PROBLEMS IN THE INSTITUTIONAL DESIGN FOR THE DEFENSE OF COMPETITION: THE ARGENTINE EXPERIENCE

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Abstract

This Article examines the institutional design of competition law enforcement in Argentina and the persistent challenges the country has faced in consolidating an effective and independent antitrust authority. Although Argentina has maintained antitrust legislation since the early twentieth century and formally adopted many international best practices in competition policy, the development of a stable institutional framework for enforcement has proven difficult. The Article situates Argentina's experience within the broader debate over the role of competition policy in economic development, particularly in emerging economies where institutional capacity and political dynamics may affect regulatory outcomes.

Drawing on comparative scholarship and empirical evaluations by international organizations, the Article analyzes key structural and operational dimensions of competition agencies—including independence, organizational structure, enforcement powers, and institutional resources. It traces the historical evolution of Argentine competition law from its early criminal-law origins through successive legislative reforms culminating in the modern framework established by Law 27.442. Despite these reforms, the Article argues that Argentina's primary challenge has not been the formal design of antitrust law, which

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largely reflects international standards, but rather the inconsistent implementation and institutional consolidation of its competition authority.

By examining legislative developments, peer-review assessments by organizations such as the OECD and UNCTAD, and empirical observations regarding agency performance, the Article identifies persistent obstacles including political influence, limited resources, and delays in establishing independent adjudicatory bodies. The Article concludes with recommendations aimed at strengthening the institutional framework for competition policy in Argentina, emphasizing the importance of agency independence, adequate resources, and coherent institutional design in promoting effective antitrust enforcement and supporting economic development.

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I. INTRODUCTION

As it has been addressed in the past, Argentina, as other developing countries, has struggled over decades in adopting and setting forth antitrust rules which are reliable, predictable, and suitable to its needs.[1] Having antitrust laws since the beginning of the twentieth century, it has only about thirty years of effective practice and relative enforcement of its laws.[2] However, a distinctive feature of this period in Argentina is the inability to consolidate the institutional design of the antitrust agencies set by said laws.[3]

In this paper we will address the difficulties and implications in setting and consolidating institutions of antitrust in Argentina.

Part I addresses the discussions about the setting of antitrust rules in developing countries and reference the comparative alternatives and international 'best practices' of setting the institutional design of competition agencies. Part II reviews the legal framework and the

1. Miguel Ángel De Dios, *Antitrust in Developing Countries: A Report on Argentina*, 14 SW. J.L. & TRADE AM. 63, 63 (2007).

2. *See* MIGUEL ÁNGEL DE DIOS, EL DISEÑO INSTITUCIONAL PARA LA DEFENSA A LA COMPETENCIA: LA EXPERIENCIA COMPARADA Y EL CASO ARGENTINO [The Institutional Design for the Defense of Competition: The Comparative Experience and the Argentine Case] 15, 139 (2023).

3. *See* Miguel Ángel De Dios, *El Paradigma de la Independencia de las Agencias de Competencia* [The Paradigm of Competition Agency Independence], EL DIAL: CONTENIDOS JURÍDICOS (Mar. 31, 2021), https://www.drga.com.ar/png/paradigma_agencias_competencia.pdf.

evolution of the antitrust institutional design in Argentina. Part III makes a critical assessment of the practice in recent years and the difficulties in establishing an independent antirust agency. Finally, we make certain recommendations and conclusions to consolidate the antitrust policy and its agency in Argentina.

II. DEFENSE OF COMPETITION AS A DRIVER OF DEVELOPMENT

There is a consensus in the fields of economic, legal, and political sciences that competition is fundamental to a market economy and economic development.[4] In fact, competition favors innovation, promotes improvement in the product and service quality that companies offer to the market, induces companies to make their best efforts to lower their production costs, and finally results in price reduction to gain market share.[5] All of this translates into benefits for consumers because the ultimate goal of defense of competition is maximizing consumer's interest or surplus. But the promotion and defense of competition is also a fundamental instrument for the organization of an efficient and dynamic market economy, capable of incorporating the market into the intense process of innovation that characterizes the globalized economy.[6] These, in turn, are necessary conditions for economic development.

There is abundant literature in economic sciences supporting the importance of competition to increase productivity and economic growth.[7] The effective use and management of resources in the private sector is related to the level of competition in each country.[8] A higher level of competition promotes better managerial practices and nurtures a virtuous relationship between competition and productivity.[9]

In an ideal universe where markets could reach elevated levels of competition and thus achieve effective use, there would be no need for institutions to create regulations in order to achieve that ideal. However, this does not occur in the real world; on the contrary, markets

4. De Dios, *supra* note 1, at 15.

5. *Id*. at 15.

6. *Id*.

7. Manuel Toledo, *Fostering Competition, in* INSTITUTIONS FOR PRODUCTIVITY: TOWARDS A BETTER BUSINESS ENVIRONMENT 95, 98 (CAF – Dev. Bank of Lat. Am. 2018), https://scioteca.caf.com/bitstream/handle/123456789/1410/Institutions%20for%20productivity.pdf?sequence=1&isAllowed=y.

8. *See id.* at 97-98.

9. *See id.* at 100.

often fail to achieve a satisfactory level of competition.[10] Therefore, institutions play a fundamental role in guaranteeing competition and thus promoting the country's economic development and citizens' access to goods and services.[11] Regulating competition is crucial as part of the social infrastructure necessary for the development of businesses, as explained by Hall and Jones, who study productivity differences across countries.[12]

Thus, in order to protect and promote these competitive dynamics, rules and regulations must be established to prevent, deter, and correct practices that are contrary to fair competition, i.e., non-competitive or anti-competitive practices, and also to prevent concentration of companies that may enable such market agents to strengthen or consolidate their power in a way that is detrimental to competitiveness and, consequently, to consumer wellbeing. As noted by Nobel Prize-winning economist Jean Tirole, " . . . Economists have long extolled the virtues of markets. Unfettered competition protects consumers from the political influence of lobbies and forces producers to deliver products and services at cost. Unfortunately, competition is rarely perfect, markets fail, and market power—the firms' ability to raise price substantially above cost or to offer low quality—must be kept in check."[13]

It is only through a rigorous, and technically reliable, practice that anti-trust policy will achieve its objectives. Otherwise, the economic and social costs of active antitrust policies may outweigh their benefits.

Empirical evidence shows that the implementation of best practices in competition advocacy is a rare asset in developing countries.[14] Thus, it has turned out that the appreciation of this economic regulatory instrument and its implementation mechanisms have not always

10. John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 174 (2015).

11. Comisión Nacional de los Mercados y la Competencia, *Guía de la competencia para consumidores* [Guide to Competition for Consumers] (CNMC 2020), at 3, 13, https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/Gu%C3%ADa_competencia_consumidores_.pdf.

12. Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output Per Worker Than Others?*, 14 Q. J. ECON. 83, 84 (1999).

13. Jean Tirole, *Market Failures and Public Policy*, 105 AM. ECON. REV. 1665, 1665 (2015).

14. De Dios, *supra* note 1, at 115 (citing Enrico Alemani et al., *New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries*, ORG. FOR ECON. CO-OPERATION & DEV. (OECD) (Dec. 12, 2013), https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/12/new-indicators-of-competition-law-and-policy-in-2013-for-oecd-and-non-oecd-countries_g17a243e/5k3ttg4r657h-en.pdf (explaining in detail a study on how competition advocacy is a rare asset in developing countries)).

been consistent or peaceful when it comes to emerging countries.[15] Indeed, the establishment of competition rules and their respective enforcement authorities have been questioned in economies where the limited scale does not allow the existence of several players in the same market, or where the incentives for market newcomers (due to their limited size) have usually been associated with the granting of special advantages or privileges.[16] The conditions for the establishment of legal monopolies in certain market niches were often associated with granting of special advantages to certain investors, rather than with strictly economic reasons to justify them.[17]

The 2018 Corporación Andina de Fomento (CAF) (Andean Development Corporation) or Development Bank of Latin America, Report on Economic Development (RED) analyzes an empirical study on how institutions, through competition regulation, impact productivity in many Latin American countries.[18] The level of competition is significantly lower in less developed Latin American countries.[19] Taking the Lerner index[20] as a measure, the graph below shows that in the most productive sector there is greater concentration in Latin American countries.[21]

15. Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 LAW & CONTEMP. PROBS. 69, 82 (2016).

16. *See id.* at 83-84.

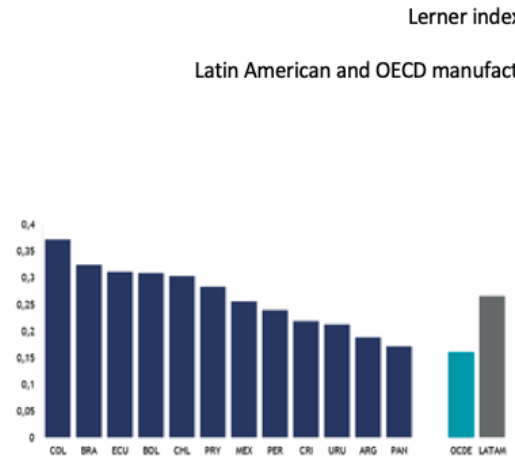
17. *Compare* STEPHEN HABER, CRONY CAPITALISM AND ECONOMIC GROWTH IN LATIN AMERICA xii (2002) (exploring how crony capitalism led officials to grant privileges to select industries by allowing them to monopolize domestic markets or shielding them from international competition), *with* FUNDACIÓN DE INVESTIGACIONES ECONÓMICAS LATINOAMERICANAS, LA REGULACIÓN DE LA COMPETENCIA Y DE LOS SERVICIOS PÚBLICOS: TEORÍA Y EXPERIENCIA ARGENTINA RECIENTE [Regulation of Competition and Public Services: Theory and Recent Argentine Experience] 85-86, 89, 402 (1998) (exploring how particular monopolies have in some instances operated legally, albeit under regulation, because of their ability to provide a type of public service (i.e., a "universal service")). *See also Legal Monopoly*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/economics/legal-monopoly/ (last visited Oct. 26, 2025) (rationalizing why a legal monopoly might be justified to achieve certain social-economic objectives).

18. *See* De Dios, *supra* note 1, at 6, 97-98.

19. *See id.* at 98.

20. *See id.* at 107.

21. *See id.*



Source: CAF based on data from INDSTAT2 (UNIDO, 2017)

The poor performance of Latin American institutions helps explain the lag with respect to more developed countries. The effort to strengthen institutions is mandatory to achieve economic development.[22] Development specialists at the Andean Development Corporation point out that the impact of competition policies is particularly strong when institutional aspects are improved, such as, for example, the level of independence of the competition authority and the extent of separation between judges and the agency conducting the investigations.[23] Renowned economist Paolo Buccirossi who studies the role of institutions for development, states that the effectiveness of competition policies "increases significantly when the judicial system is more efficient, the rule of law is stronger and the degree of compliance with laws is higher."[24] Cohesion between antitrust protection and the legal system is essential to achieve predictability and order in business. Thus, the arguments in favor of promoting pro-competitive policies,

22. Fernando Álvarez, Pablo Sanguinetti, & Manuel Toledo, *Institutions, Productivity, and Development, in* INSTITUTIONS FOR PRODUCTIVITY: TOWARDS A BETTER BUSINESS ENVIRONMENT 17, 29, 36 (CAF – Dev. Bank of Lat. Am. 2018), https://scioteca.caf.com/bitstream/handle/123456789/1410/Institutions%20for%20productivity.pdf?sequence=1&isAllowed=y.

23. Toledo, *supra* note 7, at 117 *(*citing Paolo Buccirossi, et al., *Competition Policy and Productivity Growth: An Empirical Assessment*, 95 REV. ECON. &STAT. 1324, 1324-25 (2013)).

24. Toledo, *supra* note 7, at 117 (citing Paolo Buccirossi et al., *Competition Policy and Productivity Growth: An Empirical Assessment,* 95 REV. ECON. & STAT. 1324, 1325 (2013)).

with their nuances or differentiated models, even in developing economies, are more vigorous than the reservations against.[25]

We can, therefore, assert that there is currently agreement on the benefits of implementing competition policies and regulations, not only in the developed economies of central countries, but also in emerging or developing countries. Basically, in heavily regulated economies, with unnecessary transaction costs for business development and, additionally with significant income asymmetries and vast sectors of the society living in poverty, competition advocacy should be a fundamental policy objective. We can also point out this objective based on two necessary aspects: (i) enabling the transformation of an over-regulated economy into a market economy with a system of predictable rules and a non-distortive regulatory system that promotes investment and development; but (ii) making sure that its institutional design is appropriate to guarantee the social legitimacy of the market as a mechanism for resource allocation.

III. THE INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

Consensus on establishing antitrust regulation becomes weaker when it comes to deciding which should be the body responsible for enforcing the regulation and what organizational and functional characteristics such agencies should have.[26] As we have seen in different studies and empirical research,[27] national and international competition agencies are in constant evolution and development. In particular, discussions on the structural and operational features of the agencies' organization are constantly changing. This does not happen exclusively in developing countries, since even in countries with more vigorous economies and consolidated competition agencies in place, changes in their design are observed from time to time; but it is in countries with emerging economies, as is the case of Latin America, where special attention should be paid.[28]

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25. U.N. CONF. ON TRADE & DEV., *The Role of Competition Policy in Promoting Economic Recovery* (2010) ¶ 18, https://unctad.org/system/files/official-document/tdxibp9_en.pdf.

26. Juan R. Cuadrado Roura & Marta Carrillo Neff, *Agencias de la Regulación y la Competencia: La Independencia y la Elección de un Modelo Multisectorial o Integrado* [*Competition and Regulatory Agencies: Independence and the Choice of a Multisectoral or Integrated Model*], 17 REV. ESPAÑOLA DE CONTROL EXTERNO 77, 77-78 (Sept. 2015).

27. *See generally* Miguel Ángel De Dios, *El Diseño Institucional para la Defensa de la Competencia: La Experiencia Comparada y el Caso Argentino* [*Institutional Design for the Defense of Competition: Comparative Experience and the Argentine Case*] (Ediciones DyD, 2023). *See generally* DE DIOS, *supra* note 2.

28. Toledo, *supra* note 7, at 98.

In our comparative study of competition agencies and Argentinian case law,[29] we make an exhaustive analysis of the regulatory design of each time period into which we divide the centennial experience of competition advocacy in Argentina. For this purpose, our starting point has been the conceptual framework provided by Professors William Kovacic and David A. Hyman in "*Competition Agency Design: What's on the Menu?"* which was published in the George Washington University Law Review[30] (a paper to which we will refer as "Kovacic-Hyman"), and then will further analyze the most important ones on competition. Specifically including the report on institutional design and organization of competition agencies presented by the working group on agency efficiency of the International Competition Network (referred to as the "ICN Report"),[31] Professor Frederic Jenny's, Chairperson of the OECD[32] Competition Committee, article[33] (referred to as "Jenny"), and finally, the work of the so-called GAL Project led by Professors Eleanor Fox of New York University and Michael J. Trebilcock of the University of Toronto (referred to as "GAL").[34]

Kovacic-Hyman identifies nine key issues to be considered in the design of competition agencies.[35] We have worked on the topics highlighted by the authors using a systematized approach, classifying and sorting themas structural issues and as operational issues in the institutional design of competition agencies.

We refer to structural aspects when we discuss, namely: (i) the paradigm of agency independence and its extent, i.e., the level of autonomy of the agency or the control to which the agency is subject, whether by the political leaders or other third parties, (ii) whether the agency should be structured as a collegial body composed of several members or as an entity chaired by a single official, (iii) whether the

29. *See* De Dios, *supra* note 1.

30. *See* William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?,* 8(3) EUR. COMPETITION J. (2012).

31. *See Report on Agency Effectiveness Through Organisational Design*, INTERNATIONAL COMPETITION NETWORK, (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/AEWG-Organisational-design-2019-report.pdf.

32. *See generally id.*

33. *See Global Administrative Law*, INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, https://www.iilj.org/gal/ (last visited Oct. 13, 2025).

34. *See* Eleanor M. Fox & Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, *in* THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

35. *See* Kovacic & Hyman, s*upra* note 30, at 1.

agency should be established outside any other government agency or department or, on the contrary, should be inserted into another government agency or ministry; (iv) whether competition affairs are assigned to a single agency or whether there are various government agencies or departments responsible for competition law enforcement; and, finally, (v) whether the competition agency is structured as an administrative and/or judicial organization and what is the interaction between the administrative decision and its eventual judicial review.

Operational aspects of the agency's design involve the following: (vi) whether the agency shall exclusively tackle antitrust issues or may also operate in areas or issues such as consumer defense, commercial fairness, economic regulatory aspects of specific sectors, etc. (vii) whether its operations will exclusively include law enforcement or it may also participate in the formulation of free competition public policies; (viii) what are the tools it will use to carry out its tasks (powers, sanctions to be imposed, etc.); and, finally, (ix) which should be its internal administrative design.

We were then able to analyze and evaluate each of the above-mentioned topics together with the empirical work of ICN, Jenny and GAL and other special expert work on the functioning of competition agencies in particular. We compared these alternatives with the regulatory solutions established in the competition laws during the periods we call the modern age and the contemporary age of antitrust in Argentina.

As we will briefly see, from the formal legal standpoint the antitrust laws and agencies in Argentina have not significantly departed from the best international standards. However, the critical issue during recent decades was the difficulties in establishing and consolidating the antitrust agency in accordance with the provisions of the laws.[36]

IV. THE LAWS FOR THE DEFENSE OF COMPETITION IN ARGENTINA

Argentina has had antitrust regulations since the early decades of the twentieth century.[37] Market regulation has always been based on the constitutional exercise of state police power in economic matters.[38] Through several of its provisions, the National Constitution of 1853/60

36. See Germán Coloma, *The Enforcement of the Argentine Antitrust Law* (Universidad del Centro de Estudios Macroeconómicos de Argentina (UCEMA), Working Paper No. 748, 2020).

37. Marcelo den Toom, Godofredo Ortiz & Ilan Soae, *Argentina: Development and Enforcement of the Competition Regime in its First Century of Existence*, N° 4-2024 CONCURRENCES 1, 1 (2024) (Fr.).

38. Agustín Gordillo, *Tratado de Derecho Administrativo*, vol. 1, ch. V, El poder de policía, at 215–16 (11th ed., Fundación de Derecho Administrativo 2018).

establishes the principle of economic unity across the entire national territory, which should apply to the behavior of all economic agents.[39] In fact, Articles 9, 10, 11 and 12 of the National Constitution establish that the country constitutes a single space for the free movement of goods and eliminates internal customs.[40] Article 14 recognizes the right of individuals to move freely within the territory of the country, practice any lawful industry.[41] Article 17 establishes the inviolability of private property.[42] In the words of Juan Bautista Alberdi in the introduction of his book:

> The Argentine Federal Constitution contains a complete system of economic policy, insofar as it guarantees, by strict provisions, the free action of labor, capital and land, as main agents of production, ratifies the natural law of equilibrium that presides over the phenomenon of wealth distribution, and encloses in discrete and fair limits the acts that are related to the phenomenon of public consumption.[43]

The Constitution granted to Congress the power to legislate on customs and tax matters, the commercial and progress clauses contained in the Constitution of 1853/60 granted specific powers for the implementation and regulation of a single market across the national territory and, within this framework, the enactment of antitrust regulations.

However, any controversy on this power of state regulation was settled with the amendment of the Constitution in 1994.[44] In fact, such amendment adds to Article 42 of the National Constitution, the provision for regulating antitrust matters.[45] It establishes that the authorities shall provide for the defense of competition against all forms of market distortion and the control of natural and legal monopolies.[46]

The first regulatory antecedent is Law 11.210 (1923), which was a conceptual translation of sections 1 and 2 of the United States of

39. *See* Art. 9-12, 14, 17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

40. *See id.* at Art. 9-12.

41. *See id.* at Art. 14.

42. *See id.* at Art. 17.

43. Juan Bautista Alberdi, *Sistema Económico y Rentístico de la Confederación Argentina [Economic and Revenue System of the Confederation Argentina],* ORGANIZACION DE LA CONFEDERACION ARGENTINA 359, 363 (Besançon, Imprenta de Jose Joaquin, 1858).

44. *See* Julian Peña, *New Competition Policy in Argentina*, at 6 (2018), https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/download/416/208 (last visited Oct. 25, 2025) (citing Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)).

45. Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)

46. *Id.*

America ("USA") Sherman Law.[47] The law was called "repression of monopolies" and established in section 1 "Any agreement, pact, combination, amalgamation or merger of capitals, tending to establish or sustain a monopoly and profit with it, in one or more branches of production, land, fluvial or maritime traffic, or domestic or foreign trade, in one or several locations, or in the whole national territory, shall be declared a crime."[48] Article 2 also penalized acts which, regardless of any technical advance or economic growth, arbitrarily increased the profits of those executing them, keeping no proportion to the capital actually employed, and acts hindering or intended to hinder other living or legal persons from freely competing in production and domestic consumption or foreign trade.[49]

A few years later, Law 12.906 (1946) maintained the structure of the previous law but added the identification of certain specific collusive practices.[50] A regulatory decree of that time also authorized the Secretary of Industry and Commerce to conduct investigations and complaints within that regulatory framework.[51] The sanctions established by it were lodged as direct appeal before the National Criminal Justice. Both followed the U.S. antitrust model, in fighting against monopolization or attempts of companies to monopolize.[52] Both laws shared a criminal nature and had little or no effectiveness in refraining anticompetitive practices, because the enforcement authority did not have sufficient resources or technical capacity. Only a couple of sanctions have been effectively imposed thereunder.[53]

The first meaningful change in Argentine legislation was the enactment of Law 22.262 (1980).[54] This is the first time it constitutes a

47. Ariel Irizar and Pilar Moreyra, *Feliz Aniversario! 100 años de derecho de defensa de la competencia en Argentina Breve análisis de la persecución de cartels a lo largo de tiempo,* ABOGADOS (Sep. 11, 2023), https://abogados.com.ar/feliz-aniversario-100-anos-de-derecho-de-defensa-de-la-competencia-en-argentina-breve-analisis-de-la-persecucion-de-carteles-a-lo-largo-del-tiempo/33398.

48. COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA, *Breve análisis económico de la ley Argentina de defensa de la competencia* 111 (Arg.), https://www.argentina.gob.ar/sites/default/files/nota220116.pdf (last visited Nov. 7, 2025).

49. *See id.* at 112.

50. *See* Ley No. 12.906, 7 Nov. 1946, Represión de Monopolios y Trusts [Suppression of Monopolies and Trusts], Feb. 22, 1947, (Arg.).

51. *See* COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA, *supra* note 48, at 127.

52. Coloma*, supra* note 36, at 2.

53. *See* Guillermo Cabanellas de las Cuevas & Diego H. Serebrinsky, *Derecho Antimonopolio y Defensa de la Competencia* [*Antitrust Law and Defense of Competition*], tomo I, at 93 (4a ed. actualizada, Heliasta, Buenos Aires 1997) (citing Ley No. 11.210, art. 1 (1923) (Arg.)); *id.* art. 2.

54. *See* Coloma*, supra* note 36, at 2.

departure from the model in force in order to align our regulations with the model provided by the Treaty of Rome establishing the European Economic Community.[55] A deconcentrated administrative body was, therefore, created within the Ministry of Economy, called the National Commission for the Defense of Competition (CNDC).[56] A special administrative action procedure is established with judicial review of decisions before the National Court of Appeals in Economic Criminal Matters.[57] It introduces the concept of abuse of a dominant position of the European model, prohibits identified practices, and establishes criminal penalties for offenders.[58]

Although during the first years of the law's enforcement there was no substantial antitrust practice, as of the second half of the 1990s, the Ministry of Industry, Commerce and Mining provided resources to the CNDC, thus allowing a greater operational autonomy, and enabling modern antitrust practice.[59]

The enactment of Law 25.156 (1999) constitutes another milestone in the establishment of institutional design in antitrust matters. Such a law was, indeed, a major step forward towards the objective of creating an independent, collegiate, and cross-disciplinary antitrust agency.[60] The law follows the previous model in the identification of prohibited practices. It keeps the provision for a special action procedure before the enforcement authority.[61] However, it provides for the creation of a National Tribunal for the Defense of Competition (TNDC) whose members would be appointed through public competition.[62] The decisions of the TNDC would be subject to review by direct appeal before the Federal Chambers.[63] Law No. 89/2001, a

55. *Id*. at 2-3.

56. Ley No. 22.262, art. 6 (1980) (Arg.).

57. *Id.* at art. 27.

58. *Id.* at art. 28.

59. Organisation for Economic Co-operation and Development, *Competition Law and Policy in Latin America*, at 11 (OECD 2006), https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/10/competition-law-and-policy-in-latin-america_g1gh7476/9789264015142-en.pdf.

60. Coloma*, supra* note 36, at 4.

61. Dictamen del Procurador Fiscal en *AMX Argentina S.A. c. Estado Nacional – Ministerio de Producción*, CAF 72376/2017/CA3CS1, Procuración General de la Nación, at 4–5 (Dec. 2020) (Arg.) (hereinafter "Dictamen AMX"), https://www.mpf.gob.ar/dictamenes/2020/LMonti/diciembre/AMX_CAF_72376_2017_CA3CS1.pdf.

62. *See* Organisation for Economic Co-operation and Development, *COMPETITION LAW AND POLICY IN LATIN AMERICA: A PEER REVIEW – ARGENTINA, Brazil, Chile, Mexico and Peru* (OECD Pulbishing, Paris 2006) at 12, https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/10/competition-law-and-policy-in-latin-america_g1gh7476/9789264015142-en.pdf.

63. Dictamen AMX, *supra* note 61, at 5.

Regulatory Decree, established that the Secretary for the Defense of Competition would function as prosecutor before the TNDC.[64] Additionally, Law No. 25.156 introduced into the Argentine practice the procedure for the approval of economic concentration operations.[65] Finally, Executive Orders 20/1999 and 89/2001 regulating Law No. 25,156, closed the circle in terms of regulation of the new institutional design for the defense of competition in our country.[66] In fact, with the creation of the Secretary of Competition and the attribution of the necessary powers to be a party in the proceedings before the Tribunal (among others, to conduct investigations, file complaints, offer and produce evidence in the proceedings before the Tribunal), the roles of prosecutor and judge on antitrust matters submitted to the administrative tribunal were split.[67]

The TNDC was never constituted and since the enactment of the law, the CNDC, together with the Secretary of State under which the agency was administratively framed, remained "temporarily" performing the functions that the law attributed to the TNDC.[68] This certainly entailed a judicial dispute as to which was the law enforcement authority before the different Federal Chambers.[69] Law 26.993 (2014)

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64. *See* Miguel Ángel De Dios, *Problemas del Diseño Institucional para la Defensa de la Competencia en la Argentina* [*Problems of the Institutional Design for the Defense of Competition in Argentina*]; *See* De Dios, *supra* note 2; La Ley 2001-B, 969 (Arg.), TR LALEY AR/DOC/18320/2001.

65. *See* Dictamen AMX, *supra* note 61, at 5; see Ley No. 25.156, de defensa de la competencia, Aug. 25, 1999, B.O. 16/9/99 (Arg.).

66. *See* Decreto No. 20/1999 (Pres. Nación Arg.), 15 Dec. 1999, B.O. No. 29293 (Arg.), available at INFOLEG, https://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/65958/norma.htm; *See* Decreto No. 89/2001 (Pres. Nación Arg.), 25 Jan. 2001, B.O. No. 29577 (Arg.), available at INFOLEG, https://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/65959/norma.htm.

67. *See* Federico Rossi, *Argentina's New Competition Law: The Modernisation of the Argentinian Competition Law Regime*, Competition Policy Int'l (CPI), May 21, 2018, available at https://www.pymnts.com/cpi-posts/argentinas-new-competition-law-the-modernisation-of-the-argentinian-competition-law-regime/ (last visited Nov. 8, 2025).

68. Organisation for Economic Co-operation and Development, *Fighting Bid Rigging in the Procurement of Public Works in Argentina*, at 79–80 (2019), https://www.argentina.gob.ar/sites/default/files/fighting-bid-rigging-procrument-public-works-argentina-en-web.pdf (last visited Nov. 5, 2025) (discussing Law No. 26.993 (Arg.)).

69. *See, e.g.*, Cám. Na. Apel. Penal Econ., Sala B, 19 May 2014, Principales Relojería Cotax / solicitud de intervención Ley, L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/CPE63885_2014_CA1.pdf; Cám. Na. Apel. Penal Econ., Sala B, 12 July 2013, Pfizer Inc. & Johnson & Johnson Corporation / diligencia preliminar cumplimiento art. 8, Ley No. 25.156 L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/12-07.pdf; Cám. Na. Apel. Penal Econ., Sala B, 28 June 2013, Shell Compañía Argentina de Petróleo / incidente de excepciones previas y infracción Ley 25.156, L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/c.1425.pdf (each noting that, despite more than a decade since Law 25.156's enactment, the

repealed the provisions of Law 25.156 for the creation of the TNDC and reverted the process of structuring an independent agency.[70] It thus established that the law enforcement authority would be appointed by the National Executive Power.[71]

In 2014, a sharp turn was taken with the enactment of Law No. 26.993. The text of Section 17 of the Antitrust Law (LDC) was replaced, and it then establishes that "The National Executive Power shall appoint enforcement authority for this law."[72] The initial bill sent by the Executive established that the enforcement authority would be the Secretary of Commerce.[73] This attribution of competence was modified in Congress and the issue was left to be resolved by delegation or when the Executive Power issues a new regulation or enforces the Antitrust Law.[74] Apart from the delay in the creation of the Tribunal, there were no political or economic sectors or experts in the area claiming its elimination. The bill sent by the Executive proposed the elimination of the TNDC and the appointment of the Secretary of Commerce as enforcement authority.[75] This decision to eliminate the TNDC broke the political consensus reached for the enactment of Law 25.156, in force at the time,[76] and went against several bills submitted

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TNDC had not been constituted, and directing that the CSJN be informed so it might request the Executive to put the Tribunal in operation).

70. *See* Miguel Ángel De Dios, *Un Paso en Falso en el Diseño Institucional para la Defensa de la Competencia [A Misstep in Institutional Design for the Defense of Competition]*, 6 REVISTA DE DERECHO CONSTITUCIONAL (2015) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919; Law No. 26.993, (Oct. 1, 2014) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919.

71. Ley 26.993*, Sistema de Resolución de Conflictos en las Relaciones de Consumo* [Conflict Resolution System in Consumer Relations Law 26.993], BOLETÍN OFICIAL DE LA REPUBLICA ARGENTINA, 19 Sept. 2014 (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919.

72. *See id*.; Law No. 25.156, (Aug. 25, 1999) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/7198751/19990920.

73. *Mensaje del Poder Ejecutivo Nacional No. 1250/14*, DIARIO DE ASUNTOS ENTRADOS NO. 120, EXPEDIENTE 0062-S-2014, (Aug. 5, 2014) (Arg.).

74. Miguel del Pino et al., *Comentarios a la Ley de Defensa de la Competencia,* at 28–29 (Thomson Reuters Argentina 2020), https://www.thomsonreuters.com.ar/content/dam/openweb/documents/pdf/arg/white-paper/Supl%20Ley%20de%20Defensa%20de%20la%20Comp_completo.pdf (last visited Nov. 5, 2025).

75. *See Mensaje del Poder Ejecutivo Nacional No. 1250/14*, supra note 73.

76. *See generally* Ley No. 25.156, (Aug. 25, 1999), (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/7198751/19990920; *see also* CÁMARA DE DIPUTADOS DE LA NACIÓN [Chamber of Deputies of the Nation], DIRECCIÓN DE INFORMACIÓN PARLAMENTARIA, *Debates del proceso de sanción de la Ley 25.156*, 1, 2, 7, 12, 15 (May 19, 1999) (Arg.) (statements of Representatives Gabrielli, Flores, Isquilla, and Dumon); CONGRESO NACIONAL, DIARIO DE SESIONES DE LA CÁMARA DE SENADORES 3122, 3303, 3308-9 (June 23, 1999) (Arg.) (statements of Sen. León, Sen. Feris, Sen. Avelín, and Sen. Maglietti) (demonstrating the parliamentary members'

to Congress in favor of maintaining the TNDC and the creation of a competition prosecutor's office under the scope of the Ministry of Economy.[77] Furthermore, neither in the presentations of the legislators of both Houses of Congress, nor in the sessions in the committees of the House of Representatives, were there any arguments in favor of eliminating the TNDC (at least to the best of our knowledge).[78] In fact, the bill came from the Executive as if by inertia, and that is how it was finally enacted.[79]

Finally, the enactment of Law 27.442 (2018) reestablished the path of previous precedents regarding the institutional design of the competition agency.[80] With the creation of a National Competition Authority (ANC) composed of the Tribunal for the Defense of Competition (TDC), the Secretariat of Instruction of Anticompetitive Behaviors (SICA) and the Secretariat for Economic Concentrations (SCE), the model of an independent, collegiate, cross-disciplinary agency was reestablished, with members elected by a procedure that includes a competitive examination and background assessment, the intervention of the Executive Power, and the confirmation of the Senate, among others. Other interesting features include absolute prohibitions of cartels, mobile thresholds for economic concentration operations, the leniency program, creation of a Specialized Chamber within the Federal Court of Appeals in civil and commercial matters to review the decisions adopted by the TDC. [81]

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support for the TNDC during the debates regarding the enaction of Law 25.156); *see generally,* Ley 26.993, *supra* note 71.

77. *See* Congreso Naciona, *id.* at 3303, 3309 (Arg.) (statement of Sen. Leon and Sen. Maglietti referencing various bills created in support for the TNDC prior to the enaction of Law 25.156); *see generally* Cámara de Diputados de la Nación, *Proyecto de Resolución* (June 16, 2010) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=4285-D-2010; Cámara de Diputados de la Nación, *Ley 25.156 Modificaciones* (Dec. 9, 2013) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7935-D-2013; *see generally* Cámara de Diputados de la Nación, *Proyecto de Ley 7288-D-2014*, Art. 19 (Sep. 16, 2014) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7288-D-2014 (proposing the creation of the Tribunal Nacional de Defensa de la Competencia as a decentralized body after the enaction of Law 25.156).

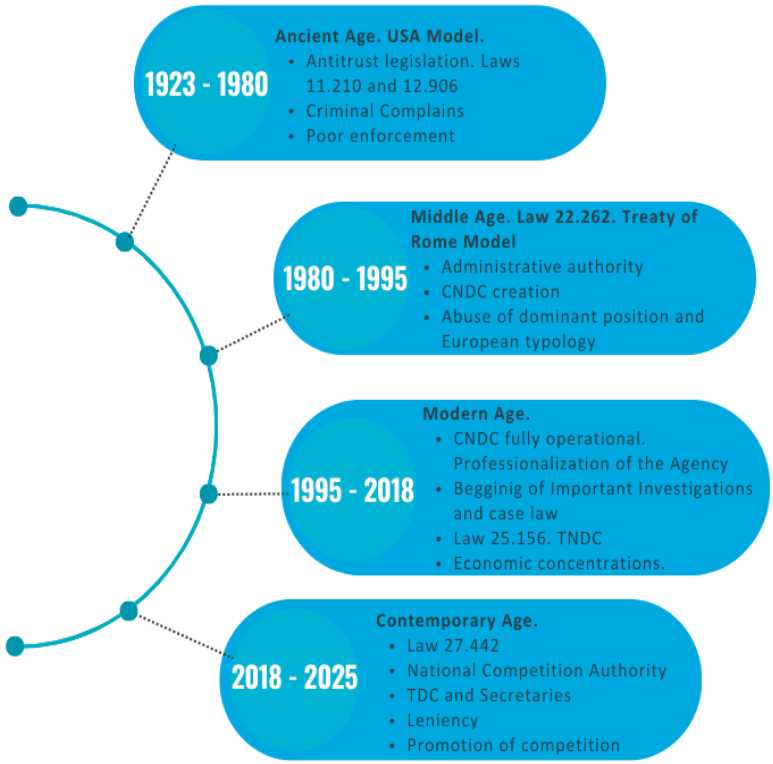
78. *See generally* Cámara de Diputados de la Nación*, Diario de sesiones de la Cámara de Disputados de La Nacion,* (Sep. 17, 2014) (Arg.), https://www.hcdn.gob.ar/sesiones/sesion.html?id=932&numVid=0&reunion=16&periodo=132 (asserting that none of the Chamber of Deputies' speakers explicitly debated that the TNDC was flawed or unnecessary).

79. *See id.* at 33.

80. *See generally* Law No. 27.442, (Apr. 9, 2018) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/183602/20180515?busqueda=2.

81. De Dios*, supra* note 1, at 40 (citing Miguel Ángel De Dios, *El Desafío Del Regreso al Sendero Correcto en el Diseño Institucional [The Challenge of Returning to the Right Path in Institutional Design]*, *in* COMENTARIOS A LA LEY DE LA DEFENSA DE LA COMPETENCIA 59, 71 (2018)).

In short, in a timeline established as follows, we can identify different stages in the evolution of the regulatory design for the defense of competition in Argentina. Namely: (i) a first stage which we call the ancient age of competition policy with very little enforcement and few written case records, (ii) a second stage or middle age where the basic structure of a special agency is established and still exists today, (iii) a third stage or modern age where plenty of relevant precedents are created and the structure is updated, and; finally, (iv) a fourth stage or contemporary age where the law in force today is found.



V. EXPERIENCE OF THE ARGENTINE COMPETITION AUTHORITY[82]

From a formalistic standpoint, we have seen that the antitrust regulation in Argentina has not departed significantly with respect to the best international practices.[83] However, the proper questions shall be: What has been the experience of the competition authority in Argentina? What has actually happened since the enactment of the first antitrust law in our country and what were the learnings?

In order to answer those questions, analysis needs to go beyond the written antitrust laws and implementing enacted decrees, and instead conduct a critical assessment, with empirical support and qualitative analysis, of how it has functioned in, what we call, the modern age of antitrust in Argentina and what the projections are for, what we call, the contemporary age.

We first provide a critical review of the agency design and how it has evolved over time through the different periods considering the results achieved in each of them. In this chapter we analyze, as well, the performance evaluations conducted by the OECD (2006 and 2012) and UNCTAD (2017) peer reviewers, by confronting their conclusions with other relevant secondary sources.[84]

We have checked the perceptions of the agency's performance with the "effectors of the competition system", i.e., members, senior officials of the agency such as directors and heads of areas, professionals in law and economics who act before the agency and/or advise market agents, leaders, academics, and other researchers who have participated in the agency's reforms or designs over the last two decades.[85] The consultation with the system's effectors consisted in a survey that yields valuable results both regarding the independence the agency has had in its history, as well as the agency´s efficiency and effectiveness over the period called the modern age of antitrust in Argentina, 1995 to 2018.[86]

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82. This part substantially includes the results of our research and analysis of our paper "*El Diseño Institucional para la Defensa de la Competencia*" (Institutional Design for the Defense of Competition); DE DIOS, *supra* note 2.

83. *See id.* at 203-04 (citing Richard Whish, *Comentarios y Evaluación General de la ley 27.442 desde una Perspectiva Europea del Derecho de la Competencia [Comment and General Assessment of Law 27.442 of 2018 from a European Competition Law Perspective]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 639, 639 (2018)).

84. *Id.* at 21-22.

85. *Id.* at 138.

86. *Id.*

Also, we cross-checked the above assessments with the investigation report on restrictive practices of competition and economic concentration operations and the review of the main cases resolved by the agency, using the competition agency's own sources as well as other research work. We conduct, at the same time, a critical review of the main cases as identified by the above-mentioned sources, as well as the results of our own considerations.

A. Peer Reviewers' Reports

The Competition Agency in Argentina was subject to evaluation by international organizations on several occasions during, what we call, the modern age of competition defense. Peer reviews are a central element of the cooperation of international agencies. Mechanisms may vary (on-site reviews, as in the case of those promoted by the OECD), ongoing performance review consultations (as in the case of those conducted by ICN), etc., but in all cases the reviews are based on the willingness of the countries under review to submit their laws and policies to substantial questioning by other states.[87] These processes generate valuable insights for the country under review and foster transparency, mutual understanding to promote exchange and growth in each respective country within the framework of a globalized economy.[88]

We can highlight the peer reviews conducted in 2006 and 2012 jointly by the Inter-American Development Bank and the OECD and another carried out in 2017 by UNCTAD on occasion of the United Nations Conference on Trade and Development.[89] Reviewers on such occasions were international experts, members, or former members of other competition authorities, who conducted their background study and assessment tasks over a period of 3 to 6 months, including in some cases staying in Argentina, interviewing CNDC officials and staff, independent experts, and professionals, among others.[90]

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 144-45.

1. Competition Law and Policy in Argentina, Peer Review (2006)[91]

The IDB and OECD Competition Committee's cooperation enabled, during the early years of the twenty-first century, the undertaking and coordinating of the assessment of competition authorities in several Latin American countries.[92] At the annual meetings of the Latin American and Caribbean Competition Forum (LACCF), several important round tables and peer reviews of laws and institutions of each country were held.[93] Peer reviews of Brazil, Chile and Peru competition authorities had already been carried out at the time Argentina was being assessed.[94] The review was led by John W. Clark, PhD in Jurisprudence, who was then a consultant to the OECD and had previously worked for 27 years in the Antitrust Division of the U.S. Department of Justice.[95]

The report consists of several chapters referring to the assessment of the local economic context. As a starting point, the report focuses on the dynamics of competition policy which include: the content core and enforcement of the competition law (behaviors, horizontal agreements, vertical restrictions, and abuse of dominant position), the procedure in cases of anticompetitive behaviors, the connection of competition policy with unfair competition and consumer protection, mergers and economic concentrations (notification, review procedure and the most relevant cases since the provision for concentration control), competition policies in the regulated sectors (electricity, natural gas, telecommunications, the banking sector, airlines and airports, and ports), competition advocacy, judicial review of the authority's decisions, international aspects of competition law enforcement, etc.[96] The report also devotes a special chapter to institutional aspects analyzing the enforcement tools available to the authority, as well as economic and human resources, issues related to the authority independence, the

91. Comisión Nacional de Defensa de la Competencia, *Competition Law and Policy in Argentina* in *Latin American Competition Forum 2006: Documentation — Fourth Meeting*, 11–12 July 2006, San Salvador, El Salvador 278 (Organisation for Economic Co-operation and Development (OECD) 2006), https://www.oecd.org/content/dam/oecd/en/networks/latin-american-and-caribbean-competition-forum/LatinAmericanCompForum2006.pdf.

92. *See id.* at 280.

93. *Id.*

94. *Id.*

95. *Id.* at 276 (citing *John William Clark,* FUNERAL CHOICES, https://funeralchoices.com/obits/john-william-clark/).

96. *Id.* at 282-83.

culture of free competition and price agreements.[97] Finally, the report establishes several recommendations to be implemented in order to strengthen the culture, practice and institutionality of competition in Argentina.[98]

Let us first focus on the institutional aspects identified in the report.[99]

Regarding the enforcement tools available, as has been assessed, the authority has the necessary powers to enforce the law.[100] This applies both to basic investigative powers, including the power to conduct market studies, to hold hearings and receive statements, to examine books and documents, and to conduct searches with judicial authorization.[101] The report highlights the fact that the authority has the power to issue opinions on competition matters, draft its internal regulations, bring actions before the courts, act with the competent agencies in the negotiation of international agreements on competition policies, and enter into consent agreements in cases.[102] Finally, it considers the sanctions for non-compliance with the law, such as the power to issue cease and desist orders and, if necessary, to impose the fulfillment of conditions aimed at neutralizing the effects of such practices; to impose fines on individuals and legal entities for infringing behavior; and, in the case of abuse of a dominant position, to request the dissolution or restructuring of the dominant company.[103] Regarding the monetary value of fines, the report notes that the currency depreciation after the termination of the convertibility regime impacted significantly the value of fines.[104]

The report focuses on evaluating a central aspect of the agency's operational capacity, the agency's financial resources and personnel.[105] To help visualize, the report the table below demonstrates the budget for the five-year period between 2001 and 2005.[106]

97. *Id.* at 282.
98. *See id.* at 283.
99. *See generally id.* at 306.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See id.*
104. *See id.*
105. *See generally id.*
106. *Id.* at 32.

2. CNDC Resources

Year	Budget in ARS	Budget in USD	Staff
2001	2.617.000	2,617,000	48
2002	2.497.202	713,572	41
2003	2.295.724	704,677	42
2004	2.161.697	745,412	48
2005	2.141.023	738,525	53

The table shows values in pesos and in US dollars to establish a constant currency for evaluating the allocation of resources. However, as the reviewer points out, the sharp drop in the amount in US dollars in 2002 was a consequence of the termination of the convertibility regime and the falling value of the Argentine peso.[107] Conversely, when the peso increased its value between 2003 and 2005, increases in dollars did not reflect a real growth in the agency's resources, but rather a strengthening of the peso.[108] The report also notes that the budget is mostly allocated to contracting locally rendered services, so that the peso values appropriately measure the funding provided to the agency during the period.[109] Among the arguments presented to the reviewers was the fact that occasionally some of the Commission's expenses had been absorbed by the budget of the Secretary of Commerce.[110] This is, however, one of the most critical points of the evaluation. Considering the cumulative inflation rate between the exit from convertibility and the date of the report (approximately 70%), the decrease in the budget is considered as a punitive measure against the agency.[111]

The report concludes that:

> [C]learly enough the Commission suffers from a total lack of economic resources, which has an impact on its staff. At the beginning of 2006, the five members of the Commission included three economists and two lawyers. The professional staff consisted of 22 economists and 11 lawyers. There were eight administrative staff members and three semi-exclusive non-professional assistants, making a total of 49 employees. There is, however, a further distinction among employees: contract staffing and permanent staffing. From year to year, there is an equal number of staff members in each of these staff groups. Contract terms are usually short, 3 or 6 months, although contracts may be renewed, which is usually the case. The salaries of

107. *Id.*
108. *Id.*
109. *Id.* at 33.
110. *Id.*
111. *See id.*

> contract personnel are higher than those of permanent staff, but on the other hand, contract employees do not receive benefits. In any case, salaries are frozen. This results in a high employee turnover, especially among contract staff. It is quite common for employees to leave the Commission for other public positions, at higher salaries. . . . a large number of highly qualified people left the Commission for better paid positions elsewhere, and it has been difficult to replace them.[112]

These considerations about the agency's staff also apply to the CNDC authorities, given that at that time their salaries were frozen, discouraging more qualified people from being tempted to fill the vacancies of members leaving.[113]

By mid-2006, the report found that unattractive salaries and high staff turnover had negatively impacted the agency's performance.[114] The report expressed a concern about the fact that the departure of people due to these circumstances meant that most of the staff lacked experience.[115] This is to the detriment of the agency's institutional memory, its efficiency and, in the reviewer's opinion, of its very essence.[116]

Finally, highlighting the opinion of the competition system operators, the report states that:

> Despite this [referring to the limitations mentioned above], the CNDC usually receives favorable comments from representatives of the private sector who interact with the Commission. The staff is often seen as a group of diligent professionals who act in a professional manner. Their work is considered to produce positive outcomes. For example, by Argentine standards, the time it takes for a typical merger review is not considered too long. As a rule, the Commission's decision on a merger is not the last in the series of governmental approvals required for such transactions. The quality of the Commission's decisions, especially with respect to mergers, deserves considerable respect. However, there is no doubt that the Commission is severely constrained by its budget.[117]

Finally, the report makes a number of recommendations to strengthen the institutionality, organization and functioning of the competition authority,[118] as follows:

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *See id.* at 46-54.

(a) Creation of the National Tribunal for the Defense of Competition

The report found it an anomaly that almost seven years after the enactment of the Antitrust Law, the agency created by this law had not been established yet.[119] The report considered that the institutional design created by the law would allow addressing at least two of the fundamental problems faced by the agency at that time: insufficient budget and lack of independence.[120] It considered, in fact, that under Sections 17 and 25 it could operate as a self-sufficient agency with its own separate budget and entitled to charge fees (for example, for the notification of mergers).[121] The possibility of deciding on the allocation of its own resources was considered the right way to function in an autonomous manner.

The report further states:

> The creation of the Tribunal would significantly enhance the independence of the competition authority. Its members would be appointed on a competitive background examination by a quasi-independent jury and for a fixed term of office. It would have the power to issue enforceable decisions, reviewable only by the judicial courts. However, experts say it is politically impossible to confer on this body the independence currently provided by law.[122]

In 2005, when the report was written, a law amendment bill was under discussion. It provided, among other things, for (i) the appointment the CNDC members as members of the first NTDC (giving the Executive the power to fill the pending positions) and (ii) granting the Ministry of Economy the power of comptroller in special merger cases.[123] Such power was a widespread practice in many jurisdictions that maintained competencies within the executive branch to review and/or determine the approval or rejection of certain merger transactions.[124] The report argued that if the bill under discussion had been passed in Congress, such power should have been limited to matters of "prevailing public interest or other phrase to that effect" with the expectation that this veto power would rarely be used.[125] In fact, the bill

119. *Id.* at 48.
120. *Id.*
121. *See id.*
122. *Id.*
123. *See id.* at 35-36.
124. *See id.* at 48.
125. *Id.*

was not approved, and the regime of Law 25.156 remained untouched in that regard. [126]

(b) Increasing the Budget and the Power of the Competition Authority to Dispose of it

The report focuses on two main aspects. First, the need for a larger budget and second, the power to dispose of it.[127]

It warns that a competition authority such as the TNDC " . . . *will need more money to attract and retain qualified professionals at the staff and board levels."*[128] The agency's budget should return in real terms, at least, to 2001 levels.[129] The report warns on the fact that most of the employees have short term contracts, which causes high personnel turnover.[130] A larger budget would therefore enable having a larger, effective, and permanent staff. Notwithstanding the difficulties of public employment in Argentina and the recurrent salary freezes, the report recommends that, as an autonomous body, the agency should have full recruiting and hiring powers and be able to structure its professional staff in a more efficient manner.[131]

Finally, it reaffirms the fact that the agency's limited power to dispose of its budget (for which the signature of the Secretary of Commerce is needed) is detrimental to its normal performance and advises that this circumstance be modified.[132]

(c) Strengthening the Deployment of Anti-Cartel Activities

The report acknowledges the experience the agency had acquired in successful cases in the cement and liquid oxygen markets.[133] It thus weighs the significant benefits for strengthening competition policy " . . . *probably to a greater extent than any other enforcement action the authority might undertake.*"[134] The report states that fighting cartels would enhance the agency's reputation within the government and with the general public and contribute to raising competition

126. *See id.* at 36.
127. *Id.* at 48.
128. *Id.*
129. *Id.*
130. *Id.* at 48-49.
131. *See id.*
132. *Id.* at 49.
133. *See id.* at 14-15.
134. *Id.* at 50.

awareness in the country by helping the public understand how it benefits from strict and competent enforcement of antitrust rules.[135]

Fighting cartels should be, therefore, a top priority within the agency. The report proposes two changes to the law then in force to allow raising the maximum cap on fines and extending such penalties to natural persons.[136]

Two other anti-cartel suggestions in the report were aimed at establishing a leniency program and conducting proactive investigations, especially in the area of public procurement, i.e., initiating *ex officio* investigations of possible bid-rigging and price-fixing in government procurement and contracting.[137]

(d) Increasing Efficiency in Investigations of Anti-Competitive Behavior

The report warns about the backlog of anti-competitive behavior investigations, most of which do not seem to have positive results.[138]

In the reviewer's opinion, much of the backlog is due to the fact that individuals initiate and participate in the investigations conducted by the agency, but in reality, they are commercial or other kind of disputes that end up not being credible because they do not involve an actual infringement of the antitrust law.[139] This creates a bottleneck that hinders smooth progress of cases that would deserve the attention of anti-competitive behavior investigation teams.[140]

The report, therefore, proposes considering ways to summarily process private complaints that clearly do not describe violations of competition law, in order to shorten the time and reduce the resources required to reach the agency's decision.

It states that the procedures applicable in most cases where the agency decides to proceed with an investigation are cumbersome. Nor do they result, in most cases, in a conviction for anti-competitive practices.[141]

135. *See id.*
136. *See id.* at 49.
137. *See id.*
138. *See id.* at 21-22.
139. *See id.* at 50.
140. *See id.*
141. *Id.*

(e) Increasing Efficiency in Merger Control

In order to improve the efficiency of merger control, the proposal is to increase the notification thresholds.[142] This is mainly because they have been fixed in pesos in the law before the economic crisis of 2001/2002. The report also proposed shortening the time period for evaluating and approving operations, especially simpler ones (such as conglomerate operations).[143] Finally, it was critical about the right to appeal the agency's decisions regarding mergers. Consideration should be given to raising the thresholds for notification.

The report highlights the fact that the CNDC does not apply a critical approach when reviewing the private sector, because it takes too long to control mergers.[144] Notwithstanding this aspect regarding assessments in the private sector, shortening the time to review straightforward cases would positively result in freeing up some of the agency's scarce resources for more important tasks. The proposal is to revise the F1 form procedure for simplification and the F2 form to make it more specific to the market with problems, as judged by the agency.[145]

(f) Reviewing the Notification Regime in Place so that it Allows Parties to Consummate the Merger Before the Agency Completes its Review

The report argues that the law's regime allowing post-consummation notification of the merger transaction is inconvenient.[146] First, because it may significantly alter the agency's ability to achieve an effective remedy in the event of an anticompetitive transaction. Particularly, in those cases where the anticompetitive effects of a merger cannot even be mitigated by a divestiture of assets and considers that, if the transaction has already been consummated, due to the long-time frames for analyzing transactions, it does not seem possible to prevent the harm from occurring.

As long as there were no amendments to the law, in order to mitigate the problem, the agency should have the possibility to issue a

142. *Id.* at 51.
143. *Id.*
144. *Id.*
145. *See generally id.*
146. *Id.* at 52.

temporary order that companies "keep their operations separate" to allow for significant divestiture of operations and assets, if required.[147]

(g) Free the CNDC from as much Political Influence as Possible, Until the Actual Setup of the Tribunal for the Defense of Competition

The report puts special emphasis on this point and makes the following assessment:

> Since the CNDC took a more active role in 1996, it has enjoyed periods when it was free from political interference. This interference seems to be the case now, though, probably because it has joined the government in fighting inflation. By keeping prices at competitive levels, effective antitrust enforcement can be a force against inflation, though in this regard there are other macroeconomic factors which seem to be more important. In any case, if the Commission is to be an ally against inflation, it must be allowed freedom in the enforcement of antitrust law. To the extent its scarce resources are diverted to other causes, its antitrust enforcement responsibilities will languish.[148]

It is the reviewer's understanding that Law 25.156 was a crucial step forward in strengthening the independence of the competition authority, but failure to effectively implement it and a growing political influence over the agency undermined that objective.[149]

(h) Continue and Extend efforts to Build a Culture of Free Competition in Argentina

The report encourages the agency to continue and expand the various useful programs that were being implemented to help build a free competition culture in Argentina.[150] These initiatives could include regular conferences or seminars on competition policy open to the public, with the participation of the public and private sector. It also recommends building a good relationship with the media, which is fundamental to this effort.[151] Each of the Commission's major decisions should be accompanied by a press release (and even presented at a press conference), communication on the website must be improved, etc.

147. *Id.* at 53.
148. *Id.*
149. *See id.*
150. *See id.*
151. *Id.* at 54.

(i) Fostering Effective and Professional Relations with Judges Hearing Appeals in Antitrust Cases

The report recommends conducting activities, seminars, and exchanges with judges in charge of reviewing competition agency decisions.[152] It does not include any opinion on the convenience of having a specialized tribunal since it considered that the Federal Civil and Commercial Chamber of CABA was a "quasi-specialized tribunal." It did point out that all events should respect the relevant legal ethics.

(j) Expanding the Role of the Competition Quthority in Regulated Sectors

The report also recommends working in collaboration with regulators in different sectors.[153] It states that inter-agency cooperation seemed to work in the case of economic concentration operations, but there was little interaction in matters of anti-competitive behavior.[154]

3. Follow-up to the Nine Latin American Peer Reviews of Competition Law and Policy (2012)[155]

As a regular feature of the Latin American and Caribbean Competition Forum, the OECD and IDB jointly conduct peer reviews of competition agencies.[156] As part of the tenth anniversary of the Latin American and Caribbean Competition Forum in 2012, a follow-up of the nine peer reviews conducted so far was carried out, it was more specific than that of 2007. It focused on two issues: first, the assessment of the impact the agency's work had on pro-competitive regulatory reforms and, second, the criteria for prioritization and selection of issues in each agency.[157] To this purpose, a questionnaire was sent to each of the agencies in the jurisdictions that have been previously reviewed, including generic questions, since in some cases no specific recommendations had been made regarding these two topics of

152. *See id.*

153. *See id.*

154. *Id.*

155. *See* Organization for Economic Cooperation and Development (OECD) & Inter-American Development Bank (IDB), FOLLOW-UP TO THE NINE PEER REVIEWS OF COMPETITION LAW AND POLICY OF LATIN AMERICAN COUNTRIES: ARGENTINA, BRAZIL, CHILE, COLOMBIA, EL SALVADOR, HONDURAS, MEXICO, PANAMA AND PERU (2012), available at https://doi.org/10.1787/afe88063-en.

156. *See id.* at 3.

157. *See id.* at 8.

interest, and an assessment of the main benefits of peer reviews.[158] The main responses and conclusions for the Argentine agency were as follows.

(a) The Agency's Role in Pro-Competitive Regulatory Reforms

The CNDC noted that the peer review contributed to strengthening the competition culture in Argentina.[159] First, through the decision of the Ministry of Economy and Finance to establish an autonomous budget for the agency, which enabled improving its internal organization and activities.[160] Second, by promoting competition within the government, allowing it to participate on certain occasions in drafting bills, decrees, regulations, and resolutions.[161] Third, by conducting sectoral studies, as in the case of audiovisual services and the hydrocarbons sector (on contractual practices in gas trade).[162] Fourth, with regulatory recommendations on tariff barriers in the steel sector, and mobile number portability.[163]

(b) The Agency's Activities

(i) Case Selection and Prioritization

The CNDC noted that cases were selected on a case-by-case, non-public basis, considering several criteria for assigning priorities (potential consumer harm, complexity of case analysis, preliminary assessment of available evidence, and the possibility of obtaining additional evidence).[164] As had been already pointed out in the 2006 report, the limited budget and staff turnover were among the main restrictions to a better performance.[165] This was notwithstanding the budget increase that the agency had received between 2007 and 2011 by almost 250% at constant values.[166] This increase was reflected in the creation of new positions in the agency, which allowed for extended contracts,

158. *See id.*
159. *Id.* at 41.
160. *Id.*
161. *Id.* at 57.
162. *See id.* at 42.
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*

increased salaries, and more organized and efficient working conditions.[167]

(ii) Anti-Cartel Enforcement Actions

One of the recommendations of the 2006 report was a proposal to amend the Antitrust Law then in force in order to introduce a procedure for the exemption and reduction of sanctions (although it was not approved by the Secretary of Domestic Trade).[168] A project to create a leniency program was also under study; this project was sent as a recommendation of the agency for its evaluation by the Executive Branch and Congress but did not even reach parliamentary status.[169]

(iii) Improving the Efficiency and Effectiveness of Investigations

The peer review had also recommended increasing the efficiency of investigations into anti-competitive behavior.[170] In response, the CNDC (i) considered the possibility of dismissing complaints when the complainants do not ratify them and the CNDC deems there is not enough evidence to pursue the complaint and (ii) proposed increasing the notification threshold and shorten the review periods for simple and complex transactions.[171]

No further progress was made with respect to the recommendations of the 2006 report, and at the time of the peer review there were still critical issues pending implementation (e.g., the Constitution of the Tribunal).

(iv) Overall Assessment of the Peer Review

The CNDC recognized the contribution of the peer review regarding (i) the establishment of an autonomous budget, which enabled a more effective distribution of resources according to the specific needs of each unit and (ii) the recommendation to implement the leniency program that was the basis for the law reform process years later.[172]

167. *See id.* at 42-43.
168. *See id.*
169. *See id.* at 43.
170. *See id.* at 59.
171. *See id.* at 43.
172. *See id.* at 41, 43-44.

4. Voluntary Peer Review of Competition Law and Policy: Argentina (2017)[173]

A subsequent peer review of the competition authority in Argentina was conducted five years after the last OECD review, carried out instead within the framework of UNCTAD.[174] Voluntary peer reviews on competition law and policy under the auspices of the United Nations are carried out at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy and at the Inter-Ministerial Conferences. UNCTAD's Special Unit on Competition and Consumer Protection Policies conducts the review of the set of Principles and Rules on Competition within the framework of the United Nations.[175] This unit entrusted Professor Luis Berenguer Fuster, lawyer, former President of the Spanish Competition Court, former member of the Spanish Courts, and member of the Advisory Group of Experts of the Competition and Consumer Protection in Latin America (COMPAL) program, with the task.[176]

The report structure is similar to that of the OECD report. It first focuses on the economic context in Argentina and on the background of the Antitrust Law then in force. It is divided into special chapters for different topics, as follows: (i) anticompetitive agreements and practices, (ii) control of economic concentrations, (iii) behavior-related procedures (the administrative procedure as a supplemental rule), (iv) compensation for damages for infringements of competition rules, (v) behavior control procedure, (vi) sanctions to be applied, (vii) the judicial appeal of the authority's decisions, (viii) the promotion of competition, (ix) certain matters considered to be particularly relevant such as horizontal and vertical agreements, abuse of dominant position and the promotion of competition, and finally, (x) institutional matters related to the enforcement authority and the promotion of competition policy.[177]

In order to analyze the status of competition policy and institutional framework at the time of the report, Section 5 begins by

173. *See* UNITED NATIONS CONF. ON TRADE & DEV. (UNCTAD), *Voluntary Peer Review of Competition Law and Policy: Argentina* (UNCTAD/DITC/CLP/2017/1) (TD/B/C.I/CLP/46) (Apr. 26, 2017).

174. *See id.* at 2, 30.

175. *See* UNITED NATIONS CONF. ON TRADE & DEV. (UNCTAD), *Competition and Consumer Protection*, (last visited Nov. 12, 2025), https://unctad.org/topic/competition-and-consumer-protection.

176. *See* Luis Berenguer Fuster, FORO DE FOROS, https://www.forodeforos.org/ponentes/luis-berenguer-fuster/ (last visited Oct. 23, 2025).

177. *See* UNCTAD, *supra* note 175, at 5.

identifying the recommendations made by the OECD in 2006. It states: "Analysis of the actions implemented as of the approval of the report [OECD 2006] should lead to frankly disheartening conclusions . . . ".[178] After favorably considering the draft amendment of the antitrust law that was then under debate in Congress (and that would eventually become Law 27.442) and certain operational changes that were being carried out in preparation for a new legal regime (such as, delegation of operational powers to the CNDC by the Secretary of Commerce, new internal administrative organizational charts and reorganization of the agency's technical teams to make its performance more efficient, the allocation of greater budgetary resources, etc.), it goes on to state:

> [B]ut as of 2016, none of the reforms proposed by the OECD concerning institutional design had been implemented, independence had not been strengthened, the effectiveness of the fight against cartels had not been enhanced, merger control regime has not been modified and the leniency program has not been set. On the contrary, instead of creating the Tribunal, as a means of strengthening the independence of the system, the Secretary of Commerce has been permanently appointed as the Enforcement Authority.[179]

We were able to prove how important the problem of institutional design is in the interview we had with Professor Berenguer and other specialists.[180] The fact that the National Tribunal for the Defense of Competition has not been constituted as provided for in Law 25.156, its elimination by Law 26.993 and the appointment of the Secretary of Commerce as enforcement authority was an issue of special interest.[181] Berenguer had been President of the Spanish Competition Court and one of the facilitators of the subsequent change in the regime of the National Competition Commission that led to the creation of the highest authority of markets and competition in Spain, the CNMC.[182]

UNCTAD ultimately came to nine conclusions in their peer review report.

(1) The recommendations made in the 2006 OECD peer review remain valid. The report states, that in the years since the approval of these recommendations and up to 2016, no apparent decline in political influence was evident in the enforcement of competition rules.[183] It is

178. *Id.* at 39.
179. *Id.* at 40.
180. Based on personal knowledge and protected information.
181. *See* UNCTAD, *supra* note 175, at 13.
182. *See* Berenguer Fuster, *supra* note 176.
183. *See* UNCTAD, *supra* note 175, at 40.

acknowledged, though, that considerable progress has been observed in this regard since 2016.[184]

(2) Initiatives adopted since 2016 in the organizational structure of the CNDC are aimed at strengthening the independence and effectiveness of the competition authority.[185]

(3) The delegation of powers by the Secretary of Commerce in favor of the CNDC is in line with international best practices in antitrust matters.[186]

(4) The bill then under discussion in Congress represents an outward expression of the political powers' commitment in line with the recommendations made in the 2006 peer review.[187]

(5) The introduced bill addresses all the concerns raised on numerous occasions and expressed in 2006, such as raising the thresholds for the notification of concentration operations, regulating the suspensive effects of notification, implementing a leniency program and the creation of the Tribunal for the Defense of Competition.[188] The report considers that the system chosen for the appointment of the Tribunal members and their security of tenure during the full term of office in conformity with the bill, are suitable measures in order to strengthen the independence of the agency from political powers and economic interests.[189]

(6) The report states that until a new law is adopted, and in fact until it enters into force, it is necessary to make the best efforts to shorten the time periods for the processing of cases both regarding anti-competitive behavior and economic concentrations.[190] The recommendation was, then, that the time periods provided for in the law should be regarded as preclusive and not merely regulatory, as has been the case before.[191]

(7) The report also highlights the fact that the Commission has started to carry out important work in the promotion of competition.[192] However, it recommends encouraging its intensification since it is "a very suitable instrument to create a culture of competition."[193]

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184. *Id.*
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *Id.* at 41.

(8) It recommends providing the competition authority with "sufficient economic resources to enable it to exercise its functions without reliance on the political will of the Executive Power, and at the same time to identify more flexible forms of hiring staff."[194] The possibility of hiring highly qualified personnel would improve the agency's prestige.[195]

(9) Finally, it recommends facilitating the private enforcement of competition rules, proposing to offer the suitable procedures to ensure that parties damaged by infringements to the competition law may state a claim for the damage caused.[196] This would also create an additional deterrent effect to public prosecution of anti-competitive practices.

B. The Evaluation of the System's Effectors

In order to obtain empirical support and a critical evaluation of the functioning of the competition authority since 1995, the year when the competition agency was provided with significant human and material resources and the will of the political powers contributed to a substantial practice, we conducted a survey among the participants of the competition system, be they public officials, professionals, academics, etc., from 1995 to 2019, the period we call in this research the modern age of competition advocacy in Argentina.

The Objective of the Survey was presented to the respondents as follows:

> There is a general consensus that the enactment of competition regulation is beneficial for the economy, market agents and, in particular, consumers. However, this consensus is weakened when trying to establish which body shall be responsible for carrying out such regulatory functions and what organizational and functional characteristics competition agencies should have. This survey is intended to collect the opinions and perceptions of the system's effectors (whether public and/or private) on the institutional design of the competition agency in general and the agencies' performance in Argentina in the period from 1995 to 2019.

To facilitate the analysis of the findings, the survey will be divided into three parts. Namely, the sample description, the perceptions of satisfaction of the sample and the evaluation of the principles that should be considered in an ideal system.

194. *Id.*
195. *See id.*
196. *See id.*

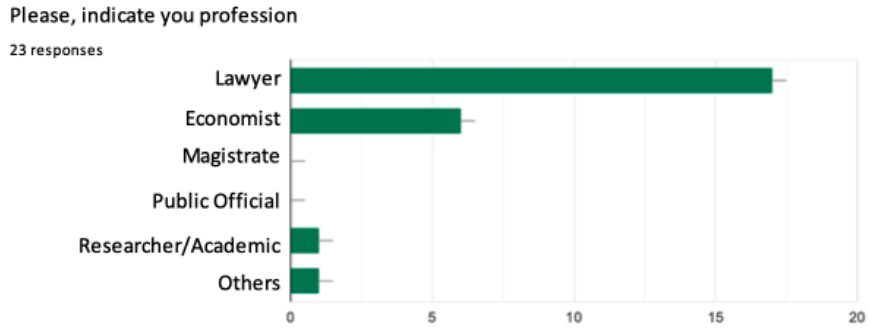
1. Sample Description

Respondents were told why they had been chosen and were asked to provide a description of their specialty and participation in certain processes during the time period of the research. This was communicated as follows:

> You have been selected as one of the effectors of the competition system in Argentina. This survey is anonymous. However, we will now ask you a few questions to allow us to further segment the analysis of the opinions resulting from the survey.
>
> Please answer all relevant questions.
>
> 1. Professional lawyer/ economist/ other/ none
> 2. Magistrate/public official/researcher/academic/ other.
> 3. Served as an official or employee in the competition agency between 1995/2019. [Yes/No]
> 4. Have you been involved (whether as an official, legislator, advisor, etc.) in the formulation or articulation of antitrust rules or provisions between 1995/2019? [Yes/No]

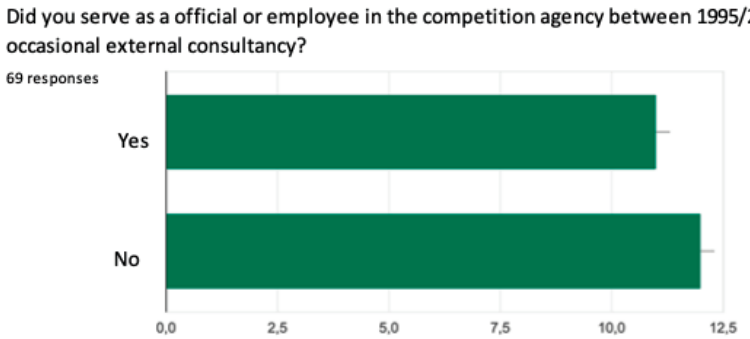
Respondents were allowed to answer anonymously. The survey was sent to more than 200 people who, met any of the following requirements: (i) have participated in the CNDC, either as members or hierarchical officials, as Director of different areas within the agency organizational structure; (ii) have acted regularly before the competition agency, either as lawyers, economists and/or consultants; and/or (iii) have been involved in the processes of discussion and modification of the institutional design between 1995 and 2019 by the merit of their experience or academic, professional or political background. The objective was to ascertain the perceptions these effectors had of the design and operation of the competition agency system at different points in time.

Responses showed an over-representation of professionals with a background in law, accounting for almost three quarters of the responses received, while just over one in four had a background in economics. Additionally, there is a smaller percentage who identify themselves as researchers/academics or doing other activities.



The over-representation of people with a background in law is seen as a favorable factor for evaluating the institutional design and its functioning from a legal perspective during the years under investigation. Either those who have participated in the competition agency as members or public officials or whose experience is the result of their professional performance before the competition agency.

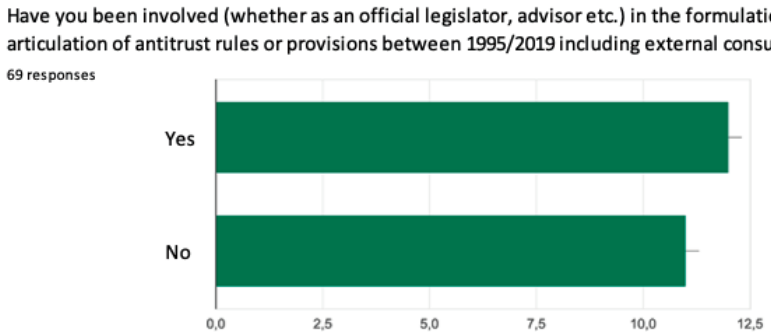
The graph below shows the direct participation in the competition agency or their performance before it.



Responses showed that 48% had served as an official or employee of the agency, while the remaining 52% did not. We also believe that the almost equal representation of those who have participated from both sides of the counter allows for a balanced load of perceptions. When evaluating results, the favorable bias of those who have participated in the agency is tempered by the broad time spectrum covered and the different conformations of the internal structures of the agency during that time. Some might argue that this could be understood as an over-representation of public agents when in the identification of potential respondents, the initial ratio was one out of three public officials or agents and two out of three who had never been members or officials

of the agency. But we understand that, with due consideration of the relevant caveats, the survey content allows a qualitative analysis of perceptions.

Regarding the participation in the processes of the regulation drafting or revision and design of the competition defense, the results also reached a certain balance.



Percentage values are inverted as compared to the previous question. This allows us to conclude that some respondents, even if they were not officials of the competition agency, did participate in the processes of regulatory modification. This may be due either to their institutional political participation (in the Executive Power or in the Congress) or to their participation in the open debate and discussion sessions in the agency or in congress committees. In fact, during the process of approval of Law 25.156, Law 26.993 and Law 27.442, consultations and debates were held both in the drafting stage under the scope of the Executive Power and in the meetings of the special committees in Congress.[197] We participated in two occasions. Together with experts, sectorial chambers, and consumer protection associations, we were invited to participate as speakers in discussion sessions of the Joint Commissions of Competition and Consumer Protection, and Budget and Finance and Constitutional Affairs of the House of Representatives.[198] And when the CNDC was in the process of drafting the bill, which later became Law 27.442, the competition authority invited us to express our opinions and suggestions ahead of time in an interesting formal session including the participation of stakeholders from

197. *See id.* at 30-31.; Luis Berenguer Fuster, *BROSETA incorpora a Luis Berenguer, expresidente de la CNC*, BROSETA, https://www.broseta.com/en/leading-international-expert-on-competition-law-luis-berenguer-joins-broseta/ (last visited Nov. 13, 2025).

198. Based on personal knowledge and communications with competition authorities.

the general public.[199] These external stakeholders were the ones we identified to include in the segment of participants who collaborated in the institutional design of the defense of competition regulation without actually having been officials.

2. Perceptions of Satisfaction

For the assessment of the agency's performance, which has been a central part of the survey, we made distinctions by themes, focusing on different evaluation perspectives and using a time frame fragmented in five-year periods.

(a) Conceptual Framework

The conceptual framework of the consultation can be divided into three distinct but complementary aspects. Namely, independence, efficiency and solvency, and effectiveness of the competition agency.

In fact, the first question aims at the core issue in the discussion on institutional design, namely the independence of the competition authority. As shown in this research, the issue of independence is always present in the debate and in the expert discussion forums when it comes to design the competition authority.

In a second part in the survey, a specific question is intended to evaluate the efficiency and solvency of the agency whether in the investigation of practices restricting competition or in the analysis of economic concentration operations.

Finally, the last part includes a third and a fourth question referring to the time the agency takes to solve issues under its responsibility, we intend to assess the effectiveness of the competition agency. We make a distinction between the prosecution of anti-competitive practices and the evaluation of mergers (except for the initial period of the survey when the latter was not yet regulated). This is because, as this research shows, since the entry into force of Law 25.156, the time, and resources available to the agency for corporate mergers oversight has increased significantly to the detriment of other investigations.[200] So evaluating both tasks could have a significant distorting effect on the overall agency assessment. By comparing the different assessments for

199. Based on personal knowledge and communications with competition authorities.

200. Melissa Petruzzello, *List of Presidents of Argentina*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/list-of-presidents-of-Argentina-2060769 (last visited Nov. 13, 2025).

the different areas of antitrust, we confirm that separating the perception of effectiveness has been a wise decision.

(b) Timeframe

The survey time frame has been segmented into five periods of five years each: 1995-99, 2000-04, 2005-2009, 2010-2014, and 2015-2019. The periods typically correspond to governments of the same political party, except for the period from 2000 to 2004, which alternates the administrations of Fernando De la Rúa, Eduardo Duhalde, and Néstor Kirchner, and the first year of the last period, 2015, which is the end of Cristina Kirchner's administration followed by the full term of Mauricio Macri. However, within each of the selected periods there are several officials who were temporarily in charge of the Ministries of Economy, Production and Secretary of Commerce.[201] This has an influence, since the CNDC was always under the scope of these areas and the agendas of the Ministers and Secretaries were always permeating to a greater or lesser extent the performance of the competition authority.

(c) The Results for the Different Periods

(i) 1995 – 1999

Prompts were as follows:

"1995-99 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied"

a. Autonomy/independence from political authority

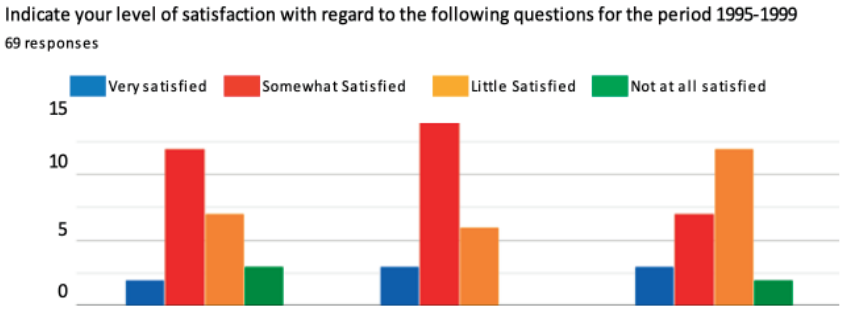
b. Analytical/technical/ solvency/ regarding key decisions

c. Speed and efficiency in the prosecution of anti-competitive behavior

d. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

201. *See id.* at 15.; based on personal knowledge.

Results are represented in the graph below:



Autonomy/independence from political authority

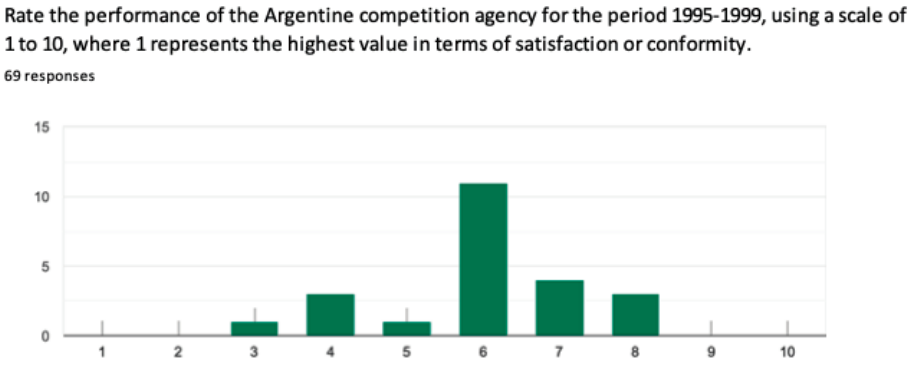
Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive behavior

On evaluating the perceptions regarding the agency's independence, we observed that 52% of the respondents were somewhat satisfied and 9% were very satisfied. 30% were little satisfied and 9% not at all satisfied. The overall result is that the perception of the agency´s independence in this period is positive.

When we go on to evaluate efficiency and solvency, 61% of respondents are satisfied and an additional 13% are very satisfied. 26% are little satisfied and no respondent reported being not at all satisfied. As in this period the analysis of economic concentration operations was not regulated yet, the assessment of analytical and technical solvency of the decisions is restricted to anti-competitive behavior.

Finally, regarding the agency's effectiveness in performing its tasks, there is a more negative bias than in the previous cases. Here we only had as reference the prosecution of anticompetitive behaviors. The median has been 48% of respondents little satisfied and an additional 9% not at all satisfied. This makes a clearly negative result. Only 13% of respondents were very satisfied with the agency's effectiveness in this period and 30% somewhat satisfied.



The above graph reflects the overall rating of the agency's performance in the 1995-99 period. The median with 47.8% of the respondents renders a rating of six points and if we add that 17.4% rated it with seven points, we can conclude that almost two-thirds of the respondents rated the agency´s performance as good, 13% rated it as very good with eight points, 17.3% rated it as fair with four to five points and only 4.3% rated it as poor with three points.

The general evaluation ends up being positive, which is the same as the evaluation of the agency´s independence and its efficiency in anticompetitive behavior oversight.

(ii) 2000 – 2004

Prompts were as follows:

"2000-04 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority

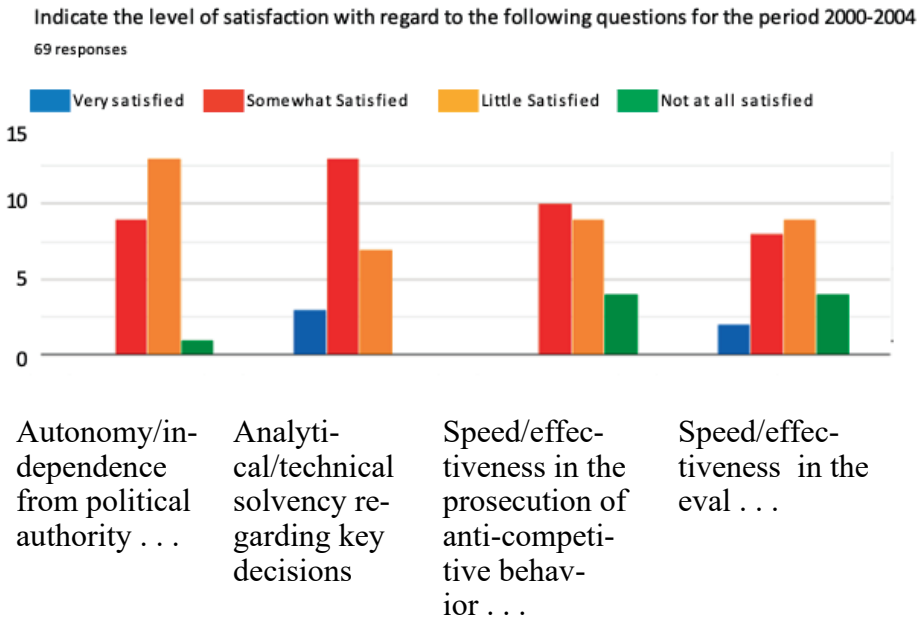
b. Analytical/technical/solvency/ regarding key decisions

c. Speed and efficiency in the prosecution of anti-competitive behavior

d. Speed and efficiency in the evaluation of mergers

e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

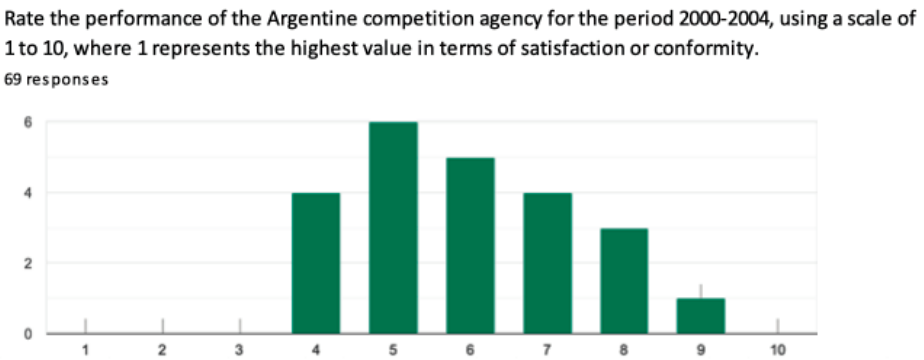
Results are shown in the graph below:



For this period, 57% of the respondents were little satisfied with the agency´s independence and 39% were somewhat satisfied, no very satisfied respondents and 4% not at all satisfied. We observe that the percentage of little satisfied respondents partially increased over somewhat satisfied and not at all satisfied respondents. There were no respondents that were reportedly very satisfied until the last period under study.

The agency´s efficiency and solvency for this period keeps almost the same rating as in the previous period. The study showed 57% of the respondents were somewhat satisfied with the agency's technical solvency and 13% were very satisfied, as in the previous period, and 30% of the total were little satisfied. No respondent reported being not at all satisfied regarding the agency's technical solvency. Although similar results, there was a slight increase of 4% in the number of respondents compared to the previous period. Also of note, the institutional breakdown in December 2001, right in the middle of this period, led to the early termination of President De la Rua's government, the beginning of Eduardo Duhalde's transitional term between January

2002 and May 2003, and finally the beginning of Nestor Kirchner's term.[202]



The graph above shows that the median rating is five points, representing 26.1% of the responses received, which if added to the four-point ratings, representing 17.4% of the total, gives a fair rating for 43.5% of the total survey. With 21.7% scoring six points and 17.4% scoring seven points, the agency's performance in this period was rated as good by 39.3% of the respondents. For 13% the performance deserved a rating of eight points and for 4.3% a rating of nine points, which represents 17.3% rating it as very good.

(iii) 2005 – 2009

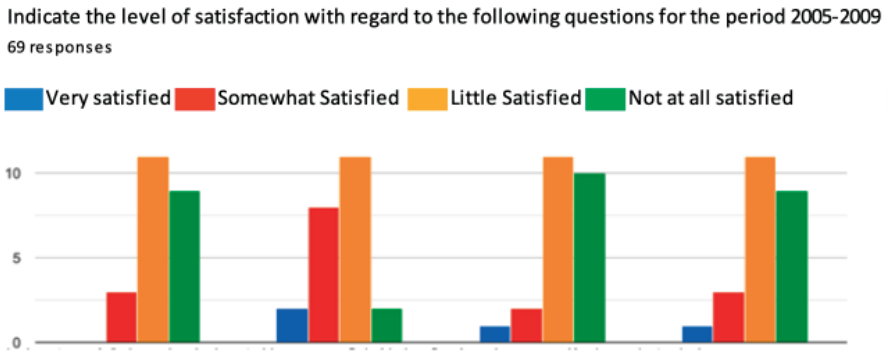
Prompts were as follows:

"2005-09 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority
b. Analytical/technical/ solvency/ regarding key decisions
c. Speed and efficiency in the prosecution of anti-competitive behavior
d. Speed and efficiency in the evaluation of mergers
e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

202. *See* J. F. Hornbeck & Meaghan K. Marshall, *The Argentine Financial Crisis: A Chronology of Events,* CRS Rep. RL31582 (LIBRARY OF CONGRESS, CONG. RSCH. SERV., updated June 5, 2003) at 4-5, 13.

Results are shown in the graphs below:



Autonomy/independence from political authority . . .

Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive behavior . . .

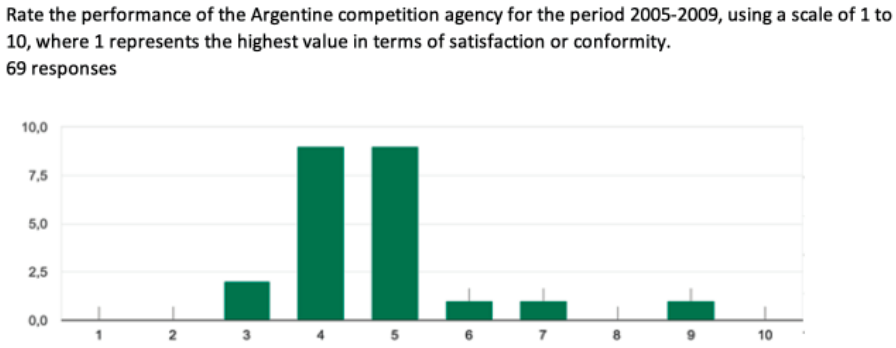
Speed/effectiveness in the eval . . .

Here, 48% of the respondents, stated that they were little satisfied with the agency's independence and the consideration of being not at all satisfied increased to 39% of the responses. Only 13% said they were somewhat satisfied, and no respondent reported being very satisfied.

The perception of the respondents regarding the agency's technical solvency began showing a clear decline. The number of very satisfied respondents went down to 9% and somewhat satisfied to 35%, which means that for the first time in the survey much less than half of the respondents reported a positive assessment of the agency´s efficiency. Instead, now, 48% of the respondents were little satisfied, while 9% were not at all satisfied.

As to the agency´s effectiveness in matters related to anti-competitive behavior, the median is 48% of the respondents being not at all satisfied, 43% were little satisfied. The percentage for somewhat satisfied respondents went down to 9% and only 4% were very satisfied.

We observe that the rating regarding effectiveness in the control of economic concentrations has declined as compared to the previous period, but it is better than that regarding behaviors for this period. Here, the median is again 48%, of respondents being little satisfied. Although 35% of respondents were not at all satisfied, this percentage is lower than in the previous period. Additionally, 13% of the respondents were somewhat satisfied and a consistent 4% were very satisfied.



The graph shows a performance rating of four points (with 39.1%) and five points (with 39.1%), which makes a total fair rating from 78.2% of the respondents. Alternatively, 8.7% of the respondents rated the performance with three points with an evaluation of poor performance. 8.6% rated it as good, with an equal number of votes with six and seven points, and finally, 4.3% rated it as very good.

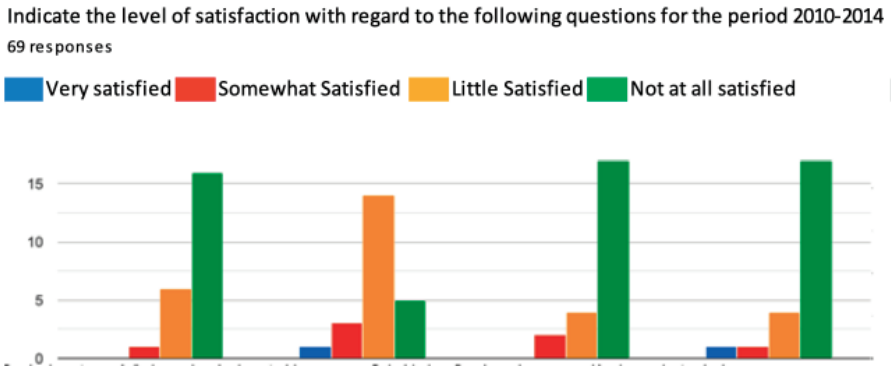
(iv) 2010 – 2014

Prompts were as follows:

"2010-14 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority
b. Analytical/technical/ solvency/ regarding key decisions
c. Speed and efficiency in the prosecution of anti-competitive behavior
d. Speed and efficiency in the evaluation of mergers
e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

Responses are shown in the graphs below:



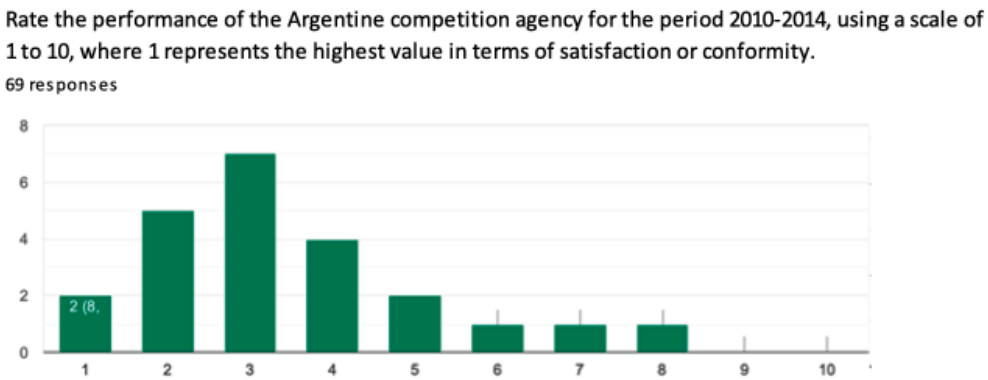
Auton-omy/inde-pendence from political authority . . .

Analytical/tech-nical solvency re-garding key deci-sions

Speed/effec-tiveness in the prosecu-tion of anti-competitive behavior . . .

Speed/effec-tiveness in the eval . . .

For this period, all aspects covered by the survey received the lowest ratings.



About 70% of the respondents reported they were not at all satisfied with the agency's independence, 26% of respondents were little satisfied and only 4% somewhat satisfied. In total, 96% gave a poor rating to the agency's independence.

The assessment of technical solvency was also negative. In this category, 61% said they were little satisfied, 22% not at all satisfied, 13% said they were somewhat satisfied, and 4% were very satisfied.

The prosecution of anti-competitive behavior had the most negative valuation. Reportedly, 74% were not at all satisfied with the

agency's performance in this area, 17% were little satisfied. Only 9% were somewhat satisfied. No respondent reported being very satisfied in this category.

Regarding the control of economic concentrations, 74% of the respondents were not at all satisfied, 17% were little satisfied. As to the rest of the responses, 4% were somewhat satisfied and another 4% very satisfied.

The graphs above show the falling trend in the rating of the agencies. The median is three points with 30.4% of the responses. Adding this to 21.7% rating with two points and 8.7% with one point, we obtain a total negative evaluation of the performance by 60.8% of the respondents. A total of 26.1% rated it as fair with four and five points and finally, the remaining 12.9% rated it as good or very good, with six to eight points.

(v) 2015 – 2019

Prompts were as follows:

"2015-19 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority

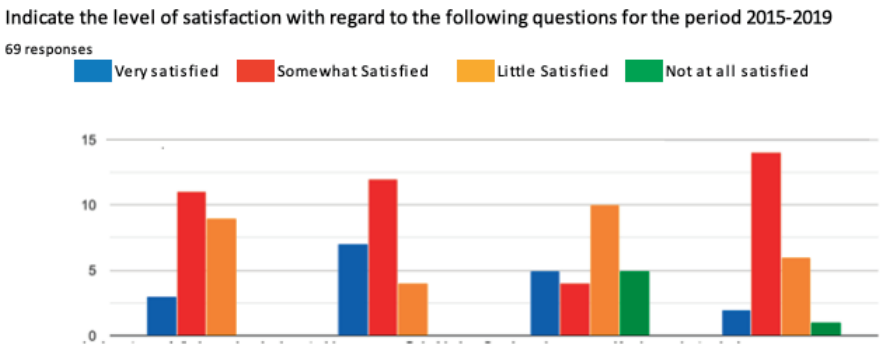
b. Analytical/technical/ solvency/ regarding key decisions

c. Speed and effectiveness in the prosecution of anti-competitive behavior

d. Speed and effectiveness in the evaluation of mergers

e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

Responses are shown in the graphs below:



Autonomy/independence from political authority . . .

Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive . .

Speed/effectiveness in the eval . . .

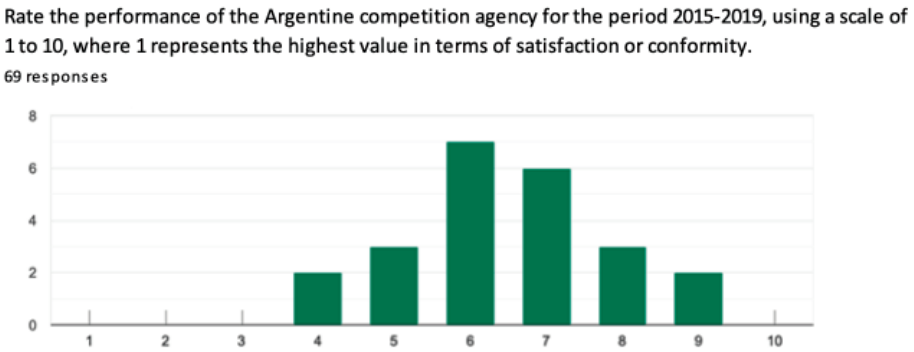
In this period there is a reversal in the indicators. The downward trend in the respondents' evaluations of all the items shown for the first four periods is reversed, though based on different criteria for this period.

With regard to the agency's independence, the first distinctive feature is that no respondent reported being not at all satisfied. The median lies at 48% of the respondents being somewhat satisfied. Additionally, 13% gave a positive indication responding they were very satisfied with the agency regarding this item, however, 39%, are still little satisfied in this area.

There has been no respondent not at all satisfied with the agency's technical solvency, and only 17% reported being little satisfied in this regard. The positive opinion is clear. The median at 52% of the respondents reported being somewhat satisfied and 30% very satisfied.

Indicators are not so positive regarding the agency's effectiveness. For the prosecution of behaviors, the median is 43% of the responses reporting little satisfaction and 17% were not at all satisfied.

Finally, the effectiveness regarding economic concentration operations had a positive assessment with 61% of respondents being somewhat satisfied, 9% very satisfied, 26% were little satisfied, and 4% not at all satisfied.



The graph above reflects in the overall assessment of the agency's performance the notes highlighted in the previous questions. The median is at six points with 30.4% of the responses, and if we add that 26.1% rated it at seven points, the overall survey results can be evaluated as good by 56.4%. Additionally, 20% rated it as very good with eight and nine points, while 2.17% rated it as fair with a scoring of four to five points.

3. Intertemporal Evaluation and the Latest Expert's Literature in Argentina

The peer reviews and the system effectors´ perceptions of the performance and difficulties faced by the competition authority are confirmed by the opinion expressed in several research papers and experts' publications.[203] As pointed out in several papers and studies, the causes for the agency's poor performance are associated to a poor institutional design as well as to other external factors that have been crucial.[204] To verify this circumstance, we confronted the peer reviewers' reports and the perceptions of the system's effectors with the specialized expert literature and the latest publications on design and practice of the competition authority in Argentina.

In order to frame and narrow down this part of the work, we will follow the scheme of evaluation across different time periods of topics including the agency's independence, efficiency through technical solvency and effectiveness regarding anti-competitive behavior and economic concentration operations.

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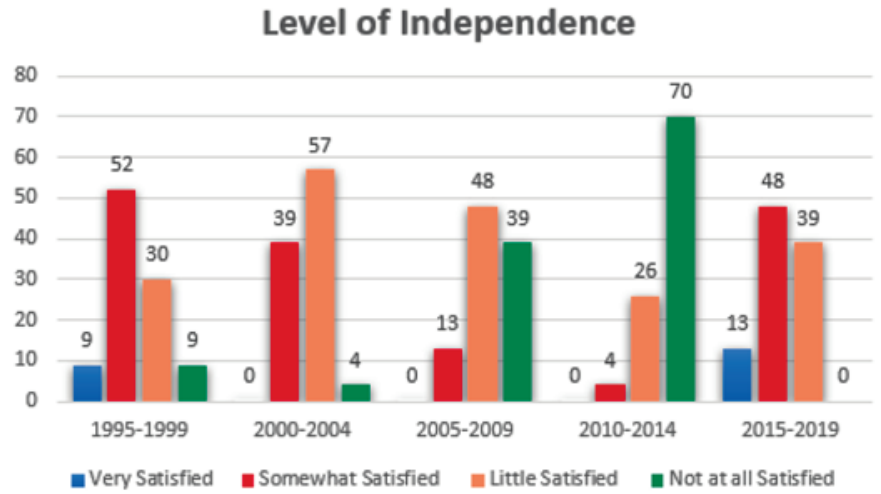
203. *See* UNCTAD, *supra* note 175, at 13, 15.

204. *See* Juan Carlos Sanguinetti, *Lineamientos Generales del Diseño Institucional de la Autoridad Nacional de la Competencia [General Guidelines for the Institutional Design of the National Competition Authority], in* COMENTARIOS A LA LEY DE DEFENSAS DE LA COMPETENCIA [COMMENTS TO THE DEFENSE LAW FROM THE COMPETITION] 75 (2018).

(a) The Agency's Independence

The graph showing the system's effectors perceptions from 1995 to 2019 establishes the following:



The significant drop in the agency's independence rating in the periods 2005-2009 and 2010-2014 is also depicted in experts' articles and academic publications in Argentina.[205] As stated there, the setback in competition matters between 2007 and 2015 is the result of a growing politicization of the decisions adopted by the agency and the limited application of sanctions.[206] The main cause for that has been the lack of a competition authority independent from the political power, with the necessary human and financial resources to effectively carry out the tasks assigned to it by law.[207] The recurrent interference of the Secretary of Commerce and the use of the CNDC to control prices and obtain information from companies has been most criticized for significantly affecting the agency's performance.[208]

205. *See* UNCTAD, *supra* note 175, at 39-40.

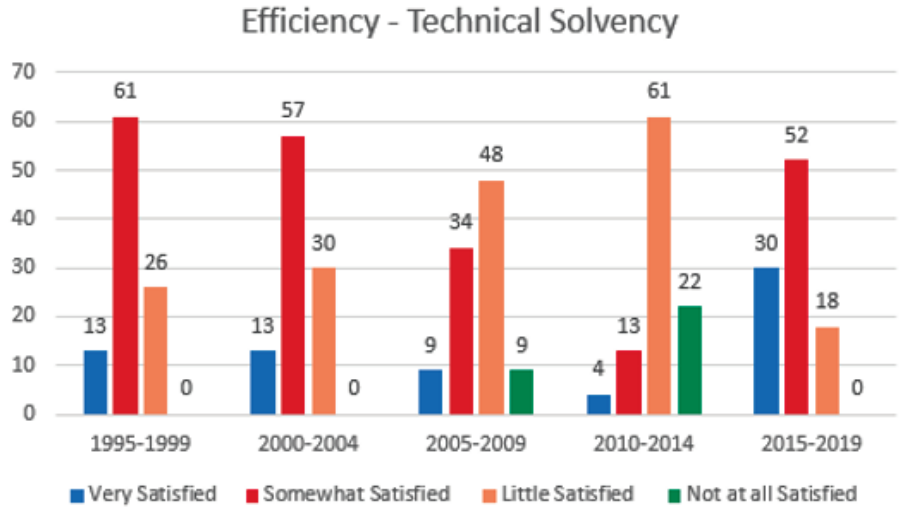
206. *Id.*; *See* Sanguinetti, *supra* note 204, at 75.

207. *Id.*

208. *See* Miguel del Pino, *La Protección de la Competencia en Argentina. Próximos Desafíos de Cara al Futuro (Competition Protection in Argentina: Upcoming Challenged for the Future), in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA [COMMENTS TO THE DEFENSE LAW FROM THE COMPETITION] 25, 42 (2018); United Nations Conf. on Trade & Dev., *Competition and Inflation – Note by Argentina*, DAF/COMP/WD (2022) 110 (Nov. 14, 2022) at 5.

(b) The Efficiency and Solvency of the Agency

The evaluation of the system effectors also showed a decline in the consideration of the agency´s technical solvency over the periods under assessment with a recovery starting in 2016. However, this deterioration in efficiency and solvency is less pronounced than the other items compared. The graph below reflects this description.



The peer reviewers agreed in identifying the main cases solved up to 2005 as part of the work done by the OECD and up to 2017 as part of the work done by the UNCTAD which is when the studies were completed.[209] This is consistent with the opinion of the most recent doctrine.[210] Similarly, peer reviewers of various academic and research works found in specific cases of cartel practices and abuse of dominant position sanctioning during the first two five-year periods of this analysis the highest technical solvency.[211] This assessment is applicable to the development of investigation procedures and the economic and legal basis of the case. An effective control test to verify this has been the judicial review of these proceedings and the imposition of fines, where applicable, which have reached the Supreme Court itself. There are also some specific cases of assessment of economic concentration operations.[212]

209. *See* UNCTAD, *supra* note 175, at 21.
210. *See id.*
211. *See id.* at 19.
212. *See id.*

Next, we describe the main cases reported by peer reviewers and doctrine during the period under research.

(i) Portland Cement Case[213]

In this case, several cement companies and a petrochemical company were accused of developing a market distribution scheme for almost 20 years.[214] The investigation was initiated in 1999, after the publication of an article by the journalist Marcelo Zlotogwiazda, which detailed the cartel's alleged activities.[215] The article was written based on information received from a former employee of Loma Negra (one of the companies involved in the cartel), a source that the journalist initially decided not to disclose.[216] It was then impossible to verify the complete information in the newspaper article, which delayed the process in its initial stage.[217] However, the facts of the case and the journalist's testimony requested by the agency allowed the CNDC to initiate an *ex officio* investigation through which sufficient circumstantial evidence was gathered to prove the unlawful conduct.[218] The agreement had been structured by the industry's trade chamber, the Association of Portland Cement Manufacturers (AFCP).[219] The AFCP's members, through a monthly spreadsheet that collected data on each of its members, exchanged information about their production, deliveries, and sales.[220] The agency obtained the documentation through a search of the AFCP offices.[221] Even though the CNDC decided not to request the judge to extend the search to each of the companies involved in the investigation, numerous e-mail exchanges were found from the files obtained where the infringing companies expressed their consent and the importance of such exchange of information for them.[222] The investigation also revealed meetings between the members as a "place to collude," although it was impossible to know the

213. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 513, Expte. No. 064-012896/1999*,* "Loma Negra Cía. S.A., Cemento San Martín S.A., Juan Minetti S.A., Corcemar S.A., Cementos Avellaneda S.A., Cementos El Gigante S.A. y Petroquímica Comodoro Rivadavia S.A.," (Arg.) (July 25, 2005).

214. *See id.* at 1.

215. *See id.* at 1, 28.

216. *See id.* at 19.

217. *See id.* at 3.

218. *See id.* at 23.

219. *See id.* at 13.

220. *See id.* at 3, 58.

221. *See id.* at 23.

222. *See id.* at 26-27.

content of these meetings.[223] It was especially important for the agency to verify the existence of audits carried out by the AFCP to verify the truthfulness of the information provided by the companies and, ultimately, the fulfillment of the market distribution agreements.[224] This enabled the agency to verify that, when one of the participants in the Province of Chubut decided to sell at lower prices and to customers who "belonged" to other cartel members, the discipline mechanism that the sustainability of a cartel requires worked effectively.[225] Thus, the remaining companies collectively "attacked" the "wayward" company's market with super-aggressive pricing, forcing this company to readjust to the cartel's pricing and customer sharing terms.[226] In some cases, evidence of specific price-fixing agreements was also obtained.[227] Moreover, relevant economic evidence allowed the agency to verify the high idle capacity of the industry during the investigated period (between 1981 and 1999), reaching almost 53% of the installed capacity per year, subject to the so-called competitive market test, which contributed to provide evidence of the effective practice of cartelization.[228] The CNDC argued in this case that: (i) the relevant market was the production and commercialization of Portland cement at a national level, (ii) the accused companies represented 100% of cement production in the domestic market during the period under investigation, (iii) imports did not represent a competitive threat to domestic incumbents, (iv) proven agreement on quotas and shares on a national scale, fixing uniform sale and agreement terms and conditions to offer inflated prices in public bids and exchange of sensitive information, and (v) practices could not be justified on economic efficiency grounds.[229] The accused companies along with others, put up as their main defense that it was impossible for the agency to prove the damage to the general economic interest resulting from the alleged conduct.[230] Based on the evidence obtained, the agency rejected the defense put up by the infringing companies and fined four of them and the

223. *See id.* at 27-28.
224. *See id.* at 67.
225. *See id.* at 167.
226. *See id.* at 90.
227. *See id.* at 82.
228. *See id.* at 43.
229. *See id.* at 6-7.
230. *See id.* at 138.

AFCP.[231] The total fine amounted to $309,729,289.[232] The agency's decision was subject to review by the National Economic Criminal Court, which on August 26, 2008, confirmed the administrative decision.[233] Finally, the Supreme Court of Justice rejected the extraordinary appeals filed by the companies, and the sentences imposed became final.[234]

(ii) Liquid Oxygen Case[235]

The investigation was initiated in 2001 by the CNDC based on several healthcare establishment complaints which stated that they were unable to acquire liquid oxygen from competitors of their usual supplier.[236] When there was a bidding process for the supply of liquid oxygen, the offers submitted belonged only to the incumbent suppliers, or any other alternative offer was much higher than that of the usual suppliers.[237] Thus, the Secretariat of Competition, Deregulation and Consumer Protection instructed the CNDC to begin an investigation into the medical liquid oxygen market.[238] When defining the relevant market, the agency found that liquid oxygen was a highly concentrated market, which is why the access for new suppliers encountered significant barriers to entry.[239] The agency was able to carry out a surprise search on the companies involved [240] and relevant evidence was obtained.[241] Documentary evidence (letters, handwritten papers, memos, and internal notes) and e-mail exchanges collected during the searches proved that, over a period of at least five years, the investigated companies had held permanent meetings and agreed on the terms of a cartelized practice.[242] Through its investigation, the CNDC made the

231. *See id.* at 12-13.

232. Alfredo O'Farrell & Miguel del Pino, Argentina, in *The Public Competition Enforcement Review* 1, 4 (Law Bus. Research 2009).

233. *Id.* at 23.

234. Cementeras S.A. & Ors., Exp. ADJ-0.270291001368051783 (C.S.J.N. Aug. 26, 2008), https://www.cij.gov.ar/adj/pdfs/ADJ-0.270291001368051783.pdf.

235. Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 510/2005, Expte. No. 064-011323/2001 "Liquid Oxygen," p. 1, (Arg. July 15, 2005).

236. *See id.* at 4.

237. *See id.* at 94.

238. *See id.* at 1.

239. *See id.* at 67.

240. The companies investigated were Praxair Argentina S.A, Air Liquide Argentina S.A., A.G.A. S.A., and Indura Argentina S.A.

241. *See id.* at 2.

242. *See id.* at 6.

following determinations: (i) Oxygen price varied substantially both in the market in general and in the prices offered by each company individually since, liquid oxygen is a homogeneous product.[243] In this way, liquid oxygen was sold to different customers at different prices and the difference was not justified by quantity discounts or otherwise on market grounds. Customers were reluctant to submit offers in bids (public hospitals): generally, no company participated in bidding processes, except for the incumbent company.[244] Refusal to provide a quote (private health-care establishments) was the same as in the preceding case, but with the private health-care establishments.[245] Some companies refused to quote or quoted exorbitant prices.[246] Market sharing and price fixing by companies involved sharing the market through the method explained in the preceding paragraphs.[247] Access restriction to competitors is a concern, given that the advancement in new technologies could jeopardize the possibility to charge supra-competitive prices derived from the alleged non-competition agreement, Indura, Air Liquide, Praxair and AGA which try to restrict the development of new technologies, especially the so-called PSA technology.[248] Therefore, these companies would restrict a competitor's access to the market. The four reported companies were fined a total of $70,300,000 for engaging in a false competitive practice and agreeing on prices and client allocation with an artificial price increase to the detriment of the general economic interest.[249]

(iii) Other Cartel Prosecution Cases

The 2017 peer reviewers' report and other more recent works related to the Cement and Liquid Oxygen cases point at other noteworthy cartel prosecution cases resolved by the agency.[250]

(i) The Automotive Cartel,[251] the agency found some of the parties involved in a price fixing mechanism (absence of effective

243. *See id.* at 3.

244. *See id.* at 6.

245. *See id.* at 5-6.

246. *See id.* at 6.

247. *See id.*

248. *See id.*

249. *See id.* at 138.

250. *See* del Pino, *supra* note 208, at 39 (citing Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 510 (Arg.) (July 25, 2005); s*ee also* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 513 (Arg.) (July 25, 2005)).

251. Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 271/2014, Expte. No. 0000803/2008 *Cartel Automotor* [Automotive Cartel] (Dec. 12, 2014) (Arg.).

competition, cartel practices, refusal to transfer tax benefits to prices, etc.).[252] The main evidence was the parallel behavior adopted among the investigated companies, which resulted in a much higher price than that in Chile, under the same market conditions and benefits.[253] The agency imposed a total fine of $ 1,060,245,904.[254] The case was reviewed by the Federal Court of Appeals of Comodoro Rivadavia which revoked the decision because the parallel behavior noted by the agency was no more than an argument related to the structure of the markets that facilitated collusion, but without sufficient evidence to confirm the materiality of the behavior attributed to the investigated parties.[255]

(ii) The Medicinal Gelatins Cartel[256] was the result of a nine-year investigation by the agency following an anonymous complaint about concerted practices during bidding processes carried out by private healthcare facilities and public hospitals.[257] Four pharmaceutical laboratories and three individuals representing the investigated companies were fined a total of $40,000,000[258] for the former and $600,000[259] for the latter. The decision was reviewed by the Court of Appeals for Economic Criminal Matters.[260]

(iii) The Bariloche Medical Center Cartel[261] was the result of a collusive agreement within the medical care market.[262] The agency issued an injunction against the accused parties, which remained in force throughout the investigation to immediately stop the practice carried

252. *See id.* at 3-4.

253. *See id.* at 36.

254. *See id.* at 5-6.

255. *See* Cámara Federal de Apelaciones de Comodoro Rivadavia [Fed. Ct App. Comodoro Rivadavia], 13/8/2015, Honda Motors Argentina S.A. & Others c. Estado Nacional – Secretaría de Comercio, 2015-81 (Arg.).

256. Comisión Nacional de Defensa de la Competencia (CNDC), *Memorias 2015–2017* 48 (Dec. 2018) (Arg.).

257. *Id.*

258. *Id.* at 49.

259. *Id.*

260. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 705/2015, Expte. No. S01-064-0320435/2006, *Gelatinas Medicinales* [Medicinal Gelatins Cartel] 108 (Dec. 4, 2015) (Arg.).

261. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 510/2005, Expte. No. 0063196/2013, "Sanatorio San Carlos, S.A.," at 1463, (Mar. 13, 2018) (Arg.) (holding the collusive agreement between the medical centers (i) fixed prices and (ii) imposed on traveler's medical assistance companies the contracting and commercial conditions care insured students' care. It began with the Argentine Chamber of Assistance Service Companies filing a complaint against all the private health-care establishments in the city of Bariloche).

262. *See id.* ¶ 224.

out by the medical center.[263] Finally, the accused parties were found responsible for the cartelized practice and fined for a total of $320,950,[264] which was calculated according to the level of participation in the cartel and benefits obtained by each of them.[265]

(iv) Abuse of Dominant Position in the Liquefied Petroleum Gas Market (YPF)[266]

The case was initiated by an *ex officio* investigation by the CNDC in August 1997, as a corollary of a market study that indicated the existence of several striking circumstances in the sales of bulk Liquefied Petroleum Gas (LPG).[267] The case dealt with significant increases in sales prices to fractionator plants from late 1992 to 1997 that were not due to higher production costs,a context of quasi-standstill domestic demand,significant increase in production and export of LPG,and existence of a growing gap between sales prices to fractionator plants and export prices.[268] The relevant market was defined as the bulk supply of LPG (a by-product of natural gas production) nationwide. Taking into consideration both supply and demand, the agency concluded that neither the petrochemical sector nor the fractionator plants had an effective possibility of substituting LPG for another product.[269] On the supply side, the existence of significant market entry barriers to import the product led to the conclusion that there was no substitutability either.[270] It was concluded, then, that YPF was in a dominant position in that market. The purpose of the investigation was to verify whether YPF was behaving as a dominant company.[271] This implemented a policy of restricting domestic supply to keep the selling price to fractionator plants artificially high compared to export prices.[272] YPF's practice of (i) exporting a "disproportionate" volume of its production at prices below its domestic prices and (ii) imposing clauses in its

263. *See id.* at 1.

264. *See id.* ¶ 284.

265. *See id.* ¶ 275.

266. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 314/99, Expte. No. 064-002687/97, "YPF, S.A.," at 1 (Mar. 22, 1999) (Arg.).

267. *See id*.

268. *See id.* at 2.

269. Comisión Nacional de Defensa de la Competencia [CNDC], *Memoria 1999-2001* [Triennial Report] (1999-2001), at 19 (Arg.) (concluding that both the petrochemical sector and fractionators "no contaban con la posibilidad efectiva de reemplazar el GLP por otro producto.").

270. *See id*. at 31.

271. *See id.* at 2.

272. *See id.* at 4.

export agreements prohibiting the reimportation of the product constituted an exploitative abuse of dominant position.[273] The CNDC imposed on YPF (i) the cessation of what it considered a discriminatory arbitrage between the domestic and export markets with the obligation to eliminate the clauses prohibiting reimportation from its export agreements and (iii) a fine equal to $109,644.[274] The decision was appealed before the Court of Appeals for Economic Criminal Matters which was upheld by the Supreme Court of Justice by rejecting the extraordinary appeal filed by the accused party.[275]

(v) Other Important Restrictive Practices

Namely:

(i) The Clorox Case[276] is a type of exclusive abuse of a dominant position in the bleach market.[277] Clorox imposed (i) more burdensome conditions on distributors if they purchased products from competitors or other companies or (ii) offered distributors certain economic incentives for offering competitors' products at artificially soaring prices.[278] The agency fined the company for a total of $50,000,000.[279]

(ii) The Royal Canin Case[280] has its origins in a complaint made by a distributor of Royal Canin products in the pet food market based on certain exclusionary sales denials and discrimination in the relevant market.[281] The case was resolved through an agreement between the

273. *See id.* at 27.

274. *See id.* at 30, 34 (imposing the maximum fine provided for in Law 22.262 in force at that time. This was 120% of the illicit profit obtained over the period of the practice ($91,370,000USD). Given the convertibility regime in force at the time, the fine imposed represented the sum of $109,644,000USD in constant currency, the highest fine imposed which has been upheld in court during what we called "the Modern Age" of the competition agency in Argentina).

275. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/7/2002, "Yacimientos Petrolíferos Fiscales S.A./ recurso de hecho," Fallos (2002-325-1702) (Arg.).

276. Ministerio de Economía y Finanzas Públicas [Ministry of Economy and Public Finance], Resolución No. 65/2015, Clorox Argentina S.A. (17 Apr. 2015) (Arg.).

277. *See id.* at 9-10.

278. *See id.* at 75-77.

279. *Id*. at 10.

280. *See id.* at 30, 34 (imposing the maximum fine provided for in Law 22.262 in force at that time. This was 120% of the illicit profit obtained over the period of the practice ($91,370,000USD). Given the convertibility regime in force at the time, the fine imposed represented the sum of $109,644,000USD in constant currency, the highest fine imposed which has been upheld in court during what we called "the Modern Age" of the competition agency in Argentina).

281. *See id.* at 9-10.

parties by means of a commitment presented by the defendant offering greater benefits than the prosecution of the case.[282]

(vi) Economic Merger Operations

The cases identified by the peer reviewers' report within the OECD that are also highlighted by the doctrine up to 2005 are the following: (i) Oca/ Correo Argentino S.A.,[283] a concentration in the postal services market including the former State-owned company and its main competitor in the national territory, the only two networks of such magnitude.[284] This was the first of the few cases in which a merger was rejected; *(ii) Quilmes/ Brahma*a merger operation in the beer production, marketing and distribution market which was approved in 2003 but subject to specific conditions, including the disinvestment of a plant and four beer brands and the granting of certain distribution commitments to a new market competitor;[285] *(iii) Bimbo/ Fargo*[286] concentration in the national bread and bakery markets that was approved with conditions that had to be reviewed up to a decade later.[287]

The 2017 peer reviewers' report carried out by the UNCTAD focused on concentration operations which were after the previous report.[288] Thus, among the main ones, it is worth mentioning (iv) Cablevisión/*Multicanal* which resulted in the definition of the so-called pay TV market through the approval of a voluntary commitment submitted by the merger parties;[289] (v) *Telecom/Telefónica*[290], through a preliminary procedure, the CNDC investigated whether Telefónica de

282. *See id.* at 3-4.

283. OECD & IDB, *supra* note 155, at 58 (citing Resolución No. 64, Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 226, "Correo Argentino S.A." (Mar. 9, 2001) (Arg.) (explaining that the CNDC rejected the merger of the two principal national competitors in postal services because, although smaller competitors existed, only the merging firms operated nationwide networks covering basic mail, telegraph services, money transfers, business services, packages, high-security shipments, and international courier services, and the transaction would eliminate the main competitor and give the merged firm substantial market power)).

284. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 226, "Correo Argentino S.A." at 4 (Mar. 9, 2001) (Arg.).

285. OECD & IDB, *supra* note 155, at 30.

286. In re Bimbo–Fargo Concentration, Dictamen No. 395 (Conc. 418), Comisión Nacional de Defensa de la Competencia, Expte. S01:0302940/2004 (Arg.) (Sept. 10, 2004).

287. *Id.*

288. *See* UNCTAD, *supra* note 175.

289. In re Cablevisión S.A. Concentration, Dictamen No. 637 (Conc. 596), Secretaría de Comercio Interior, Expte. S01:0373486/2006 (Arg.) (Dec. 7, 2007).

290. In re Pirelli Concentration, Dictamen No. 1123 (Conc. 741), Comisión Nacional de Defensa de la Competencia, Expte. S01:0277520/2007 (Arg.) (Oct. 13, 2010).

España (Telefónica Argentina's parent company) should be notified of the share purchase in a subsidiary of the Pirelli group (Telecom Argentina's parent company) in the telephone and internet market which has led to an innovation in the prior control concept and notification criteria;[291] (vi) *Iberia/British Airways*[292] a market concentration in the cargo and passenger transportation market that was approved under conditions of route maintenance and price monitoring;[293] and (vii) *Hoyts/ Cinemark Argentina,*[294]a market concentration for the operation of multi-screen cinema complexes, which was approved on the basis of a commitment submitted by the merger parties.[295]

291. *Id.*

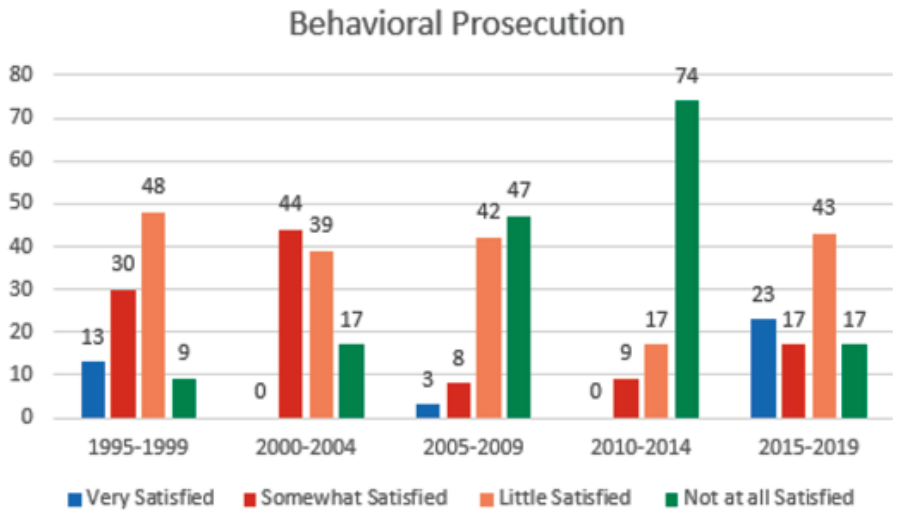
292. In re Iberia–British Airways Concentration, Dictamen No. 1094 (Conc. 840), Comisión Nacional de Defensa de la Competencia, Expte. S01: 0252139/2010 (Arg.) (Feb. 2, 2015).

293. *Id.*

294. Comisión Nacional de Defensa de la Competencia, *Hoyts General Cinema South America Inc. Y Cinemark Argentina Holdings Inc. (CONC 938)*, ARGENTINA.GOB (June 5, 2015) (Arg.), https://www.argentina.gob.ar/defensadelacompetencia/hoyts-general-cinema-south-america-inc-y-cinemark-argentina-holdings-inc-conc.

295. *Id.*

(vii) The Dynamic Efficiency of the Agency



As we have seen above, the perception of the system's effectors reflects a declining assessment as of 1999 and a relative upturn in the last five years as of 2016.[296] The graph reflects this evolution.

This assessment is confirmed by what was stated by the peer reviewers both in 2005 and 2017, as they conclude after evaluations and recommendations of specific actions to be taken to tackle this trend.[297]

To corroborate these conclusions and to add a quantitative perspective on the agency's effectiveness in dealing with anticompetitive behavior, we can look at the number of cases initiated and resolved by the agency during that period. Below is a descriptive graph of the periods under investigation in which the information is available.

296. Esteban M. Greco, Lucia Quesada, and Federico A. Volujewicz, *Argentina: Competition Authority,* 2017 GLOB. COMPETITION REV. (SPECIAL ISSUE).

297. *See generally Competition Assessment Reviews: Argentina*, OECD https://www.oecd.org (2006); UNCTAD, *supra* note 175.

CNDC[298] Anticompetitive Behavior Statistics								
							Sanctions	
Year	Cases	Commitment	File	Acceptance of Explanations	Rejections	Referral to other Organizations	Fine	Cease and Desist Order/ Other Obligations
1999	17	1	-	9	4	-	3	-
2000	15	1	-	7	5	-	2	-
2001	20	-	-	8	9	-	3	-
2002	33	2	1	12	16	-	2	-
2003	20	1	1	9	7	-	2	-
2004	29	2	4	10	13	-	0	-
2005	52	2	12	17	15	1	5	-
2006	8	-	3	-	2	1	2	-
2007	11	1	6	3	1	-	0	-
2008	14	-	5	4	-	3	2	-
2009	-	-	-	-	-	-		-
2010	16	3	5	-	1	-	7	-
2011	5	-	-	-	-	-	3	2
2012	46	4	19	11	3	4	2	3
2013	14	3	6	-	-	-	5	-
2014	2	1	-	-	-	-	1	-
2015	8	3	1	-	-	-	4	-
2016	51	-	43	5	1	2		-
2017	104	1	95	3	3	1	1	-
2018	17	-	11	1	1	1	3	-
Total	482	25	212	99	81	13	47	5

Between 1999 and 2018, the agency resolved a total of 482 cases of anti-competitive behavior for any of the causes described in sections 1 and 2 of the laws in force at the time.[299] The first distinctive feature

298. Pino, *supra* note 74, at 38.
299. *Id.*

is that less than 10% resulted in the imposition of a fine.[300] If we add the five cases in which there was some other measure imposed on the accused parties (e.g., a cease-and-desist order or some other obligation that the parties had to comply with), the total sanctions imposed do not exceed 11% of solved cases. Of those proceeding without any sanction, 20% were terminated due to acceptance of the explanations provided by the parties, and almost 17% were directly rejected.[301] This may be because, as noted in the peer reviewers' reports, many of the complaints pursued purposes other than anticompetitive practices investigations and more related to a different type of commercial disputes. However, the fact that almost 43% were filed without any final decision of acquittal or sanction is meaningful.[302]

The lack of activity in the prosecution and sanctioning of cartels is also significant. The CNDC reports that since its creation in 1980 and up to 2018, it has investigated a total of 56 cases, of which only 20 resulted in sanctions.[303]

The same analysis can be made concerning the economic concentration control. The system effectors pointed out a deterioration since 1999, when Law 25.156 entered into force, having a significant rebound from 2016 onwards.[304] The graph below reflects this evolution.

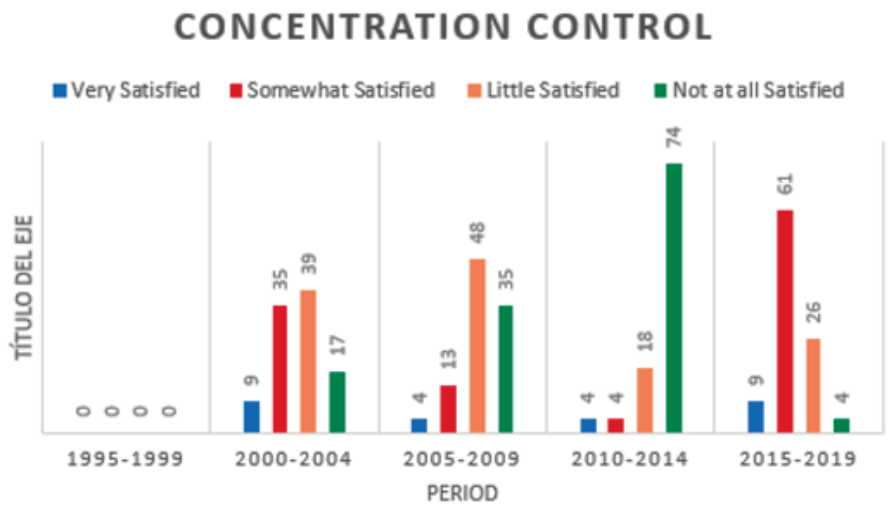
300. *Id.*

301. *Id.*

302. *Id.*

303. Gabriela Ariela Irizar, Carla Antonella Boidi, *La Persecución de Carteles en la República Argentina [The Prosecution of Cartels in the Argentine Republic]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, vol. 3, at 3 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

304. *See Id.*



The information available on the CNDC website also allows comparing these assessments with the statistical support of the economic operation cases that were analyzed and resolved by the competition agency in this period.

CNDC[305] Anticompetitive Behavior Statistics						
Year	**Cases**	**Approved - Section 13. a)**	**Approved - Section 13. a) with Condition**	**Subject to Section 13. b)**	**Rejected - Section 13. c)**	**Exempt from Notification**
1999	7	6	1	0	0	-
2000	160	147	8	5	0	-
2001	98	92	2	3	1	-
2002	25	23	0	1	1	-
2003	40	35	1	2	1	-
2004	44	39	1	4	1	-
2005	42	37	2	3	0	-
2006	56	54	0	2	0	-
2007	33	31	1	0	1	-
2008	38	34	2	2	0	-
2009	45	40	2	3	0	-
2010	43	35	0	8	0	-
2011	40	31	1	8	0	-
2012	34	29	0	5	0	-
2013	46	40	0	6	0	-
2014	45	40	2	2	0	1
2015	26	19	0	7	0	-
2016	117	117	0	0	0	-
2017	200	197	0	1	0	2
2018	63	60	1	1	0	1
Total	**1202**	**1106**	**24**	**63**	**5**	**4**

Of the total number of cases resolved, 92% of the concentration operations were approved without any kind of conditioning and/or subordination.[306] A little more than 7% were approved with some type of conditioning (2%), which means that the operation is not appealable before any administrative authority (unless this information has been

305. Pino, *supra* note 74, at 30-31.

306. *Id.* at 31.

provided based on false or erroneous evidence) or subordinated to compliance with a disinvestment or other type of condition (5%).[307] Finally, it is worth noting that the total number of rejected operations is equal to 0.41% of those submitted to the agency for consideration and that, since 2007, no concentration operation has been rejected.[308]

This data leads some of the most qualified doctrine to have an extremely negative view of the effectiveness of the competition agency.[309]

Thus, for example, the expert and professor Guillermo Cabanellas (H) argues that, in general, the Argentine experience has not been able to count on " . . . *a minimally effective antitrust regime . . . [t]here has been a succession of laws imposing or substantially modifying the applicable regime . . . without any of them having a minimally acceptable effectiveness*."[310] In his opinion, this is so regardless of the opportunity and quality of the cases and decisions that the agency has made over time.[311] First, he points out the stages in which effective enforcement has been abandoned or suspended by the competition authority itself.[312] Even though, during the period covered by this investigation, the authorities have "totally abstained" from initiating investigations or imposing sanctions. Secondly, he considers that the antitrust sanctioning regime has been weak or absent from implementation in such a way that it has induced economic agents not to restrict themselves from continuing or executing harmful competition practices as provided for by the law.[313] Finally, Cabanellas states that the coexistence of the antitrust provisions with legal regimes of State intervention in the economy against market mechanisms in which competition policy and legislation are developed has been detrimental to the establishment of a competition culture necessary for the consolidation of antitrust practices.[314] At this point, the author focuses on the regime of Law 20.680 (Supply Law) and its amendments which, by granting the Secretary of Commerce the possibility of regulating "*extensively and*

307. *Id.*

308. *Id.*

309. *Id.*

310. See Guillermo Cabanellas (h.), *Comentario y Valoración General de la Nueva Ley de Defensa de la Competencia [General Commentary and Assessment of the New Competition Law]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, vol. 3, at 3 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

intensively almost all economic activity," leaves no margin for the market forces, which are the core of competition policies.[315]

What have been the reasons for this failure? The main reason attributed by Cabanellas is the "*lack of a minimum consensus, at the different levels of society, regarding the need for an adequate antitrust regime.*"[316] The main actors, such as companies and consumers, resort to different alternatives other than demanding the effective implementation of an antitrust law.[317] Consumers, far from seeking to complain about the abuse of producers and traders, prefer solutions in "magic formulas" such as price control.[318] On the other hand, the business sector, far from promoting competitive conducts to grow in the market and maximize profits, prefers to seek protection with agreements where the main market organizer is the State itself. The big players of this sector use their lobbying power to avoid the enforcement of antitrust law even when there are flagrant infringements.[319].

In summary, in the opinion of Professor Cabanellas, the antitrust regime is a legal transplant from those countries where it has had political and social roots.[320] Argentina, however, does not have enough economic and social power to enforce it.

Professor Cabanellas' extremely negative point of view is not shared by most of the specialized doctrine. As evidenced in cases shown and peer reviews and experts' opinions, and although the lack of consolidated competition culture among market players and political leaders has been a negative external factor, the antitrust commission has had periods in which it has been able to solve cases of anticompetitive practices and economic concentration operations with relative technical solvency and efficiency.[321]

VI. AMENDMENTS TOWARDS THE FUTURE

The enactment of Law 27.442 attempts to address the deficiencies in the institutional design that were highlighted in the previous chapter

315. *Id.* at 4.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *See* Fernando C. Aranovich, *Monopolios: El Encanto de la Inflación, el Arrepentimiento y la Burocracia" [Monopolies: The Charm of Inaction, Regret and Bureaucracy]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, 23, 24 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

to strengthen the competition system in Argentina.[322] To what extent will these regulatory amendments allow necessary advances to build a more vigorous competition culture and practice, or what additional tools will be needed to achieve this goal? First, we will review the opinions of international experts who had the opportunity to express their views on the amendments to Law 27.442. Next, we are going to analyze the opinions of the system effectors and other experts on what would be the main aspects to keep in mind regarding the future of antitrust practice in Argentina. We will also review the difficulties in establishing the National Competition Agency and the amendments to the law that have been submitted to Congress during this period.

A. The Opinion of International Experts on the Future of Competition in Argentina Considering Law 27.442[323]

The institutional design outlined in Law 27.442 was welcomed by the international experts who were consulted.[324]

Professor Richard Whish has stated that Law 27.442 places the antitrust system substantially at the same level as the best antitrust practices of other countries worldwide.[325] First, he points out that it has been helpful for the law to adopt the recommendations made by the peer reviewers in the OECD reports in 2006.[326] Then, he highlights among the aspects of the institutional design that (i) the creation of the National Competition Authority aligns the situation in Argentina with the practice in the European Union (EU), where, as a general rule, decisions are taken by independent competition authorities (either the European Commission for the EU or national entities within each member country); and (ii) the creation of a special appeal court.[327] This model is not followed by most of the countries of the EU but it is the model followed by the United Kingdom, which has the Competition Appeal Tribunal that allows developing technical expertise in the event

322. *See generally* Ley de Defensa de la Competencia [Defense of Competition Law], Law No. 27.442, B.O. May 15, 2018 (Arg.).

323. *Id.*

324. *Id.*

325. See Richard Whish, "*Comment and General Assessment of Law 27.442 of 2018 from a European Competition Law Perspective,*" *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA [Comments to the Defense Law from the Competition], 639, 639 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

326. *Id.* at 639-40.

327. *Id.* at 639.

of a judicial review.[328] In his work, Whish also highlights the fact that the law is stricter than its regulatory precedents in terms of horizontal mergers.[329] This is so because section 2 of the law set forth the presumption of illegality, the increase of sanctions as variables adjusted to the illicit turnover or profit, the implementation of the leniency program, and the possibility of claiming damages.[330] Finally, he argues that " . . . *The changes made are substantial and place Argentina next to the best antitrust practices of other countries in the world (not only in Latin America). The decade ahead will be remarkably interesting!*"[331]

Folguera Crespo and Solano Díaz[332] also point out that the legislative effort to achieve both the functional and financial independence of the competition authority may require adhering to the following guidelines: (i) to allow the Tribunal for the Defense of Competition to formulate its budget and submit it to the Executive Power, (ii) to impose a fee for the review of concentration operations to support the agency's ordinary expenses, and (iii) to allow the National Competition Authority to be an autonomous entity concerning the Executive Branch, with legal and financial capacity.[333] The authors also point out that the design chosen takes into consideration an entity separation between the investigative work and the adoption of decisions under those models that guarantee due process.[334] This is a model similar to the one used in some EU states, such as Spain, and it is contrasted with the organization established in the EU, that is believed to be imperfect.[335]

Professor Javier Tapia,[336] after a comparative evaluation of certain aspects of the Chilean experience (particularly those related to the

328. *Id.* at 641.

329. *Id.*

330. *Id.* at 642.

331. *Id.* at 650.

332. *See* Jaime Folguera Crespo & Pablo Solano Diaz, *La Nueva Ley de Defensa de la Competencia Argentina: Algunas Consideraciones Desde la Perspectiva Europea* [*Argentina's New Competition Law: Some Considerations From a European Perspective*], *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 663, 677 (Demetrio A. Chamatropulos et. al. eds., Thomson Reuters La Ley, 2018).

333. *Id.*

334. *Id.* at 677.

335. *Id*.

336. *See* Javier Tapia, *Comentario y Valoración General de la Nueva Ley de Defensa de la Competencia Argentina desde el Derecho Chileno* [*General Commentary and Assessment of the New Argentine Competition Defense Law From the Perspective of Chilean Law*], *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 703, 703, 706-708 (Demetrio A. Chamatropulos et al. eds., Thomson Reuters La Ley, 2018).

design of the agency and judicial review), argues that it is enough to quickly review the new legislation to notice that it is a well-thought-out regulation.[337] This is because it includes the standards commonly accepted by doctrine, and it is also in line with the advances that have been made in other jurisdictions.[338] Tapia affirms that these two institutional aspects allow us to state that we are in the presence of a "modern" regulation.[339] First, the design of the National Competition Authority, which points at the criterion of independence as a decision-making body, is correct for the political emancipation of the agency.[340] Second, the creation of a special judicial review court whose judicial review is based on the consideration given to the administrative instance with competition matters in the early stages.[341] The experience gained by the special court over time through the repetition of cases will allow a harmonious interplay that contributes to building a legal competition culture. Finally, Tapia concludes that the new competition legislation in Argentina allows him to be optimistic, and says " . . . *in good hands, and with the support of the entire economic-legal and political community, it is possible to predict increasingly better health and an extended duration. With this, we will witness significant progress in the protection of competition in the Argentine markets, for the sake of the society at large.*"[342]

B. Evaluation of the Main Principles and Aspects the Institutional Design of the Competition Agency is Expected to Have

In order to look into the future of the competition agency in Argentina, we wanted to take the opportunity to gather the perceptions of the system effectors. Thus, we set out to identify the main issues to be considered when establishing the appropriate institutional design for the competition agency. To avoid ending up criticizing recent regulation, we have tried a more general consultation of perceptions on principles and/or tangible solutions for implementing or consolidating the agency.

To identify the key issues to be addressed in the competition agency institutional design in a way that verifiable opinion parameters

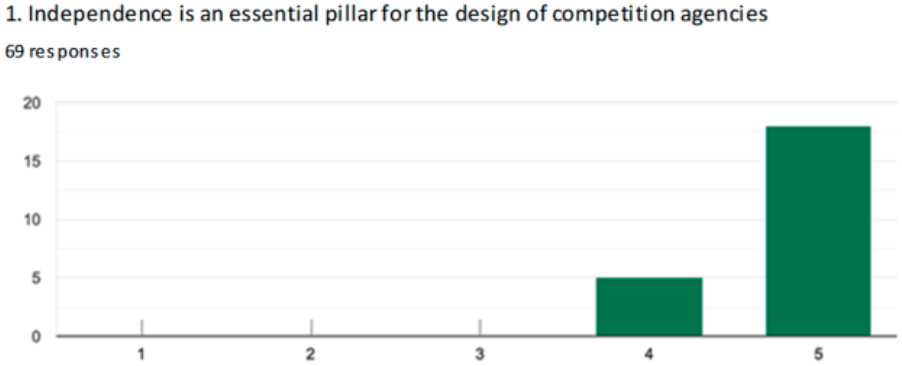
337. *Id*.
338. *Id.* at 703.
339. *Id.*
340. *Id.* at 705-06.
341. *See id.* at 707-08.
342. *Id.* at 713.

among the respondents can be established, we tailored eleven conceptual and empirical statements resulting from our research. The purpose was to measure the degree of agreement or disagreement with these statements, which were presented as follows:

> Evaluation of key aspects of the Institutional Design
>
> Please indicate your degree of agreement/disagreement with the following statements? Use a scale of one to five to express your agreement, where one represents fully disagree and five fully agree.

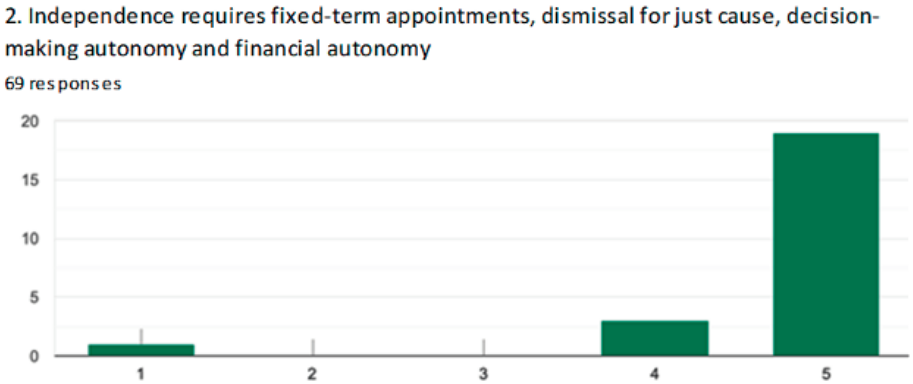
The graphs below each statement show the answers obtained.

(a) "Independence is an essential pillar for the design of competition agencies."



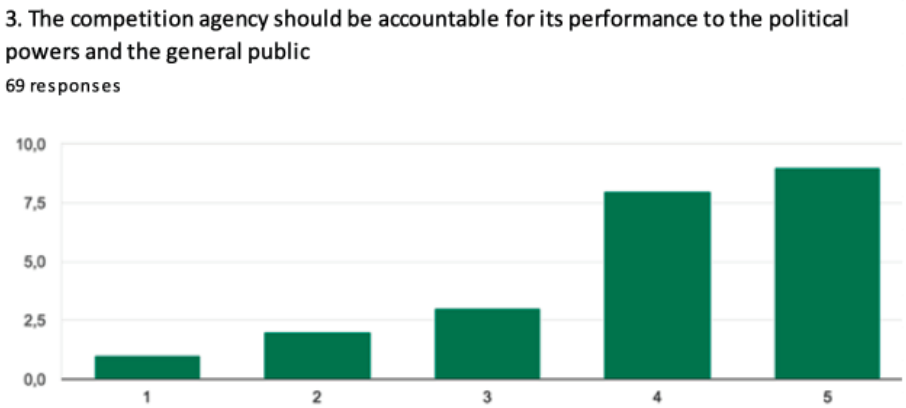
78% of the responses chose the highest rating, and 22% chose the second highest rating. Respondents reach an overall rating of 330 points out of a maximum score of 345 points. This is consistent with the rating given by the peer reviewers and the review of national and international doctrine on the subject.

(b) "Independence requires fixed-term appointments, dismissal for just cause, decision-making autonomy and financial self-sufficiency."



When consulting the aspects that should be considered for the agency's independence, the rating continues to be extremely high. More than 82% of the survey respondents chose the highest rating, 13% only one point lower, and a little more than 4% chose the lowest rating. The overall rating achieved a total score of 324 out of 345 points, which is slightly less than the statement about the importance of independence as a general idea.

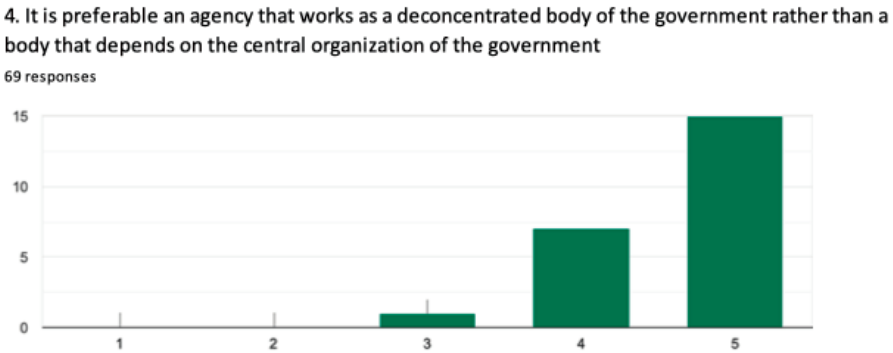
(c) "The competition agency should be accountable for its performance before the political powers and the general public."



Although agency accountability is closely related to the issue of independence, the responses to this statement were more scattered. Thus, only 39% of the survey respondents chose the highest rating for the statement on accountability.

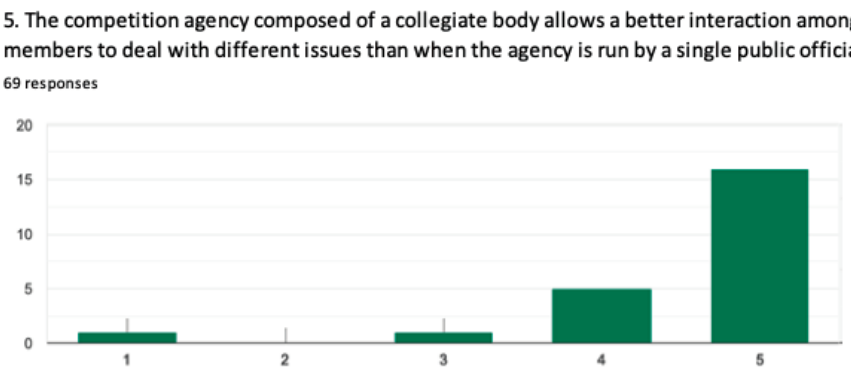
Almost 35% of them chose the second highest rating. About 13% believed that the answers to this statement deserved three points, 9% two points, and 4% one point. The overall rating for this statement is only 273 out of 345 points.

(d) "It is preferable to have an agency that works as a deconcentrated body of the government rather than a body that depends on a ministry."



An agency that does not report to a government department also got a high rating, 65% percent of the respondents rated it with five points, 30% with four points, and the remaining 5% three points. Therefore, the statement in favor of the agency being a deconcentrated from the public administration obtained an overall rating of 318 out of 345 points.

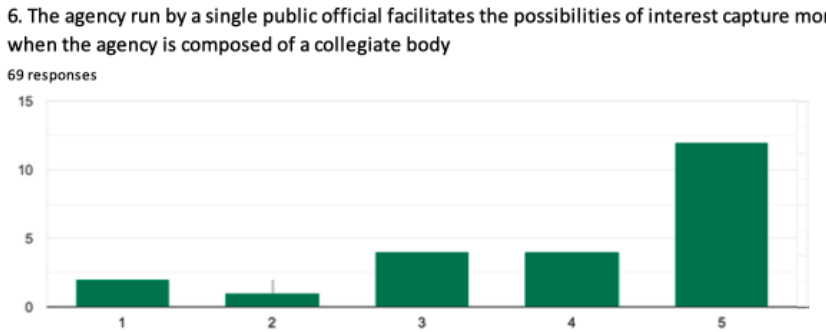
(e) "When the competition agency is a collegiate body there is better interaction among its members to deal with different issues than when the agency is run by a single public official."



Almost 70% of the respondents were in favor of the agency being an interdisciplinary collegiate body, which therefore rendered the highest rating.

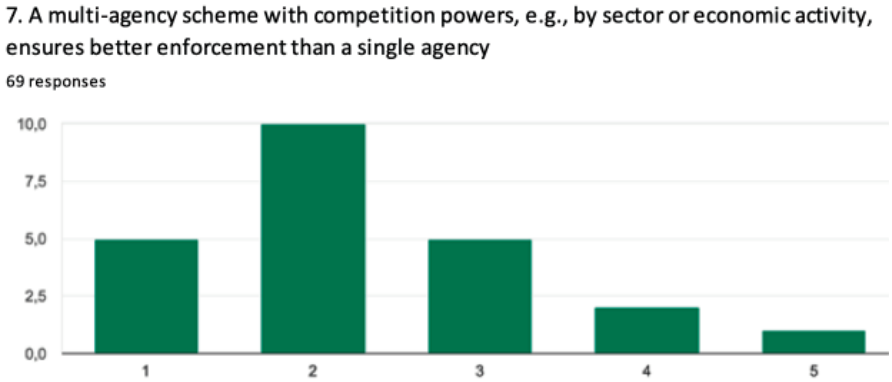
Almost 22% of the respondents rated it with four points. Slightly more than 4% rated it with three points, and another was 312 out of 345 points.

(f) "The agency run by a single public official enables interest capture more than when the agency is a collegiate body."



This statement refers to one of the recurring difficulties in the public management of regulatory entities, which is the advantages and/or disadvantages of having a collegiate body or a single public official responsible for management. Although a majority of 52% of the respondents gave the highest rating to the principle that the collegiate body makes interest capture more difficult, the answers were widely scattered. Just over 17% rated it with four points and another 17% with three points, 4% of the respondents rated this statement with two points, and almost 9% with only one point. The total rating was 276 out of 345 points.

(g) "A multi-agency scheme with competition powers, e.g., by sector or economic activity, ensures better enforcement than a single agency."



This statement was contrary to the experience in Argentina to challenge the survey respondents and significant changes in the structure of the institutional design. The responses showed a refractory attitude. The average reached 43.5% with a rating of two points. Almost 22% of the respondents rated it with only one point and another 22% with three points. Almost 8.7% of them chose four points , and only slightly more than 4% chose five points. The total rating for this statement was 159 out of 345 points.

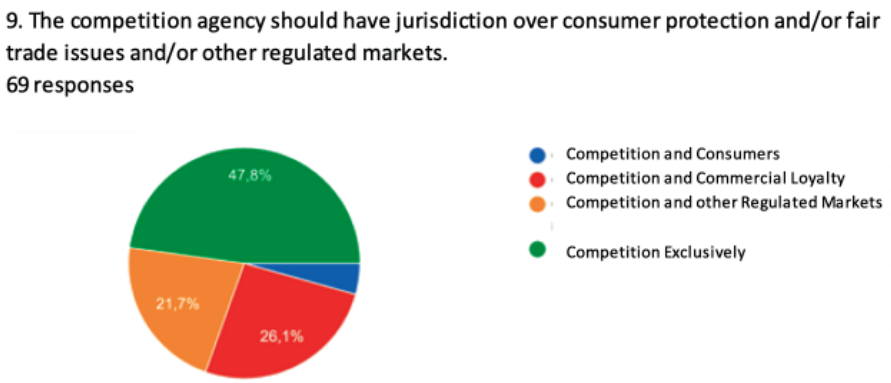
(h) "The division of functions, areas and teams for investigative tasks with respect to the adjudication of cases strengthens the guarantee of due process."



This statement points at the issue that has most divided experts in law and economics in the analysis of the institutional design. This design has not been generally the case in the traditional structure of the Argentinian design but rather only exceptionally present. However, the highest scale rating was given to this statement by 43.5% of the

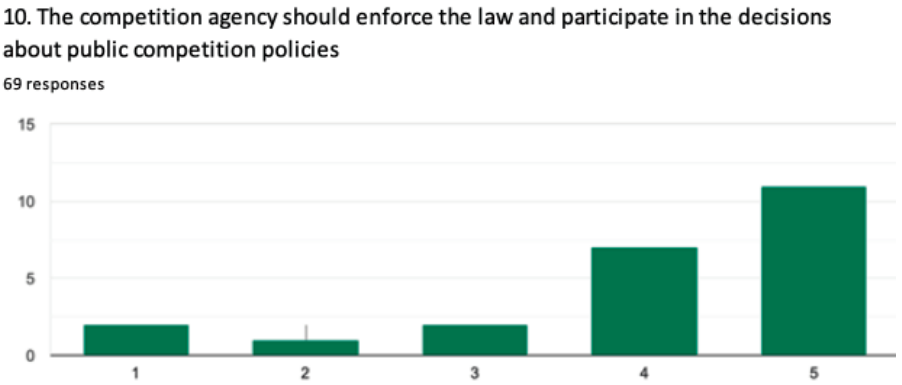
respondents, and another 43.5% gave the statement four points. Almost 9% of them gave it three points and 4% two points. Thus, the overall rating for this statement was 294 out of 345.

(i) "The competition agency should have jurisdiction over consumer protection and/or fair-trade issues and/or other regulated markets."



With this statement, we attempt to explore the view that the institutional design may depart from the Argentine experience and give the competition agency other issues within its jurisdiction. To facilitate the answer, we indicate possible combinations. As a result, almost half of the respondents chose to exclusively maintain competition issues within its jurisdiction. The fact that only 4.4% of the responses proposed the combination of competition and consumer protection was significant enough since it indicates that the general perception, despite the respondents' qualified training and/or experience, is to separate the two subjects. Thus, 26% of the respondents considered the convenience of attributing jurisdiction over other regulated markets, and almost 22% considered combining competition and fair-trade issues.

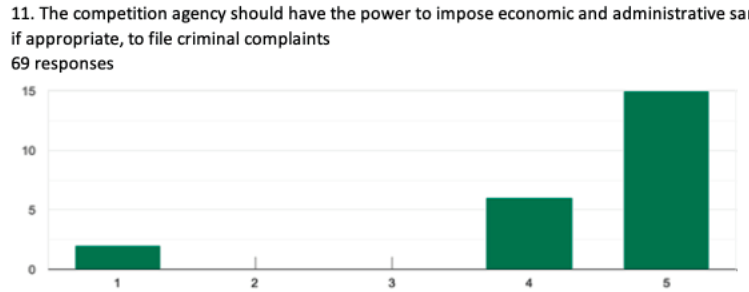
(j) "The competition agency should enforce the law and participate in the decisions about public competition policies."



This statement refers to the agency's performance in what is called competition advocacy and implies assigning a more proactive and politicized role to the agency.

Responses were diverse. Almost 48% rated it with five points and 30% with four points. Almost 8% rated it with three points, 4% two points, and almost 9% only one point. Hence, we can state that a clear majority favorably considered the possibility of the agency doing competition advocacy, as is currently the case in agencies worldwide. The overall rating was 279 out of 345 points.

(k) "The competition agency should have the power to impose economic and administrative sanctions and, if appropriate, to file criminal complaints."



This question was aimed at verifying how the respondents valued the possibility of the agency having the power to impose sanctions and even file criminal complaints. About 65% of the respondents rated this favorably with the maximum rate. About 26% rated it with four points. Almost 9% of the respondents were opposite to the majority and rated

it with only one point. Thus, the overall rating was 303 out of 345 points.

As we noted in Part III of the survey, we left it up to the participants to suggest proposals for regulatory changes. The question was phrased as follows:

"From your experience or knowledge, what improvements or proposals would you suggest to the institutional design established by Law 27.442?"

The following are some of the responses:

1. Promote private action for damages, in order to achieve a double objective: to promote the reporting of anti-competitive practices and to strengthen the "awareness" about the impact of non-compliance with these rules.

2. It should not be so complicated to appoint the members of the competition agency. This has led to a deadlock in appointments, and now we "are left floating adrift" on this issue for many years to come.

3. The effective conformation of the National Competition Authority, which should be tested before proposing any type of modification to the institutional design.

4. There is a myth about the need for an independent body through a technical candidate selection process. There is no such body in the developed world or elsewhere. The relevance of "anti-trust" decisions has such a significant impact on the economic structure and even political effects . . . that it must necessarily be articulated with State policies.

5. *I fully agreement with having a this favorably decentralized and autonomous body within the scope of the Executive Power. I agree with its organizational structure, it seems to me functional and optimal at an operational level. Perhaps in the Secretariat of Anti-competitive Conduct Instruction, I would place a multidisciplinary auxiliary team to make investigations even more professional and flexible.*

6. I agree with having the members of the National Competition Authority appointed by the Executive Power and recruiting them on the basis of a previous public selection process based on background, requiring them to submit a sworn statement of their own and their family's assets, in compliance with the Financial Information Unit (UIF) requirements in general.

7. Criminal penalties should be included for any infringement on competition regulations and due consideration should be given

to the design of a completely autonomous authority, independent from any political power. Adopting a system like the one in Chile.

8. I agree with the design. The problem is that it has not been implemented. 1- An administrative body separate from the technical body for accountability. 2- Hybrid UK system with one executive head and collegiate support. 3- Prosecution Scheme. 4- Revision of the objective "To benefit the consumer", I visualize it as a broader purpose. Competition has benefits of interest that transcend the market and consumers (industry development, R&D positioning, international competitive improvement, generation of foreign exchange via exports). 5- Sanctioning-promoting scheme. 6- Not unify with Consumer until competition maturity is achieved, only then unification could be considered. 7- - Centralized operational organization based on Divisions focused on Specific Strategic Categories and a generic or general Category – Definitely implementing the National Competition Authority organization simplifying members appointment.

9. Establishing thresholds more in line with the economic activity of our country, the entry into force of the Agency and the prior notification regime, to the extent that the agency and/or authority has the resources and can guarantee agility and compliance with the legal deadlines.

10. Better balance of powers between public officials and Court. In hindsight, I would not have opted for a public candidate selection process.

11. Administrative splitting of the areas of the Secretariats from those of the Court. Facilitate the mechanism for member appointment in order to speed up this process. Provide public disclosure of annual reports to facilitate transparency of decisions.

12. I would review Decree 480/219 and amend everything that modifies the spirit of Law 27.442, for example, what refers to the different hierarchies and ranks among the members of the National Competition Authority provided for in Decree 480/19, in a different manner than the one established by Law 27.442.

1. Antitrust Law Bills with Parliamentary Status in Recent Years

Seven years have elapsed since the enactment of Law 27.442 without having put into operation the National Competition Agency.[343] Both Houses of Congress have submitted bills for the creation of the National Competition Agency, which have had different parliamentary status aiming to solve the dilemma of the agency's structure and make additional amendments to the current law.[344] We will analyze the bills submitted during the administration of President Alberto Fernandez (2019-2023) and those submitted by the administration of President Javier Milei (2024).

2. The Bills Under Treatment During the Government of President Alberto Fernandez

Within the framework of the first extraordinary session of the Senate (HSN) on February 4, 2021, the bill duly submitted by the Senator for the Province of Corrientes, Claudia Almirón, proposing several amendments to Law No. 27.442, was approved.[345] The bill was the subject of heated debate during its treatment.[346] One of the crucial points of the debate and controversy centered on the issue of the agency's independence.[347]

Senator Almirón, in defense of her bill, stated the following:

> Actually . . . 2 years have passed, and the authorities have still not been appointed. The amendments we are proposing today, regarding the appointment of the national competition authorities, have to do not only with facilitating the effective appointment -which has not happened yet, and which we have also discussed with many legislators, including those of the opposition, who understood that the public candidate selection process defined by Law 27.442 has become cumbersome, but also with facilitating the

343. *See* Marval O'Farrell Mairal, *New Step Toward Creating a Competition Authority*, LEXOLOGY (Apr. 4 2025), https://www.lexology.com/library/detail.aspx?g=0d89cad8-d560-428c-8210-edfd12aa4edb.

344. Wolters Kluwer Competition Blog, *Main Developments in Competition Law and Policy: 2024 – Argentina* (Jan. 2024), https://legalblogs.wolterskluwer.com/competition-blog/main-developments-in-competition-law-and-policy-2024-argentina/.

345. Miguel Ángel De Dios, *El Paradigma de la Independencia de las Agencias de Compentencia. El Dilema entre Independencia versus la Rendición de Cuentas Politica* [*The Paradigm of the Independence of Competition Agencies. The Dilemma Between Independence Versus Political Accountability*], EL DIAL (March 31, 2021), https://www.eldial.com/nuevo/nuevo_diseno/v2/doctrina2.asp?id=13772&base=50&t=d.

346. *See* SENADO ARGENTINA, VERSIÓN TAQUIGRÁFICA, SESIÓN EXTRAORDINARIA, PERÍODO 138, 29A REUNIÓN – 1A SESIÓN EXTRAORDINARIA, 65-68 (Feb. 4, 2021).

347. *Id.* at 34.

> subsequent actions that the enforcement authority should take . . . .What we are suggesting . . . with this amendment is that, precisely, the Executive Power, through the Ministry of Productive Development, should be the one to appoint these authorities, guaranteeing it rapidly, because this is what the issue requires: that it should be done in an expeditious manner. But the truth is that this appointment made by the Executive Power, through the Ministry of Productive Development, must be guaranteed under conditions of suitability, of equality in access to positions and, above all - this is an incorporation that was provided for in this regulation - that it also be in accordance with the gender perspective and under conditions of parity. . . . [those who may be concerned] . . . . about hand-picked appointment . . . of those who are going to take office in the National Tribunal for the Defense of Competition . . . I am not going to bother you anymore, because the truth is that such appointment is going to be reviewed by the Comisión de Acuerdos (Confirmation Committee) of this Senate, where all political forces are represented; where each political force can make its consultations, can evaluate the suitability of each of the positions to be appointed, and where the different provinces are represented.[348]

Then, the Senator also points out that:

> No member of the National Competition Authority, in the three years prior to being appointed, may have been associated with any consulting firms or any other firm related in some way with the companies that will be controlled . . . Another amendment we are going to introduce has to do with providing institutional stability to the agency -because the Senate has the institutional quality and the control to do so. Therefore, we are going to additionally provide for Tribunal for the Defense of Competition -its authorities- to submit an annual report to this National Senate at the beginning of the legislative period."[349]

Senator Almirón was joined in the defense of the bill by Senator Parrilli, with additional arguments on the need to strengthen the monitoring of foreign direct investment, the comparative experience to protect the national economy, and other aspects incorporated by him into the bill.[350]

The most well-founded criticism from opposition senators was made by Senator Martín Lousteau, who after reviewing the history of the competition agency from the enactment of Law 25.156.[351] The Senator recalled that the initial bill resulting in the enactment of Law 27.442 was drafted by himself when he was a Congress Representative

348. *Id.* at 34-35.
349. *Id.* at 36-37.
350. *Id.* at 39-42.
351. *Id.* at 42-47.

and reintroduced by other legislators when the bill had lost its parliamentary status.[352] He highlighted the importance of the agency's independence in the model of both preceding laws and the mechanism for appointing its members and pointed out the following:

> What was the appointment process provided for in the law? [he refers to law 27.442] In Section 20: a public candidate selection process by background and competition; with a jury that was the Treasury Attorney of the Nation, the Minister of Economic Development, with the participation of a representative of the National Law Academy and a representative of the Argentine Association of Political Economy; and the Minister, in case of a tie, had a double vote. After that, shortlists were submitted and based on those lists, the Executive Power decided. There was a publication, there were observations and then, it must be confirmed by the Senate . . . what we are saying today is that this is too cumbersome, that it is very complex. To tell the truth, is politics really unable to solve this complex process and who can expect then it will solve mergers, acquisitions, market interventions, competition defense? How complex, how difficult it is to have such low self-esteem to say that we cannot decide on a simple public candidate selection through a background examination program! . . . . Not now: now the procedure is internal within a ministry. It stays under the orbit of the ministry. And then, once again, as it happened with another Secretary of Domestic Trade, we have the possibility of political interference. I insist on this matter, with the possible consequences, it is a huge problem and a huge mistake. Curiously enough, this bill is called 'bill amending the Law for the Defense of Competition to improve the structure of the enforcement authority.' It is called 'improving the structure of the enforcement authority.[353]

The debate was not limited to the parliamentary sphere, it also touched upon the press, specialized magazines, and social media, with abundant and substantial criticism.[354]

The bill approved in the HSN replaces the mechanism for selecting the National Competition Authority (Autoridad Nacional de la

352. *Id.* at 43.

353. SENADO ARGENTINA, *supra* note 346, at 46.

354. *See* Luis Barry, *Una nueva amenaza a la defensa de la competencia [A new threat to the defense of competiton],* LA NACION, (Dec. 15. 2020) https://www.lanacion.com.ar/opinion/una-nueva-amenaza-defensa-competencia-nid2540107/; PUBLIC STATEMENT FROM THE BAR ASSOCIATION OF THE CITY OF BUENOS AIRES, *Ley De Defensa De La Competencia Una Reforma Innecesaria Y Que No Protege La Competencia [Competition Defense Law An Unnecessary Reform That Does Not Protect Competition]* (Feb. 10, 2021); Pablo Trevisán, *Argentine Competition Law: A Hurried and Suspicious Reform,* LINKEDIN, https://www.linkedin.com/pulse/argentine-competition-law-hurried-suspicious-reform-pablo-trevis%25C3%25A1n/?trackingId=kieHj4p%2BRcS%2FZfeYZFJukA%3D%3D (last visited Oct. 19, 2025).

Competencia) ("ANC") members under Section 20 of Law 27.442 which states that:

> The Executive Power shall appoint the members of the National Competition Authority at the proposal of the Ministry of Productive Development of the Nation, or the one that in the future replaces it, who shall meet all the requirements related to behavior, technical qualifications in the subject matter and other requirements under Section 19 of this law. The selection will be carried out under the scope of the National Ministry of Productive Development Nation, within the framework of a public, open, and transparent procedure that guarantees conditions of equality, gender parity and suitability.[355]

It eliminates the procedure of prior competition and background provided for in the regulation still in force.[356] It also establishes that "Candidates shall submit a sworn statement of their assets, of those of their spouse and/or cohabitants," and of those of the marital partnership and shall comply with other provisions set forth in Section 6 of Law 25.188 on Ethics in the Exercise of Public Office and its regulations.[357] They must also attach another sworn statement in which they must include the list of the civil associations and commercial companies they are members of, or have been members of in the last five (5) years, the list of clients or contractors of the last five (5) years within the framework.[358] The list is allowed by the rules of professional ethics in force, the law, accounting or consulting firms to which they have been part of as appropriate, and in general any type of commitment that may affect the impartiality of their judgment due to their activities, those of their spouse, their ascendants and descendants in first degree, in order to allow an objective evaluation of the existence of incompatibilities or conflicts of interest.[359] The Anticorruption Office shall make a report before the appointment of the candidates about the actual or potential conflicts of interest that may arise by the sworn statements mentioned in the preceding paragraph.[360] Likewise, a report shall be requested from the Federal Administration of Public Revenues (AFIP), preserving tax secrecy, regarding the compliance with tax obligations of the persons eventually proposed."[361] The required sworn statement

355. SENADO ARGENTINA, *supra* note 346, at 65.
356. *Id.*
357. Ley No. 27.442, May 15, 2018, [33.870] B.O. 3, 8 (Arg.).
358. *Id.*
359. *Id.*
360. *Id.*
361. De Dios, *supra* note 345, at 11.

imposes a duty to provide background information in case they have been part of the aforementioned entities or organizations and the request for information to the AFIP.[362] All of which should be read to evaluate the suitability and transparency of the candidates.[363]

Further on, the bill maintains the possibility for third parties to express their opinion and, in this way, participate in the candidate selection process.[364] Hence, Section 22 sets forth that:

> Citizens, non-governmental organizations, professional associations and consumer and user associations, academic and human rights entities may, within fifteen days of the publication stipulated in section 21 of this law, submit to the Ministry of Productive Development and to the President of the Honorable Senate of the Nation, in writing and in a well-founded and documented manner, the observations they consider important to express regarding those candidates included in the pre-selection process.[365]

Notwithstanding the submissions made, within the same period, civil society organizations and experts, professionals and academics with recognized trajectory and prestige in the matter may be requested to provide a well-founded opinion.[366]

The bill states that the appointment of the ANC members will require the confirmation of the HSN and allows the Executive Power to make provisional appointments during the time it takes to get such confirmation.[367] Each member of the National Competition Authority will serve for a term of four years and may be reelected only once.[368]

Finally, regarding accountability, it establishes that the members of the ANC must submit an annual management report to the HSN at the beginning of each legislative term and that any of them may be removed from office by the Executive Power when the grounds outlined in the Antitrust Law are met.[369] This requires a prior non-binding opinion of an *ad hoc* committee composed by the Chairpersons of the Consumer, User and Competition Defense Committee of the House of Representatives, the Industry and Commerce Committee of the Senate, the Chairpersons of the House of Representatives, and of the Senate.[370] In the event of a tie within this *ad hoc* committee, the vote of the

362. *Id.*
363. *Id.*
364. Ley No. 27.442, art. 22.
365. *Id.*
366. De Dios, *supra* note 345, at 12.
367. Ley No. 27.442, art. 23.
368. *Id.* at art. 24.
369. *Id.*; *author's personal knowledge.*
370. *Id.*

President of the House of Representatives shall break the tie.[371] In the House of Representatives, there are other recent bills drafted by members from the opposition equally intended to replace the mechanism of public candidate selection by competition for the authorities of the ANC.[372]

Every time we were able to participate in the discussion on the institutional design of the competition agency, we defended the importance of maintaining its independence as a basic pillar of its organization. We have also defended the benefits of having a selection procedure that includes a previous public competition for candidates.

We can agree with the aforementioned proposals stating that the amendment to the Antitrust Law must take special consideration in establishing an independent competition agency. But without denying the benefits of a selection procedure for the ANC candidates that includes a public competition process, we do not believe that the rule of the agency's independence should be subsumed to the establishment of a candidate selection process as provided for in Laws 25.156 and 27.442. Undoubtedly, it is regrettable that political circumstances have frustrated the candidate selection process during 2019; I can attest to the enormous effort and reliability of many of its participants and of several of those deservedly selected during the first competitions.[373] It is clear to us that the modifications in the selection process are aimed at streamlining the appointment mechanism to fill vacancies in the ANC and "debureaucratize" the political selection of candidates, but it does not change the fact that the positions are finally filled by the Executive Power with the confirmation of the HSN.[374] Is the proposed modification a meaningful change in the status of the National Competition Authority pursuant to the law in force? A deep analysis of this legislative amendment appears to show otherwise. First, according to the wording of the enacted law, for the pre-selection of candidates just a simple majority is required in the Jury, two votes correspond to the government (one to the National Treasury Attorney and the other to the Minister of Productive Development) and the other two votes to the science academies (one to the National Academy of Law and the

371. *Id.*

372. Proyecto de Ley, 27.422, CÁMARA DE DIPUTADOS DE LA NACIÓN (Arg.).

373. *See* Resolución Conjunta 1/2019, Feb. 12, 2019, [34.054] B.O. 60 (Arg.); Resolución 84/2019, Mar. 27, 2019, [34.083] B.O. 21 (Arg.); Resolución 146/2019, Apr. 25, 2019, [34.101] B.O. 27 (Arg.); Resolución 638/2019, Oct. 2, 2019 [34.210] B.O. 15 (Arg.); Decisión Administrativa 1798/2020, Oct. 6, 2020, [34.490] B.O. 18 (Arg.).

374. SENADO ARGENTINA, *supra* note 346, at 65.

other to the Argentine Association of Political Economy).[375] However, in the event of a tie, the Minister of Productive Development has a double vote.[376] It could be, therefore, argued that the government's influence at this stage of the selection process is still strong, if not decisive. The difference with the current legislation is that the mandatory participation of the aforementioned academies (a provision that was also present in Law 25.156) has been removed.[377] If this bill becomes law, the candidate selection process will be carried out by a ministry of the Executive Power without any external participation whatsoever.[378] The bill establishes that it must be "public, open and transparent, guaranteeing conditions of equality, gender parity and suitability."[379] The bill set forth the possibility that public applicants, i.e., citizens, NGOs, professional associations, associations for the defense of consumers and users, and academic and human rights entities make the pertaining observations before both the Executive Power and the HSN.[380] It also establishes that the Ministry of Productive Development may request the opinion of civil society organizations and experts, professionals and academics with recognized trajectory and prestige in the matter as a way of "mitigating" the effects of having removed from the legislation the participation of law and economics academies during the process.[381]

As mentioned above, the bill generated some criticism, as it was claimed that it affected the independence of the agency. This bill lost parliamentary status but served to raise the issue.[382]

3. The Bill Proposed During the Administration of President Javier Milei

On December 10, 2023, the new government of President Milei took office.[383] One of the first measures of his government was to send to Congress an omnibus bill with substantial reforms in different areas. This bill was called the "Proyecto de Ley de Bases y Puntos de Partida

375. *See id.* at 45.

376. *See id.* at 46.

377. *See* Ley de Defensa de la Competencia, *supra* note 322, at art. 18.

378. *See* SENADO ARGENTINA, *supra* note 346, at 55.

379. See SENADO ARGENTINA, *supra* note 346, at 65.

380. *Id.*; Ley de Defensa de la Competencia, *supra* note 322, at art. 22.

381. *See* SENADO ARGENTINA, *supra* note 346, at 35.

382. *See* Ley de Defensa de la Competencia, *supra* note 322, at art. 81.

383. *The Inauguration of Javier Milei has Argentina Wondering what President it will Get*, NPR, Dec. 10, 2023, https://www.npr.org/2023/12/10/1218430385/the-inauguration-of-javier-milei-has-argentina-wondering.

para la Libertad de los Argentinos" (Bill on the Foundations and Starting Points for the Freedom of Argentinians).[384] Section 58 of the bill states the repeal of Law 27.442, the Antitrust Law (LDC), and the approval of a new legislation to replace it.[385] This project is part of a deep and extensive process of economic deregulation.[386]

Notwithstanding the repeal of the LDC, practically all of its provisions are incorporated into the new bill and its structure was replicated. However, there are a couple of critical issues regarding the agency design and the mechanism for the appointment of its members that we will consider next.

The bill establishes a new institutional design of the competition agency.[387] Thus, it creates the Markets and Competition Agency (AMC), headed by a Secretary, and the Tribunal for Defense of Competition (TDC), composed of five members, of which at least two must be lawyers and two economists.[388] Both agencies would be decentralized and autonomous within the scope of the Executive Power and would replace the National Competition Authority created by Law 27.442.[389] Notwithstanding the aforementioned difference in the institutional design, the Markets and Competition Agency and the Tribunal for Defense of Competition (TDC) have the powers that Law 27.442 granted to the Agency.[390] The distinctive feature is that it establishes a functional division between the role of research and preliminary investigation of the Markets and Competition Agency[391] and the role of review and allocation of the TDC.[392]

According to the Bill, the Secretary in charge of the AMC will be appointed by the National Executive Power through a public, open, and transparent selection procedure that guarantees the suitability of the candidate.[393] The candidate must be a lawyer or an economist, an Argentine citizen, and must have a background that proves suitability

384. *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos [Law of Bases and Starting Points of the Freedom of Argentines]*, Proyecto de Ley, Biblioteca del Congreso de la Nación (Arg.), Registro No. 2023-153350572-APN-JGM, 2023, at 4 [hereinafter the Freedom Bill].

385. *Id*. at art. 61.

386. Decreto 70/2023, Dec. 20, 2023, [DNU-2023-70-APN-PTE] B.O, at 4 (Arg.).

387. *See* Freedom Bill, *supra* note 384, at art. 13.

388. *Id.* at art. 28.

389. *Id.* at art. 26.

390. *Id.* at art. 70.

391. *Id.* at art. 22.

392. *Id.* at art. 26 & 28.

393. Resolución Conjunta 1/2019, art. 2.

for the performance of the position.[394] The exercise of the duties requires exclusive dedication and is incompatible with any other public or private activity, except part-time teaching.[395]Any political activity is prohibited for the duration of their term of office.[396] It establishes a complex removal procedure with the intervention of the Legislative Power to guarantee stability during the term of office.[397]

The TDC will have full legal jurisdiction to act in public and private matters and will have its headquarters in the Autonomous City of Buenos Aires but may act, be established, and hold meetings anywhere within the country.[398] The president of the TDC will exercise the legal representation and administrative functions of the organization and will be composed of five members, of which at least two will be lawyers and the remaining two must have a master's or PhD degree in Economics.[399] The members shall be appointed by the National Executive Power through a public, open, and transparent selection procedure that allows evaluation of the candidates suitability.[400] Each member of the TDC shall serve for a term of five years. [401]

Any of the members of the TDC may be removed from office by the National Executive Power when the grounds provided for under the law in force[402] are met, with the prior binding opinion of a bicameral committee composed of the chairmen of the Consumer, User, Competition Defense Committees of the House of Representatives, Industry, Commerce Committee of the Senate, and the presidents of the House of Representatives and the Senate.[403] In case of a tie, the vote of the President of the House of Representatives will decide.[404] Only two chapters of the Antitrust Law were not incorporated into the bill, the one creating the Specialized Antitrust Chamber (Chapter XI of the Antitrust Law[405]) and the regime for the promotion of competition (Chapter XIII of the Antitrust Law).[406]

394. Freedom Bill, *supra* note 384, at art. 19-20.
395. *Id*. at art. 20.
396. *Id.*
397. *Id.* at art. 25.
398. *Id.* at art. 26.
399. *Id.* at art. 27-28.
400. *Id.* at art. 28.
401. *Id.* at art. 32.
402. *Id.* at art. 25.
403. *Id.*
404. *Id.*
405. Ley 27.442, arts. 68-70.
406. *Id.* at arts. 74-78.

Indeed, the bill establishes a simpler mechanism for the appointment of the public officials in charge of the competition agency that does not have to resort to a previous public candidate selection process.[407] It is also worth mentioning that initially, the bill did not require the confirmation of the Senate for the appointment of the TDC members, but this requirement was later introduced in the debates within the House of Representatives' Committee.[408] As in Law 27.442, there is an instance of public scrutiny in the process of public officials' selection.[409] The bill includes the public selection procedure currently regulated in the LDC so that citizens, NGOs, professional associations, and academic entities may submit comments regarding the candidates.[410] Additionally, the opinion of relevant organizations in the professional, judicial, and academic fields may be requested for their assessment.[411]

4. The Provisional Appointment of the Agency by the Administration of President Javier Milei

A relevant institutional development took place in Argentina during 2025, during the elaboration this paper, concerning the long-postponed implementation of the National Competition Authority (Autoridad Nacional de la Competencia, ANC) established by Law No. 27,442. Following a prolonged period in which the legal framework for an independent and collegiate competition authority formally existed but remained operationally incomplete, the Executive Branch adopted a significant—albeit transitional—step toward activating the institutional design envisaged by the statute.

In November 2025, by means of Decree No. 810/2025[412], the President appointed in commission the President and two members of the Competition Tribunal, as well as the heads of the Secretariat for Anticompetitive Conduct and the Secretariat for Economic Concentrations, thereby allowing the ANC to begin exercising its core functions. These appointments followed a public, merit-based selection process conducted throughout 2025 in accordance with the procedures set forth in

407. *Id.* at art. 20.

408. *See generally id.* at art. 22.; based on personal knowledge.

409. *Id.* at art. 22.

410. *Id.*

411. *Id.* at art. 23.

412. Boletín Oficial de la República Argentina, Decreto 810/2025, AUTORIDAD NACIONAL DE LA COMPETENCIA (17 Nov. 2025), https://www.boletinoficial.gob.ar/detalleAviso/primera/334595/20251117 (last visited Dec. 22, 2025).

Law No. 27,442 and its implementing regulations, including competitive examinations, evaluation of professional backgrounds, interviews, and the submission of shortlists by a multi-sector jury. However, the process (i) failed to complete the full five members of the Competition Tribunal and left two of the members to be appointed in a future selection process and, (ii) pursuant to the Constitution and the statute itself, the definitive consolidation of those appointments made remains subject to confirmation by the Senate, which at the time of writing is still pending.

From the standpoint of institutional design, this development constitutes a meaningful departure from the longstanding transitional enforcement arrangements that characterized Argentine competition policy for more than two decades. The activation of the ANC marks the first effective attempt since 1999 to implement a decentralized and autarkic authority with separated investigative and adjudicative functions. At the same time, the reliance on in commission appointments underscores the persistence of an incomplete institutional cycle. While this mechanism enables the authority to operate and mitigates the enforcement vacuum identified throughout this paper, it also introduces an element of institutional fragility, insofar as the temporary nature of the appointments may affect perceptions of independence, stability, and insulation from political influence.

Accordingly, the 2025 appointments should be understood as a transitional institutional solution rather than the full completion of the reform process initiated by Law No. 27,442. They confirm the central thesis advanced in this paper: that the effectiveness of competition policy in Argentina depends not only on the formal adoption of international best practices in statutory design, but also on the completion and durability of appointment mechanisms, the political economy of enforcement, and the consolidation of institutional independence over time. The definitive validation of this reform will ultimately depend on the completion of the constitutional confirmation process and the sustained operation of the ANC as an autonomous and stable authority.

C. The Selection and Appointment of the Competition Agency Members: What is the Real Obstacle to Create the Agency as Provided for in the Legislation?

We can see that the different bills to amend the Antitrust Law have several aspects to consider. These drafts of the bill maintain the general structure of the current law (as the model of the last 25 years) with changes that present few substantial characteristics but with a common

denominator: to simplify the candidate selection process for the competition agency.

Strictly speaking, the change in the candidate selection process for the authorities of the competition agency seems to focus on the elimination of the pre-selection process with external "decision-making" participation.[413] Is the pre-selection process a common procedure among other competition agencies around the world?

The answer is no. The prior candidate selection process for the authorities of the competition agency is not the most popular mechanism in comparative legislation. This is demonstrated by the cases of prestigious agencies such as the European Commission itself, the agencies of Spain, England, Germany, France, Italy, Denmark, Holland, Greece, Czech Republic, etc., as far as Europe is concerned. Neither is the case of the USA, Canada, Japan, Israel, Australia, or New Zealand's antitrust agencies.[414] Meanwhile, in the region, Brazil, Colombia, Ecuador, etc., do not contemplate prior candidate selection process either.[415]

413. *Id.* at art. 20.

414. *See infra* note 416, 419, 421.

415. *See infra* note 421, 423, 430.

COUNTRY	**NAME OF THE AUTHORITY**	**FORM FOR APPOINTMENT**
1. Australia	Australian Competition and Consumer Commission	By the Governor-General.[416]
2. Spain	National Commission on Markets and Competition (CNMC)	The members of the Board, including the President and the Vice-President, will be appointed by the Government, by Royal Decree, under the basis of a proposal by the Minister of Economy and Competitiveness, from among persons of recognized prestige and professional experience in the subject market.[417]
3. Israel	Israel Competition Authority (ICA)	It is chaired by the Director General, who is chosen by the Prime Minister, with the recommendation of the Ministry of Economy and Industry. The minister must choose the Director-General from a list that has been prepared by a formal committee.[418]
4. Belgium	Belgian Competition Authority (BCA)	The president of the BCA will be appointed by the King by a decree deliberated the Council of Ministers. The president must pass the exam regarding professional skills. Further details and the examination program are determined by the King.

416. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION, *Review of the Australian Competition and Consumer Commission Annual Report 1999-2000* (Sept. 2001), at 2, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=efpa/accc9900/report.htm. (Austl.) (last visited Oct. 22, 2025).

417. RÉSEAU MÉDITERRANÉEN DES AUTHORITÉS DE RÉGULATION [MEDITERRANEAN NETWORK OF REGULATORY AUTHORITES], *CNMC (Comisión Nacional de los Mercados y la Competencia),* https://www.rirm.org/en/cnmc-comision-nacional-de-los-mercados-y-competencia-2/ (Spain) (last visited Oct. 23, 2025).

418. OECD, *Competition Law and Policy in Israel* 49 (2011), https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/11/competition-law-and-policy-in-israel_g1g127a1/9789264097667-en.pdf.

		Attorney General for Competition. The representative is chosen by the King and must pass an exam.[419]
5. Brazil	Administrative Council for Economic Defense (CADE)	The President is chosen by the President of the Nation with the agreement of the Senate. The President of the CADE is appointed by the President of Brazil and confirmed by the Federal Senate.[420]
6. Canada	Competition Bureau	The Governor in Council appoints the Commissioner of Competition.
7. Czech Republic	Office for the Protection of Competition.	The President of the Czech Republic appoints the Chairperson of the Office for the Protection of Competition, based on a proposal from the Government.[421]
8. Colombia	Competition Protection – Superintendency of Industry and Commerce	Superintendent Delegate for Competition Protection – Appointed by the Superintendency.[422]
9. Uruguay	Commission for the Promotion and Defense of Competition (CPDC)	The President appoints its three members, acting in the Council of Ministers.[423]

419. Code de droit économique [Code of Economic Law] (Book IV: "Protection de la concurrence" (Competition Act of 3 April 2013)), art. IV.17 §§ 1–2 (Belg.), https://www.belgiancompetition.be/en/about-us/publications/competition-act-3-april-2013.

420. *Ley No. 12.529, de 30 de novembro de 2011 [Law No. 12.529 of Nov. 30, 2011]*, DIÁRIO OFICIAL DA UNIÃO, art. 6 (Braz.), https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm?utm.

421. *Public Administration in the Czech Republic,* (David Sláma & Filip Zavřel eds., Překlady, s.r.o. trans., Ministry of the Interior 2018) (Czech.).

422. SUPERINTENDENCIA DE INDUSTRIA Y COMERCIO [SUPERINTENDENCE OF INDUSTRY AND COMMERCE], "International Relations," https://sedeelectronica.sic.gov.co/international relations. (Colom.).

423. *Ley No. 18.159 de 20 de julio de 2007, Promoción y Defensa de la Competencia [Law No. 18.159 of July 20, 2007, Promotion and Defense of Competition]*, DIARIO OFICIAL DE LA REPÚBLICA ORIENTAL DEL URUGUAY, art. 22, https://docs.uruguay.justia.com/nacionales/leyes/ley-18159-jul-20-2007.pdf. (Uru.).

10. Honduras	Commission for the Defense and Promotion of Competition (CDPC)	The three Commissioners are appointed by the National Congress, selected from a list of three candidates proposed by organizations and institutions as follows: Three candidates are proposed by the Honduran Counsel for the Private Enterprise; Three candidates proposed by the Forum of National Convergence; Three candidates proposed by the Competitive National Commission. Three candidates proposed by the Executive Power; Three candidates proposed by the Professional College of University Professionals.[424]
11. Nicaragua	National Institute for the Promotion of Competition (PROCOMPETENCIA)	The Board of Directors, which consists of a President and two Directors, is appointed by the President and confirmed by the National Assembly.[425] They are chosen from shortlists presented by the Superior Council of Private Enterprise, the Nicaraguan Council of Micro, Small, and Medium Enterprises, and the Ministry of Development, Industry, and Trade.[426]
12. Venezuela	Superintendence for the Promotion and Protection of Free Competition (Procompetition)	The Superintendent is freely chosen by the President of the Republic.[427]

424. *Ley para la Defensa Promoción de la Competencia [Law for the Defense and Promotion of Competition]* (Decreto No. 357-2005), art. 61 (Hond.), https://www.wipo.int/wipolex/en/legislation/details/10469.

425. *Ley No. 601, Ley de Promoción de la Competencia [Law No. 601, Law on the Promotion of Competition]*, art. 7, LA GACETA, No. 206, Oct. 24, 2006, http://digesto.asamblea.gob.ni/consultas/normas/shownorms.php?idnorm=MTk1NjI=#:~:text=n)%20Las%20dem%C3%A1s%20que%20le%20confiera%20la%20presente%20Ley (Nicar.).

426. *Id.*

427. *Ley para Promover y Proteger el Ejercicio de la Libre Competencia [Law to Promote and Protect the Exercise of Free Competition]*, GACETA OFICIAL, No. 34.880, art. 21 (Dec. 13, 1991) (Venez.), https://venezuela.justia.com/federales/leyes/ley-para-promover-y-proteger-el-ejercicio-de-la-libre-competencia/gdoc/?utm.

13. Denmark	Danish Consumer Council	Danish Competition and Consumer Authority.[428]
14. Ecuador	Superintendency for the Control of Market Power (SCPM)	The Superintendent is appointed by the Council of Citizen Participation and Social Control through a list of three candidates sent by the President of the Republic.[429]
15. France	Competition Authority (Autorité de la Concurrence)	It has 5 permanent and 12 non-permanent members. Of the 5 permanent members, the President is appointed by the President of the Republic and confirmed by the Senate. The other 4 are directly appointed by the President of the Republic by decree.[430]
16. Germany	Federal Cartel Office (FCO)	The President of the FCO is appointed by the Federal Government.[431]
17. Greece	Hellenic Competition Commission (HCC)	The President and Vice-President are elected by the Congress and then appointed by the Minister of Economy. The remaining 6 members are elected by the Minister of Economy.[432]
18. Italy	Italian Competition Authority (Autorità Garante della	One Chairperson and three members who are jointly appointed by the

428. DANISH COMPETITION & CONSUMER AUTHORITY, "The Competition Council," (Den.), https://en.kfst.dk/about-us/organisation/the-competition-council?utm.

429. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT & INTER-AMERICAN DEVELOPMENT BANK, *Ecuador: OECD-IBD Peer Reviews of Competition and Policy* 13 (2020) (Ecuador), https://www.oecd.org/en/publications/2021/09/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021_bc4b5e49.html.

430. AUTORITE DE LA CONCURRENCE [COMPETITION AUTHORITY], "*Le Collège,"* [The Board] (Fr.), https://www.autoritedelaconcurrence.fr/en/college#:~:text=Permanent%20members-,The%20President%20and%20the%20four%20Vice%2DPresidents%20perform%20their%20functions,decree%20of%20the%20French%20President.

431. Germany, in COMPETITION ENFORCEMENT AGENCIES HANDBOOK 2019 (Pallavi Guniganti ed., Law Bus. Rsch. Ltd. 2019), at 122, https://files.lbr.cloud/public/Germany-QA-GCR-HCEA-2019.pdf?VersionId=Nfv7CVvSJ.u5qVUkSBbMDGxL8p4OvzjQ&utm.

432. *See Law 3959/2011 on the Protection of Free Competition* (codified 2025), art. 12 (Greece), HELLENIC COMPETITION COMMISSION, https://www.epant.gr/en/legislation/protection-of-free-competition.html?utm. (Greece).

	Concorrenza e del Mercato)	Presidents of the House of Representatives and the Senate.[433]
19. Japan	Japan Fair Trade Commission (JFTC)	One Chairperson and four commissioners. These members are appointed from among experts in law or economics by the Prime Minister with the consent of Parliament. The appointment and dismissal of the chairperson is certified by the Emperor.[434]
20. The Netherlands	Netherlands Authority for Consumers and Markets (ACM)	One Chairperson and two commissioners. All three of them are appointed by the Minister of Economy.[435]
21. New Zealand	Commerce Commission	Four to six members, including the Chairperson. They are appointed by the General Governor.[436]
22. United States	Federal Trade Commission (part of the Department of Justice)	The five commissioners are appointed by the US President and subject to Senate confirmation. The President of the Nation appoints the President of the FTC from among the 5 members. The Division is led by an Assistant Attorney General, elected by the US President, and confirmed by the Senate.[437]

Whether the procedure has a public candidate selection process or not, what seems to be essential is that an independent competition agency can finally be established in Argentina pursuant to the

433. *See* AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO [ITALIAN COMPETITION AUTHORITY], "*Who We Are*," https://en.agcm.it/en/about-us/#:~:text=The%20Italian%20Competition%20Authority%20 (It.).

434. *Kōtō Bōeki Dōsei Hō (Antimonopoly Act) [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade]*, art. 29 (Japan), available at https://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_08.html.

435. Organisation for Economic Co-operation and Development (OECD), *Annual Report on Competition Policy Developments in the Netherlands, 2014* (DAF/COMP/AR(2014)40) (2015).

436. Commerce Act 1986 (N.Z.) s 9.

437. U.S. DEPARTMENT OF JUSTICE, *Antitrust Division Leadership,* https://www.justice.gov/atr/antitrust-division-leadership.

regulations enacted.[438] Since enactment of Law 25.156 at the end of 1999 up to the present – and its amendments through Laws 26.993 and 27.442 - and in relation to the institutional design of the agency, there has only been a little more than three years of coincidence between the competition authority set forth by law and the authority who performed the duties.[439] The CNDC created by Law 22.262 in 1980 has been a sort of "institutional highlander" since the aforementioned laws could not repeal it.[440] The effective impossibility of conforming the TNDC provided for by law 25.156 during fifteen years (1999-2014)[441] and the National Competition Authority provided for by law 27.442 during seven years since its sanction (2018-2025)[442] are the best answer to Senator Lousteau's rhetorical question. Evidently, politics in Argentina does not seem to find it possible to carry out a simple candidate selection process for the conformation of the competition agency.

The problem seems to go beyond the procedure of appointing the members of the competition agency through a background checking process, and it is more likely to be related to the interference of politics throughout this process. What underlies the discussion is the interest or distrust of the control of circumstantial majorities in the game of power and decision-making on behalf of the government when it comes to making decisions about the agency. We have testified the diversity of institutional solutions to finish with the tension between agency independence and accountability to discourage the fight over the mechanism for appointing the agency members. Thus, it would be a matter of seeking a way out of the tension between the technical independence versus the legitimate will of the economic policy expressed by the government in office (which prevents the conformation of an agency outside the organizational chart of and subordination to the Secretary of State in which the agency is institutionally incorporated) and switch to a constructive game of dialogue with a governmental agency that is "less" dependent or "more" independent than

438. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *OECD Economic Surveys: Argentina 2025* 103-104 (2025), https://www.oecd.org/en/publications/oecd-economic-surveys-argentina-2025_27dd6e27-en/full-report.html.

439. *See generally* Marcelo den Toom, Godofredo Agustín Ortiz & Ilan Daniel Soae, *Argentina: Development and Enforcement of the Competition Regime in Its First Century of Existence,* 4–6, Concurrences (Nov. 2024) (Arg.), https://www.concurrences.com/en/review/issues/no-4-2024/international/argentina-development-and-enforcement-of-the-competition-regime-in-its-first; based on personal knowledge.

440. *See generally id.* at 3, 5.

441. *See id.* at 5.

442. *See id.*

what we have known so far but that can be finally instituted and put into operation. I here accept with boldness and benefit of inventory, the argumentation of most modern theories in favor of broadening the spaces of inclusive dialogue used by the new dialogic constitutionalism to be applied to the institutional design of the competition agency.[443]

This cooperative institutional dialogue is what we included in Decree 89/2001, which regulates Law 25.156, to enforce the operation of the Secretariat for the Defense of Competition, Fair Trade, and Consumer Protection within the proceedings before the National Tribunal for the Defense of Competition.[444]

Clearly, we were not able to imagine that the tension regarding the agency's independence and its constitution would continue uninterrupted for another two decades. However, experience indicates that this has been an insurmountable obstacle in the institutional practice of competition in Argentina. Moreover, any observer who steps back from the immediate discussion about the constitution of the competition agency and the appointment of its members might wonder how it is possible that for several decades, a legal system could coexist in parallel to the real functioning of the agency. That this fact generates a negative net result (in this case for the antitrust practice) but is nevertheless in force *sine die*.

Thus, the issue seems to be even deeper than the policy's distrust about the competition agency's control. Part of its explanation can be found in the endemic Argentinian problem of anomia described by Professor Carlos Santiago Nino in his renowned essay "Un país al margen de la ley" (A country outside the law).[445] Nino exhaustively reviews this problem with examples that evidence the history of Argentina since colonial times and its recurrent disregard for the generalized refusal to comply with the rules.[446] He also argues that the lack of compliance with the legislation in the country has constituted a sort of "dumb anomia" because systemic non-compliance with rules generates an inefficient, low-productivity, and unfair Pareto social outcome.[447] In his essay, Nino allows us to prove how the massive non-

443. *See generally* Roberto Gargarella, *The New Dialogic Constitutionalism* 4 (2022), https://www.derecho.uba.ar/academica/posgrados/2014-roberto-gargarella.pdf.

444. Marval O'Farrell Mairal, *Competition Law in Argentina,* (Oct. 10, 2023), https://www.marval.com/publicacion/defensa-de-la-competencia-en-la-argentina-5229&lang=en.

445. Carlos Santiago Nino, *Un País al Margen de la Ley* [*A Country Outside the Law*] (Buenos Aires: Emecé Editores 1992).

446. *Id.* at 53-54, 58.

447. *See id.* at 31-32.

compliance with legal, moral, social, etc., rules in Argentina have prevented its institutional strengthening and democratic consolidation and is part of the phenomenon of the country's incomplete development.[448] Out of this framework of anomia in Argentina, it seems difficult to explain how the institutional design of a government agency (in this case for the defense of competition) can be sustained without enforcement, without effective implementation, for decades and that huge efforts of argumentation and public discussion about such matter seem to exist in a parallel reality.[449]

Thus, the National Tribunal for the Defense of Competition (or the National Competition Authority, whatever semantic reference we use to name the creation and constitution of an independent competition agency) seems to have been condemned to the myth of Sisyphus, carrying each time the heavy stone of its technical and political discussion in the scope of the National Executive Power.[450] Drafting a bill to be submitted to the National Congress, the subsequent debate and parliamentary approval, the sanction and enactment of the law, the preparation and drafting of the selection process for candidates and the implementation of the agency, to finally fail at the pinnacle of the task of its creation and implementation and start carrying the same stone again *sine die*.[451]

In the last twenty years, I have personally been part of the stone-pushing tasks on several occasions, for example, as head of the legal area in the Secretariat for the Defense of Competition and Consumer Affairs, when I participated in the drafting of the National Executive Decree 89/2001 which regulates Law 25.156 of the National Executive Power. Also, in debates in the House of Representatives Committees as a guest expert to discuss the adoption of Law 26.993.[452] Again, during the discussion of the draft bill of Law 27.442 in the CNDC.[453] At the seminar with the commissioners of the agency appointed by

448. *See id.* at 53-54, 58.

449. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *Global Forum on Competition: Contribution from Argentina, DAF/COMP/GF/WD(2016)1*, (Dec. 3, 2024), https://www.argentina.gob.ar/sites/default/files/daf-comp-gf-wd20161en_230623_102951.pdf.

450. *See generally* Mario Zúñiga, *In Reforming Its Antitrust Act, Argentina Should Not Ignore Its Institutional Achilles Heel,* TRUTH ON THE MARKET (Jan. 16, 2024), https://truthonthemarket.com/2024/01/16/in-reforming-its-antitrust-act-argentina-should-not-ignore-its-institutional-achilles-heel/.

451. *See generally id.*

452. *Id.*

453. *Id.*

Milei's Government and experts that we organized at Universidad del Salvador last May 2024 to discuss the new bill. As regards public debate, as reflected in some of the quotes made here, I have participated in presentations at academic or professional conferences or seminars, through papers published in legal journals, and as an opinion columnist in newspapers. Finally, this research is intended to make a new systemic contribution from the academia in the hope of finally getting out of the circular inertia that prevents us from institutionally establishing the antitrust agenda in Argentina.

VII. CONCLUSION

The defense of competition is an institution with its own rules of economics and law. As a public policy tool, it finds its genesis and evolution starting at the end of the 19th century in the USA. During the second half of the 20th century, it takes a key role in Europe, and in the early decades of the 21st century, it reaches a global dimension with presence in the five continents. Sequentially, the growth of market power of certain players since the second industrial revolution, the strengthening of the capitalist economy in the West, the interdependence between nations and globalization, together with the need for States to establish rules to correct the so-called market failures, have been the reasons why the defense of competition around the world become, in turn, an instrument of government, an area of business organization, a field of professional development for economists and lawyers and, finally, a growing object of study in schools of economics and law.

As a result of this work, the basic notions and fundamental provisions of the antitrust institute have been incorporated into Argentine law for more than a century and are part of our current legislation.

Also, as we have pointed out throughout this paper, the institutional design of the competition agency is a central issue for the development of a solid, technically strong, and effective competition practice. By reviewing the menu of options available to competition agencies for the definition of their structural and organizational aspects, we have been able to verify that there is not a unique model followed by the most important competition agencies in the world. Additionally, we know that a model in force in a specific country cannot be eternal, neither do international organizations consider that there is a unique institutional design of competition agency that can work for all jurisdictions and in all circumstances. When we analyzed the different works on institutional design of antitrust agencies, such as those of

Kovacic-Hyman, the GAL project, Jenny's report within the framework of the OECD and the work done by the ICN together with the evaluation of Argentine and comparative regulations we can prove that the agency´s institutional design takes into account certain basic fundamental principles but that the legal solutions vary according to various political, economic, social and legal factors of each jurisdiction and that they must be considered case by case.

In this paper, we have been able to critically review the experience of the competition agency in the period from 1995 to 2019. For this purpose, we have the opinion of international organizations such as the OECD in 2006 and 2012 and UNCTAD in 2017, which promoted the peer reviews, providing perspectives on the functioning of the agency, the evaluation of its performance, and suggestions for its evolution and improvement.[454] In addition, the expert opinions on work and publications, the perceptions of the system's effectors through the survey, and the case studies of the prosecution of anti-competitive conduct and economic concentration operations provided us with substantial information and confirmatory guidelines for our proposed hypothesis.

We have been able to verify that in those instances in which the agency has enjoyed greater operational autonomy and professionalism when resolving cases, it has been able to issue more solid rulings with severe sanctions against practices of abuse of dominant position, as in the liquefied petroleum gas case or the cartelized practices in the liquid oxygen or cement case. This is equally applicable to the economic concentration cases such as the rejection of Oca/Correos, the conditions imposed on Brahma/Quilmes, and, despite greater political influence, the solvency in the market definition in Cablevision/Multicanal or the efficiency of the preliminary investigation in Telefónica/Telecom. The perception and assessment of the agency's independence followed a downward curve during the period analyzed, but it is in the results of the cases evaluated according to the considerations of the peer reviewers and the opinion of the experts where the satisfaction and appreciation regarding the efficiency and effectiveness of the agency is reflected. The results of the perceptions of the system's effectors and the assessments of the peer reviewers and other experts showed a somewhat flatter trend for technical solvency than for effectiveness in solving cases. The agency´s best practice has been seen in cases where decisions could be made based on antitrust reasons, at the expense of the

454. *See generally* Comisión Nacional de Defensa de la Competencia, *supra* note 91; UNCTAD, *supra* note 173.

institutional design that did not contribute to allow an independent practice consolidated over time. When there was interaction with the Secretary of State to which the agency was subordinated, or when the cases did not involve a prevailing political interest, the decisions taken were more suitable. Putting a competition agency into operation within an institutional design that grants it relative autonomy will be a significant step forward in preventing this condition of being tied to the moods of government officials.

Undoubtedly, an important standard for the evaluation of the most important cases mentioned was the judicial review to which they have been subjected. This judicial review is evident when observing that in all the antitrust cases mentioned, the accused parties were able to file the corresponding appeals. The same happened in the cases of claims of the parties involved in economic concentration operations or whenever there was a change in political orientation that attempted to modify the agency´s decisions.

When assessing the judicial review of the agency's solvency in the resolution of such cases, judicial control of due process and the preservation of the guarantee of defense at trial are present.[455] Even more, in all those major cases, the decisions were upheld by the courts of appeal, and, in the case of certain fines, they were in turn confirmed by the Supreme Court.[456]

As we have seen, the design of the competition agency established by Law 27.442 with the creation of the National Competition Authority, as well as the creation of the TNDC through Law 25.156, is a step in the right direction towards creating a collegiate, interdisciplinary, autonomous competition agency. We know that this will contribute to the professionalization of the agency and focus it specifically on market competitiveness and consumer protection issues. The risk that the Argentine experience involves is that this agency (the TNDC for fifteen years or the ANC for seven years so far) might never be consolidated. Either because of the fear of politicians of losing control over an important regulatory instrument in the hands of "technicians" or because of the "pleasure" experienced by the government responsible for the selection process and agency setup, which slows down the process, and, in the end, the agency is never actually set up. The 2025 activation of the National Competition Authority, a major step forward

455. Pedro Aberastury, *Judicial Control of Administrative Competition Law Decisions in Argentina, in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 23-37 (Guobin Zhu ed., Springer 2020) (ebook).

456. *Id.* at 25.

though still institutionally incomplete, underscores the urgency of the recommendations advanced in this paper, particularly those aimed at strengthening independence, stability, and the full institutional closure of Argentina's competition regime.

In our opinion, we must repel the recurring ghosts that have prevented the formation of an institutionally independent agency. This is the greatest challenge that our legal and political context presents us with. Only once the competition agency is up and running will it be able to acquire internal strength, gain reputation with other government agencies and market agents, and thus enable the promotion and consolidation of a culture of competition in Argentina. So then measures should be taken to correct this defect ever lingering on us. For example, we could strengthen (i) the aspects that make the agency accountable to the public to give "comfort" to the policy regarding the probable technical isolation of the agency (as, for example, with the institutional proposal of periodic reporting to Congress), (ii) interaction with other government agencies in cases involving issues related to regulated sectors of the economy (with non-binding consultations as in the case of economic concentration operations), and/or (iii) "debureaucratize" or facilitate the selection of the agency members (such as a public and transparent procedure for candidates proposed by the Executive Power with the Congress confirmation) to overcome "the difficulties that the policy has had" to complete a public competition such as those established in laws 25.156 and 27.442.[457] These measures could be a kind of sub-optimal scenario to the solution that we consider most appropriate, but which is necessary to overcome the inertia of recent decades. It is our opinion that the intervention of a Secretary of State for competition and consumer protection within the regulated process before the agency, as was the attempt with Decree 89/2001, allowing it to function as a competition prosecutor's office before the TNC, could be a more effective means for us to allow "institutional dialogue" between the competition agency and the government. However, we understand that some of the mechanisms may be plausible proposals without having to perform major surgery on the current design.[458]

We understand that the separation between the TDC and the SICA and SCE secretariats, even within the National Competition Authority, is also a step in the right direction for splitting the investigation

457. Based on personal knowledge.

458. Based on personal knowledge.

function and the resolution of the antitrust cases. However, having unified in the person of the TDC President the institutional and administrative responsibility of the National Competition Authority (including the Secretariats) will demand a cooperative activity between the TDC and the Secretariats that will be a challenge to face. This could generate some mechanism of financial or operational control of the TDC over the Secretariat to the detriment of separating those roles, as we have pointed out. The action dynamics between these agency areas should prove that the fear of such risks will not take place.

Aspects related to due process and the guarantee of defense in court should be considered in the agency´s internal organization and own rules of procedure. This will be one of the first tasks that the National Competition Authority will have to carry out once it is established. The experience of the CNDC itself at times when it had less political interference and its judicial review give us reasons to be optimistic about this.

Law 27.442 is in line with the guidelines and international best practices, so we know that the establishment of the National Competition Authority is the first step. As regards the other aspects, we have pointed out that they have not been resolved in the way we consider most optimal, and they might be susceptible to adjustment, if necessary, once the agency is up and running.

In this regard, the institutional developments that took place in Argentina during 2025—particularly the partial activation of the National Competition Authority—provide a concrete illustration of the dynamics analyzed throughout this paper and further reinforce the relevance and urgency of the recommendations set forth herein.

Setting up and consolidating the National Competition Authority shall be deem as the main factor in promoting a strong culture of competition among market players and government policy makers so that the legal interest protected by antitrust law, which is to promote the competitiveness of markets and consumer welfare, can be effectively pursued.