Although the work product of those two agencies was, by and large, reasonable, it is in the most sensitive cases where the lack of independence of the CNDC was most evident.

36. Over time, courts began to accept arguments from private plaintiffs—mostly in merger cases—alleging that both the CNDC and Secretariat of Trade were not empowered to enforce certain provisions of Law 25,156 because they were not the enforcement authorities that the law intended to create. The response of the government was, rather than appointing the Tribunal, to promote an amendment of the law[12] that banned several sections of Law 25,156, eliminating every reference to the Tribunal, strengthening the empowerment of the Secretariat of Trade and depriving the CNDC of many of its original empowerment. In other words, the reform moved in the exact opposite direction originally contemplated by Law 25,156.

37. In 2015, a center-right coalition took office, ending more than twelve years of the Kirchner-Fernández administrations, characterized by an inclination for measures aimed at the direct intervention of the economy rather than the enforcement of competition laws. The new Macri administration put a focus on increasing the enforcement of the behavioral side of antitrust, while leaving the CNDC with more room to decide based on legal and economic considerations only, at least in most cases. It failed, however, to prompt the appointment of the Tribunal, and instead pushed for a new piece of antitrust legislation, ultimately approved as Law 27,442, which entered into force on 22 May 2018.[13]

38. As a recap of the period in which Law 25,156 was in force, it can be stated that (i) antitrust enforcement was active, but not significantly higher than in the last years of enforcement of Law 22,262; (ii) the goal of appointing an independent competition enforcement authority was never achieved, regardless of the political sign of the administration in power; (iii) therefore, the "interim" competition agencies—CNDC and Secretariat of Trade—remained active, the latter influencing at varying levels the CNDC over time; and (iv) priority was given to merger control, at the expense of conduct investigations, evidenced by the fact that, between 1999 and 2018, about 482 cases for anticompetitive practices were decided, in contrast to 1,202 merger cases.

V. Fourth period: From legislative modernization to a new institutional stagnation (2018-2024)

1. Key developments of Law 27,442

39. Law 27,442, while not introducing fundamental changes to the structure of Law 25,156, modernized it in many ways.

1.1 A new institutional agency

40. The National Competition Authority (Autoridad Nacional de Competencia or ANC), entrusted with the enforcement of the new law, was created as an independent, decentralized and autarchic body, within the scope of the executive. In turn, the ANC includes three separate branches: the Competition Defense Tribunal, the Antitrust Investigations Secretariat and the Economic Concentrations Secretariat. The Tribunal adjudicates decisions, while each of the two secretariats handles antitrust investigations and merger control cases, presenting those cases to the review of the Tribunal, in a way similar to the interaction of the CNDC with the Secretariat of Trade.

12 Law 26,993 (2014), available in Spanish at https://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235275/norma.htm.

13 Law 27,442 (2018), available in Spanish at https://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310241/norma.htm.

41. Transparent and public mechanisms were also established for the selection of the members of the ANC.

42. Furthermore, a specialized Competition Law Chamber was created within the National Civil and Commercial Court of Appeals.

1.2 Merger control

43. A mandatory pre-closing merger notification was introduced, to enter into force one year after a period of one year since the ANC has been appointed elapses.

44. Turnover thresholds were steeply increased, by allowing them to adjust on a yearly basis based on inflation.

45. Fines for gun jumping were substantially increased, from a fixed daily sum of one million pesos—as provided in Law 25,156—to a daily amount of up to 0.1% of the consolidated local turnover of the economic group to which the infringer belongs, during the last fiscal year.

46. Another important milestone was the incorporation of the statement of objections, as a report to be issued by the Tribunal in those cases where it considers that a notified transaction has the potential to raise substantive antitrust concerns, its purpose being the calling of the parties involved to a special hearing to consider possible measures to mitigate the negative effect on competition.

1.3 Anticompetitive conduct

47. The law identified certain "hardcore cartels" (namely, price fixing, restriction of output, market division and bid rigging) as per se illegal, such presumption being nonetheless rebuttable.

48. The inclusion of a leniency program for collusive practices was one of the most notable developments of Law 27,442. The program adopted by the law contemplates, among other aspects: (i) full indemnity to the first applicant; (ii) a reduction of between 50% and 20% to successive applicants; and (iii) a "leniency plus" benefit for the disclosure of additional cartel activity, rewarded with a further 30% reduction in the cartel where leniency was requested in the first place. The program is in place both for companies and individuals alike. In this last case, the benefit also encompasses the exemption to criminal sanctions for specific cartel activity contemplated under the Criminal Code (provisions that were never enforced in practice so far).

2. Enforcement of Law 27,442

49. Even when Law 27,442 suggested a shift in enforcement priorities, by reducing the number of mergers being notified and—presumably—devoting new resources to investigations, this was not necessarily the case.

50. In effect, the new notification thresholds reduced the number of mergers, and the agencies found in the statement of objections a useful tool to obtain concessions from the parties in exchange for approval without objections, or the imposition of undertakings more amenable to them.

51. Investigations kept about the same pace they had with Law 25,156, with some notable exceptions. In this area, a distinction can be made between the cases enforced in the Macri administration (2015–2019) and the Fernández administration (2019–2023), as the latter mostly followed cases opened during the former, in one case closing a very ambitious investigation opened by the CNDC during the Macri administration, in what can be regarded as a low point of an otherwise reasonable track record.[14]

52. The appointment of the ANC turned out to be a new frustration, as the Macri administration, while advancing the process, failed to complete it, and the following administration annulled the entire process, thus giving an extra life to the CNDC-Secretariat of Trade combo. In 2021, members of the political party of this last administration even achieved the approval by the Senate of a bill amending Law 27,442, in areas such as the procedure to appoint the members of the ANC and the elimination of the leniency program (which, as of this date, has never been used), to name a few of such controversial changes. The bill was heavily criticized by the private bar and ultimately lost parliamentary status.

3. 2024: New administration, new competition bill?

53. In December 2023, the libertarian and pro-market candidate Javier Milei took office as president of Argentina. During his campaign and as part of his electoral platform, he promised to endorse free competition policies.

54. On December 27, 2023, the new government presented before Congress a draft Law on Foundations and Starting Points for the Freedom of Argentinians. The 351-page bill, dealing with several areas of the economy, proposed the repeal of Law 27,442 and its replacement with a new competition law.

14 Secretariat of Trade, *In re C. 1698-Secretaría de Comercio s/ solicitud de intervención*, June 29, 2023.

55. In a nutshell, the draft Competition Law proposed to: (i) considerably increase merger control thresholds; (ii) change the notification system from post- to pre-closing shortly after the passing of the law; (iii) introduce a voluntary merger control notification regime for mergers under the threshold; (iv) reduce fines for anticompetitive conduct; (v) eliminate the special chamber at the Court of Appeals to deal only with competition cases; and (vi) again, create two new competition authorities, one entrusted with the review of mergers and the other the enforcement of anticompetitive conduct, the members of both of which would be appointed by the executive.

56. The reform proposal could hardly be considered an improvement, but maybe at this point of the development of competition law in Argentina, it could be seen as pragmatic, as it would finally create specialized competition agencies that would not need to deal with political appointees to get the job done, and finally adopt a merger control system in line with that in force in most countries.

57. In any event, the original version of the ambitious Law on Foundations and Starting Points for the Freedom of Argentinians was repealed by Congress, and after further negotiations a leaner version of such bill was ultimately approved, such bill, however, not including a competition law chapter, as a consequence of which Law 27,442 remains In force, the new Administration now focusing on forming the independent jury that would ultimately select the candidates for the independent competition agency contemplated In such law.

VI. 100 years: Balance and future perspectives

58. Throughout the last 100 years, Argentine competition law has been full of good intentions, but the economic turmoil to which the country has been exposed had a negative impact on its enforcement, as competition law may be regarded as an extravagance when annual inflation is in the three digits or more. On the political side, attempts to create a new independent agency have been disheartening, as one administration would achieve the approval of a new piece of legislation contemplating it, while the following ignore such legal mandate.

59. While it is obvious that Argentine competition law did not fulfill the promise of being among the first Latin American countries regulating this area, it still has over 100 years of existence, and much is to be learned from it, for good and bad. We suspect that its fate is inextricably linked to that of the economy, and if the latter stabilizes, competition law will play a significant role in the new reality.

60. While it is easy to think that the near future will show more of the same, we hope that, regardless of the fate of the latest initiatives for reform, improvements will be made to align Argentine competition law to, at least, regional standards. ■

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