

Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

Antitrust and developing and emerging economies

Paula de Andrade Baqueiro

Adviser Tribunal of the Administrative Council for Economic Defense (CADE), Brasilia

Paula Farani de Azevedo Silveira

Commissioner Administrative Council for Economic Defense (CADE), Brasilia
Professor of Law and Economics Institute for Public Law, Brasilia

Mor Bakhoun

Affiliated Research Fellow Max Planck Institute for Innovation and Competition, Munich
Lecturer Virtual University of Sénégal, Dakar

Arsenio Balisacan

Chairman Philippine Competition Commission, Quezon City
Academician National Academy of Science and Technology of Philippines, Taguig

Luis Guilherme A. Batista

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Laurie Binge

Senior Director FTI Consulting, Cape Town

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Executive Director NET Institute, New York

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New York University School of Law

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Leni Papa

Consultant Philippine Competition Commission, Quezon City

George L. Paul

Partner White & Case, Washington, DC

Daniel L. Rubinfeld

Professor of Law and Economics UC Berkeley Emeritus and New York University School of Law

Pablo Trevisán

Co-author Argentine Competition Law 27,442 (enacted in May 2018)
Former Commissioner Comisión Nacional de Defensa de la Competencia (CNDC), Buenos Aires
Partner Estudio Trevisán, Buenos Aires

Antitrust and developing and emerging economies

ABSTRACT

The present contributions were gathered following up the 6th edition of the "Antitrust and developing and emerging economies" annual Concurrences review Conference held in New York on November 1st, 2019, at the New York University School of Law. The discussions revolved around four topics. The members of the first panel addressed the relationship between the fight against cartels and the fight against corruption. The second panel discussed the effects of data, digital networks and platforms on the economic development. The third panel focused on the evolution of merger control policies in developing countries. Finally, the fourth panel dealt with new developments in enforcement at play in the US, Argentina, the Philippines and South Africa, with a particular focus on international cooperation and the issue of effectiveness of competition authorities.

Les présentes contributions ont été recueillies à la suite de la 6e édition de la conférence annuelle de la revue Concurrences "Antitrust and developing and emerging economies" qui s'est tenue à New York le 1er novembre 2019, à New York University School of Law. Les discussions étaient organisées en quatre thèmes. Les membres du premier panel ont abordé la relation entre la lutte contre les cartels et la lutte contre la corruption. Le deuxième panel a discuté des effets des données, des réseaux et des plateformes numériques sur le développement économique. Le troisième panel s'est concentré sur l'évolution des politiques de contrôle des concentrations dans les pays en développement. Enfin, le quatrième panel a traité des nouveaux développements en matière d'application du droit de la concurrence aux États-Unis, en Argentine, aux Philippines et en Afrique du Sud, avec un accent particulier sur la coopération internationale et la question de l'efficacité des autorités de la concurrence.

Argentine Kintsugi

Pablo Trevisán

ptrevisan@estudiotrevisan.com

Co-author of the Argentine Competition Law 27,442 (enacted in May 2018)

Former Commissioner

Comisión Nacional de Defensa de la Competencia (CNDC), Buenos Aires

Partner

Estudio Trevisán, Buenos Aires

“The world breaks everyone and afterward many are strong at the broken places”

Ernest Hemingway*

I. Introduction

1. Kintsugi is a Japanese art of repairing broken pottery by mending the areas of breakage with lacquer dusted or mixed with powdered gold, silver or platinum. As a philosophy, it treats breakage and repair as part of the history of an object, rather than something to disguise.

2. Probably, the main breakage of the history of Argentine competition law and policy is its lack of institutional respect.

3. The centennial history of Argentine competition institutionalism could easily be summarized in a tweet: “1923, 1st antitrust law; no authority. '80, CNDC created; '96, CNDC's 1st president appointed. '99, 1st independent authority created, never appointed. 2018, new independent authority created, not appointed yet.”

4. Argentina has had some kind of competition law for almost a century. In 1923, the first antitrust law was enacted following the model of the US Sherman Act but no enforcement authority was created. That law was amended in 1946. Neither of them had a significant application.

5. In 1980, a first comprehensive competition law was introduced through Law 22,262, which created the National Commission for the Defense of Competition (CNDC), although the first president of the CNDC was only appointed in 1996, sixteen years after CNDC's creation.

6. An important reform took place in 1999, through the enactment of Law 25,156, which intended to create the first independent authority, the Tribunal of Defense of Competition (the “TDC”), but it was never appointed and, consequently, never came into operation.¹

7. In the words of our Supreme Court, a legal scandal took place from 1999 until an unfortunate reform that took place in 2014,² which abolished the TDC and introduced some inconvenient reforms to Law 25,156.

8. More recently, in May 2018, the new Competition Law 27,442³ (the “LDC”) was enacted,^{4 5 6} introducing various important and positive changes, being the main reform of the Argentine antitrust system in recent decades. Among the most important changes, the LDC intends to tackle the institutional issues, through the creation of a new independent authority, the National Competition Authority (the “ANC”), with renewed powers.⁷

9. Almost two years have passed since the enactment of the new LDC. As we say in Argentina: “*Quien se quema con leche, ve una vaca y llora*” (i.e., that who burns with milk, sees a cow and cries).

10. Everything is yet to be seen and much, maybe too much, depends on the respect of the institutional design created under the LDC... been there, done that, got the t-shirt.

2 Through the enactment of Law 26,993.

3 Law 27,442: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310241/norma.htm>.

4 Decree 480/2018: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310663/norma.htm>.

5 P. Trevisán (2018-III), *Defensa de la Competencia: Nullius in Verba, RDCO 292* (Buenos Aires: Thomson Reuters – La Ley, 2018), p. 527, for a detailed description of the drafting and discussion of Law 27,442.

6 For future discussions, questions will remain as if it would be advisable to reinstate specific criminal sanctions for certain anti-competitive behaviors in our country. We anticipate our favorable opinion to their incorporation in the LDC. In fact, in the first draft of the LDC, under the responsibility of the undersigned, it included prison sanctions for up to three years, for cases of cartelization in public tenders. Finally, their incorporation into the LDC was not accepted.

7 The LDC also created a Specialized Chamber in Defense of Competition within the Federal Civil and Commercial Court of Appeals for judicial review of ANC's decisions. For a detailed explanation of the main reforms and the genesis of the new LDC, see: P. Trevisán (2018-I), *Rebuilding the Argentine Antitrust House While Living in It: A View from the Trenches*, in *Douglas H. Ginsburg Liber Amicorum. An Antitrust Professor on the Bench*, Vol. I, N. Charbit, C. S. Malhado and E. Yang, eds. (Concurrences, 2018), pp. 561–586.

* E. Hemingway, *A Farewell to Arms* (New York: Charles Scribner's Sons, 1929).

1 To make things worse, an unfortunate reform took place in 2014, through Law 26,993, which abolished the TDC and introduced some inconvenient reforms to Law 25,156.

11. The purpose of this short article is to carry out a brief analysis of the reasons why we consider that competition policy has had a variable application in Argentina, putting special emphasis on the reason we consider to be the main cause of all pitfalls of Argentine competition law and policy: the persistent lack of respect to the norms and, specifically, to the institutional design created by such norms. Following that assumption, we suggest the need to learn from our own mistakes, and not only repair them, but also take such as part of the history that shall teach us not to fall again in those same breakages.

II. Argentine competition law

1. Why Argentina does not have a strong enforcement of competition law

12. When Section 1 of the LDC identifies the general economic interest as a protected legal principle, it is referring to the concepts and interests that necessarily derive from the economic model of the Argentine Constitution of 1853.

13. The functioning of the market, as a constitutional imperative, turns out to be of public interest, as it is of interest to individuals, whether they are consumers or competitors of the market, or the state itself, which has the duty to legislate on these rights and guarantees and enforce them.

14. It is in this context that Argentine competition law receives and regulates the rights and guarantees established in various provisions of our Constitution. In other words, competition law and policy has constitutional status in Argentina, which derives from several provisions and declarations of rights and guarantees of the Constitution, but, in particular, by the provisions of its Section 42 that establishes that the authorities will provide “*for the defense of competition against all forms of market distortion*” and “*to the control of natural and legal monopolies*.”⁸

15. Having said that, and although our country has a long tradition in competition law, it is also true that the execution of its rules and the application of its principles have fluctuated more or less, according to the times, and we have not yet achieved a deep-rooted culture of genuine and consolidated competition within our society.

16. In other more developed countries than ours, free competition policies have greater effectiveness and impact on business decisions. On the contrary, in less developed countries, this effectiveness and impact are scarce and, in many cases, although there are rules for the defense of competition, they turn out to be merely formal.

17. This asymmetry responds, in part, to the widespread lack of legalities of life in some developing countries—social, economic and in general; that is, competition law is not respected because the law in general is not respected.

18. As evidence of this, we can mention the irregular manner in which many laws are regulated, violating the provisions of the law that they are intended to regulate. Unfortunately, for various reasons to which we have referred in previous works, the regulation of the new LDC was no exception to the rule.⁹

19. However, there are other specific reasons that have led to the weak enforcement of competition law and policy in Argentina and other Latin American countries.

20. In some cases, there is no state impulse to ensure its optimal implementation and application. This is confirmed by the lack of an agency budget, insufficient staff, inadmissible delays in the procedures, and other obstacles that prevent, in fact, a reasonable application of the law that only governs from the formal.

21. In other cases, competition law and policy seems to be an alien model to the basic beliefs of a certain important part of the population. In this cultural environment, it is titanic to find understanding and acceptance of the law and the policy of free competition.

22. Finally, as several authors indicate, sometimes competition law is systematically captured by the executive branch, which either has no interest in the matter—due to the lack of immediate political revenues—or has the pressure of its clientele and of the economic interests that sustain it so as not to diligently apply the competition rules.¹⁰

23. Thus, during practically the last century since our country has had some kind of antitrust legislation, the application of these norms has been mutable.

9 In particular, we consider that Decree 972/2018 established unjustified differences in ranks and hierarchies among the members of the ANC that the LDC does not provide; furthermore, erroneously in our opinion, such Decree equated ANC's members' remuneration level to the levels of officials of the executive power. On the other hand, Decree 480/2018 introduced—through the last sentence of its Section 84—a change that could have gone unnoticed for some, but which, by suspending the application of the third paragraph of Section 9 of the LDC, in practice means that until a year has elapsed after the new ANC is put into operation, we will have an *ex post* merger control system as never seen in our country. An unnecessary mischief.

10 As an example of this, it is sufficient to cite the lack of constitution of the Tribunal of Defense of Competition created under Law 25,156. From the enactment of said law, until the enactment of law 26,993 that ordered its disappearance, coalitions of the most varied political dye ruled in our country and none of them complied with the provisions of Law 25,156 as far as the Tribunal is concerned.

8 P. Trevisán (2020), Unlocking Constitutional Fundamentals of Argentine Competition Law and Policy, in Richard Whish QC (Hon) *Liber Amicorum. Taking Competition Law Outside the Box*, N. Charbit and S. Ahmad, eds. (Concurrences, 2020), for a more comprehensive analysis of the subject matter.

24. For many years there was no application, with restrictions and distortions of competition in all areas and even the use of it as a tool of pressure by certain governments or power groups. Years also passed in which competition policy seemed to take off, as it happened after the enactment of Law 22,262, at the end of the 1990s with the sanction of Law 25,156, and during the period started in 2016 and crowned with the enactment of law 27,442 and the call for the public contest to appoint the new authority, which advanced neatly—although much slower than what would have been desired—until December 2019.¹¹

III. Too early to tell

25. It might be too early to make a final assessment of CNDC's performance during the last four years.

26. It is incontestable that competition law and policy had a renewed momentum in Argentina during that period, however—like almost everything in life—just as there were successes, there also were mistakes, things that could have been done better or that were left pending.

27. Analyzing each of these issues in detail would exceed by far the object of this short essay and, as said, it might be too soon to judge, but we may at least—broadly speaking—try to give a very general enunciation of:

– What was done well:

(i) to draft a new bill and promote the sanction of the new LDC, transparently discussing its terms with both the local and international communities, and negotiating its details at the executive and legislative branches, with representatives of all the spectrum of political parties;

(ii) to reorganize the CNDC, clearly dividing relevant areas of investigation;

(iii) to decide, in historic averages, more cases than ever in the history of Argentine antitrust and competition law and policy in a given period;

(iv) to carry out various new market studies and investigations, closing all of them during the same period, some of which allowed the CNDC to open important files and others were relevant for the purpose of promoting pro-competitive measures or expanding competition advocacy to be carried out by the competition authority;

(v) to return to the international scene.

– What could have been done better:

(i) together with the reorganization of the CNDC and the increase in the number of cases resolved, it would have been desirable to allocate equitable resources to all of CNDC's authorities and to grant full access of information to all members of CNDC's investigation teams;

(ii) regarding merger control cases, it would be important to review the confusing criteria set during these four years on: (a) the analysis of ancillary restraints, (b) the change in the nature of control, (c) the exemptions to notify, (d) the definition of assets, (e) the calculation of applicable fines for late filing; (f) when applicable, the optimal remedies to be imposed in merger cases when approved with conditions, establishing clear mechanisms to monitor and follow up on the remedies imposed;¹² and

(iii) regarding conduct cases: (a) to make deeper investigations on behavioral cases when reasonable doubts are still not dissipated; (b) to develop solid case law where preventive measures might be applied;

(iv) likewise, it will be important to follow up on the case law evolution regarding access to public information and confidentiality.

– What shall improve:

(i) internal reorganization of the authority is not enough per se, if it is not accompanied by rules of internal procedures for the optimal functioning of the enforcement authority;

(ii) the increase in the number of cases decided shall go hand by hand with the highest quality of resolutions, and this shall only happen with full compliance of the legal mandate to constitute the ANC, the independent authority created under the LDC.

IV. Achilles' heel

28. *“In Greek mythology, when Achilles was a baby, it was foretold that he would die young. To prevent his death, his mother Thetis took Achilles to the River Styx, which was supposed to offer powers of invulnerability, and dipped his body into the water; however, as Thetis held Achilles by the heel, his heel was not washed over by the water of the magical river. Achilles grew up to be a man of war who survived many great battles. (...) [Achilles] became invulnerable where the waters touched him—that is, everywhere except the areas of his heel that were covered by her thumb and forefinger.”*¹³

11 The president's candidates were sent to the Senate on 6 December 2019 for final confirmation and appointment.

12 P. Trevisán, Argentina, in *Merger Remedies Guide*, R. P. Harty and N. Kiratzis, eds. (2nd ed., GCR, 2019), Chapter 15, p. 181.

13 https://en.wikipedia.org/wiki/Achilles%27_heel (last retrieved on 12 January 2020).

29. Argentina's competition law and policy Achilles' heel is the lack of respect of the institutional design established by the subsequent laws.

1. Institutional design

30. Wrong does not cease to be wrong because the majority share in it, said Tolstoy.¹⁴

31. It is worth to mention here the impact that an appropriate institutional design has on due process issues that must be strictly respected by a competition authority.

32. The new LDC establishes that the ANC will have separate investigation functions from the decision and adjudication functions, through the creation of two separate secretariats, that will investigate conducts and economic concentrations, each respectively, and a tribunal, which will decide the cases.

33. Competition cases presented by an enforcement authority in which the same officials who direct or authorize the personnel that must carry out the investigation, direct or authorize the personnel that will resolve the case based on the evidence presented in that investigation, and then decide whether the evidence is sufficient to show an infraction, could reasonably be considered to be of interest in the result¹⁵ and, consequently, such result could be unfair.

34. This increases the risk that the authority might weigh the ends over the means, especially when the ends are measured in the total annual fines that enter the treasury of the government on duty.^{16 17 18}

35. In this regard, a serious error was incurred under Decree 972/2018 when establishing different ranks and hierarchies among the members of the ANC.¹⁹ Should that error not be modified, those who investigate would have lower ranks than those who resolve, resulting in the former having some dependence on the latter, something that is definitely undesired by the LDC and which goes into the opposite line to the spirit and the institutional design projected under the LDC.

14 L. Tolstoy, *A Confession*, 1894.

15 D. H. Ginsburg, and T. M. Owings, *Due Process in Competition Proceedings*, 11 *Competition Law International* 39 (2015), 44.

16 I. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 *European Law Review* 817 (December 2009). The author observed that the procedures of the European Commission to determine guilt or innocence under competition rules, and when imposing sanctions, would not correspond to the standards established by the European Convention on Human Rights. Forrester points out that the adjudication and case decision panel has political personnel designated that does not attend the hearings and does not participate in the drafting of the order.

17 See ECHR, 27 September 2011, *A. Menarini Diagnostics*. The Court confirmed the coherence with human rights of the systems that have integrated agencies, at least when the system offers a judicial review.

18 J. M. Gidley and M. J. Hyman, *The Emergence of Due Process following the Growth of International Antitrust Enforcement*, Concurrences Conference on Antitrust in Emerging and Developing Countries, NYU, October 2015.

19 P. Trevisan (2020), *Unlocking Constitutional Fundamentals of Argentine Competition Law and Policy*, in *Richard Whish QC (Hon) Liber Amicorum. Taking Competition Law Outside the Box*, N. Charbit and S. Ahmad, eds. (Concurrences, 2020), for a more comprehensive analysis of the subject matter.

2. Every competition authority must have internal rules of procedure

36. They say the devil is in the details. As we previously mentioned, an integral part of the Argentine legal system, the LDC receives the rights and guarantees recognized by our Constitution. Among them, are the right of individuals to an effective administrative and judicial protection (Section 18) and the duty of the state to provide for the defense of competition against all distortions of the markets (Section 42).

37. Similarly, during the processes that come to its knowledge, the action of the competition enforcement authority must be carried out with utmost respect for the principles that govern the LDC, so that these constitutional rights and guarantees do not become mere theoretical or abstract proclamations.

38. In this context, in addition to strict compliance with the legal framework granted by the LDC and its supplementary rules, it will be essential that the competition authority have clear internal rules of procedure that, in the end, allow for a transparent and orderly operation, as well as a full respect for the constitutional guarantees of due process.

39. That is, in order to materialize the general and specific guarantees of due process and within the framework of the provisions of the LDC, it is imperative that the competition authority have transparent, clear and objective rules that serve as a guide and order, from beginning to end of the procedure carried out by said authority.

40. In accordance with good art in this area, all administrative or judicial agencies, authorities, organs and tribunals with collegial characteristics similar to those of a competition authority such as that provided under the LDC, have internal rules of procedure.

41. The lack of these internal regulations could lead to complex obscurantism and processes stained with lack of transparency and objective order. In addition, the lack of an internal regulation can have as a direct consequence that many tasks are unnecessarily multiplied between the members of the authority and their teams, a situation that, without a clear division of tasks between the authorities, implies that each of them ends up being in practice personally responsible for the instruction of each and every one of the procedures, files and other actions that are processed by said authority.

42. The centennial experience of the courts indicates that when all its members claim to be responsible for all pending proceedings, none is. That is why there are clear internal rules—in many cases, also centuries old—in every reasonable collegiate body.

43. The presence of an internal regulation is virtually unchanged in any collegiate body, insurmountable when it comes to the exercise of jurisdictional or instructional

powers, as is the case of a competition authority. In our country, the examples remain, but they begin with the Supreme Court of Justice, replicating in all the judicial courts of appeals, in administrative courts such as the National Tax Court and in the entities created by law.

44. The lack of an internal procedure regulation can also pose serious daily problems within a competition authority, for its authorities as well as for its different areas and their respective teams of instructors and personnel in charge.

45. To instruct is to indicate the steps and procedures that must be followed during the proceedings, from its beginning and until its conclusion. There are several ways to correctly instruct a file, but not all of them necessarily provide the same evidence, and not all tests have the same value or generate the same conviction.

46. The absence of an internal regulation entails the lack of close monitoring of the files by the authorities, files that end up being instructed exclusively by line officials. Thus, the files reach the members of the enforcement authority, after an enormous effort and based on premises, information and documentation, which could be deemed insufficient, or deviated from the vision of the voting members of the respective authority.

47. We believe that an internal regulation should contain minimum and clear operational guidelines, from the beginning of the instruction until the decision, resolution and/or similar act that ends the intervention of the competition authority, in each of the actions, in particular, at least, on:

- the clear, transparent and objective mechanism for random case draw among the members of the competition authority, for the purpose of expressly determining which of them will act as a pre-applicant, lead investigator or instructor in each of the files;
- the distribution of the files by public act among all the authorities, including those that are in use for a license for up to a certain reasonable number of days, according to the results of the respective random draws;
- respect for the principle of equanimity;
- the balanced allocation of resources, between and for each of the members of the authority, including but not limited to human resources;
- expressly contemplating, for those cases where appropriate, compensation systems for the distribution of files, in cases of:

(i) impediment of the drawn authority for well-founded reasons, in which case a new draw and the corresponding compensation of files between the authorities must be made;

(ii) vacancy by resignation, suspension, expiration of the mandate, death or removal of the instructing authority, in whose cases, as a principle, the files in question should be assigned to the authority designated in replacement;

- the meetings of the plenary of the authority of initiation and follow-up of instruction of each file, in particular, establishing the specific moments in which they will be carried out, according to the type of measure or procedure in question, always respecting the principle of full, timely and permanent information between and towards the authorities;
- ordinary and/or extraordinary meetings of all the members of the authority, according to the measure or procedure in question, which must be convened reliably and with sufficient and reasonable formal notice, in accordance with the principle of full and timely information between and towards the members of the authority.

48. It is expected that the new ANC will issue its own internal rules of procedure with guidelines such as those mentioned here, with clear, objective and transparent terms, both internally and externally of the authority. If this happens, a serious deficiency that characterizes the current enforcement authority will have been corrected.

V. Conclusion

49. What is wrong does not cease to be wrong because many fall in the same mistake over and over again.

50. The Achilles' heel of the centennial history of Argentine competition law and policy was, is and—so far—continues to be the lack of institutional respect. In this context, with its ups and downs, the last four years may have witnessed the best possible performance of the current applicable system, until the spirit and rules of the LDC are fully respected and the relevant independent institutions are put in place as the LDC clearly establishes.

51. Should that happen, following the principles of Kintsugi's art and philosophy, it would be important to bear in mind the lessons learned and assume that systematic breaching of the wording and spirit of the norms, manifested by a total lack of respect for the institutional design of the LDC, has impeded a fully developed competition policy in Argentina, which, until now, has prevented the fulfillment of the principles and guarantees of our Constitution. ■

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