Shall We Play in the Forest (While the Wolf is not Around)?

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I. Introduction

Airports closed and turned into airplane graveyards overnight; travel restrictions; massive cancellation of flights; sporting events and shows were suspended everywhere; industrial production in central countries plummeted; a strong downward impact was felt on stock markets worldwide; unemployment benefits broke all historical records; the price of oil pierced its lows until it reached negative values; all growth forecasts for countries around the world dropped; the sale of assets such as automobiles fell like never before; the sale of orange juice concentrate had unprecedented increases; internet sites, from those dedicated to exercising at home to those delivering food and supplies, grew by an average of 300%; alcohol gel and toilet paper were in short supply for weeks in many countries.

There are many other examples; but for a taste, this will do.

Over the first half of 2020, the world has witnessed the unprecedented impact brought on by the health crisis. A tsunami that destroyed some and propelled others, with unprecedented power. During this period there was marked growth in certain sectors, while others suffered like never before. The COVID-19 pandemic will leave behind both winners and losers.

II. Competition Law and Policy Are Not Quarantined

It is not the first time that competition authorities have had to deal with this type of crisis. About ten years ago, during the global financial crisis, many issues similar to those seen today were discussed. It is important to take into account the lessons learned at the time, and apply what is relevant to this current situation.

The message sent by various competition authorities to the markets is important, insisting that this pandemic and its resulting crisis should not be used to try to justify collusive or cartel-like behavior, as this will not and should not be tolerated under any circumstances, even less so in times of crisis.

That said, common sense tells us that cooperation between competitors, in certain cases, may not only be justifiable, but also desirable during these times of crisis as a result of the global pandemic plaguing the world.

There are several areas in which such cooperation could take place or be necessary, as a consequence of the imbalances between supply and demand in the markets. On the one hand, there could be a reduction in the supply or offer of certain products or services. We can see this in many countries, with some examples involving alcohol gel, face masks, and toilet paper. But there could also be an oversupply of products, as happened with milk producers in certain jurisdictions.

Cooperation could also be necessary to attack possible logistical problems in supermarkets or pharmacies, in transportation, in the interconnection between water, land, and air routes. Even for the discovery of the oft-mentioned vaccine.

All of this raises substantial and procedural questions. From a substantial point of view, in the more than 130 countries that have some sort of antitrust legislation, condemnation of cartel behavior is unanimous. However, this does not mean that certain cooperative conducts between competitors are not legal or desirable, when they produce efficiencies

or, in the case of Argentina, when they not only avoid causing harm, but may also eventually provide benefits to the general economic interest.

But this is not a full answer either. In other words, going back to the supermarket example, it could -*a priori*- seem reasonable that in times of crisis such as this, competing supermarkets would come together and decide to ensure logistics and other details that would allow all of them to provide enough bread, flour, dry pasta or other basic food staples. However, agreements that stop the sale or marketing of other types of goods that may not be of first necessity, such as luxury goods, do not seem to follow the same logic. In these cases, it may be necessary to go beyond the usual defenses of efficiencies such as those usually raised in defense of competition.

From a procedural point of view, it is important that competition authorities provide clear guidelines, particularly in new jurisdictions or where these rules are not so commonly accepted or well known.

On one hand, agencies should produce generic guidelines –similar to the ones released in recent months by the International Competition Network (ICN), European Competition Network (ECN), Competition and Markets Authority (CMA, United Kingdom), the Fiscalía Nacional Económica (FNE, Chile) and various others[2]- where they establish that, of course, cartels are not allowed and continue to be illegal, but where it is clarified that certain collaboration could be tolerable, as long as they are narrowly focused, intended to benefit the public interest, limited in time, and not more restrictive than strictly necessary.

In addition to generic guidelines, it will undoubtedly be necessary to provide specific guidelines for certain cases of possible cooperation agreements, and it will also be necessary that said guidelines be provided in relatively short notice, since it is expected that the COVID-19 crisis will have a limited duration and, consequently, such agreements would require clarity on their legitimacy in the short term. As an example we could mention the Letter of Comfort the European Commission issued[3] -for the first time after more than twenty years of not using this instrument- in the case of medicines, allowing cooperation between competitors within said industry in order to increase their production and improve the supply of critical and urgently needed drugs for hospitals with patients undergoing treatment for COVID-19.

Along these same lines, a legal instrument in Argentina that could be explored is that of the permits incorporated under Section 29 of the Competition Law 27,442 (LDC), which states:

> *"The Tribunal for the Defense of Competition (...) may, by a substantiated decision, issue permits for the execution of contracts, agreements or arrangements that contemplate conducts included in Section 2 of this document, which at the Tribunal's discretion, will not constitute damages to the general economic interest."*

It is important to remember that the new Section 2 of the LDC, referred to in the aforementioned Section 29, lists a series of conducts related to agreements between two or more competitors that would constitute "Practices absolutely restricting competition", would be presumed "to cause damage to the general economic interest", would be "null" and "would not produce any legal effect"; in addition to being liable to sanctions that would exceed several billion pesos.

The permits mentioned in Section 29 of the new LDC, may be a valuable tool under certain circumstances, as long as they are used according to their purpose, for very particular cases, and for duly founded reasons.

The situation we are currently facing as a consequence of the various negative effects of COVID-19 provides a favorable framework for understanding what this instrument is about, and to apply it in the way it was conceived of by the legislature.

During these pandemic times we have been witness to countless regulations issued by the government (both nationally, as well as by various provincial and municipal authorities, and various agencies).

During this time, it has been common to hear references made to concepts such as critical supplies, maximum prices, requests for increased production, financial assistances, alleged shortages of certain products and medical, cleaning, and sanitary supplies, among others.

For its part, the Secretariat of Internal Trade (SCI) resolved to suspend procedural deadlines in the cases being processed by the National Commission for the Defense of Competition (CNDC). Regardless, an emergency filing mechanism was established and the CNDC and its team continue to work remotely.

On the other hand, there have been many voices, in Argentina and abroad, that suggest "mitigating" or "relaxing" the application of competition rules. We believe that this can be a very dangerous and unnecessary simplification, depending on how, when, where, and for how long this “relaxation” is proposed.

In the case of Argentina we start from the premise that Section 1 of the LDC provides that the legal right protected by the Argentine competition regime is the “general economic interest”. In more general terms, and leaving other more technical considerations aside, the general economic interest referred to by the LDC is none other than the public interest, applied to competition law and policy.

That said, it should be noted that the norms, principles, and not least the spirit of the LDC continues –and must continue– to be in full force, even –or even more– in the current situation of health and economic crises unleashed by COVID-19.

In other words, collusion with a competitor continues to represent behavior that is absolutely restrictive to competition and is presumed to cause damages to the general economic interest (Sections 2 and 3, LDC); abusing a dominant position in a certain market, either by setting abusive prices that impact consumers or carrying out behaviors that could exclude competitors (Sections 3, 5 and 6, LDC), or by pursuing economic mergers whose objective or effect is to restrict competition (Section 8, LDC), are still prohibited conducts under the LDC (Section 1, LDC).

However, it cannot be ignored that the different regulations issued recently in order to contain the spread of COVID-19 in Argentina, could imply that certain people, whether they are natural (human) or legal entities, could involuntarily find themselves in complex situations, which could be framed as constituting some of the behaviors previously mentioned.

In practice, there could be a collision of legitimate interests between various rules and behaviors, such as the interests intended to protect competition and those intended to uphold the various health and sanitary emergency rules issued during the COVID-19 crisis.

To better illustrate this point, it would not be strange for supermarkets or other players in the retail or consumer market distribution chain, at some point during COVID-19's advance, to coordinate their behavior in order to guarantee the provision of food; or that laboratories, distributors, drugstores, pharmacies or others, might also agree on how to face the demand for certain medicines or critical supplies in different regions of the country, just to name two critical areas -food and healthcare - that will likely be among those most affected as the spread of the pandemic progresses.

It is here that Section 29 of the new LDC reveals its real dimension. Competitors who find themselves in the aforementioned situations are not, on one hand, exempt from complying with the competition rules, but on the other hand, they must also comply with the emergency rules.

In order to fully comply with the latter without committing illegalities under the LDC regime, the enforcement authority could analyse these cases and, if appropriate, issue clear permits duly substantiated under Section 29 and of limited temporal and geographic scope that would grant certainty to competitors faced with this dilemma. Needless to say, such permits would not imply a letter of indemnity allowing one to commit any kind of anti-competitive conduct.

If this is achieved, we will have successfully balanced these conflicting interests, probably contributing to a more optimal attack on the pandemic with the joint efforts of the public and private sectors, and finally the permits of the novel Section 29 of the LDC will have been born, in full health .

III. Merger Control during COVID-19 Times: Playing in the Forest?

So far we have provided a quick screenshot of the scenario in which we find ourselves during the COVID-19 crisis and the main reactions expected from competition law and policy, particularly related to conduct.

Most of these challenges will also be felt in the merger control area in the short and medium term, due to their nature. Unlike the LDC's application to anti-competitive behaviors, which focuses on dealing with past behavior so that a substantial amount of time may pass between the conduct in question occurring and the investigation and the possible decision, under merger control the timeframes are –or should be– shorter, and the analysis is - supposed to be– prospective in nature.

However, we may wonder how may a competition authorities actually carry out this analysis while significant developments are taking place in the market and when important parts of the economy are at a standstill? For example, imagine a merger involving airlines when nearly all of them have had to ground their planes. It could be said that there currently IS no competition in much of the airline market, so how could a "prospective analysis" be performed when it is not yet clear how far the economy will contract, and which of all the scenarios or forecasts is more credible over the following months - or years?

In principle, the enforcement authority contained in the LDC could only block or condition a notified transaction if there is a strict causal link between the operation being evaluated and the anticipated damages to competition. While the anti-competitive effect of a merger may not be discussed, in some acute economic crisis situations such a link might not be established. That could be the case if the affected markets, in the absence of the merger,

still experienced an increase in concentration and a significant decrease in competition. This is where the failing firm defense (FFD) becomes relevant.

Thus, regarding merger control in particular, as soon as the pandemic started and anticipation of what could happen if the health and economic crisis continued for a long time, we decided to review what we know so far about the FFD.

In Argentina, during these months we revisited such cases as Bimbo-Fargo, Papelera Massuh, Supermercados Toledo, Venado Tuerto TV, AA2000-LAPA, OCA-Correo Argentino, among others, which -although they were not expressly resolved on the basis of the FFD- provide certain reasonable guidelines regarding how the FFD would be applied in Argentina.

A recent statement by the CNDC regarding 2018's economic concentration guidelines should also be taken into account, as certain clear guides are given, and which -similar to the horizontal merger guidelines of the European Commission-, basically admits the FFD defense if: (i) the company in difficulty would likely be forced to exit the market due to financial difficulties, unless it was acquired by another company; (ii) there is no other less anti-competitive alternative; and (iii) without the respective economic merger, the assets of the company in crisis will inevitably disappear from the market.

It is expected that we would reapply these guidelines during COVID-19 and its resulting economic crisis in our jurisdictions. In Argentina, in particular, it is likely that during the post-pandemic period the competition enforcement authority may hear cases where the parties to an economic concentration attempt to argue using the FFD, including counter-factual arguments related to the future. It remains to be seen, then, whether the FFD standards are maintained or revised, either to relax them or to make them more stringent. To a large extent, this will depend on the definitive dimensions of the COVID-19 crisis and its effects on the Argentine economy, with its true effects and final scope still under development.

On the other hand, one of the characteristics that set Argentina apart from other countries with competition legislation around the world is that merger control continues to be *ex-post*. Unfortunately, in practice, there is still no *ex-ante* merger control in Argentina.

I had the opportunity to lead the writing of the LDC draft bill, also discussing its terms with the government and then again with legislators and advisers in both Houses of Congress. I always maintained that, in Argentina, we should move definitively and directly towards an *ex-ante* merger control system. Unfortunately, though the text of the LDC establishes such an *ex-ante* merger control system, a transition period was also established – an unfortunate modification to the terms of our original draft bill, in my opinion – during which an "enhanced" *ex-post* merger control system will continue to be enforced in Argentina, the result of an erroneous subsequent regulation of the LDC by the Executive Power, until a year has passed after the new competition authority comes into operation[4].

I bring this up because in a situation such as that caused by COVID-19, an *ex-post* merger control system presents a variety of dangers and drawbacks, which would not arise under an *ex-ante* merger control system. In an *ex-ante* merger control system the enforcement authority has the opportunity to act preemptively, prior to the closing and completion of the notified transaction. In an *ex-post* merger control system such as the one in place in Argentina, where it is not only possible to close but also to consummate notified

transactions before the competition authority decides on their fate, it is very difficult -and, sometimes, simply impossible- to roll back or block transactions that have been fully completed in practice. The analogy that refers to the unavoidable difficulty of "unscrambling an egg" applies here.

Shifting gears now, it is worth mentioning certain actions and tools that the competition authority has available. Among others, we could mention the fast-track or simplified procedure for merger control on transactions with low impact on the market, and the Registry of Competition (Section 13, second paragraph, of the LDC), that is to be permanently updated, "so that each act of concentration notified to the National Competition Authority takes on public status, and any interested party can formulate the manifestations and oppositions they deem appropriate"[5].

In this context, it is also important for competition authorities to be creative. There is definitely a lot to be done, but with the digitalization of bureaucratic procedures and other new tools, processes can be streamlined and better substantiated.

Finally, both during and after the pandemic it is highly likely that the LDC enforcement authority will have to strike a delicate balance between political pragmatism and the technical orthodoxy of competition as long-term public policy.

In recent months, in the midst of a pandemic and in parallel with the emergency regulations issued week-by-week, the country has also witnessed some proposals for state intervention in private companies or for their expropriation by the State. In such cases, whether or not they have an apparent relationship to the COVID-19 pandemic, as clearly stated in Section 4 of the LDC, it is to be expected that such cases of State intervention will also be subjected to the corresponding controls by the competition enforcement authority, unless they are authorized under the framework of some bankruptcy or similar judicial process, or if there is a rule of similar or superior rank to that of the LDC that expressly exempts it, for well-founded reasons, from said control measures.

IV. Conclusions: Will the General Economic Interest or Politics Prevail?

In the current context, competition law and policy must occupy a dominant and fully active position in order to avoid finding ourselves with horribly concentrated markets once COVID-19 ends, and perhaps it will be too late to avoid another pandemic: that of excessive concentration of economic power by a few, to the detriment of the general economic interest.

Among other issues to be resolved, the question is likely to arise whether it is preferable to accept artificially keeping certain companies in the market, at the expense of all taxpayers (as a result of eventual State intervention measures), or whether it is more appropriate to allow certain companies to acquire other competitors in a declining situation, at the expense of a much smaller group (that is, of the consumers or users of the products or services offered by said companies, who will possibly be affected due to the loss of competition and the creation of monopolies or oligopolies).

To answer this question, once again, it is worth remembering that the defense of competition has constitutional status in Argentina, in accordance with the provisions of Sections 42 and 43 of the National Constitution, among others.

On the other hand, and no less relevant especially in times of acute crises like the current one, any analysis carried out by the enforcement authority of the LDC must be guided by the protected legal rights of the LDC, which are none other than the general economic interest (Section 1, LDC).

Consequently, far from relaxing or mitigating its rules, during times of crisis such as COVID-19 or other eventual crises competition law and policy must be especially strengthened and exercised with full force and determination.

The LDC has established mechanisms allowing authorities and businesses to adapt to these circumstances, and gives its enforcement authority sufficient tools and parameters to be able to optimally exercise its responsibility.

[1] A similar version of this article was originally published in Spanish at Gutiérrez, Juan David (Ed.). (2020), "Retos del COVID-19 para el derecho y la política de competencia en América Latina y el Caribe", Bogotá, Colombia: Capítulo América Latina de ASCOLA.

[2] For example (last access, April 3rd, 2020):

(i) US: FTC and DOJ Joint Statement: (March 24, 2020) Federal Trade Commission and Justice Department Announce Expedited Antitrust Procedure and Guidance for Coronavirus Public Health Efforts. Federal Trade Commission. Disponible en: https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure;

(ii) Europe: European Competition Network Joint Statement: Antitrust: Joint statement by European Competition Network (ECN) on application of competition law during the Corona crisis. European Competition Network. Disponible en: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf;

(iii) UK: CMA – COVID-19 Task Force: (March 20, 2020) Guidance: https://www.gov.uk/government/publications/covid-19-cma-taskforce/cma-covid-19-taskforce;

(iv) Australia: ACCC (March 31, 2020), medicine wholesalers to co-operate on access to pharmaceutical products. Australian Competition & Consumer Commission: https://www.accc.gov.au/media-release/medicine-wholesalers-to-co-operate-on-access-to-pharmaceutical-products;

(v) Norway: (March 19, 2020), transportation sector is granted temporary exception from the Competition Act. Norwegian Competition Authority: https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en;

(vi) South Africa: (March 31, 2020), COVID-19 update: competition commission flooded with over 500 complaints of excessive pricing: , http://www.compcom.co.za/wp-content/uploads/2020/03/CCSA-COVID-19-statement-31-March-2020-Final-1.pdf;

(vii) Chile: FNE (April 3, 2020). Public declaration: https://www.fne.gob.cl/declaracion-publica/, among others.

[3] European Commission DG Competition (March 8, 2020), Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients: https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf

[4] Incidentally, as of the date of writing this article (i.e., more than two years after the enactment of the LDC), nothing is officially known regarding the new competition authority's composition.

[5] See Section 13 of the LDC.