

Competition law in Argentina: uncertainties beyond the pandemic

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The new competition law 27,442 enacted in Argentina in 2018 paved the way to a refreshed model of competition law in Argentina. The new law promised to create an independent National Competition Authority and the implementation of a suspensory merger control regime, among others. However, the recent change in government and the irruption of the Covid-19 pandemic shifted the plans envisaged when the law was enacted two years ago. The immediate future, hence, has become blurred and uncertain. Meanwhile, local practitioners need to understand, interpret and adapt to the current enforcement policies, to manage their legal advice in the wake of a challenging environment.

In this article, I will briefly analyse the regulatory landscape enacted by means of the competition law 27,442, along with the impact of recent political changes and the pandemic on domestic law enforcement. Finally, I will aim to identify the main challenges that lie ahead in the near future from a practical and institutional perspective.

Challenges before the pandemic: the new Competition Law 27,442

On May 15th, 2018, the new Competition Law 27,442 ("LDC") was enacted in Argentina. The LDC amended several sections of the previous law 25,156. Simply put, it incorporated significant changes to the merger control system, to anticompetitive conduct investigation procedures, and introduced leniency programmes.

It also created the National Competition Authority, a new decentralized and autarkic body within the scope of the Executive Branch (art. 18), formed by the Antitrust Tribunal, the Secretariat of Instruction of Anticompetitive Behaviour and the Secretariat of Economic Concentrations. Pursuant to the LDC, the members of the National Competition Authority would be appointed through a public selection process (art. 20, 21, 22) and approved by the Senate (art. 23).

The possibility of having an autarkic and independent competition authority triggered much expectations in practitioners, who aimed to see an enhancement of the rule of law within the enforcement of Argentine competition law. That said, the previous law 25,156 (1999-2018) contemplated the creation of an autarkic National Antitrust Tribunal (art. 17, Law 25,156). However, the Tribunal was never created throughout those 19 years.

Absent the creation of the National Antitrust Tribunal, such a role was undertaken by a two-tier regulatory body formed by (i) the National Commission for the Defense of Competition - CNDC, a technical body who issues non-binding recommendations and, (ii) the Secretary of Domestic Trade (SCI), who issues the final decision based on the CNDC's non-binding recommendation. This Secretary acts under the orbit of the Ministry of Productive Development, which is part of the National Executive Power.

The importance of the creation of the National Competition Authority under the new LDC cannot be overstated. Apart from the institutional factor of independence mentioned above, the creation of the new Authority would start the clock on the implementation of the long-awaited suspensory merger control regime in Argentina.[1] One year after the effective creation of the National Competition Authority, companies will not be able to close a transaction without obtaining the prior authorization from the National Competition Authority. Hence, in the meantime, the current non-suspensive system remains in place, and parties will be able to notify up to one week after closing the transaction (art. 84, Law 27,442).

Recent political changes and their impact on competition law enforcement

Almost a year ago, on December 10th, 2019, Mr. Alberto Fernández became the new President of Argentina, leaving behind four years of Mauricio Macri's administration. Only four days after the new President resumed his new role, Decree 36/2019 was published in the Argentina Official Gazette. Among other provisions, this Decree instructed Ministers, Secretaries and other authorities to revise, within the term of 6 months, the legality of any personnel selection procedures undertaken by the former administration (art. 4).

As we will see later on in this article, said decree served as the legal platform for the Secretary of Domestic Trade to declare, last month, the nullity of the selection procedure of the members of the National Competition Authority, undertaken under President Macri's administration.

In January 2020, Decree 94/2020 appointed Mr Rodrigo Luchinsky as the new President of the Argentine Competition Commission ("CNDC"). The team of commissioners that worked under President Macri's administration (2015-2019), was also replaced in full.

Enforcement of competition laws during the pandemic

Argentine authorities acting in the wake of Covid-19 have undertaken strong enforcement activities against price gouging. Specifically, they have promoted the application of a three-tier statutory framework to tackle inflation and lack of supplies undermining consumer welfare: the Supply Law 20,680, the Competition law 27,442 and Commercial Loyalty Decree 274/2019. Similar measures have also been adopted in other parts of the world in light of the pandemic (e.g. Canada, United States, Germany, Greece, Italy, France, India, Japan, among others), with different scopes and modalities.[2]

Domestic aggressive price and supply-level controls included a wide variety of products - some linked to public health (e.g. medical supplies, face masks) and others of essential nature (food, hygiene, personal care). These measures were put in place at the early stages of the crisis, as from February 2020 and, in the great majority, were issued by the Secretary of Domestic Trade (Res. SCI 86/2020, 100/2020, among others) acting within the ample powers granted by the Supply Law.

That said, the Executive Power has recently begun to authorize companies to slightly increase the price of certain products (Disposition 13 and 14/2020) or to exclude some of them from the scope of the price controls scheme (Res. SCI 552/2020), due to requests made by companies alleging the lack of essential nature of certain products.

During the pandemic, the SCI also entrusted the CNDC to carry out market investigations (e.g. beef, pharmaceutical, massive consumption, liquid oxygen markets) to detect any violation of competition laws, primarily searching for abuse of dominance and excessive pricing policies.

In March 2020, the SCI requested the CNDC to open an in-depth investigation into the beef market (Art. 7, Res. SCI 103/2020). Furthermore, according to public records, the CNDC would open an investigation of the market for bulk and tube medicinal liquid oxygen, alongside its transportation service, to determine possible breaches of the competition law. In addition, on June 30th, the SCI issued Resolution 202/2020, which applied price and supply-level controls over a product commercialized by the pharma company Biogen Argentina, and requested the CNDC to open an in-depth investigation to rule out possible violations of competition laws.

Furthermore, from mid-March until the end of October, the terms and deadlines for merger controls, anticompetitive conducts and other procedures under the LDC were suspended (Res. SCI 98/2020 and its subsequent extensions). During this time, interaction with the CNDC was done primarily through email aimed to address urgent matters and requests for information. And more recently, through an electronic remote platform entitled "*Trámites a Distancia*" for merger control filings and advisory opinions (Res. SCI 231/2020).

As of October 26th, 2020, the terms and deadlines in all administrative procedures regulated by the LDC resumed (Res. SCI 448/2020), and the regulatory activity is expected to pick up in the coming months.

Uncertainties that go far beyond the pandemic

As in many other jurisdictions, Argentina is undergoing a severe economic crisis due to the pandemic. Despite the efforts being made throughout this year, the Covid-19 crisis is likely to leave Argentina with a 2020 GDP loss of about 8 per cent, and an unemployment rate reaching about 10 per cent.

In this context, many companies have recently decided to restructure their organizations, sell their domestic operations and leave the country.[3] This includes names such as Latam Airlines, Walmart, Brightstar, Glovo, Uber Eats, among others[4]. Undoubtedly, this has a direct impact on competitiveness, innovation, consumer choice and market concentration. Abuse of dominance (exclusionary or exploitative) and concerted practices stemming from this may affect the general economic interest protected by the LDC (art. 1, LDC).

The new normality of competition law practice in Argentina may revolve around *ad hoc* requests for information issued by the CNDC, searching for costs and margins structures of dominant companies, and the initiation of new market investigations.

In the past few years, the CNDC carried out intensive market investigation work, which included the pharmaceutical and retail market (2019), aluminium, steel and transportation services (2018) and mass consumption products, such as beef, milk and soap/laundry detergents (2017).[5] In the wake of the abovementioned exodus of companies, special attention might be deployed to those markets with, *prima facie*, highly concentrated market shares as per the Herfindahl-Hirschman Index (HHI).

From an enforcement perspective, uncertainty is likely to extend far beyond the pandemic. Following the review of the selection procedures undertaken under President Macri's administration, as instructed by Decree 36/2019 (please refer to section III above), last month the Secretary of Domestic Trade declared the absolute nullity of the procedure followed to select the new members of the National Competition Authority created by the LDC (Resolution SCI 527/2020).

It remains to be seen whether the current administration will promote a new process to select the members of the National Competition Authority, as enshrined under Article 20 of the LDC. Alternatively, the SCI and the CNDC could remain as the enforcement authorities. The latter would be, *prima facie*, much closer to the Executive Power. Hence, the agency could be prone to leverage the concept of public interest to enforce competition law.

In some case-law prior to 2015, the CNDC stated that "*Competition policy in Argentina must correspond with the economic policy in force in recent years. This statement is far from being a general statement since competition policy ensures that there is no transfer of income from consumers to companies with a dominant position (individual or joint) due to anti-competitive behaviour or structural changes that imply an increase in concentration in the markets*".[6] The same CNDC also stressed the need to follow the prevailing economic model that "*not only generates significant results in terms of economic growth but also in reducing the extremely high levels of unemployment and underemployment that the crisis had produced*".[7]

Finally, on November 13th, 2020, Senator Ms Ana Almiron (*Frente de Todos* - officialist party) filed in Congress a bill of law to reform the LDC (docket number 2795/20)[8]. One of the proposed reforms is related to the set-up of the National Competition Authority. In this regard, simply put the bill proposes that the appointment of its members be made by the Executive Power, at the proposal of the Ministry of Productive Development. But unlike art. 20 of LDC, it foresees no public selection procedure of background and opposition.

Per the author of the bill, the proposed procedure “aims to guarantee the effective appointment of the candidates, with the celerity that the importance of this issue demands”, bearing in mind that “one of the greatest problems of the Argentine economy is that of the concentration of supply; in a lot of chains production competition is not normal. For example, in the production of mass consumer goods, in bakeries a company has 80% of the market, in soft drinks two companies have 82%, in cookies four companies 80%, in dairy two companies 80%, in cleaning two companies have 80% and in beers a company has 75% of the market. Input suppliers of industrial small and medium-sized companies are also highly concentrated; there is only one sheet metal supplier, a single aluminium supplier and a single polyethylene supplier (...)”.

Conclusion

Before the pandemic, the main challenge for the Argentine authorities was to manage the way to fully enforce the provisions of the new Competition Law 27.442, notably, in regards to the set-up of the long-awaited National Competition Authority. The incorporation of this new authority was expected to enhance the institutionality of competition laws in the medium and long-run, to take competition law practice in Argentina to a whole new level.

However, the change in government alongside the irruption of the pandemic shifted the path and strategy of the competition law practice in Argentina. *Prima facie*, it seems that the urgent overtook the important, predominantly, by means of the establishment of strict control and sanction of price gouging practices that affect end consumers.

The aftermath of the pandemic is likely to leave significant challenges from an enforcement perspective. The CNDC will need to think about the most efficient way to prevent or detect exclusionary or exploitative abuses, or concerted practices stemming from increased concentration across several markets. Also, to send an institutional message to the private sector showing determination and transparency to effectively incorporate the National Competition Authority.

In light of the above, it is clear that any multijurisdictional strategy involving Argentina needs to be carefully assessed and planned ahead of its implementation, to appraise the legal and operational risks of the companies involved.

[1] Since the introduction of the merger control system in Argentina in 1999 (Law 25,156), the parties involved in a transaction have been allowed to notify the economic concentration to the enforcement authority, either before or within the term of one week as of the closing of the transaction (art. 8, Law 25,156).

^[2] *Tackling the COVID-19 challenge—a perspective from the CMA*, available at <https://academic.oup.com/antitrust/article/8/2/250/5856299>.

^[3] *Companies Flee Argentina, and Coronavirus Is Just One Reason*, <https://www.bloomberg.com/news/articles/2020-07-27/companies-are-leaving-argentina-and-it-s-not-pandemic-s-fault>, BloombergBusinessweek, 27 July 2020.

[4] *La lista completa de las multinacionales que se fueron o se quieren ir de la Argentina*, <https://www.infobae.com/economia/2020/10/23/la-lista-completa-de-las-multinacionales-que-se-fueron-o-se-quieren-ir-de-la-argentina/>, Infobae, 23 October 2020.

[5] A comprehensive list with the most recent market investigations can be found on the CNDC’s website: <https://www.argentina.gob.ar/defensadelacompetencia/estudiosdemercado#:~:text=La%20CNDC%20tiene%20la%20facultad,0%20disponible%20en%20la%20CNDC>.

[6] Resolution SCI 6 dated January 26, 2012 and Decision CNDC 739 dated January 25, 2012.

[7] FERREYRA ROMEA, Sebastián, *Aproximación al estudio de los efectos de la política económica sobre la defensa de la competencia*, *Revista Argentina de Derecho Comercial y de los Negocios*, Number 9, April 1, 2014.

[8] Further information can be found at the Argentine Parliament’s website, in the following link: <https://www.hcdn.gob.ar/proyectos>