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Judicial Perspectives on Competition Law

-- Argentina¹ --

1. Introduction

1. Competition Agencies' decisions around the world are subject to judicial control. Judges' degree of specialization in economic matters is a key element towards an optimal system of competition enforcement in every country.
2. In Argentina, the relationship between the Competition Authority² and the judiciary power has always been under constant debate. Since the enactment of Act 25,156 in 1999, jurisprudence has been ambiguous and contradictory. This undesirable circumstance has led to an unclear legal structure in which the private sector cannot foresee the branch of the judiciary that shall analyze a case, which results in a lack of predictability when considering which court of appeals shall understand on competition matters.
3. Under the Argentine Competition Act N° 25,156 (hereinafter the "ACL"), the relationship between the Courts and the Competition Authority works as a very illustrative example of the uncertainty referred above, and it has a direct linkage to the appeals matter. Over the last two decades, the discussion has focused on whether the Federal Court of Appeals on Civil and Commercial Matters or the Criminal Court of Appeals on Economic Matters shall intervene as an appeals court in antitrust issues. Since then, both judicial bodies have issued resolutions on matters arising from the ACL.
4. Argentina is a federal country and provincial and federal courts coexist. Therefore, defining the court that has jurisdiction on appeals against resolutions from the Competition Authority is beyond the scope of the ACL and it tackles with certain provisions of the Argentine Constitution and the organization of the Judiciary.
5. In the following lines, we will explore the interaction between the Competition Authority and the judicial Courts in Argentina during the last 35 years, and the future challenges faced towards the enactment of a new competition bill, which pretends to bring light to the subject matter.

¹ This contribution was prepared by Pablo Trevisán, Federico Volujewicz and Eduardo Aracil and received comments from Lucía Quesada. Contribution from the National Commission for the Defense of Competition, Argentina

² Pursuant to Decree 718/2016, the Secretary of Commerce of the Ministry of Production acts as the enforcement authority of Argentine Competition Law, 25,156, while the National Commission for the Defense of Competition acts as a technical body under the purview of the Secretary of Commerce of the Ministry of Production.

2. Argentine Legal Framework: Court of Appeals in Competition Matters

6. Almost 20 years after the enactment of the ACL, certain aspects still remain at the heart of debates concerning the judicial control of decisions made by the Competition Authority.

2.1. 1980's Act 22,262

7. Antitrust legislation in Argentina has been in force since the beginning of the 20th century³. One of the landmark steps towards the development of antitrust practice in Argentina was the enactment of Act 22,262 in 1980. This Act, which mimicked some European concepts of competition law in the Treaty of Rome, created the National Commission for the Defense of Competition (hereinafter the "CNDC" for its Spanish acronym) and made violations of competition law a criminal offense that would be tried before a criminal court.

8. While having criminal sanctions, the jurisdiction of the criminal courts in the events of violation of antitrust laws was not questioned. In that sense, Act 22,262 stipulated that the Criminal Court of Appeals on Economic Matters shall have jurisdiction to decide in antitrust matters in the City of Buenos Aires as well as Federal Judges in the provinces, depending on the place where the offence was committed.⁴

2.2. The regime established by Act 25,156

9. The ACL, enacted in 1999, among other reforms, eliminated criminal charges among the sanctions for violation of the law and consequently replaced the court which shall review the decisions rendered by the Competition Authority.

10. Under section 53, the ACL established that appeals to the decisions held by the National Tribunal for the Defense of Competition⁵ (hereinafter the "TDC"), should be filed and justified before the same body, which within five days after the file of such recourse should raise it before the National Court for Commercial Appeals or before the corresponding Federal Chamber of a given province of the country.

11. However, Decree 1019/99 enacted the ACL, left apart the criteria established by Act 22,262 and removed any references to the "National Court for Commercial Appeals" and "a given province of the country" as stipulated by Act 25,156 original text.

12. Two years later, Regulatory Decree 89/2001 of the ACL, established that the Civil and Commercial Federal Court in the city of Buenos Aires, and the respective Federal Chamber with powers in any given province of the country shall have the faculties to intervene in cases of appeals filed against decisions made by the TDC, according to the terms set forth in section 53 of ACL.

³ Argentina's first competition law was enacted in 1923.

⁴ Section 34, Act 22,262.

⁵ The TDC was a body created by Section 17 of Act 25,156, which was meant to replace the CNDC. Since the TDC was never created, and due to 2014 reform of Act 25,156 the CNDC is still responsible for the enforcement of the ACL.

2.3. The enactment of Act 26,993

13. Act 26,993, enacted in September 2014, modified certain aspects of the ACL. Among others, Act 26,993 eliminated the TDC and empowered the Executive to determine the competition law enforcement authority and established that all provisions referring to the TDC shall be understood as referring to such enforcement authority.

14. Said Act, also modified Section 53, stipulating that the appeal to the decisions held by the enforcement authority should be filed and justified before the same body, within ten days after the file of the appeal, the enforcement authority shall raise it before the National Court of Appeals in Consumer Relations or before the “*Competent Court of Appeals*”.

15. The National Court of Appeals in Consumer Relations was created by section 41, Act 26,993. However, said Court of Appeals has not been put in place yet. As a consequence, pursuant to section 76 of Act 26,993, until the Court of Appeals in Consumer Relations is appointed, the competences conferred to said Court, shall be exercised by Courts currently dealing with the subject matter, which takes us again to the same question; which Court of Appeals shall be in charge of dealing with antitrust matters?

3. Judicial Precedents

16. Argentine Supreme Court of Justice (ASCJ) had intervened in several occasions, trying to put an end to the jurisdictional concern and to determine which body shall intervene as an appeals court in antitrust matters; shall there intervene a court that acts in matters related to economic and market aspects? Or shall the competent court be the one that intervenes in criminal complaint procedures with regulatory powers in economic aspects?

17. Through the enactment of several decisions, the ASCJ tried to deal with these questions.

18. In re *Imagen Satelital S.A.*⁶, the ASCJ named the Criminal Court in Economic Matters as having jurisdiction to decide the matters concerning the case, thus maintaining the guidelines set forth by Act 22,262. The position of the ASCJ was that a correct interpretation of Decree 1019/99 indicated that its intention was to maintain the competition assigned by Act 22,262 to the Criminal Court in Economic Matters⁷.

19. When deciding on case *Surcor TV SA c/ Multicanal SA*⁸, the ASCJ followed the wording of section 53 of ACL (prior to the enactment of Act 26,993), and determined that the ruling framework envisaged an appeal “before the respective Federal Chamber”. While deciding on said case, the ASCJ recalled a principle that stipulates that whenever laws establish jurisdiction to a particular court in certain matters; they indicate the specialization given by the legal order, which constitutes a relevant circumstance to take into account when there are no legal provisions imposing a different attribution of powers.

⁶ *Imagen Satelital SA*, ASCJ 09/14/2000 (fallos 323:2577).

⁷ PETRE CARLOS A. Tribunal de alzada en la Defensa de la Competencia. Una polémica abierta. LA LEY, 2009-D, 1997.

⁸ *Surcor TV SA c/Multicanal*, ASCJ 05/07/2002 (fallos 325:957).

20. In the case *Repsol YPF*⁹, the ASCJ named again the Criminal Court in Economic Matters as having the faculties to decide as to the matters concerning the case. In this case, the ASCJ agreed with the opinion issued by the Prosecutor before the Supreme Court of Justice, who considered that the question was similar to the one treated on the case *Imagen Satelital*, and said that section 53 of Act 25,156 provided for appeal before the corresponding Federal Court.

21. However, scholars and practitioners interpreted that this decision gave jurisdiction to the Criminal Court on Economic Matters only on those cases that were not included on sections 35¹⁰ and 52¹¹ of the ACL, being the Federal Court of Appeals on Civil and Commercial Matters competent on appeals against resolutions included under said sections of the ACL.¹²

22. Finally, in re *Multicanal SA y otro*¹³, the ASCJ assigned jurisdiction to a Federal Chamber of Appeals of the province with subject matter jurisdiction. The jurisdiction matter was solved taking into account the geographic market affected by the conducts under investigation, where said conduct had *'prima facie'* anticompetitive effects. The ASCJ agreed with the opinion issued by the Prosecutor Before the Supreme Court of Justice saying that section 53, enacted by Decree 89/2001, established that the Federal Court on Civil and Commercial Matters on the City of Buenos Aires, and the corresponding Federal Chamber in the interior of the country, shall understand on the appeals filed against antitrust enforcement authority decisions.

23. As previously mentioned, in 2014 Act 26,993 introduced several amendments to the ACL including certain amendments on the appeal process of the decisions issued by antitrust authorities.

24. In 2014, after said amendments became into force, in case “Clariant Participations LTD y otros”¹⁴, the CNDC raised an appeal before the Federal Administrative Court of Appeals, which decided that it was not competent on antitrust matters and forwarded the case to the Federal Court of Appeals on Civil and Commercial Matters. This was the first

⁹ Repsol YPF Envasado en la Ciudad de San Nicolás s/ Recurso de queja, ASCJ 03/21/2006 (fallos 329:860).

¹⁰ Section 35 of the ACL stipulates: *The Court at any stage of the proceedings, is empowered to impose the compliance of the conditions it establishes or order cessation or abstention of the damaging behavior. When serious damage could be caused to the competition regime the court shall be able to order the measures which were suitable according to the circumstances to prevent the damage. An appeal can be lodged against this resolution with returning effect, in the form and terms provided by sections 52 and 53. In the same way it shall be able to order, on the court’s own motion or upon request of the party, the suspension, modification or reversal of the measures provided by virtue of occurring circumstances or which could not be known at the moment of their adoption.*

¹¹ Section 52 of the ACL (1999) stipulated: *“...Resolutions pronounced by the Tribunal on the following matters shall be subject to appeal a) application of fines; b) cessation or abstention of a practice; c) opposition or conditioning regarding acts provided in Chapter III; d) dismissal of the complaint by the Tribunal for the Defense of Competition. ...”*

¹² CERVIO, Guillermo y RÓPOLO, Esteban “Ley 25.156 de defensa de la competencia: comentada y anotada” 1 Ed., Buenos Aires, La Ley, 2010.

¹³ “Multicanal SA y otro s/Denuncia Infracción Ley 22,262, ASCJ 04/10/2007” (fallos 330:1610).

¹⁴ “Clariant Participations LTD y otros c/ Defensa de la Competencia s/ Apel Resol Comisión Nac Defensa de la Compet” Causa 25.240/15/CA2 – Camara Civil y Comercial Federal 2016

case after the enactment of Act 26,993, where judges dealt with jurisdiction matters regarding antitrust cases. This case was appealed to the ASCJ, which decided not to analyze the case, thus confirming this criteria.

25. As seen, applicable laws have been blamed for not providing certainty as to which courts have competent jurisdiction to review antitrust cases. Likewise, the development at the ASCJ, although providing some clarity with its decisions, is yet to provide a clear-cut indication as to which court shall be entrusted with full powers to undertake judicial review on appeals of the decisions of the Competition Authority.

4. Future Changes in Argentina's Antitrust Draft Bill

26. The current status of the matter requires to address the issue bearing in mind which courts could be more suitable to handle antitrust cases based on the complexity and principles of economic and legal analysis that govern the ACL

27. During 2016, the CNDC drafted a new competition bill (hereinafter the "Draft Bill"), along with congressmen that had already been involved in previous proposals which addresses this issue, among others.

28. The Draft Bill was mostly designed aiming at achieving antitrust international best practices as well as OECD recommendations, together with Argentine experience and reality.

29. Following that premise and regarding the subject matter the Draft Bill creates a Court of Appeals on Antitrust Matters ("ACAM") entitled to understand in the specific antitrust controversies.

30. The creation of a specialized appellate body on competition matters will answer the question antitrust scholars and practitioners have been asking themselves since the enactment of Act 25,156; "which court has jurisdiction to understand in competition issues?"

31. This will also give certainty and bring light to the relationship between the Competition Authority and the Judiciary. Additionally, it is expected to lead to greater efficiency in the decision-making process as competition cases involve different disciplines, requiring legal and economic expertise to properly analyze existing evidences in any given case.

32. In addition, the establishment of a single Court, specialized in reviewing competition cases, will minimize the potential different interpretations and will avoid contradictory decisions. At the same time, it will improve the predictability of the Court which redounds in the benefit of economic agents.

5. Closing remarks

33. Although antitrust laws have been in force in Argentina since decades, the discussion on which court shall act as an appellate body in antitrust issues is yet unresolved.

34. Both, legislation and jurisprudence had taken steps forwards and backwards, reflecting an important lack of predictability, which leads to a weak institutional framework in competition issues in Argentina.

35. The Draft Bill comes to put an end to this question, creating a specialized court in the framework of the Federal Courts of Appeals in Civil and Commercial Matters, which will act as an appellate body to review the decisions issued by the competition enforcement authority¹⁵.

36. Specialization should not only solve this “*enigma*” but it’s also expected to lead to a better functioning of the whole antitrust legal framework, improving the quality of the decisions, and consequently demanding a better performance of the competition authorities, lawyers and experts.

¹⁵ The Draft Bill creates an independent authority the National Competition Authority, with sufficient powers to adopt its own decisions, control its own budget, and function without political interference.