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Advantages and Disadvantages of Competition Welfare Standards – Note by Argentina

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This document reproduces a written contribution from Argentina submitted for Item 6 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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1. Notably, this roundtable proposes to discuss the welfare standards applied across jurisdictions without assuming that this is unavoidably the consumer welfare standard typically associated with competition policy. This reflects the fact that the review of this notion has been ongoing for some time and that the discussion is already mature in the spheres that bring together competition authorities. Unlike the debates held in academic circles, agencies cannot escape the knowledge and experience that comes from enforcement, which brings an additional dimension to the discussion on this type of criteria, which has to do with what is effectively verifiable, assessable, probable with the evidence that is gathered throughout the cases processed. In this sense, various standards are inevitably applied in different jurisdictions.

2. Ultimately, the objective of the defence of competition regulations and that of the authorities that implement them is not to preserve competition *per se*. What underlies the idea of more competitive markets is the assumption that greater competition increases the overall welfare of society. To question the welfare standard, then, is to reflect on the objectives of competition policy, which implies understanding its scope. These objectives may be limited to lower prices, higher quality products, and greater innovation, or they may include goals that rarely appear as a direct consequence of greater competition or are associated with competition advocacy, which may have to do, for example, with maintaining employment levels or increasing exports.

3. In Argentina, the interest protected by competition law is the so-called General Economic Interest (IEG, for its acronym in Spanish). Indeed, Act No. 27.442 on Defence of Competition (LDC, for its acronym in Spanish) establishes in Section 1 the following:

*Agreements between competitors, economic concentrations, acts or conducts, in any form, manifested, related to the production and exchange of goods or services, that have the purpose or effect of limiting, restricting, falsifying or distorting competition or market access or that constitute abuse of a dominant position in a market, in a way that may result in damage to the **general economic interest**, are prohibited. Those who carry out such acts or engage in such conduct shall be subject to the penalties provided for in this Act without prejudice to any other liabilities that may arise from such actions or behaviour.*

4. To reflect on the definition of the IEG and its scope concerning competition policy objectives, this note is structured as follows. The first section provides a brief overview of Argentine competition law and introduces the concept of IEG to the legal body of rules protecting competition in the country. The second part examines what kind of welfare standards the IEG has been associated with and the interpretation that competition authority and experts have made of its definition and scope since its institution in 1980 as the interest protected by the LDC. The third section considers the interpretation that the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) has made more recently of the notion of IEG and how this has contributed to broadening the objectives of competition policy. To explore the new scope of the concept, the "Dow" case is analysed, which opens a new page in the jurisprudence on the subject. The fourth part examines a new provision of the recently adopted merger control regulation dedicated to assessing if a transaction results on benefits to the IEG. To conclude, the fifth section weighs the advantages and disadvantages of the IEG as a welfare standard for competition policy in Argentina.

1. 100 Years of Argentine Competition Law and the Introduction of the IEG

5. Argentina passed its first competition law, Act No. 11.210, in 1923, which will be a century old in August this year. This legislation and the following one, Act No. 12.906, enacted in 1947, were inspired by the US Sherman Act. From 1980 onwards, a second body of competition rules was passed, inspired by European Community Law which, unlike the previous acts, focused on avoiding anti-competitive distortions in markets.

6. The legislation that established Argentina's first modern antitrust regulatory system was Act No. 22.262 on Defence of Competition. First, because it created the enforcement authority, the CNDC, an agency that was initially in charge of investigating complaints of alleged anti-competitive conduct. Secondly, because in abandoning the model inspired by US law, the new regulation left aside the criminal prosecution of monopoly and adopted the prosecution of practices that distort competition and the abuse of dominant position as a guiding criterion. Monopoly power was no longer required for a behaviour to be distortive of competition; market power was sufficient. The concept of IEG was introduced by this legislation, and its affectation was established in Section 1—in an early version of the first section corresponding to the current LDC quoted in the introduction—as a necessary condition for the conduct to be punishable under the provisions of the regulation.

7. Act No. 25.156, passed in August 1999, was the first comprehensive antitrust regulation with a clear and precise definition of its object and the administrative procedures contained therein, as it incorporated the control of economic concentrations as a specific procedure. The IEG was retained as the protected interest, with its listing in the first section, as in the previous Act, playing a significant role, with its harm appearing as a prerequisite for identifying the acts forbidden by the legislation. In this case, the IEG was also mentioned in the chapter dedicated to merger control, as Section 7 stated: "*Economic concentrations whose object or effect is or may be to diminish, restrict or distort competition, in such a way that harm general economic interest, are prohibited*".

8. Finally, the legislative process culminated with the enactment of Act No. 27.442—the LDC—in 2018. This regulation improved the competition regime in many aspects. Still, if we should mention some issues concerning the IEG, it should be considered that the law began to distinguish between two groups of anti-competitive practices. The first, as established in Section 2, comprises conducts that are presumed to affect the IEG by being *absolutely restrictive of competition*, which include those anti-competitive practices known as *hard-core cartels*. The second group is made up of those conducts that are anti-competitive to the extent that they meet the hypothesis of Section 1, that is, practices "*that have the object or effect of limiting, restricting, falsifying or distorting competition or access to the market or that constitute an abuse of a dominant position in a market, in a way that may be detrimental to the general economic interest*".

9. In line with this definition, Section 29 of Act No. 27.442 provides that the competition authority may issue permits for the execution of contracts, agreements or arrangements amongst competitors that may contemplate conducts included in Section 2 of the LDC, provided that the authority finds grounds to argue that such practices do not constitute harm to the IEG. In this sense, although the LDC has a harsher interpretation of *hard-core cartels* (price fixing, restricting output, dividing, or sharing markets and submitting collusive tenders), regarding them as absolutely restrictive practices, it also gives the authority the possibility to authorise certain agreements between competitors, when evidence that the IEG will not be harmed—or even will be benefited—is conclusive.

10. Although the body of antitrust law, which began in 1980 and developed until the current LDC, incorporates the concept of IEG as a standard to distinguish what constitutes a prohibited and punishable act under the law, none of the three cited regulations establishes

a definition of this notion and a delimitation of its scope, to delineate the objectives of competition policy in the legislation that structures it. Nor is this explicit in the decrees that regulate these norms. As a result, the IEG has been and continues to be a source of debate. The meaning of the dimensions it embraces has evolved, based on jurisprudence derived from CNDC judgments and court opinions related to cases handled by the authority.

2. The Scope of the IEG and the Objectives of the Competition Policy

11. When the IEG was adopted as the LDC's protected interest in 1980, the CNDC gave a broad interpretation of the idea in its decisions, linking it with the common good of society and the economic benefit of the country as a whole. This interpretation could be considered closer to a citizen welfare standard, even incorporating public interest considerations. In this sense, the scope of the IEG reflected a competition policy following more general economic policy measures that pursued various objectives, including, among others, maintaining employment in a specific sector or promoting foreign exchange earnings from exports.

12. An example of this criterion can be seen in an archival decision that the CNDC issued in 1992 when alleged anti-competitive conduct in which Argentina's largest oil and gas company, Yacimientos Petrolíferos Fiscales (YPF), was denounced for entering into a contract with the firms Great Lakes Carbon Corporation (GLCC) and Copetro, for the purchase and sale of residual coke. The agreement contained a clause that allegedly favoured the firm GLCC to acquire coke outside the contract, matching the price of the best bidder. In that opinion, the CNDC dismissed the case because it did not find that the agreement was detrimental to the IEG:

From an economic analysis perspective, the general economic interest is equivalent to the utility that the community receives from the conduct under analysis. And, to speak of foreign exchange savings and other benefits such as employment of Argentine labour, supply of inputs, etc., without having neglected the supply of traditional local buyers through a contract that assured YPF the location of an important volume of residual oil coal in the domestic market, with productive balances destined for export, which has also made possible the self-supply and export of calcined coke related to this fact with more rational, useful and profitable use of resources, is to speak consequently of a benefit received by the community and not of damage to the general economic interest.

13. By the end of the 1990s, this wide interpretation of the concept of IEG was changed to a narrower one, assimilated with a total welfare criterion. In a working paper called "Brief Analysis of the Argentine Defence of Competition Act", published in 1997, the CNDC examines the concept of IEG. After indicating that, in the context of Act No. 22.262, "it is a deliberately vague concept that is difficult to apply from a legal point of view", it tends to identify the IEG with "the total surplus of economic agents", for which it breaks down the analysis into an assessment of consumer surplus and producer surplus. It also notes that the proposed identification cannot be total, as it omits to weight the welfare of each economic agent, which is necessary to arrive to a *welfare function* or a *total welfare standard*, which, according to this document, could give results comparable to the IEG.

14. This type of interpretation has also been present in opinions issued by the CNDC. For example, in a 2010 decision, the IEG is identified with "the interest of the community and not that of certain economic agents", considering that the competition authority does not debate conflicting interests between parties but rather protects "a public interest that is not susceptible to appropriation by private parties". In the same decision, it is also stated

that the IEG refers to *"the expectations or rights of economic content of a multiplicity or plurality of persons, which are those that constitute the consumer sector"*. In other words, the IEG oscillates between a narrower interpretation of consumer welfare and a broader one closer to the total welfare of society or citizens.

15. More recently, the CNDC also addressed the concept of IEG in the “Guidelines for the Control of Economic Concentrations”, published in 2018. In the introduction of that document, it is stated that a concentration harms IEG when:

(...) it generates or strengthens sufficient market power to restrict supply and raise the price of the good being traded. All units of a good consumed in a competitive market economy will generate a net positive value. Society values those units consumed more than it costs to produce them; otherwise, the goods would not be consumed since the price consumers would be willing to pay for them (which reflects the valuation consumers place on the good) would be lower than the price producers would demand (which, in a competitive environment, reflects the cost of producing the good). Thus, when the supply of a good is restricted through market power, units that previously generated positive net social value are no longer consumed, and society as a whole is harmed.

16. This position also brings the concept of IEG closer to the notion of the consumer welfare standard or, at most, to a total welfare standard, which in addition to considering consumer welfare, also considers producer welfare. The competition policy objectives underlying this interpretation of IEG are narrower and have to do mainly with what directly benefits consumers: lower prices, better product quality and greater innovation.

3. New Criteria on the Scope of the IEG

17. In recent years, the CNDC has begun a process of redefining the notion of IEG, as it engaged in the debate regarding the goals of competition policy. It could be argued that the notion of IEG that only relates to economic efficiency and is assimilated to consumer welfare or the total welfare of economic agents is a restrictive standard, which ignores other critical elements that should be considered when assessing a potential harm to IEG from a merger or conduct, even to consider whether there is indeed a harm or, by incorporating other factors in the weighing of the effects, a benefit to IEG.

18. In this regard, the authority has considered what other effects deriving from implementing a merger or the commission of a conduct could be considered when assessing the impact on the IEG. The elements considered have been based on the understanding that the concept of IEG cannot be constructed in a legal vacuum but must be based on the principles and interpretations arising from legal rules in force in Argentine law. Governmental agencies, including the competition authority, should apply a concept of IEG that is under the criteria provided by the country's legislative system, which is shaped by assessments of which economic goals and interests deserve the protection of the different public authorities. Laws such as those on industrial promotion, foreign investment, tenders, and financial and tax legislation, in general, involve an assessment, albeit broad and flexible, of the economic interests to be protected by the legal system.

19. Based on this criterion, an assessment of the impact of the IEG, in addition to consumer welfare, could incorporate new dimensions by considering the effects of an economic concentration operation or conduct on, for example, productivity —both in the sector directly affected or in others linked to it—; or the technical level or the diffusion of know-how in the productive system; or the geographical distribution of production and

population; or international trade and the earning of foreign currency through exports; and employment levels.

20. One of the opportunities that the CNDC had to establish this new criterion concerning the IEG was in the opinion issued in the context of an investigation initiated ex officio, based on the declaration of the company Dow, which stated its intention to leave the country and close its production plant in Puerto General San Martín, located in the province of Santa Fe. This plant produces mainly polyoxy propylene glycol and glycol ethers, critical inputs for some of Argentina's strategic industries, such as the automotive, mattress and household appliance industries.

21. The CNDC assessed the incidence and possible impact of this decision on the IEG, considering that the company was the only producer of polyoxy propylene glycol and could supply almost 100% of the apparent national consumption. The inputs produced in that plant were critical since the company had a preponderance in the production and supply of the product in Argentina and at a regional level within the Southern Common Market (Mercosur, for its acronym in Spanish).

22. In this context, the CNDC considered that an interruption of activities in the production unit could constitute a supply restriction to a more competitive alleged scenario in which the facilities in question were to be acquired by another competing firm, guaranteeing the supply of the input produced in the country. On the other hand, it was assessed that, from the point of view of national production, the dismantling of an operating plant would result in a reduction of the country's production capacities, the loss of jobs and would harm the sector's foreign exchange balance.

23. In its decision, the CNDC examined the effects that shutting down the plant would have on the IEG, considering its constituent elements productivity, technical level, the geographical distribution of domestic production, international trade, employment, and consumer welfare. It was also assumed that the concept of IEG does not have a unique and invariable content and that better working conditions, a healthier environment, better education, lower unemployment, and better income distribution are all elements that contribute to the well-being of the population and its economic interest. Based on the evidence gathered, the CNDC understood that, by eliminating these assets, Dow would have strengthened its market power from its plant in Brazil, creating an effect on the IEG that would become irremediable.

24. In this context, an injunction was ordered so that the company would not alter or modify the plant's productive assets—whose closure had been announced—unless the action taken was based on its maintenance, repair, or improvement, and until the case's merits were resolved.

4. Benefits of the Transaction to the IEG According to the New Merger Regulation

25. On May 16, 2023, the Secretariat of Commerce of the Ministry of Economy passed the new "Regulation for the Notification of Economic Concentration Operations". The regulation establishes a new guideline for the notification of mergers and acquisitions, which includes the redesign of the forms to be completed by the notifying parties to comply with the information requirements needed by the CNDC for the analysis of each case.

26. The regulation provides for a new section of Form F2—which is required in every phase 2 analysis—that is dedicated to assessing whether the transaction results in any benefit to the IEG that offsets the damage it entails. This implies a reinterpretation of the

former "efficiency gains" section, as it considers, not only a quantification of such gains but also the weighing of the effects of the transaction on a wide range of elements.

27. Indeed, the form provides for the parties to indicate the benefits that the transaction could have on aggregate variables such as employment generation, income, import substitution, investments, environmental care, and gender policies, among others. It also requires the identification of parameters, measurements and/or proportions that allow determining the fulfilment of such benefits and their sustainability over time.

28. The regulation, which will go into effect on July 5 of this year, is the first directive issued by the CNDC that formalises a broad interpretation of the IEG. This is significant because it offers certainty regarding the parameters of the welfare standard and clarity regarding how to quantify the damage (or benefit) caused over the IEG.

5. Concluding Remarks

29. As we have explored throughout this note, the interest protected by the LDC in Argentina is the IEG, the welfare standard whose harm (or benefit) determines to what extent a conduct or economic concentration that reduces competition in one or several markets is contrary to the law.

30. As mentioned above, neither the LDC nor the decree that regulates the rule defines this standard. In this sense, it is a legal notion that, in principle, could be abstract and diffuse. However, its inclusion in the law since 1980 has ensured that more than 40 years of jurisprudence have delineated its scope. Although its interpretation has been modified over the decades, the changes have not been abrupt or capricious: from an early stage closer to a total or citizen welfare standard to a long period when IEG was associated with the consumer welfare standard, to the recent return to a broader vision that includes attributes related to labour markets, foreign trade, income distribution, and other factors.

31. The IEG, then, is a flexible standard that adapts to objectives that are less direct in their univocal affection to the consumer and more focused on enhancing society's general welfare, aligning the LDC with this fundamental purpose. It is not unique to the IEG, however, as other standards taken into account also acknowledge some degree of malleability.

32. Although the elements that may comprise the IEG and, therefore, may underlie the objectives of competition policy arise from and are in line with other regulations in Argentine law, the CNDC understands that it is a complex notion that includes a variety of factors. The introduction of a section dedicated to the assessment of the benefits to the IEG in the new regulation for the notification of economic concentration operations is part of the authority's efforts to produce guidelines that allow for greater predictability in understanding the scope of the welfare standard and enhance the implementation of a criterion that comprises the IEG as a complete standard, in harmony with other policies focused on improving the welfare of society.