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On February 23, 2023, Argentina's Supreme Court upheld a decision that struck down the first and only sanction made by the country's competition agency over excessive pricing. [2]

Following an investigation and resolution by the National Commission for the Defense of Competition (Comisión Nacional de Defensa de la Competencia, "CNDC"), the Secretary of Commerce had, in June 2018, issued a fine against the Argentinian organization that collectively manages the copyrights for music works ("SADAIC") over their abuse of dominance in fixing the price of fees hotels must pay for installing a TV in their rooms. Furthermore, a recommendation was made to the National Executive Power (Poder Ejecutivo Nacional, "PEN") to regulate said fees, given that existing norms did not cover them (unlike other activities, which included price caps).[3]

On August 20, 2019, the Federal Civilian and Commercial Chamber – Chamber III – supported the recommendation to regulate hotel fees and, towards the end of August 2019, the PEN issued a decree regulating the fees charged for the public use of intellectual property of authors and performers by hotels.[4] Nonetheless, the Chamber also struck down the fine. Later, the Supreme Court ultimately rejected the appeal presented by the State and upheld the decision striking down the fine in the *SADAIC* case.

This had been the first and only case where Argentina's competition authority had sanctioned an agent for excessive pricing. The legal test used by the competition authority was quite strict, and consistent with a comparable case upheld by the European Court of Justice. Therefore, if this case was not ratified as an exploitative abuse of dominance through excessive pricing, one must conclude that Argentina's Law for the Defense of Competition (Ley de Defensa de la Competencia) does not consider excessive pricing to be an infraction-worthy conduct.

In this article, we explain the details of the case, as well as the arguments and evidence considered by the CNDC when making their recommendations for a fine and the regulation. We then analyze the Chamber's sentence, which was recently upheld by the Supreme Court.

I. The *SADAIC* Case in Argentina

The case began with a complaint against SADAIC presented on October 16, 2009 by the Hotel and Gastronomic Business Federation of the Republic of Argentina (Federación Empresaria Hotelera Gastronómica de la República Argentina, "FEHGRA"), an organization representing hotel and gastronomic businesses across the country.

FEHGRA's complaint was concerned with a change in the methodology used to charge hotel fees by SADAIC under the concept of "secondary use of musical works," which implied

[1] The authors have been, respectively, President and Commissioner of Argentina's National Commission for the Defense of Competition (2016-2020). It was during this period that the Competition authority issued the fine and recommendation discussed in this article.

[2] See CSJN (2023), Decision by the Supreme Court, February 23, 2023, https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7816991.

[3] See CNDC (2017), Resolution by the National Commission for the Defense of Competition N° 43, May 17, 2017, http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/1302%20Dictamen%20y%20Resolucion%20SADAIC-ilovepdf-compressed.pdf, and SC (2018), Resolution by the Secretary of Commerce N° 371, June 26, 2018, http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/1302%20Dictamen%20y%20Resolucion%20SADAIC-ilovepdf-compressed.pdf.

[4] See CCCF (2019), Sentence by the Federal Civilian and Commercial Chamber – Chamber III, August 20, 2019, and Decree 600/19 (Dated August 29, 2019). This decree covers not only SADAIC, but all other Collective Management Associations for the rights of authors and performers. The Joint Resolution by the Ministry of Justice and Human Rights and the Government Secretary of Tourism 2/19. dated 3/12/2019, established specific regulation over fees.

a significant price increase for hotels with more than 70 rooms. The CNDC estimated increases that ranged from 43 to 84 percent for hotels with 100 rooms, and between 257 and 359 percent for hotels with more than 250 rooms. Furthermore, the CNDC's investigation found that, beyond the change in tariffs, the existence of excessive prices affected all hotels. The CNDC carried out an international comparative analysis of fees charged by entities similar to SADAIC in other countries. This exercise showed that SADAIC's rates were between 7 and 16 times higher than the average (and between 26 and 80 times higher when compared to the lowest fees. See table below).[5]

Table 1. Author and Composer Copyright Fees for Hotels. International Comparison

Country	Entity	Characteristics	Monthly Fee per Room by Category-Stars ($US PPP)				
			1	2	3	4	5
Venezuela	SACVEN	General Rate	1.32	1.32	1.58	1.85	2.38
Chile	SCD	General Rate	0.90	0.90	1.16	1.43	2.29
Paraguay	APA	General Rate	0.00	0.84	2.81	7.01	14.03
Mexico	SACM	Average	0.26	0.39	0.51	1.84	4.29
Colombia	SAYCO	Average	--	0.28	0.37	0.78	2.81
Spain	SGAE	General Rate	0.11	0.16	0.29	0.58	1.15
Reference Country Avg.			**0.52**	**0.65**	**1.12**	**2.25**	**4.49**
Argentina	**SADAIC**	**General Rate**	**8.41**	**8.76**	**10.77**	**16.37**	**30.31**

Source: Table 6 of CNDC resolution.

The CNDC's analysis also compared SADAIC's fees with the hotel fees charged by other collective rights management associations in Argentina, such as those representing phonogram performers and producers ("AADI-CAPIF")[6] and theatre (text, choreography and music), radio, film, television (text and choreography) and new technologies authors (ARGENTORES).[7] Differences here were also significant for all hotels, not only for those with 70 rooms or more. SADAIC's fees were between 12.5 and 112 percent higher than those charged by AADI-CAPIF for hotels up to 20 rooms; between 122 and 400 percent higher for hotels up to 50 rooms; 800% higher for hotels over 100 rooms, and up to 1700 percent higher for hotels with 200 rooms or more.[8]

Therefore, while the change in tariffs was a manifestation of SADAIC's market power and the direct motivation for the complaint, the basis for the sanction over a violation of the Law for the Defense of Competition ("LDC") was the fixing of excessive fees for all hotels.

II. SADAIC and Excessive Pricing in Argentina's LDC

There is no firm international consensus over whether the setting of very high prices by a company with a dominant position is itself a

[5] In order to make measurements comparable, the value of fees was presented taking into account Purchasing Power Parity. This method allows the CNDC to take into account the purchasing power of each country's currency.

[6] Argentine Performers Association (Asociación Argentina de Interpretes, "AADI") and Argentine chamber of Phonogram and Videogram Producers (Cámara Argentina de Productores de Fonogramas y Videogramas, "CAPIF").

[7] General Association of Authors of Argentina (Sociedad General de Autores de la Argentina).

[8] Comparison between Table 8 and Table 2 of the CNDC's resolution (2017).

violation of defense of competition laws (what is known as exploitative abuse). Likewise, a high risk of Type I errors (false positives) is recognized to be implied in enforcement against this conduct.[9]

In the United States, exploitative abuse of a dominant position is not typically considered as a violation of antitrust legislation. In other words, in the US, the independent fixing of prices by a company may be considered legal *per se* regardless of the level at which said prices are fixed or of any variation with previously prevailing prices, or the firm's market position.[10]

For their part, European law does consider exploitative abuse.[11] In particular, and quite recently, a case was seen in Latvia that is analogous to Argentina's *SADAIC* case, where the competition authority fined the Copyright and Communications Advisory Agency/Latvian Authors Association ("AKKA/LAA"), a music copyright collective management organization, for abuse of dominance after applying excessive fees. This case was upheld by the European Court of Justice ("ECJ") in 2017 (ECJ, 2017). In their decision, the Court defined a highly precise "legal test" for the excessive pricing case being analyzed.[12] The main conditions of this test are: (a) the presence of a legal monopoly, and therefore insurmountable entry barriers that prevent the market from self-correcting,[13] (b) a method for determining the existence of excessive prices based on an international comparison using a homogenous base. Particularly, the ECJ upheld the comparative criteria as suitable evidence of excessive pricing, a comparative methodology based on purchasing power parity ("PPP"), and even the possibility of comparing fees for different user segments.[14] The ECJ considered international comparisons among European countries to be valid, and held that substantial price differences between them can in themselves be considered evidence of excessive pricing and indications of abuse of dominance, falling on the firm in question to indicate any objective and specific differences that would explain these disparities.

We should point out that the legal test applied by the CNDC in the *SADAIC* case perfectly matches the indications by the European Court of Justice for evaluating the case. Condition a) is met, given that SADAIC is a legal monopoly being the only entity authorized to commercialize the rights for playing music in hotels. As for condition b), the CNDC carried out an analysis equal to the one upheld by the ECJ, comparing Ibero- American countries and using PPP methodology. The CNDC's case also fulfills the general condition established by the ECJ for cases of excessive pricing, that is, the disconnect between the rates paid and the economic value to be obtained by the service.[15] Furthermore, the CNDC noted the existence of a regulatory flaw, a legal loophole in the regulation of fees charged by SADAIC, which motivated the additional recommendation to

[9] See OECD (2018), Excessive Prices in Pharmaceutical Markets. http://www.oecd.org/daf/competition/excessive-pricing-in-pharmaceuticals.htm.

[10] For an analysis of the justification for this approach in the U.S., see DOJ & FTC (2018), Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), Excessive Pricing in Pharmaceutical Markets - Note by the United States, written contribution from the United States submitted for Item 9 of the 130th OECD Competition Committee meeting on 27-28 November 2018.

[11] See interpretation of the European Court of Justice of Article 102 of the Treaty of the Functioning of the European Union, ECJ (2017), Sentence by the European Court of Justice (Second Chamber), September 14 1017, Case C-177/16. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62016CJ0177.

[12] The legal test is the set of conditions under which, in principle, practices are prohibited or permitted, and may represent violations of antitrust legislation (Ibáñez Colomo, 2019, Legal Tests in EU Competition Law: Taxonomy and Operation, available at http://dx.doi.org/10.2139/ssrn.3394889).

[13] The existence of a legal monopoly necessarily grants a dominant position.

[14] Regarding the royalties charged by a collective copyright management association, the ECJ opined that: "In order to examine whether a copyright management association has applied unfair prices (…) it is appropriate to compare their rates with those applicable in neighboring States, and those applicable in other member states, corrected by the PPP index, provided that the States used as reference have been selected according to objective, appropriate and verifiable criteria, and that the basis of these comparisons is carried out homogenously. It is possible to compare the fees applied to one or several specific segments if there is indication that the excessive rate of royalties is affecting these segments " (ECJ, 2017).

[15] "(…) the abusive exploitation of a dominant position (…) may consist in the fact of demanding an excessive price, with no reasonable relation to the economic value of the service provided" (ECJ, 2017).

regulate.[16] Note as well that the standard set by the ECJ, and followed by the CNDC, includes highly restrictive criteria, consistent with the fact that there are not many cases of sanctions for comparative jurisprudence.

The Chamber's decision specifically deals with this matter from a position closer to US jurisprudence as it concludes that, even in the presence of alleged excessive prices, this does not imply a violation of the LDC. The Chamber considered that, given the circumstance, the correct way forward is regulation, and not a sanction for violating the LDC: "The harm derived from the allegedly "excessive" prices in the context of a monopoly with these characteristics (which presents, within the spectrum of abuse of dominance situations, an "exploitative abuse" rather than an "exclusionary abuse"; …) could be solved through direct state regulation for controlling rates" … "The way to uphold social welfare in these cases would then be through regulation or deregulation. This is precisely because there is no competition to be guarded in this market…"

Likewise, the Chamber considered that sanctioning this conduct would "run the risk that, while intending to prevent abuse, the competition authorities would ultimately regulate prices and distort the market they are charged with protecting," which follows from the idea that competition agencies are not the ideal entities for regulating prices. Thus, the Chamber holds that "exploitative abuses are adequately corrected through direct fiscal review by a regulatory entity monitoring the market; that is, neither the Judicial branch nor the competition agencies can exert such control with the same level of efficiency."

This interpretation by the Chamber is consistent with a view assigning very high risk of Type I errors to the possibility of competition agencies acting to sanction exploitative abuse of dominant position practices. It is also consistent with ratifying the Secretary of Commerce and CNDC's recommendations to close the regulatory loophole regarding the fees SADAIC charges hotels.

The Chamber's interpretation concluded that "a price, even when considered "excessive" (…) does not mean it is illicit or uncompetitive. One of the goals of the LDC must be to safeguard consumer welfare; however, the way this duty is carried out is indirectly, precisely through the sanctioning of practices that affect competition."

It is this matter of doctrine, this approach and interpretation by the Chamber, that underpins and determines the decision to strike down the fine against SADAIC. Even if the Chamber, upon analyzing the legal framework around the secondary reproduction of music in hotels and the controversy regarding SADAIC's rates after 2009 had determined that their fees are disproportionate, they would have found an insurmountable roadblock due to their interpretation of the LDC, as they find no exclusionary practices.

Additionally, the Chamber explicitly refers to the difficulty in setting a parameter for determining excessive prices and rejects the comparative methodology (which was accepted by the ECJ in Latvia's case), thus closing any avenue for demonstrating an exploitative abuse of dominance through excessive pricing.

It is clear that the revocation of SADAIC's fine is not an issue with the evidence, but a matter of doctrine, and the ratification of this decision and the criteria adopted by the Chamber would kick all excessive pricing cases in Argentina out the door. Likewise, these arguments could extend to the concept of exploitative abuse of dominance.

III. Conclusions

To close, the *SADAIC* case has set highly relevant jurisprudence since, as the Chamber declared, "local jurisprudence lacks any background of sanctions based solely on excessive pricing." (CCCF, 2019). In this article we have argued that the *SADAIC* case met the strictest of conditions for the fixing of excessive prices to be considered an exploitative abuse of dominance. It is hard to imagine another case that would have harder evidence of the

[16] Law 17.648 and Decree 5146/69 are the regulatory framework under which SADAIC operates, establishing caps on the fees owed by event and spectacle organizers and by radio and TV broadcasters. These caps are not applicable to fees for secondary reproduction in hotels.

conditions set by the legal test. The Chamber's resolution is based on doctrine, as it considers that excessive prices cannot be punished by the LDC. The Supreme Court has upheld this decision, which leads us to conclude that Argentina's Law for the Defense of Competition does not consider an exploitative abuse of dominance through excessive pricing to be a violation.