

INTERNATIONAL COMPETITION LAW SERIES

# Merger Control Regimes in Emerging Economies

A Case Study on Brazil and Argentina

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Marco Botta



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Law & Business

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*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspublishers.com](mailto:customer.service@aspublishers.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-3402-8

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Printed in Great Britain.

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**International Competition Law Series**

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VOLUME 46

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Editor-in-Chief

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Visiting Fellow at the Centre of European Law at King's College,  
London

*The titles published in this series are listed at the end of this volume.*

## About the Author

In 2004, Marco Botta\* received a Bachelor's Degree in International and Diplomatic Sciences from the Faculty of Political Sciences of the University of Turin (Italy). In 2006, he obtained an LL.M. in European Business Law from the Faculty of Law of Leiden University (The Netherlands). In March 2010, he defended his PhD thesis in the Law Department of the European University Institute, Florence (Italy).

During his studies, Marco Botta developed a number of different research interests, from international relations to EU law. In particular, his current research interest concerns the development of competition law in the emerging economies, a topic on which he has published a number of articles in academic journals. His doctoral thesis concerns the systems of merger control in the emerging economies, taking Brazil and Argentina as cases study. In order to conduct research for his PhD thesis, between April and July 2008, Marco Botta was a visiting scholar at the Universidad San Andrés in Buenos Aires (Argentina).

During his studies, Marco Botta had internship experiences in the European Commission and in the Italian Diplomatic Mission to the OSCE in Vienna (Austria). In addition, during the last years he has collaborated with the legal database Caselex in the area of Italian and EU competition law. Finally, between April and July 2010 he taught the seminar classes of the course of substantive EU Law at Utrecht University (The Netherlands).

At the moment, Marco Botta is a research assistant in the Florence School of Regulation of the Robert Schuman Centre for Advanced Studies, Florence (Italy). Besides conducting research, he coordinates the e-learning course provided to the officers of the national telecom regulatory authorities concerning the EU legislation in the telecom and media sectors.

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## Preface

The book discusses the development of competition law in the emerging economies. In particular, the research focuses on the systems of merger control, taking Brazil and Argentina as case study.

The relevance of the book is linked with the growing number of competition law jurisdictions in the world, especially in the emerging economies. Nevertheless, the literature on competition law in the emerging economies is still quite scarce. The literature still focuses mainly on the EU and the US competition law systems. The latter are usually the examples to which the emerging economies usually refer when they draft their competition law, and when they start to enforce it. However, the emerging economies are usually characterized by a number of peculiarities (e.g., lack of functioning formal and informal institutions in the country; a market structure which is usually more concentrated for the majority of the relevant markets, due to the lower internal demand) which deserve a deeper empirical analysis of these problems. A case study approach is the most suitable method to address the specific issues that characterize the emerging economies.

Brazil and Argentina have been selected as case study due to the fact that they have an enforcement record of a system of merger control of ten and fifteen years respectively. However, during the last decade the Brazilian and the Argentinian systems of merger control have developed in opposite directions: while the Brazilian model of competition law is today regarded as a successful example for other emerging economies, in Argentina the enforcement of competition law has been subject to a growing politicization during the last years. Therefore, these countries have been selected as case studies to analyse which factors may either favour or hamper the development of competition law in an emerging economy. In addition, the number of cross-border concentrations involving Brazil and Argentina has recently increased, due to the strong trade links that these countries

have established within Mercosur. These are transactions which often affect the merger control jurisdictions of the emerging economies. This is the reason why the fourth chapter of the book focuses on the analysis of the 'multi-jurisdictional mergers' in these countries. Finally, the beginning in May 2010 of a new round of negotiations between the European Union and Mercosur to conclude a free trade area agreement calls for a deep analysis of the competition law systems of the two main Mercosur Member States. The free trade agreement is expected to include competition law provisions, and it is also expected to revitalize the possibility of introducing regional competition law rules within Mercosur.

The book is based on the analysis of the Brazilian and Argentinian legislations in the field of competition law, as well as the main merger decisions adopted by the competition authorities and the judgments held by the courts of these countries. At the moment of writing, the text of a new competition law is pending in the Brazilian Senate; it is unclear when the new draft law will enter into force. However, the book contains an analysis both of the system of the competition law which is currently enforced in Brazil, and an analysis of the main innovations brought by the new draft bill. In addition, the analysis is based on the interviews that the author has conducted between April and July 2008 in Buenos Aires, Brasília and São Paulo with competition lawyers and officers of the competition authorities of these countries. Therefore, even though the book is based on a legal analysis, it also follows an inter-disciplinary method, which takes into consideration the economic and political aspects which may favour or hamper the development of competition law in an emerging economy.

The core subjects discussed in the book concern the institutional issues undermining the enforcement of competition law in the emerging economies, the features that a system of merger control in these countries should have and the problems faced by the National Competition Authorities (NCAs) of the emerging economies when they have to review multi-jurisdictional concentrations. In the final chapter of the book the findings concerning Brazil and Argentina are discussed against the background of the literature concerning the topic of competition law in the emerging economies. The conclusions of the book identify a number of policy proposals for improving the enforcement record of the 'formal' institutions in the emerging economies (e.g., the NCA and the judiciary) in order to increase their credibility vis-a-vis the public opinion, business community and other branches of the State administration, and thus improving the competition culture in the country.



## Acknowledgements

The book is the result of three years of research in the Law Department of the European University Institute (EUI). The book, in fact, represents the publication of my doctoral thesis, which was defended at the EUI on 5 March 2010.

The list of people who supported me during these years, and who enabled me to complete this work in a reasonable period of time, is quite long. First of all, I would like to thank my wife, Rozeta, to whom the book is dedicated: from the beginning she had faith in my ability to be accepted as a PhD candidate at the EUI, and to complete this research. I am also thankful to her for tolerating my long absence from Europe during my stay in Brazil and Argentina, and for having carefully read every single page of my book.

I would also like to thank my thesis supervisor, Prof. Heike Schweitzer. I am grateful to her for having encouraged me to explore an interesting development of competition law in the twenty-first century, namely the spreading of competition law to emerging economies. I have been impressed by the great amount of time that she dedicated to her role of thesis supervisor. She always provided me with very detailed comments on the work done, in a short period of time. Beside my supervisor, I would also like to thank Prof. Giuliano Amato, Prof. Frédéric Jenny and Juan Antonio Rivièrre y Matí, for their useful comments as members of the jury of my PhD defence. At the EUI, I would also like to thank Pablo for his critical comments on my work on Argentinian competition law, Edurne for her interesting classes of Spanish language, and Angela for the spelling and grammar correction of this work. My gratitude also extends to Prof. Christophe Hillion and Prof. Christa Tobler, who supported me in applying for the PhD at the EUI during my LL.M. at the University of Leiden.

This empirical research would have not been possible without the information and impressions gathered from the lawyers and the economists I met during my stay in Brazil and Argentina. In particular, I had several discussions with Julián

## *Acknowledgements*

Peña in Buenos Aires, a practising lawyer well acquainted with the enforcement of competition law in the country, and Prof. Lucas Grosman, academic and former Commissioner of the *Comisión Nacional de Defensa de la Competencia* (CNDC). In Brazil, I received help for my research from Prof. Vincente Bagnoli, Professor at Mackenzie University in São Paulo, and Murillo Lubambo de Melo, current officer of the *Secretaria de Direito Econômico* (SDE).

Last but not least, I am thankful to my parents Mario and Rossella, and my sister Alessandra, who have always supported me during these years of studies. Although they were not fully familiar with the topic of my thesis, they always encouraged me to pursue my academic interest. In addition, I would like to thank Gildo, Mirelle, Celine, Manuel and Dina for having welcomed me in their family during the years spent in Florence.

13 November 2010

A handwritten signature in black ink, appearing to be 'ABA' with a stylized flourish extending from the end.

## List of Abbreviations

ADIMRA:	<i>Asociación de Industriales Metalurgicos de la Republica Argentina</i> (Association of the Metallurgic Manufacturers of the Republic of Argentina)
AGCM:	<i>Autorità Garante della Concorrenza e del Mercato</i> (Italian Competition Authority)
AHPC:	American Home Products Corporations
ALCOA:	Aluminium of America (US aluminium producer)
AMBEV:	<i>Companhia de Bebidas das Américas</i> (Brazilian drinks producer)
ANATEL:	<i>Agência Nacional de Telecomunicações</i> (Brazilian Regulatory Authority for Telecommunications)
ANP:	<i>Agência Nacional do Petróleo</i> (Brazilian Regulatory Authority for Oil)
APRO:	<i>Acordo de Preservação da Reversibilidade da Operação</i> (Agreement to Preserve the Reversibility of the Transaction, concluded by CADE with merging parties)
BACEN:	<i>Banco Central do Brasil</i> (Brazilian Central Bank)
CADE:	<i>Conselho Administrativo de Defesa Econômica</i> (Brazilian Administrative Council of Economic Defence)
CCM:	<i>Comisión de Comercio del Mercosur</i> (Mercosur Trade Commission)
CDC:	<i>Comité de Defensa de la Competencia</i> (Mercosur Committee of the Protection of Competition)
CdS:	<i>Consiglio di Stato</i> (Italian Administrative Supreme Court)
CFC:	<i>centro de formação de condutores</i> (driving school, Brazil)
CFI:	European Court of First Instance

## List of Abbreviations

CMC:	<i>Consejo del Mercado Común</i> (Mercosur Council of the Common Market)
CNDC:	<i>Comisión Nacional de Defensa de la Competencia</i> (Argentinian National Commission for Competition Defence)
CNI:	<i>Confederação Nacional da Indústria</i> (Brazilian National Confederation of Industry)
CT5:	<i>Comité Técnico n.5</i> (Mercosur Technical Committee n.5, which discusses competition law issues)
CVRD:	Companhia Vale do Rio Doce (Brazilian steel producer)
DETRAN:	<i>Departamento de Trânsito</i> (Brazilian State Department of Transportation)
DENATRAN:	<i>Departamento Nacional de Trânsito</i> (Brazilian Federal Department of Transportation)
DG COMP:	Directorate-General of the European Commission for Competition Law
DoJ:	US Department of Justice
DPDE:	<i>Proteção e Defesa Econômica</i> (SDE Department for Protection and Economic Defence)
EBRD:	European Bank for Reconstruction and Development
ECJ:	European Court of Justice
EC:	European Community
ECLAC:	United Nations Economic Commission for Latin America and the Caribbean
EEA:	European Economic Area
EU:	European Union
FCC:	US Federal Communications Commission
FDDE:	<i>Fundo de Defesa de Direitos Difusos</i> (Brazilian Fund for the Defence of Shared Rights)
FDI:	foreign direct investments
FNE:	<i>Fiscalía Nacional Económica</i> (Chilean competition authority)
FPC:	<i>Fórum Permanente de Discussão de Políticas de Concorrência</i> (CADE Permanent Forum for Discussion of Competition Policy)
FTC:	US Federal Trade Commission
GDP:	gross domestic product
GE:	General Electric
HHI:	Herfindahl-Hirschman Index
HSR:	Hart-Scott-Rodino Act
IADB:	Inter-American Development Bank
IBGE:	<i>Instituto Brasileiro de Geographia e Estadística, Economia</i> (Brazilian Institute of Geography, Statistics and Economics)
IBRAC:	<i>Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional</i> (Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade)
ICN:	International Competition Network

IMF:	International Monetary Fund
INDEC:	<i>Instituto Nacional de Estadística y Censos</i> (Argentinian National Institute for Statistics and Census)
IP:	intellectual property
M&A:	merger and acquisition
MERCOSUR:	<i>Mercado Común del Sur</i> (Southern Common Market of Latin American countries)
MES:	minimum efficient scale of production for a firm
MVPD:	multi-channel video programming distribution
NCA:	national competition authority
NIE:	New Institutional Economics
NRA:	national regulatory authority
OECD:	Organization for Economic Cooperation and Development
OJ:	Official Journal of the European Communities
PAC:	<i>Programa de Aceleração do Crescimento</i> (Program of Acceleration of the Economic Development, Brazilian Government)
PPP:	purchasing power parity
ProCADE:	<i>Procuradoria do CADE</i> (CADE Attorney General)
SDE:	<i>Secretaria de Direito Econômico</i> (Brazilian Secretariat of Economic Law)
SEAE:	<i>Secretaria de Acompanhamento Econômico</i> (Brazilian Secretariat for Economic Monitoring)
SLS:	significant lessening of competition test
SSNIP:	small but significant and non-transitory price increase test
STF:	<i>Supremo Tribunal Federal</i> (Brazilian Federal Supreme Court)
STJ:	<i>Superior Tribunal de Justiça</i> (Brazilian Superior Court of Justice)
TAR:	<i>Tribunale Amministrativo Regionale</i> (Italian Regional Administrative Court).
TCD:	<i>Termo de Compromisso de Desempenho</i> (performance commitment negotiated by CADE with merging parties)
TFEU:	Treaty of the Functioning of the European Union (Lisbon Treaty)
TRF:	<i>Tribunal Regional Federal</i> (Brazilian Federal Regional Tribunal)
UK:	United Kingdom
UNCTAD:	United Nations Conference on Trade and Development
USA:	United States of America
USC:	United States Federal Code
USD:	United States Dollar
WB:	World Bank
WTO:	World Trade Organization

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