Competition Policy International

Argentina's CNDC, Lacking the "Big Guns" in the Fight Against Monopolies

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Argentina's Competition Law dates back to 1999, with its latest round of tweaks and addenda in 2014. At the time of its writing, at the dawn of the new Millennium, this was a modern, ground-breaking legislation, based on international Best Practices and advocating for more robust institutions that might make a more independent National Competition Authority possible.

Eighteen years on, and even the recent changes made in 2014 were not enough to keep the National Commission for the Defense of Competition (CNDC) at the vanguard in the world of anti-trust. There are three main reasons for this. First, the world's leading competition authorities began to implement a series of tools that today are vital in the field of cartel detection, such as leniency or immunity programs or market research, neither of which were part of the 2014 reforms. Second, the 1999 law had been written in the context of macroeconomic stability, and so it made sense to set the guideline fine limits and the thresholds for notifying of mergers based on non-revisable peso amounts. The profound macroeconomic shifts that have rocked the country since then have made this approach untenable, in urgent need of change. And finally, we must consider the chronic institutional weakening and destruction wrought by the *Kirchnerista* administrations and their effect on competition policy. Not only did the competition authority fail to make the vaunted gains in terms of independence, it instead became completely dependent on political considerations. This prevented the creation of a Competition Defense Tribunal, as required by Article 17 of the 1999 law and intended as an autonomous institution tasked with applying the law. However, even the creation of said Tribunal was eventually struck from the 2014 law (Article 65).

All three of the points raised above are currently being discussed by the National Congress, as they prepare a new Competition Law drafted by ruling party deputies in collaboration with CNDC authorities.

Leniency programs are a popular tool among leading competition authorities worldwide. These programs have brought forth a true revolution in the way that cartels are detected, prosecuted and deterred. In a way, they are replacing older cartel detection mechanisms that focused on analyzing consumer complaints and carrying out raids on offices. Leniency programs work by reducing the sanctions on businesses involved in a cartel so long as they willingly offer information regarding said cartel to the competition authority, cooperating during the proceedings to prosecute the remaining cartel members. The way these programs have been applied in the U.S.A. and the European Union varies substantially. However, the central idea is to reduce or eliminate fines for companies that can bring forward substantial evidence to help the authority detect or dismantle a cartel.

In the case of the U.S.A., leniency is offered only to the first company to step forward with information regarding the cartel. Some other conditions also have to be met before the company is granted leniency. In the European Union, on the other hand, leniency can be given to several companies in a cartel. The first to come forward can get a reduction in fines of up to 100%, with later comers receiving successively smaller reductions. In any case, the information provided must be accurate and helpful in prosecuting the members of the cartel.

Another modern tool used by competition agencies are Market Investigations. We will leave their description to a later article.

Our second point is concerned with how outdated the current law is in terms of possible applicable fines and the threshold amounts required to trigger a merger notification. At present, any merger or acquisition operation exceeding AR$200 million (about US$12.7 million) must be notified to the competition authority. To get an idea of how far behind the times this figure is, consider cases where companies have had to notify the CNDC when buying a new office or a costly asset needed to carry out their activities. This is absolutely ridiculous.

Furthermore, the fines that the Commission may impose to punish an illegal action, whether it is price-fixing collusion or unilateral abuse of dominance, must fall in the range of AR$10 thousand and AR$150 million (between US$640 and US$9.5 million). These amounts are miniscule, and in no way serve as a deterrent to uncompetitive practices. In many cases, the benefits accrued by companies engaging in these illegal practices will be far greater than the potential cost of any fine they may face – in the unlikely case that the Commission, lacking a working Leniency program, can actually detect abuses of dominance or the formation of cartels.

As we find ourselves in a macroeconomic context with persistent high inflation, the thresholds on obligatory notification of mergers must allow for yearly adjustments based on inflation, measured either against the Price Index, or by directly pegging these limits to a 'hard' currency such as the U.S. Dollar. To give us some idea, the thresholds for notification of mergers in the U.S.A. is US$80 million, while in the European Union the threshold is €250 million (US$284 million). It must be mentioned that US competition law applies at a national level, while European Union laws act on a Supra-national level. Within the countries that make up the Union the actual limits are closer to that found in the U.S.A. Perhaps the $200 million peso-dollar equivalence from the age of full conversion would be too high for Argentina today, making a threshold of somewhere between US$50 million and US$100 million more appropriate.

On the other hand, when considering fines imposed over illegal practices – whether price-fixing through a cartel or unilateral abuse of dominance – there should be no upper limit. International experience on the matter suggests that the proper amount for each case will greatly depend on the amount of harm caused by the companies involved. In the European Union, as well as in Mexico, certain limits are set in terms of a percentage of the company's total income for a given year.

Lastly, it's important that we remark on the institutional aspects that represent a necessary, if insufficient condition for the creation of a World Class competition authority. The regulator must be autonomous and independent from the executive. It should have its own budget, free from any pressure coming from Ministries whether due to political reasons, or due to lobbying from economic agents. This is not the situation we see today. The CNDC today depends on the Ministry of Commerce, and its resolutions are non-binding. Final decisions are taken by the Secretary of Commerce, who may or may not take the Commission's recommendations into account.

Before December 2015, the CNDC depended to a large degree on the political expediency of the time. Now, the Commission led by Esteban Greco works under a highly technical and independent approach, but this progress could easily be reversed by a change in the government. For this reason, in order to achieve a stable process of growth, improvement and greater transparency in the application of competition laws, we must have a competition authority that is independent from political power.

In order to remedy the three problems outlined above a new competition law is required, one which adopts the concepts of Leniency programs and that brings the threshold amounts for merger notifications and the limits on fines up to date, and which allows the Competition Authority greater freedom from political influence. The draft for this new law was presented before the Chamber of Deputies in September 2016, with all of these elements included to some degree. However, the law has not yet been approved. It is necessary for this new Competition Law to be discussed and passed, in order to allow the CNDC to use the 'big guns' it needs in its fight against monopolies and cartels.