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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III:
Industrial Policy and the Promotion of Domestic Industry**

– Contribution from Argentina –

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The attached document from Argentina is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 18-19 September 2018 in Argentina.

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Session III: Industrial Policy and the Promotion of Domestic Industry

– Contribution from Argentina¹ –

1. Introduction

1. The aim of this contribution to the session on industrial policy and anti-trust policy is to summarise some of the areas where they come into contact and to provide examples of where the National Anti-Trust Commission of Argentina (CNDC) has experienced that overlap.
2. The contribution will therefore be structured in three parts. The first will summarise some ideas about the relationship between industrial and anti-trust policy. The second will analyse Argentine anti-trust regulations, with particular reference to possible interactions with various types of industrial policy. Finally, the third part will give an overview of some cases where interactions of these kinds have occurred.

2. Industrial policy and anti-trust policy

3. In line with a definition by the German economist Jörg Meyer-Stamer, industrial policy can be said to consist in state intervention in the economy with the aim of modifying the structure of industry by sector (favouring some industries over others) or by area (favouring some regions over others), or fostering the international competitiveness of domestic industry.² In terms of its objectives, industrial policy can, in turn, be classified into three major types: (“horizontal”) (seeking to foster development without expressly favouring some industries at the expense of others), “modernising” (seeking to accelerate certain spontaneous changes in the structure of industry and mitigate their negative effects) and “redistributive” (seeking to redistribute income between sectors and regions as a means of forcing or expediting a structural change).
4. Anti-trust policy differs greatly from industrial policy in that it is generally neutral and shies away from favouring some economic agents over others whether with regard to their place in the economic structure or their geographical location (inside or outside a particular country). By contrast, industrial policy usually makes use of instruments that, by definition, result in some economic agents being favoured and others being disadvantaged. Those instruments include measures to promote technology, public-sector procurement policy, subsidies and tax waivers, and the selective use of tariffs and other restraints on imports.

¹ This contribution was drawn up by Germán Coloma and Esteban Greco in co-operation with Lucía Quesada and Marina Bidart.

² Meyer-Stamer, Jörg: “Modern Industrial Policy or Postmodern Industrial Policies?”; Berlin, Friedrich Ebert Foundation, 2009.

5. As this demonstrates, the objectives of industrial policy often come into conflict with some of the basic objectives of a country's anti-trust policy. This is because some industrial policy measures can reduce competition in certain markets (for example competition from imported products) or encourage the emergence of dominant positions (for example by firms that are subsidised or in receipt of tax breaks). It is, however, uncommon for industrial policies to lead to the emergence of anti-competitive practices in the true sense, although in many cases they do give rise to "less competitive environments" than would have existed in the absence of those policies.

6. By contrast, industrial policy and competition policy can also complement each other in certain circumstances, for example when a punishment for anti-competitive practices increases the competitiveness of the economy (e.g. a punishment given to suppliers of inputs). Moreover, some industrial policies intended to promote the development of small or medium-sized enterprises may also diversify some markets and thus increase competition within them. Something similar may occur with industrial policies that aim to stimulate technological innovation to the extent that they can result in the emergence of more competition in the form of new products.

3. Anti-trust measures and industrial policy in Argentine legislation

7. Argentina has a relatively long history of anti-trust rules dating back to Law 11,210 on controls on speculation and trusts, enacted in 1923. The outstanding example of legislation on this matter at various times is Law 22,262 of 1980 establishing the National Anti-Trust Commission (CNDC). That Law also outlined the chief criteria for determining whether a particular behaviour constituted a punishable anti-competitive practice. Those criteria have essentially remained in place to date following their incorporation into the anti-trust laws approved in 1999 (Law 25,156) and in May 2018 (Law 27,442). Law 25,156 incorporated controls on mergers. The criteria for determining whether an investigated practice should be punished or whether a proposed merger can be authorised in full do not include industrial policy considerations.

8. Article 5 of Law 22,262 included a provision establishing that the definition of anti-competitive practice excluded all "acts and practices that comply with the general or special rules or with administrative measures issued pursuant to those rules". That provision was generally interpreted as applying to cases where a practice that could have been regarded as an infringement of anti-trust law appeared to be specifically authorised under another rule and could therefore be put forward as an argument in cases where industrial policy rules were incompatible in some respect with competition policy. As a result of this interpretation, a more specific industrial policy prevailed over the application of a more general law such as anti-trust law.

9. However, Article 5 of Law 22,262 was repealed in 1995 under Law 24,481 and when Law 25,156 (which replaced Law 22,262) was approved in 1999 it did not include any provision on those lines. On the contrary, Article 1 of Law 25,156 provided that, to the extent that they could be deemed unlawful anticompetitive practices, practices consisting in "securing significant competitive advantages through the infringement ... of other rules", were also punishable; this could be interpreted as the opposite of the situation provided for in Article 5 of Law 22,262. Article 59 of Law 25,156 also repealed "any jurisdiction related to the subject of this Law conferred upon other state bodies or entities".

10. Those provisions remained in place when Law 27,442 was approved: Article 1 of the new anti-trust law retained the wording of Article 1 of Law 25,156, and Article 82 of Law 27,442 is similar to Article 59 of Law 25,156. Additionally, Law 27,442 sets out a series of powers that are reserved to the Anti-Trust Court (provided for in the Law) that allow that Court to carry out activities related to “issuing an opinion on free competition in relation to laws, regulations, circulars and administrative acts” and to “issuing recommendations in favour of competition of a general or sectoral nature concerning patterns of competition in the markets” (Article 28(h) and (i)).³ It also includes a chapter entitled “Regime to promote competition” (Articles 74 to 78) laying down a series of powers, most of which lie with the National Trade Secretariat, and concern programmes to improve competition conditions, indicators for the effects of competition in the markets, administrative resolutions that may affect the competition regime, and statistics on free competition.

11. The express powers of the anti-trust authorities as set out in Law 27,442 do not imply that they have any kind of veto over the rules of industrial policy based on competition considerations. Perhaps the sole exception in that regard is the power concerning the application of Law 26,522 (Law on audio-visual communications services) which in Article 30 lays the foundations for a policy to allow certain not-for-profit public service providers (chiefly electronic and telephony cooperatives) to provide audio-visual services such as cable television or broadband Internet. Pursuant to that policy, however, it may so arise that the business in question takes advantage of its position as a provider of public services to exercise market power as a provider of audio-visual services, and that possibility would also be detrimental to competition in a given relevant geographical market. Under the system set out in Law 26,522, that possibility is to be evaluated by the anti-trust authority provided that an objection is lodged by a pre-existing audio-visual services provider who suffers harm. That objection is analysed by the CNDC who must also give an opinion on the potential damage to competition that may occur in each specific case.⁴

12. In short, the Anti-Trust Law does not expressly state that the considerations or objectives of industrial policy should form part of the grounds of decisions either in investigations into anti-competitive practices or in the evaluation of the effects on competition of mergers. However, some interaction between industrial policy and anti-trust policy has been apparent in certain individual cases involving anti-competitive practices or mergers, especially in contexts where decisions were potentially influenced by other public policy objectives. We will refer to some of these cases by way of illustration in the next section of this paper.

³ These provisions are similar in rigour to others that were included in Article 24 of Law 25,156.

⁴ There is already a fairly large body of case-law in that regard (just over 60 files at 30 June 2018) in which the CNDC has issued opinions in this type of case. Its opinion has been favourable in all cases to the extent that it has found that the public services cooperatives were able to play a useful role in favour of competition in various local audio-visual services markets; nonetheless, it has made recommendations concerning the separation of businesses and other behavioural conditions to prevent exclusionary practices.

4. Cases involving anti-trust policy and industrial policy

13. Although principles of industrial policy cannot now be included in cases to which anti-trust law applies, pursuant to Law 27,442 which establishes an independent authority to that end, we will describe a few cases that illustrate the discussion in this paper.

14. One resolved case involving considerations associated with industrial policy was the merger involving the acquisition of the company Pérez Companc SA (Pecom) by the Brazilian company Petrobras.⁵ The transaction, in which the leading Brazilian oil company acquired a major Argentine company, had an impact on various oil, gas and power-related markets. In relation to power specifically, Pecom controlled the company that held the monopoly concession for a particular part of the power transmission backbone in Argentina (Transener SA), and that was subject to specific sectoral regulations. As Petrobras had no previous share in this market, the CNDC took the view that, in that respect, the transaction was merely a conglomerate merger and was inherently incapable of adversely affecting competition or the general economic interest.

15. When the Petrobras/Pecom merger was finally authorised by the Secretary for Competition, Deregulation and Anti-Trust Measures, one of the considerations in that decision concerned industrial policy: the decision implied the acceptance of a commitment made by Petrobras in which Petrobras would relinquish its shareholding in Transener. That commitment was probably related to the fact that, while the CNDC was considering the proposed merger, certain economic agents had presented arguments (unrelated to anti-trust considerations) raising the potential disadvantage of a Brazilian company having control of a significant share of the backbone power grid of the Argentine Republic.

16. Another merger that was finalised with an “industrial” condition (a condition that was inconsistent with anti-trust criteria) involved the acquisition of the company Esso Petrolera Argentina SRL by Bidas Corporation.⁶ In contrast to the Petrobras/Pecom case, the acquirer here was predominantly locally owned and the acquired company was the subsidiary of a North American business. The merger was essentially vertical given that Bidas was part of a group whose chief activity was oil and gas exploration and exploitation – in Argentina, Esso was involved in oil refining and the subsequent marketing of oil-derived fuels.

17. The decision of the Secretary for Domestic Trade approved the merger subject to the condition that Bidas had to extend Esso’s refinery in Argentina in order to substantially increase its installed capacity and its production of naphtha and diesel.

18. Although the Petrobras and Bidas cases involved situations in which the anti-trust authority reflected industrial policy-related considerations, there have also been cases where the CNDC has intervened in cases under consideration by other bodies resulting in decisions in which industrial policy-related measures took into account anti-trust aspects. This amounts to a change in approach, and it began to occur in 2016.

⁵ Petrobras/Pecom; Decision 62/2003 of the Secretariat of Competition, Deregulation and Consumer Protection.

⁶ Bidas/Esso; Decision 82/2012 of the Secretariat of Domestic Trade.

19. One case of this kind occurred in an investigation involving the market in load cells for weighing scales which sought to impose anti-dumping measures on Chinese imports of these products.⁷ Since those imports represented a very significant percentage of the supply of load cells sold in Argentina and local production was virtually monopolised by one company (Flexar SRL), the CNDC advised that the anti-dumping measure should be rejected on the grounds that it would result in a drastic fall in supply and an increase in the price of load cells (which would prejudice not only consumers but also local manufacturers of scales). This argument was taken on board by the Minister for Production of Argentina whose decision ultimately did not include the imposition of any kind of anti-dumping duty on the imports in question.

⁷ Flexar SRL on Dumping; Ministry of Production Decision 551/2016.