



Antitrust Developments in Argentina

By Julián Peña & Federico Rossi¹
(Allende & Brea)



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Antitrust enforcement in Argentina has been going through changes in recent times and has continued to do so in the past few months. These include the new antitrust law passed in May 2018; a new economic crisis that also started in May 2018 but that has reached a new dimension since August 2019; a new government that has taken office in December 2019; the unexpected COVID-19 pandemic that started in March 2020; and the full replacement of all of the antitrust authorities, including all of the members of the *Comisión Nacional de Defensa de la Competencia* (“CNDC”)² that was completed in April 2020. These developments have all drastically reshaped the context in which antitrust law has been and will be enforced in Argentina.

Although Argentina has had modern antitrust laws since 1980 (a couple of anti-monopoly laws were approved in 1923 and 1946 without much application), its enforcement has been erratic over time. With the beginning of the Macri government in late 2015, there was a period in which the antitrust authority was given strong political and economic support that reached its peak with a new antitrust law No. 27,442³ (the “Antitrust Law”), which was approved by Congress in May 2018. Unfortunately, the day before the Congress gave its final approval to the Antitrust Law, a significant economic crisis hit, and the government decided to approach the International Monetary Fund for financial relief. A drastic governmental budget cut came along with that relief. This led to a slow meltdown of the CNDC’s workforce and economic resources, with consequent effects on its ability to deliver.

In the primary presidential elections of August 2019, then-President and candidate Macri dealt a significant defeat in the results and, although the general elections would not take place until October 2019, a win by his main opponent, Alberto Fernández, was perceived as the most likely scenario. The early start of a lengthy transition period until the change of government on December 10, 2019, increased uncertainty and aggravated the economic crisis with a drastic currency devaluation and a consequent jump in inflation. Additionally, the adverse electoral results had a direct impact on the already delayed appointment process of the independent antitrust authority created by the Antitrust Law. This appointment process was finished by the Macri government a few days before leaving office, which sent a list of members selected for the new National Antitrust Authority for Congress to confirm. However, the Fernández administration revoked the list of selected members in January 2020.

Instead of moving towards the creation of the new institutional framework mandated by the Antitrust Law, the new government appointed new members to the temporary institutional framework. In that regard, the Fernández administration appointed a new Secretary of Domestic Trade and a new President of the CNDC in January 2020. Furthermore, two CNDC commissioners were appointed in May 2020.

The appointment of new CNDC commissioners and the launch of the new institutional framework have both been directly and drastically affected by the COVID-19 pandemic in March 2020 and the lockdown imposed by the Argentine government, which is still in place as this article goes to press.

Below we point out some of the relevant recent developments in antitrust enforcement in Argentina since the change of government of December 2019, including some recent measures adopted by the Argentina’s Antitrust Authority to deal with the consequences of COVID-19.

I. Institutional Issues

A) Appointment of New Members to the Transitory Antitrust Enforcement Authorities

As a consequence of the election of a new government, which took office on December 10, 2019, new members have been appointed to the transitory antitrust enforcement authorities.

By means of Decree 93/2019 (published in the Official Gazette on January 7, 2020), Mrs. Paula Español has been appointed as Secretary of Domestic Trade and by means of Decree 94/2020 (published in the Official Gazette on January 21, 2020), Mr. Rodrigo Luchinsky has been appointed as President of the CNDC.

Prior to her appointment as Secretary of Domestic Trade, economist Paula Español acted as Undersecretary of Foreign Trade under Cristina Kirchner's administration.

For his part, Rodrigo Luchinsky is a lawyer that holds a Ph.D. in Law from the University of Buenos Aires and an LL.M. from Columbia University. He is also a law professor at the University of Buenos Aires and, prior to his designation, Mr. Luchinsky served as Undersecretary of Justice of the City of Buenos Aires and as Undersecretary of the National Ministry of Security under Cristina Kirchner's administration.

Additionally, on May 16, 2020, lawyer Pablo Lepere and economist Guillermo Perez Vacchini have been appointed as CNDC commissioners, effective as of March 19, 2020, and April 23, 2020, respectively. Lepere has been an adviser to the CNDC's former Vice-President Humberto Guardia Mendonca. Perez Vacchini holds an economics degree from the University of Buenos Aires, was a CNDC staff economist in the past, and has been working in private practice until his appointment.

At present, the CNDC is composed of three out of its five statutory members, now meeting its legal quorum requirements. In that regard, the Supreme Court in 2008 overturned a Court of Appeals decision that ordered the CNDC to act with its five members.⁴ The Supreme Court ruled that the statute that created the CNDC does not require a minimum quorum for the agency to act, hence, ordering the CNDC to act with its five members was unwarranted. Additionally, and more relevant to the current situation, in a 2016 ruling, the Court of Appeals in Civil and Commercial matters held that collegiate administrative bodies whose regulations fail to establish quorum rules (such as the CNDC), should be governed by the general rules applicable to collegiate administrative bodies which dictate that they must act with half plus one of its statutory members.⁵ In light of this reasoning, the Court of Appeals ruled that the CNDC decision under scrutiny was valid as it had been issued by three members, even when the remaining two CNDC seats were vacant.

B) The Postponement of the Creation of the new National Antitrust Authority

The Antitrust Law enacted in May 2018 provided for the creation of a new National Antitrust Authority to replace the existing, transitory Antitrust Authority (i.e. the Secretary of Domestic Trade with the technical aid of the CNDC).

On December 6, 2019, a handful of days before leaving office, the Macri administration sent a communication to Congress with the list of nominees to the new National Antitrust Authority. However, on January 26, 2020, the Fernandez administration requested Congress to disregard the nominees to the new National Antitrust Authority, thus withdrawing the proposed candidates.

At present, the creation of the new National Antitrust Authority (which will trigger the 1-year term to effectively implement the *ex ante* merger control regime in the country) remains a question mark.

The failure to put in place the new institutional framework has not only postponed the implementation of the *ex ante* merger control regime, but has also dented the reputation and credibility of Argentina's recently enacted leniency program. Almost two years since its creation, as far as we are aware, the program has not received a single leniency application. Argentina's poor cartel track-record (which has not seen a dawn raid in the past 10 years) certainly does not create the incentives for colluding firms and the involved individuals to blow the whistle and self-report their wrongdoings.⁶

II. Merger Control Issues

On January 27, 2020, the Secretary of Domestic Trade - Argentina's transitory Antitrust Authority- published Resolution No. 13/2020 whereby the value of the administrative unit used as a reference point by the Antitrust Law, was increased from 26.4 pesos to 40.61 pesos, thereby updating both the merger control notification thresholds and the monetary penalties set out in the Antitrust Law.

Pursuant to the Antitrust Law, both the merger control notification thresholds and the monetary penalties are expressed in administrative units, unlike the previous antitrust regime where these were expressed in fixed local currency amounts and thus quickly became outdated as a consequence of inflation. The administrative unit's value, according to the Antitrust Law, is to be updated on a yearly basis by the Antitrust Authority following the evolution of the official consumer price index.

As a consequence, as from January 27, 2020, economic concentrations must be notified to the Antitrust Authority if the combined Argentine annual net sales of the acquiring group and the target group exceed AR\$4,061 million during the preceding fiscal year (approx. US\$64.4 million taking based on the exchange rate in force on December 30, 2019).

Additionally, the *de minimis* exemption was updated, and now otherwise notifiable economic concentrations are exempted if both the amount of the Argentine portion of the transaction and the value of the assets to be transferred in Argentina are below AR\$812.2 million (approx. US\$11.6 million at the May 15, 2020, exchange rate),⁷ unless the acquiring group was involved in an economic concentration in the same market in Argentina valued at AR\$812.2 million during the preceding 12 month period or AR\$2,436.6 million (approx. US\$34.9 million) during the preceding 36 month period.

III. Antitrust Enforcement Issues

A) COVID-19 and the Suspension of Legal Terms for Ongoing Proceedings

The government, through issuing successive decrees and resolutions, has suspended the legal terms of all ongoing proceedings under the Antitrust Law – conduct and mergers alike - from March 16, 2020 to the end of the lockdown (currently until May 24, 2020, though could be extended further).

During the lockdown, the offices of the CNDC will remain closed. In that regard, we have been informally told that the CNDC's staff is working remotely while their premises remain closed.

Since the suspension of legal terms refers exclusively to "ongoing proceedings" and allows "urgent presentations," new proceedings - such as the notification of mergers and the submission of new antitrust claims - are not included in the suspension and shall thus be submitted for analysis by the CNDC.

"Urgent presentations" such as the notification of new mergers and claims, can either be done in person at the Ministry of Productive Development or electronically by sending the relevant documents via email to the CNDC. Electronic presentations must follow certain formal requirements specified on the CNDC's website.

In this regard, we have been informally told that the CNDC has received a handful of new merger notifications by electronic means since the beginning of the lockdown.

B) Initiation of Sector Inquiries into the Beef and Medical Oxygen Markets

In April 2020, the Argentine Antitrust Authority instructed the CNDC to launch a sector inquiry into the beef market in light of alleged shortages and price hikes experienced in the distribution and commercialization of beef. The Argentine Antitrust Authority issued a market report in relation to the same market in 2017, which found a low degree of concentration and low entry barriers.

Furthermore, pursuant to an official communication issued on April 29, 2020, the Argentine Antitrust Authority instructed the CNDC to launch an investigation into the production and commercialization of bulk and cylinder medical oxygen. It is worth remembering that a prior market inquiry into this sector was initiated in mid-2019.

As in other jurisdictions, sector inquiries do not target any specific company, but rather attempt to gather information from agents active in a particular market (including manufacturers, clients and suppliers) to assess the conditions in which competition takes place, which normally includes an analysis of the evolution of pricing and other commercial policies by companies, barriers to entry, and the level of transparency in the market, among other relevant factors. Sector inquiries may conclude with a recommendation addressed to either companies or regulators active in the market under analysis and/or with the launch of a formal antitrust investigation against certain companies if evidence of anticompetitive behavior is found.

C) The Secretary of Domestic Trade is Using its Enforcement Powers under the Supply Law to Tackle Alleged Excessive Pricing

In addition to acting as the enforcement authority for the Antitrust Law, the Secretary of Domestic Trade is also the enforcement authority for the Supply Law (No. 20,680⁸ enacted in 1974, and modified in 2014 through Law 26,991).⁹

The Supply Law grants the Secretary of Domestic Trade sweeping powers to intervene in the conduct of private businesses, in particular, to set profit margins, maximum and minimum prices, to dictate the level of production or output, and to impose obligations to continue manufacturing in relation to any sector of the economy or industry. It additionally provides for broad inspection powers, and companies may be obliged to submit their cost and pricing information for the Secretary of Domestic Trade to monitor and control the evolution of prices.

Since the beginning of COVID-19, the Secretary of Domestic Trade has resorted to the application of the Supply Law to tackle soaring prices and alleged shortages in the supply of certain critical products, such as hand sanitizers, masks and consumer products.

For instance, Resolution 86/2020 issued on March 12, 2020 by the Secretary of Domestic Trade set the prices of hand sanitizers back to their February 15, 2020 level for a 90-day period and has ordered companies active in their commercialization (as well as those active in upstream and downstream related markets) to increase their levels of production to their maximum capacity.

Additionally, Resolution 100/2020, issued on March 30, 2020 by the Secretary of Domestic Trade, has frozen consumer prices at the March 6, 2020 level, while ordering all companies active in the manufacturing, distribution, wholesale and retail segments to increase their output to their maximum capacity. The effects of Resolution 100/2020 have been extended until June 30, 2020 through subsequent resolutions.

IV. Conclusions

Coinciding with the enactment of the Antitrust Law in May 2018, a series of developments have challenged, and continue to challenge, the enforcement of antitrust law in Argentina. The most relevant of all, perhaps, has been the COVID-19 pandemic and its multiple side-effects.

This scenario puts antitrust enforcement in Argentina at a critical juncture. In the upcoming months we will probably have a clearer picture of how antitrust enforcement will evolve in Argentina. The COVID-19 pandemic has affected everyone's agenda and antitrust enforcement in Argentina is not immune to the effects of the disease.

One of the relevant indicators to assess the approach of the new government towards antitrust enforcement will be whether it decides to establish the new National Antitrust Authority as mandated by Congress. An independent, sufficiently funded, and technically sound authority is of the foremost importance when it comes to efficient antitrust enforcement.

In the same vein, if the government continues to resort, even amid the pandemic, to the Supply Law to fix maximum prices rather than urging firms to compete through an active anti-cartel policy under the umbrella of the Antitrust Law, it would move Argentina away from mainstream antitrust enforcement.

¹ Allende & Brea (Argentina).

² The CNDC is the technical agency that advises the Secretary of Domestic Trade, Argentina's Antitrust Authority.

³ Law No. 27,442, May 15, 2018, B.O. 33,870 (Arg.).

⁴ Supreme Court of Justice, "*Belmonte Manuel y la Asociación Ruralista de General Alvear c/Estado Nacional*," April 18, 2008.

⁵ Federal Court of Appeals in Civil and Commercial matters, "*Decoteve SA c/ Grupo Clarín SA y otros s/apel. resol Comisión Nac. Defensa de la Compet*," March 15, 2016.

⁶ The cornerstones of effective leniency programs are threat of severe sanctions, fear of detection, and predictability, transparency and certainty. See Rossi, Federico, "Cornerstones of effective leniency programmes: the Latin American experience," *Revista do Ibrac*, Volume 24, Número 1, 2018.

⁷ On May 14, 2020, the exchange rate amounted to USD1=AR\$69.75.

⁸ Law No. 20,680, Jun. 25, 1974, B.O. 22,939 (Arg.).

⁹ Law No. 26,991, Sep. 19, 2014, B.O. 32,972 (Arg.).