

Competition Law and Policy in Argentina

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Introduction

In the past 25 years Argentina has made considerable, if uneven, progress toward building a successful market economy. In any country, an effective competition policy is an important part of that effort. Argentina's progress in competition policy has also been uneven, having been affected in many ways by the country's turbulent political and economic history.

Argentina's first modern competition law was enacted in 1980. At the beginning, however, the law was not actively enforced. The 1980s were a period of hyperinflation in the country, and inflation was not tamed until 1992, when the government adopted a policy of "convertibility", pegging the Argentine peso one-to-one to the US dollar. Simultaneously the government embarked on an ambitious programme of privatisation and market reforms, and the Argentine economy enjoyed stability and growth in the 1990s. Coincidentally the competition agency became more active with these reforms. In 1999 a new competition law was enacted, creating a new, independent competition agency and introducing merger control for the first time. A serious economic crisis in 2001 interfered with the full implementation of the law, however. In 2002 the economy again began to grow. Since 2001, however, the competition agency, while staffed with dedicated professionals, has been hampered by an inadequate budget and, some would say, unnecessary interference and oversight from the government. Nevertheless it has undertaken some important merger cases, and in 2005 it prosecuted two large cartels.

An OECD report on *Competition Law and Policy in Argentina*, prepared in co-operation with the Inter-American Development Bank, was presented and peer-reviewed at the OECD-IADB Latin American Forum on Competition in July 2006. The report describes and critiques competition law enforcement in Argentina and offers some far-ranging recommendations on how it can be improved. ■

How is competition law enforced in Argentina?

Argentina's competition agency is the National Commission for the Defence of Competition (CNDC). Situated within the Ministry of Economy and Production, the CNDC has four commissioners and a president. It does not have independent enforcement powers, however. Its decisions must be ratified by a secretariat within the Ministry, currently the Secretariat for Technical Coordination. The CNDC was created by the 1980 competition law. The 1999 law created a new, independent competition agency, the Tribunal for the Defence of Competition, but the Tribunal has not yet been constituted. In an anomalous situation, the substantive provisions of the 1999 law are fully applicable, but they are enforced by the CNDC.

Most competition laws have provisions that apply to three types of business conduct: anticompetitive agreements, including cartels, anticompetitive single firm conduct (abuse of dominance) and merger control. Argentina's law is no exception. The substantive standards that apply in these three areas resemble those in many other national laws, and are consistent with generally accepted norms.

Cartel conduct is the most harmful of all types of anticompetitive conduct, and many competition experts, including the OECD's Competition Committee, consider anti-cartel enforcement to be the most important function of a competition agency. The CNDC has been slow to prosecute cartels. It generated only a handful of such cases until 2005, but in that year it announced two important cartel cases, resulting in large fines, involving producers of cement and oxygen used for medical purposes. The bulk of the CNDC's non-merger cases have been dominance (single firm) cases. Most of these originated as a result of complaints submitted to the Commission by private parties. The law requires the Commission to consider all such complaints. It has adopted appropriately conservative standards that it applies to these cases, and most of them have not resulted in sanctions. The most important dominance case considered by the Commission has been the YPF case, involving the country's dominant oil and gas producer. It was decided in 2000, and resulted in a large fine imposed upon the company.

The 1999 law introduced merger control to Argentina. Mergers exceeding certain size thresholds must be notified to the CNDC, which then has a specified time period within which to approve or deny the transaction. Unlike the laws in some other countries, the notification is not required to be done "pre-merger", that is, the merging parties are permitted to consummate their transaction before the CNDC and the Secretariat reach their decision on its legality. Soon after the enactment of the 1999 law it became clear that the notification thresholds were too low; the Commission was having to consider too many mergers that had no competitive consequences, diverting resources from its work in conduct (restrictive agreements, abuse of dominance) cases. In 2001 the thresholds were revised upward, which improved the situation, but it appears that they may again be too low, having been effectively reduced by inflation. The CNDC has considered several important merger cases, some of which are described in the OECD report. The analysis that it applies to mergers is consistent with international best practices.

The 1999 law provides the competition agency with adequate enforcement tools. It can conduct “dawn raids” (surprise visits to business offices to acquire documents), and it can compel the production of documents, information and oral testimony. It can impose fines of up to AR\$ 150 million for conduct violations. This is a large fine, but it may no longer be adequate, especially in cartel cases, given the recent inflation in the country. The agency can issue orders prohibiting anticompetitive conduct and/or requiring affirmative action to remedy effects from harmful conduct. In the case of abuse of dominance it can order the restructuring of the dominant firm (though it has never done so). In the case of mergers, it can prohibit their consummation or require structural remedies, such as asset divestitures, to remedy the perceived anticompetitive effects of a transaction.

The law and accompanying decrees and regulations create formal case handling procedures. In most conduct cases, and in all merger cases, a report is prepared for the Commission after a formal investigation. The Commission then makes a decision (a majority of those voting is required), which is forwarded to the Secretariat for approval or disapproval. The law and regulations set out time periods within which the various phases in a case must be completed, though these can be, and in the case of mergers often are, extended for appropriate reasons.

The Commission has a significant backlog in conduct cases, though in 2005 and 2006 it has been reduced to some extent. It takes an average of 3-4 months to complete the usual merger review, which is long by OECD standards. The formal procedures for both types of cases contribute to these delays, but this effect must be balanced against the need for transparency in a country where scepticism about honesty in government persists.

There are no explicit exemptions or exclusions from the competition law. The law applies in all sectors, including those in which there is regulation. The CNDC’s activity in regulated sectors has been sporadic. The law explicitly requires that mergers in regulated sectors be approved by the competition agency (the sector regulator may also have approval authority). The Commission has on occasion considered conduct cases in regulated sectors, most frequently in telecommunications. It has also infrequently engaged in competition advocacy in regulated sectors. Its ability to do competition advocacy is constrained by a lack of resources. The OECD report contains a brief description of competition policy in selected regulated sectors. ■

What are the principal strengths and weaknesses of competition law enforcement in Argentina?

The 1999 competition law is a good one. It articulates the right substantive standards applying to restrictive agreements, abuse of dominance and mergers; it creates an independent, professional enforcement authority and provides it with the legal and administrative tools that it needs for the job. Competition policy has benefited from another fundamental advantage over the years: a dedicated, competent staff of professionals in the CNDC. There are two overriding institutional problems confronting competition law enforcement in Argentina, however: insufficient budget and insufficient

independence for the competition agency. These, in turn, are manifestations of a more general condition: the lack of a strong competition culture in the country.

Since 2001 the CNDC has suffered severe budget cuts, in both real and absolute terms. These cuts have had their greatest impact on the agency's personnel. Salary levels are low. As many as one-half of the agency's professional employees are employed on a short-term contractual basis; they have no benefits or job security. As a result, employee turnover in the agency is high, which negatively affects the agency's level of expertise. Also, as noted above, the Tribunal for the Defence of Competition, the independent competition court envisioned by the 1999 law, has never been created. The CNDC continues to operate without having independent decision-making authority. While in some years past the agency was accorded substantial independence by the government, the perception is that today it has relatively less of it.

There is a growing competition culture in Argentina, and the CNDC has contributed to it, for example by publishing its decisions, holding conferences on competition policy and creating a Web site. Still, for the most part a competition culture has not taken hold with the public at large. The CNDC's recent cartel cases, for example, were perceived in some quarters not as actions against egregious conduct that harms consumers but as part of the government's greater effort against inflation. In this same vein, the government has recently entered into a series of agreements with the members of the private sector limiting their ability to raise prices (the CNDC is not directly involved in these agreements). Such efforts at price control, whatever their value against inflation, are inconsistent with an effective competition policy.

Finally, in addition to these important institutional issues, which have a significant political component, there are operational issues facing the agency as well, including the need to improve its anti-cartel programme and to make its case handling procedures more efficient. ■

What can be done to enhance competition policy in Argentina?

The OECD report contains several recommendations for enhancing competition policy in Argentina.

Create the Tribunal for the Defence of Competition

Seven years after the enactment of the law that provided for a new, independent competition agency that agency does not yet exist. Creating the Tribunal would address both of the fundamental problems confronting the competition agency, insufficient budget and insufficient independence. The law would permit the new agency to begin to impose fees for certain aspects of its work, notably merger notification fees. In many countries such fees supplement the regular budget of the competition agency. The new

agency would be composed of seven members, appointed for fixed terms by a quasi-independent jury. It would have the power to enforce its own decisions, subject to appeal to the courts.

It is thought by some that it is politically impossible to create such a fully independent agency at this time – that there should be some authority in the government to review the agency’s decisions, especially in mergers. In 2005 there was legislation to create the Tribunal containing such a merger review provision, but it narrowly failed. If such a compromise is eventually reached, it should be made clear that a merger decision should be overturned rarely, and only for reasons of “overriding public interest”.

Increase the budget of the competition agency

It is clear that the CNDC does not have sufficient funds to accomplish its mission effectively. Its budget (or that of the Tribunal if it is created), should at least be restored to 2001 levels in real terms. Moreover, the CNDC has little discretion as to how to spend the budget that it has. Most decisions of that type must be approved by the Secretariat. There must be oversight, but the agency should have more discretion in these matters.

Strengthen anti-cartel enforcement

Anti-cartel enforcement should have top priority within the competition agency. An important element in a successful anti-cartel effort is the imposition of severe sanctions against cartel operators. Strong sanctions both provide a deterrent to future unlawful conduct and create an incentive for cartel operators to co-operate with the prosecutor in order to reduce or eliminate the sanctions. Thus, the competition agency should begin to impose higher fines in cartel cases, and also begin to fine natural persons as well as businesses. To this end, the statutory maximum fine should be increased from the current AR\$ 150 million. The agency should also establish a leniency programme, which offers the elimination of sanctions to the first cartel participant to offer co-operation.

Increase efficiency in conduct investigations and merger review

The Commission considers many private complaints of unlawful conduct. The great majority of these do not result in a finding of illegality, but many are nevertheless subject to a formal inquiry and decision. The CNDC could conserve its scarce resources by finding ways to deal more summarily with these cases, without compromising the important need for transparency.

It faces similar issues in merger control. It should consider raising the notification thresholds, which would reduce the number of mergers that it would have to review, and it should explore ways to shorten the time required to review and approve the 90% of mergers that pose no important competitive issues.

Review the current merger notification regime which permits the parties to consummate their merger before the competition authority completes its investigation

The ability of merging parties to consummate their transaction before the competition agency makes its decision on a merger can adversely affect the agency's ability to obtain an effective remedy in case the merger is found to be unlawful. While the anticompetitive effects of a merger can often be remedied by asset divestitures, sometimes only complete prohibition is effective, and this is not possible if the merger has been consummated. Pre-merger notification, which requires the parties to wait to consummate their merger until after the agency's decision, avoids this problem. It also has a second salutary effect: it creates a stimulus for the merging parties to co-operate with the investigation in order to speed its conclusion. It may be politically difficult to change the law to accomplish this, however. In the alternative, the agency could consider creating procedures that would permit the agency to apply for an order preventing consummation in specific cases, or to require the parties in a consummated merger to "hold separate" their operations until after the agency's decision.

Until the Tribunal is created, free the CNDC from as much political interference as possible

The 1999 law articulates a clear policy in favour of independence of the competition authority. Until that law is fully implemented it seems that its spirit should be observed by preserving the CNDC's independence as much as possible.

Continue and broaden the efforts toward building a competition culture in Argentina

The CNDC has engaged in several programmes for the purpose of enhancing a competition culture in Argentina. It should continue these and initiate others, such as sponsoring conferences and seminars, building good relations with the press and publishing brochures or pamphlets for public consumption. Above all, effective competition law enforcement, including bringing cases of demonstrable benefit to consumers, is the most effective means of developing a national competition culture.

Develop an effective, professional relationship with the judges who hear appeals in competition cases

The CNDC has had relatively good success on appeals of its decisions to the courts. It would be useful, however, to conduct programmes that would help the judges who hear its cases to better understand the unique aspects of competition analysis.

Expand the competition agency's role in regulated sectors

The agency should consider opportunities for conduct cases in these sectors, and, consistent with its limited budget, for more competition advocacy. It would be helpful also for it to develop closer working relationships with sector regulators. ■

For further information

For more information on the OECD's work on competition policy, please see our website at www.oecd.org/competition or contact dafcomp.contact@oecd.org. For more information about this Policy Brief and the report on Argentina, please contact Michael Wise, tel.: 33 (0) 1 45 24 89 78, e-mail: Michael.wise@oecd.org.



For further reading

- OECD/IDB (2006) **Competition Law and Policy in Latin America: Peer Reviews of Argentina, Brazil, Chile, Mexico and Peru.**
- OECD, **OECD Journal of Competition Law and Policy**, ISSN 1560-7771, Subscription (3 issues per year), € 152.

The following publications are available at www.oecd.org/competition.

- In "Reports" section: **Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation.**
- In "Latin American Competition Forum, 19-20 July 2005": **Merger Control Laws and Procedures in Latin America and the Caribbean.**

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