



A country of diverse terrain, Argentina is nearly 4,000 km long from the subtropical North to the sub-Antarctic South. It encompasses part of the Andes mountain range, swamps, the large plains of the Pampas, and a long coastline.

Economy

For more than 40 years, Argentina followed the path of industrialisation through import substitution with strong state intervention. The 1976 military coup forced profound political, social and economic changes that resulted in the interruption of the industrialisation process and the implementation of an entirely new economic system.

With the arrival of President Menem in 1989, Argentina underwent an accelerated and widespread process of market deregulation and privatisation of public enterprises without paying attention to the promotion and protection of competition. After eight years of parliamentary debates a new Competition Act (Bill 25.156) was enacted in September 1999.

Competition Evolution and Environment

Competition legislation exists in Argentina since the beginning of the 20th century. The first Act was passed in 1923 (Bill 11.210) to control practices oriented towards establishing or strengthening monopolies. Though amendments were introduced to make it more effective, the Act has seldom been enforced.

Later on, in 1980, the military dictatorship passed a new legislation (Decree-Law 22.262), which prohibited anticompetitive practices that harmed the general economic interest. The system was thought to examine the harm done and did not include a list of prohibitions of restrictive practices.

A critical issue missing from the 1980 Act was an explicit regulatory mechanism over M&As, which made it outdated in light of the structural reform adopted by the Menem

PROFILE	
Population:	36.8 million***
GDP (Current US\$):	129.6 billion***
Per Capita Income: (Current US\$)	3,810 (Atlas method)*** 10,880 (at PPP.)
Surface Area:	2.8 mn sq kms.***
Life Expectancy:	74.1 years**
Literacy (%):	97 (of ages 15 and above)**
HDI Rank:	34
Sources: - World Development Indicators Database, World Bank, 2005 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

Administration at the end of 1989. During the 90's, several legislative proposals on competition were introduced and discussed in the Parliament. However, not enough political will was gathered to pass a new Competition Act contributing to accelerated vertical and horizontal concentration. Between 1992 and 2000, more than 1000 M&As took place, mainly in the areas of manufacturing, mining, telecommunications, financing and agriculture.

Competition Law

Finally, in September 1999, a new Competition Act (Bill 25.156) was passed. But the regulation for its implementation (Decree 89/2001) was adopted in the beginning of 2000, a year after the expiration of the deadline (120 days from the passing of the Bill) established by the National Assembly for this purpose.

The 1999 Competition Act

The implicit objective of Bill 25.156 is to ensure fair competition in Argentina by prohibiting anticompetitive practices and economic concentration that could jeopardise the general economic interest.

* Original paper submitted in September 2004. Revised by CUTS staff in October 2005 & March 2006.

According to Argentine legislation an anticompetitive Act is only prohibited when it may go against the ‘general economic interest’ (public interest) requiring in each case an evaluation of the competition authority using the ‘rule of reason’. It is up to the authorities to decide whether or not a trade (business) practice is against the ‘general economic interest’.

The main aspects of the 1999 Competition Act are:

- prohibition of abuse dominance;
- mandatory pre-notification of M&As under a specified threshold;
- establishment of a National Tribunal for Competition Defence (NTCD); and
- provision of penalties for contravention or non-compliance.

The 1999 Act represents an important improvement over the 1980 Competition Act with respect to:

- establishment of a NTCD;
- prohibition of economic concentrations that restrict or distort competition; and
- a mandatory notification system for M&As’.

Alas, provisions related to these areas have been either watered down by way of presidential decrees or have not yet been implemented.

Institutions and its Competencies

The 1999 Competition Act provides for the establishment of a *NTCD*, a self-sustained and independent body with quasi-judicial powers linked to the Economy Ministry. The NTCD is responsible for the implementation of the new

Competition Act and its decisions can be appealed. Though it means an important improvement from the National Commission for Competition Defence (CNDC) created under the 1980 Act, the NTCD has not yet been created.

Consequently, the 1999 Act is presently being implemented by the CNDC, a body that is under the control of the Secretary for Technical Coordination of the Economy Ministry. This provision defeats the purpose or the intention to protect the implementation body from political influence. Decisions of the CNDC are not legally binding until the Secretary for Technical Coordination accepts them (it also has the power to modify or reject them).

Besides, the Competition Act (enacted version) established that the Tribunal would formulate its own internal regulations, including the process to choose its president and the term of his/her mandate. But this clause has been diluted because the Act’s implementing regulation (Decree 89/2001) establishes that the Head of State, following recommendation of the Economy Minister, will choose the president of the NTDC.

Anticompetitive Business Practices

Mergers & Acquisitions

Bill 25.156 (enacted version) prohibits economic concentrations that have the effect of reducing, restricting or distorting competition in a way that might work against the general economic (public) interest. But its implementation regulation has eliminated from the purview of the Act those operations of economic concentration that have the effect of reducing competition. Consequently, the scope of prohibition is now limited only to those M&As which restrict or distort competition and might be prejudicial to the general economic interests.

The mandatory pre-notification regime saw a similar fate. Its original scope was reduced by way of presidential decrees. Bill 25.156 (enacted version) established the following three thresholds under which transactions required pre-notifications:

- Market participation: activities implying the participation of enterprises or groups of enterprises with a share equal or greater than 25 percent of the relevant market or a substantial part of it;
- The total turnover of the acquiring and target group of companies exceeds the amount of US\$200mn (in Argentine Pesos) in the national market; and
- The total turnover of acquiring and target group of companies exceeds the amount of US\$250mn (in Argentine Pesos) in the international market.

However, two of the three thresholds have been eliminated. According to the current Competition Act and its implementing regulation (Decree 89/2001), only those economic concentrations that are above the following threshold require mandatory notification:

Box 102.1: Wal-Mart Facing Problem of Entry due to Dominance of Carrefour

The acquisition of two big Argentine chains of supermarkets – *Norte* and *Tia* by the French supermarket chain *Carrefour* has made the French company a leader in the retail business in the Latin American country. Due to the level of the turnover of the acquired entity, the case was notified to the CNDC. The economic operation was approved subject to only one condition – a one-year interdiction to establish new outlets in the Rosario area (the capital city of the province of Santa Fe) where the target group already had 50 percent of the relevant market.

The competition authority argued that the supermarkets and hypermarkets sector was under expansion and therefore the merger could be challenged. However, the evolution of the market has shown that the retail market was already highly saturated, contrary to the assessment of the CNDC. In fact, the giant Wal-Mart is still facing major obstacles in trying to penetrate the market in Argentina.

- A total turnover of the acquiring and target group of companies in the national market that exceed the amount of US\$200mn (Argentine Pesos) within Argentina.

The competition authority has a maximum period of 45 days to decide on the merger or acquisition. If in such period no decision is issued, the merger or acquisition will be deemed authorised (positive silence). Besides, decisions of the competition authority cannot be revised or revoked should the circumstances under which it was made have changed, except when it could be shown that the information submitted was false or incomplete.

In spite of the existence of a new competition bill, most of the M&As concluded till December 2002 were neither subject to notification nor control, mainly due to the changes introduced to the thresholds for notification. Of the cases that were under the review of the competition authority, one was rejected (Case: *Correo Argentino – OCA*) and only eight were approved subject to the compliance of conditions, most of them irrelevant to prevent anticompetitive behaviour, as in the *Carrefour-Norte* merger case.

Regulatory Framework

Telecommunications Sector

Telecommunications services in Argentina are regulated by Secretariat of Communication (Secom), which has the responsibility for determining telecom policy and

Box 102.3: Cooking Gas Cartel in the Dock

Back in July 1998, residential consumers in *San Carlos de Bariloche*, province of *Rio Negro*, were faced with an increase of 50 percent in the price of the cooking gas cylinder. All the retailers of the product, *Repsol YPF*, *Shell*, *Coopetel Ltda* and *Totalgaz Argentina*, simultaneously and uniformly raised the price.

A group of residential consumers complained to the CNDC. They stated that the increase was abusive and was organised uniformly by all distributors and retailers of liquid gas since it was impossible to find liquid gas at a cheaper price anywhere else in the whole city of *San Carlos de Bariloche*.

After investigation, the CNDC found that a rise in the price was a consequence of an agreement reached among competitors at the level of liquid gas producers. The agreement was to control the whole operation of the market – prices, terms of purchase, and to respect each other’s customers. Besides, the agreement also included a clear obligation for distributors and retailers to follow suit. The Commission stated that it was a case of unduly restrained competition.

Consequently, in May 2001, the Commission imposed economic penalties of US\$120,000 on the four companies involved in the agreement.

Box 102.2: Cartel in the Medical Oxygen Supply Market

In July 2005, the competition authority in Argentina levied a fine amounting to US\$24mn on four foreign companies *viz.* Air Liquide (France), Praxair (United States), AGA (Germany) and Indura (Chile), active in Argentina as suppliers of medical oxygen to both public and private hospitals, for operating a price cartel.

The investigation commenced in 1997 and concluded that the accused companies had entered into an agreement to distribute customers among themselves, while also participating in bid rigging. The Commission conducted four raids, in which they found certain documents showing the exchange of information about customers, bids, prices etc. As a result of this cartel, hospitals and consumers were forced to pay high prices and the cartel members enjoyed illegally high profits.

Source: Recent Important Cases, report by the UNCTAD Secretariat, September 2005

regulation, issuing licences, approving tariff and establishing taxes and duties. The National Communications Commission (CNC) has full control over the sector. Its mandate includes compliance with technical and administrative regulation, homologation equipments, resolving complaints from customers, and promoting and ensuring fair competition.

In the 1990’s the Government allowed two private firms, *Telefonica de Argentina* and Telecom Argentina, to take over the public telecommunication company (ENTel) by dividing the country into two operational regions. Some private foreign telecommunication companies have withdrawn from operating in the country due to bad reputation and inconsistent rules and practices.

The current environment for the development of IT-enabled services in Argentina is not very favourable either. ICT trade has suffered from a severe recession and political instability requiring a dependence on hard currencies and operating with an income in devalued pesos.

There are still major flaws in the regulatory law and telecommunication policy.

Electricity Sector¹

The electricity sector in Argentina is almost completely unbundled with a large number of generation, distribution and transmission companies competing for the different markets. The largest private generation company is the *Piedra del Aguila* Hydroelectric project (1,400 MW) with less than 8 percent of the total national market. There are ownership restrictions intended to avoid the exercise of market power. Generation companies that hold distribution assets are limited to own less than 10 percent of the generation capacity. In addition, the generation companies are not allowed to hold transmission assets with the exception of internal expansion projects.

However, in practice, this provision has been diluted. Though companies involved in the electrical industry are formally independent, FLACSO's studies² have shown a process of concentration together with vertical and horizontal reintegration of the different segments of this industry thanks to strategies used by the main economic groups that control the Argentine economy.

A reduced number of important economic groups active in the generation sector are part (direct or indirectly) of enterprises active in the transportation and distribution segments of the electricity and/or gas industry. For example, in 1999 the Perez Compac group owned shares in Transener (transmission), Central Costanera, Hidroeléctrica Pichi Leufu, Consorcio Uruguay (generation) and in EDESUR sa (distribution). Besides, Perez Compac has interests in important firms of the gas industry in the South and central region of the country.

The Ente Nacional Regulador de Electricidad (ENRE) is in charge of the regulation for transmission at the national level, and for distribution activities in the Gran Buenos Aires area. The Energy Secretariat (SE) is in charge of overseeing the competitive behaviour of the wholesale market in coordination with the market administrative body (CAMMESA). The entities are rather independent and have reached a good degree of consolidation. The ENRE, together with provincial governments is moving forward in the consolidation of regulatory activities.

Consumer Protection

The 1983 Commercial Loyalty Act and the 1993 Consumer Protection Act deal mainly with unfair trade practices, such as tied sales and misleading advertising. The secretaries in charge of the implementation of both Acts are part of the Ministry of Economy and their decisions can be appealed before the ordinary judicial system. Besides, consumers can also seek redressal of their complaints.

However, no system of redressal of small complaints has yet been implemented in Argentina.

Box 102.4: Misleading Advertising

In April 2002, the implementing authority of the Commercial Loyalty Act condemned Wal-Mart Argentina SA for violation of Article 9 of Bill 22.802, which prohibited misleading publicity and promotion of goods and services.

Throughout 2002, it was the norm for big supermarket chains (Wal-Mart, Carrefour, to name a few) to offer products at special prices to attract customers. However, when the time to pay the bill came, in many cases customers found out that the price charged for some of the products were different than the one announced either on the brochures or the stand.

In the case under review, the implementing authority decided to regulate the price of several products of the basic food basket. During the inspection, it found differences of over eight percent in two of the products chosen. Prices shown in the brochure or at the stand were less than the one finally charged at the counter.

The severity of the sanction took into account the fact that Wal-Mart had already been penalised for the same type of infraction more than 30 times in the period of three years.

Concluding Observations and Future Scenario

At the institutional level, the most pressing challenge is the establishment of the NTC as foreseen in the 1999 Competition Act. Besides, the competition authority requires adequate human and financial resources to carry out its mandate.

At the normative level, the 1999 Competition Act needs to be amended to better respond to the current characteristics of the Argentine economy. Studies on its implementation have identified several flaws in the competition regime. According to Notcheff and Soltz (2003), some of the changes to the Competition Act should cover:

- *Control of restrictive trade practices.* It is recommended to include a prohibition of restrictive practices, including a mechanism to authorise exceptions when it is shown that the practice benefits the common well-being or does not harm the community;

¹ www.iadb.org

² FLACSO (1999): *Privatizaciones en la Argentina. Regulación tarifaria, mutaciones en los precios relativos, rentas extraordinarias y concentración económica.*

- *Review criteria for the evaluation of operations of economic concentration.* It is suggested to include among others the impact of M&As on the increase of the financial and political powers. In addition, the impact of the changes on the thresholds for the pre-notification of M&As should be evaluated and adjusted accordingly;
- *Operations of economic concentration under evaluation.* While the competition authority is evaluating any closing operation should be forbidden; and
- *Powers of the NTCD.* The Act should be amended to provide the implementation authority with the power to revise its decision if the circumstances under which the operation was evaluated had changed, maintaining the right to appeal.

Suggested Readings

Nochteff, Hugo y Soltz, Hernan (2003); 'Aspectos de la defensa de la competencia en Argentina'. FLACSO – Área de Economía y tecnología, Documento de Trabajo Nro. 12, Programa de investigación: Privatizaciones y regulaciones en la Argentina.

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