



The Implementation Gap of Decree 1172 on Access to Information

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Despite the importance of Access to public information for democracy, Argentina does not have a national ruling law on this matter. The only existing regulation at national level is the Decree 1172/03 that only encompasses the Executive National Branch. Ten years after the regulation was passed, the decree is not enforced evenly. In particular public enterprises are not regulated accurately, leaving space to diverse interpretation of the decree towards these entities.

This document presents the results of a research focused on the answers of access to public information requests delivered to 14 public enterprises that represented the 85% of public expenditure on public enterprises in 2012.

Among the main findings of the research 3 stand out: (1) of the 14 selected enterprises, 9 answered the requests and 5 did not answer; (2) of the 9 that answered, 4 sent 10% or less of the information requested; of the remaining, 2 sent 25% of the information and 3 approximately

65%; (3) only 2 enterprises sent copies of their financial balances but not of the requested years. Finally, only 3 enterprises sent information about their staff and their public purchases.

What factors influence on such weak answers? CIPPEC's research allows us to highlight 3 factors. In first place the lack of accuracy of the norm opens the gates to divergent interpretations. Although the Decree 1172/2003 specifically names public enterprises, the diversity of legal types and participation of the State in enterprises, but it doesn't specify which are obliged. Secondly, the regulation is insufficient: there is not an implementation and control mechanism to guarantee the exercise of the right, nor a specific regulation that sets the exceptions of the obligation to inform. Finally the weak answers can also be explained by the lack of commitment of public officials with the principle of access to public information and the predominance of a bureaucratic culture prone to secrecy.

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CIPPEC

Center for the
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Introduction

Access to public information is vital for an aware and informed exercise of citizen rights. This document analyzes the compliance of the Decree 1172/03 that rules access to public information in the National Executive Branch ten years after its approval in relation to 14 public enterprises.

Public enterprises are considered all companies in which the state has more than 10% of stakeholder participation, were nationalized or are controlled by the state. Beyond their legal type by which they were created, what matters is the contribution of the state they, received or receive for their conformation and/or operation and the state control of the enterprise.

Access to public information right in Argentina

Access to public information is a human right recognized in several international conventions, such as the Inter-American Convention of Human Rights and the International Covenant on Civil and Political Rights. It is considered fundamental for citizens to exercise civil and political rights.

The publicity of information promotes transparency of state management, which facilitates the fight against corruption. Transparency seeks to avoid abuses from public officials and encourages accountability¹.

The right to access public information is set in the article 75 subsection 22 of Argentina's National Constitution. This article modified by the 1994 reform introduces several human right conventions to the Argentinean legislation. For example, the Inter-American Conventions of Human Rights in article 13 regulates the right of Access to public information: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds (...)"

Despite the importance of Access to public information, Argentina does not have a national law on this matter. The only existing regulation at national level is the Decree 1172/03 on access to public information that applies only to the executive branch. It obliges "the bodies, entities, enterprises, companies, dependencies and all other entity that works under the jurisdiction

of the National Executive Branch"² to provide public information. The Decree includes all private organizations that receive subsidies or contributions from the national public sector, and all entities that have delegated the provision of any national state public service. The decree also meant a significant progress since it allows any person – real or legal- to request public information without having to demonstrate a legitimate interest³.

Although in 2003 it meant a progress, today the decree results insufficient and incomplete for several reasons. In the first place, since it is a decree of the National Executive Branch it does not apply to the Judiciary or the Legislative Branches.

Secondly the decree does not establish a clear system of exceptions. The exceptions must be as detailed and clear as possible in order to avoid a discretionary use of them by the public official involved in the implementation. Thirdly, it does not establish an autonomous body in charge of implementation and control of the Decree.

We can also find some contextual problems. Argentina suffers from deficiencies in transparency issues, the state bodies tend to be reluctant in giving information, and web sites do not have all the data necessary to guarantee full access to information.

In Argentina access to public information right was widely recognized by the judicial branch. In the ruling "Asociación Derechos Civiles c/ PAMI (dto.1172/03) s/amparo Ley 16.986" the National Supreme Court of Justice highlights the importance of this right and concludes: "The central foundation of access to information in power of the State consists in the right to every person to know the way in which their rulers and public officials perform their tasks (...)"

Why public enterprises?

The definition adopted for this research is based on the characterization done by the Organization for Economic Co-operation and Development (OECD) on enterprises belonging to the state. Public companies are considered to be the ones with over 10% state ownership or have been expropriated, nationalized or are controlled by the state. Beyond its legal type, what matters is the state participation in them at the time of its establishment or the operation. The OECD also considers enterprises that have a different legal type to the public administration and have a commercial function. (OECD, 2011)

¹ "Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities" Inter-American Court of Human Rights Case of Claude-Reyes et al. v. Chile Judgment of September 19, 2006 Series C No. 151 Paragraph 86 and 87

² Article 2 of the 1172/2003 Decree

³ National Supreme Court of Justice "Asociación Derechos Civiles c/EN - PAMI - (dto.1172/03) s/amparo Ley 16.986, december 4 2012.

According to the OECD, public enterprises are often the ones that provide public services and belong to the infrastructure industry such as energy, transportation and telecommunication. Their performance is important not only for the entire population but also for the commercial sector. The good governance of these enterprises requires special attention to seek a positive contribution to the economic well being and competitive development of the country (OECD, 2011). According to a research done by the same organization during 2008-2009, employment in public enterprises in state members of the OECD exceeded 6 million people, and the value of all public enterprises combined added up to almost US\$ 2 billion (OECD, 2011).

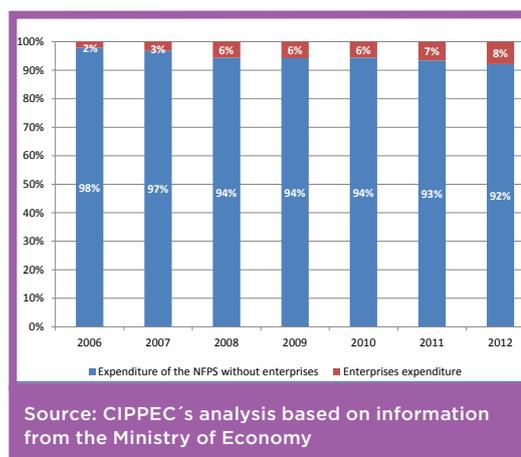
Evolution of public expenditure in public enterprises in Argentina

The economic matrix in Argentina has changed substantially in the last 20 years. During the 90', the state got rid of a great number of public enterprises, particularly those that provided public services where handed over, to become private owned.

The process of privatization started in 1989, with the approval of the national law 23.696 that declared many public enterprises "subject to privatization". According to numbers of the National Ministry of Economics, in less than six years 67 were privatized, licensed or dissolved - including Aerolíneas Argentinas, YPF and Obras Sanitarias de la Nación - today named AYSA-

The 2001 crisis generated severe damages to social political and economical stability and after 2003, a new economic and political process started in Argentina. Public policies changed substantially after 2003. Public enterprises are still today going through a process that implies the re nationalization of enterprises that had been privatized during the 1990's and the creation of new ones. This impacts in different levels of the national state; particularly, in the increase of budget allocated to public enterprises. **Graph 1** shows the increase of national expenditure in public enterprises in relation with the total expenditure of the non financial public sector.

Graph 1.
Evolution of the expenditure in public enterprises in relation with the expenses of the non financial public sector, in percentages (2006-2012)



Why is access to public information important?

It is essential for democratic life that citizens can accede to information about the running of the state. Citizens are entitled to know any relevant data to contribute with social control of public expenditure. It is important to understand the impact of public enterprises in the national economy and promote high levels of accountability.

In Argentina, it is common that the State plays both the part of administrator and the controller of the enterprises, which emphasizes the need of making civil society control stronger. Through the strengthening of systems of control and a major transparency it is possible to limit the discretion of public officials. A wider access to public information on public enterprises is vital to allow civil society, mass media and all the political system exercise a real control.

Methodology of the investigation

Between June and July 2013, CIPPEC filed an access to public information requests to a sample of 14 public enterprises. The request inquired on the following information:

- **Company norms and regulations:** a) creation of the enterprise, b) appointment of authorities, c) organization chart, d) administrative and accounting procedures handbooks.
- **Management and accountable reports for the last three years** a) balances, b) audit reports, c) reports sent to the AGN (National General Auditing Office), d) details of public purchases, e) percentage

of state participation on the enterprise, g) sworn statements of the goods of the directors of the enterprise.

- **Resources** a) personnel information: staff, occupation, functions, remuneration, b) amounts of transfers from national public state.

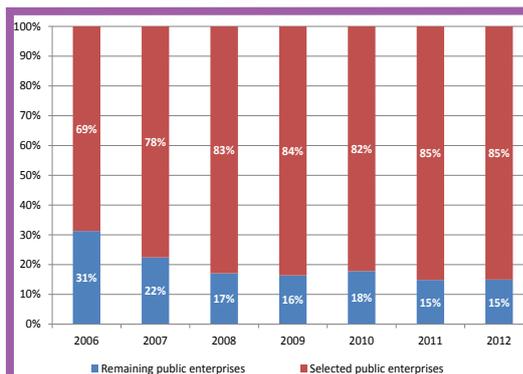
The sample

In Argentina the national state has active participation in more than 30 enterprises. This research focus on 14 enterprises that represented the 85% of the national budget allocated to public enterprises in 2012.

The public enterprises selected for this study were: ADIFSE, Administración General de Puertos, Aerolíneas Argentinas, ARSAT, AYSA, Corporación Antiguo Puerto Madero, Correo Argentino, Educ.ar, ENARSA, Lotería Nacional, Nucleoeléctrica Argentina, SOFSE, TELAM and YPF. The institutional information of each enterprise -objectives and date of constitution or modification- is detailed in annex 1.

Graph 2 shows the percentage destined to public enterprises and distinguishes between the enterprises selected for this project (that represent the 85% of the national budget allocated to public enterprises) and the remaining enterprises that receive transfers from the Argentinean National State.

Graph 2.
Transfers destined to the selected public enterprises and the remaining public enterprises, in percentage (2006-2012)



Source: CIPPEC’s analysis based on information from the Ministry of Economy

Findings of the research

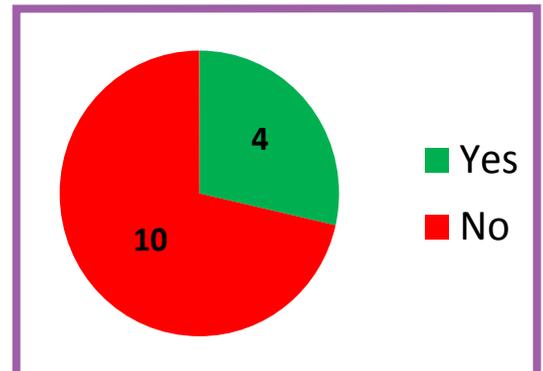
Of the 14 selected public enterprises, 9 answered the access requests and 5 did not answer (Núcleo eléctrica Argentina, Correo Argentino, YPF,

SOFSE and AySA).

From the ones that effectively answered, 4 (ADIFSE, Corporación Antiguo Puerto Madero, Administración General de Puertos y ARSAT) sent 10% or less of the requested information. Of the remaining 5, 2 sent the 25% of the information (Aerolíneas Argentinas y ENAR-SA) and 3 approximately the 65% (Lotería Nacional, TELAM and Educ.ar).

The following graph shows the results reached on the designation of enterprise authorities. Only 4 of 14 enterprises managed to present this information.

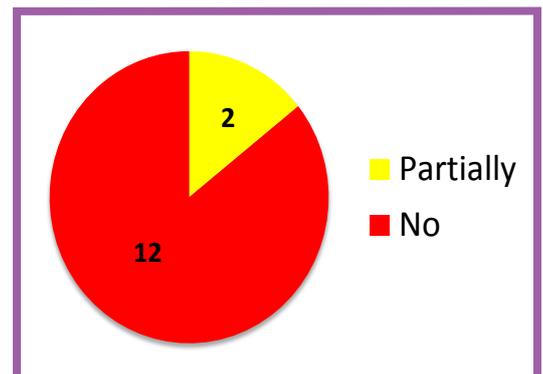
Graph 3.
Amount of answers received about the designation of authorities



Source: CIPPEC

Graph 4 shows the number of answers on financial balances belonging to the enterprises.

Graph 4.
Amount of answers regarding financial balances of the last three years



Source: CIPPEC

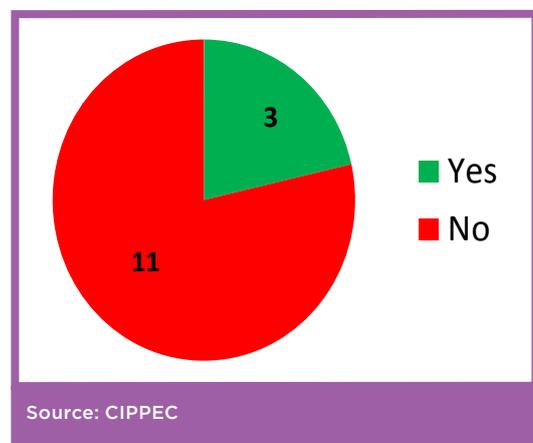
In this case the category marked as “partially” includes those enterprises that sent balances older than three years, but not the last three years.

None of the 14 enterprises sent information on their Directors assets. Although the normative is not clear on the subjects obliged to present sworn statements of the goods, it is necessary that enterprises financed with public funding fulfill the transparency criteria

in the same way as the remaining public sector.

Graph 5 shows the answers on the amount of transfers from the National State. Only three enterprises answered about this issue.

Graph 5.
Answers regarding amount of transfers received from the public sector



The heterogeneity of the answers

As it can be observed from the results, the answers obtained from the access to public information requests filled in by CIPPEC were less than satisfactory. The main arguments to deny the information were: (i) the protection of commercial secrecy; (ii) limited companies with state capitals are outside the orbit of the national public sector, so they are not reached by the decree 1172/2003; (iii) the requested information exceeded the concept of information set in the 1172/2003 decree; (iv) the information is confidential, specially, the one related to procedure handbooks, (v) trade balances of the last three years were not approved, so it was impossible to send information about the financial statements.

The enterprises created as state enterprises were the ones that generally sent the major percentage of information. A possible consequence to that is given by their legal name – State Company- allows easily relating them with the national state and, ergo subjects of the Decree 1172/2003.

On the other hand limited companies with state participation tend to excuse themselves from the compliance of the Decree. This can be interpreted by the fact that they do not consider themselves as part of the national public sector, even when the majority of their funds come from the national public sector.

Conclusions

The implementation gap of the 1172/2003 in relation with the selected public enterprises is big. The answers obtained from the requests have been limited and incomplete. The compliance to the decree has shown to be discretionary from company to company.

The different kind of responsiveness on the requests shows the discretionary application of the 1172/2003 decree in public enterprises. The data supports this conclusion: 35% of the enterprises did not answer the requests; meanwhile approximately half of the companies that answered sent less than the 10% of the requested information.

What factors impact in such weak answers? CIPPEC research allows us to highlight three factors, two of them linked with the implementation gap of the normative. First, the lack of accuracy of the norm opens the gate to divergent interpretations. There is insufficient regulation of this right and the decree does not provide enforcement and control mechanisms to ensure this right, nor a system of exceptions for public enterprises. Finally the weak answers to the requests can also be explained by the lack of commitment of public officials with the principle of access to public information and the predominance of a bureaucratic culture prone to secrecy.

Recommendations to overcome the implementation gap of the decree on access to public information in public enterprises

It is fundamental to advance towards the adoption of actions to guarantee the effective implementation of the Decree 1172/2003 and to promote an active exercise of access to public information right in relation with public enterprises. Here we list some recommendations that will allow reducing the implementation gap:

- Legislate access to public information using international standards as a benchmark.
- Promote the approval of specific normative to rule the scope and exceptions of access to public information produced by public enterprises.
- Create a collegiate implementation

- body to guarantee the right of access to public information, with functional independence and financial autarky, integrated by independent professionals selected by opposition tender, substantiated publically and with preliminary hearings in which the candidates can be subject to objections.
- Create administrative procedures to report to the implementation body:
 - (a) the negative to answer access to public information requests.
 - (b) Incomplete answers
 - (c) the silence of the administration. These procedures must be prompt and efficient. Resolutions should be mandatory for the solicited entity.
 - Create a fine system to be applied by the
 - implementation body on his own or in case of a complaint against public entities that don't comply with the obligations of the Decree 1172/2003.
 - Understand as public any public because of the state participation in them not by its legal type⁴.
 - Raise awareness on the importance on the obligation to inform
 - Create institutional mechanisms and procedures for public officials to answer access to public information requests in an accessible way - preferably digitally and in open data formats-
 - To prevent the duplicity of the requests, it is convenient to publish the information that is requested in the web sites of public enterprises.

⁴ Rulling "Asociación Derechos Civiles c/EN - PAMI - (dto.1172/03) s/amparo Ley 16.986". "State must take into consideration not only public entities but also the private ones that exercise those activities (...). The relevant factor is that it is center in the service that those subjects provide or the functions that they exercise. The amplitude suposs to include as obliged subjects not only the state public bodies, in all in all its branches and levels, local or national, but also to state enterprises, hospitals, private institutions or other structures with state-acting capacity or exercising public functions." (National Supreme Court of Justice, 2012).

Enterprise	Date of creation or expropriation	Mission	Institutional Dependence
Administración de Infraestructuras Ferroviarias Sociedad del Estado (ADIFSE)	Creation: 25/03/2008	It is in charge of developing plans, programs, projects and works in relation to the railway system. Distribute through three areas of action: human development, productive territory integration and infrastructure.	Ministry of interior, Office of transport.
Administración General de Puertos Sociedad del Estado	Creation as State Society 4/09/1987 Intervention for it's dissolution: 26/05/1992	It is the enterprise responsible of the administration and maintenance of the not concessioned areas of the Buenos Aires Port, it also acts as application authority in the terminals operated by privates.	Ministry of interior, Office of transport.
Aerolíneas Argentinas Sociedad Anónima	Creation: 7/12/1950 Conversion to State Society : 09/04/1979 Privatization: 03/01/1990 Declaration of utility and subject to expropriation Expropriation: 22/12/2008	It is Argentinean official airline enterprise.	Not applicable.
AYSA	Creation of Obras Sanitarias Sociedad del Estado: 18/04/1973 Privatization: 5/10/1990 Creation AYSA: 22/03/2006	The objective is the provision of water at national level.	Ministry of Planning.
Correo Argentino Sociedad Anónima	Privatization: 25/03/1997 Cancellation of the concession: 20/11/2003 Creation Correo Argentino: 11/06/2004	Is the state enterprise in charge of the postal service.	Ministry of Planning.
Corporación Antiquo Puerto Madero Sociedad Anónima	Creation: 17/05/2000	It was the enterprise in charge of developing the Puerto Madero Area. Currently, it's objective it's to collaborate in the development of new architectural projects in Argentina and Latin America, to promote the interaction between public and private sector.	Not applicable.
Educ.ar Sociedad del Estado	Creation: 17/05/2000	It is a web site dedicated to the development of new technologies for education and teachers training.	Ministry of Education.
Empresa Argentina de Soluciones Satelitales Sociedad Anónima (ARSAT)	Creation: 27/04/2006	In charge of the strategic roll in the implementation of state policies in the areas of telecommunication, broadcasting, internet, increase the provision of satellite services, broadcasting and telecommunications in the country for commercial, public, private or governance activities.	Ministry of Planning.

ENARSA	Creation: 03/11/2004	It's objective consists in the exploration and exploitation of hydrocarbons, solid, liquids and gaseous, and the transportation and distribution of those and of natural gas.	Ministry of Planning.
Lotería Nacional Sociedad del Estado	Creation: 09/04/1990	It's principal function is to regulate, administrate and exercise the control in the games of chance, as to contribute with the development of society as a whole and generate benefits destined to the promotion and social assistance.	Ministry of Social Development.
Nucleoeléctrica Argentina Sociedad Anónima	Creation: 30/08/1994	It's an enterprise dedicated to the energetic development in Argentina.	Ministry of Planning.
Sociedad Operadora Ferroviaria Sociedad del Estado (SOFSE)	Creation: 25/03/2008	It's objective is to guarantee, maintain and develop the transportation railway system, both passengers and cargo, as to consolidate an efficient public service according to the users needs.	Ministry of interior, Office of transport.
Télam Sociedad del Estado	Creation: 06/12/2002	It's a news agency in charge of transmitting the facts that take part at national, regional and international level. It has a web site that is updated 24 hours.	Chief of cabinet
YPF Sociedad Anónima	Privatization: 13/10/1992 Intervention YPF: 16/04/2012	It is dedicated to the exploration, exploitation, distilling, distribution and sale of petroleum and it's derivate products.	Not applicable.

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Administración de Infraestructuras Ferroviarias Sociedad del Estado <http://www.adifse.com.ar>

Empresa Argentina de Soluciones Satelitales Sociedad Anónima AR-SAT <http://www.arsat.com.ar>

Agua y Saneamientos Argentinos Sociedad Anónima <http://www.aysa.com.ar>

Energía Argentina Sociedad Anónima <http://www.enarsa.com.ar>

Corporación Antiguo Puerto Madero Sociedad Anónima.
<http://www.corporacionpuertomadero.com>

Correo Oficial de la República Argentina Sociedad Anónima <http://www.correoar-gentino.com.ar>

EDUC.AR Sociedad del Estado <http://www.educ.ar>

Lotería Nacional Sociedad del Estado <http://www.loteria-nacional.gov.ar>

Nucleoeléctrica Argentina Sociedad Anónima <http://www.na-sa.com.ar>

Operadora Ferroviaria Sociedad del Estado <http://www.sofse.gob.ar>

Télam Sociedad del Estado <http://www.telam.com.ar>

Yacimientos Petrolíferos Fiscales (YPF) <http://www.ypf.com>

Aerolíneas Argentinas Sociedad Anónima <http://www.aerolineas.com.ar>

National Ministry of Finance <http://www.mecon.gov.ar/>

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This document was produced with the support of the **Center for International Private Enterprise - CIPE**

To quote this document: Elena, S., Pichon Rivière, A., and Ruival, A. (January 2014). The implementation gap of Decree 1172 on Access to information. **Policy Brief / Analysis No. 125**. Buenos Aires: CIPPEC.

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