Argentina: Competition Authority

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In summary

With the enactment of Law 27 442 on the defence of competition, a new procedure was introduced in Argentina as regards the analysis of concentrations and mergers of companies. In accordance with the provisions of section 14 of the aforementioned law, if a notified operation has the potential to restrict or distort competition, so that it may result in damage to the general economic interest, prior to making a decision, the objections that exist with respect to it will be communicated to the parties through a well-founded report, and they will take part in a special hearing to consider possible measures that may mitigate the negative effect on competition. In this work, the result of the application of this new standard will be analysed, pointing out the established procedure, and the results that its application has yielded up to now.

Discussion points

Mergers and acquisitions
Economic concentrations
Procedure for a merger analysis.
Objection report.

Referenced in this article

Act N 27 442 on the defence of competition.
Regulatory Decree 480/2018 on the defence of competition.
Regulation (CE) 139/2004.

1. The Defence of Competition in Argentina.

The process of development of antitrust laws in Argentina has several singularities. One of them is that it was the first Latin American country to have antitrust regulations. The second is that its original standards - Laws 11 210 and 12 906 - were inspired by the North American regulation of persecution of monopolies; whereas in 1980 a second body of norms was enacted - Acts 22 262, 25 156 and current 27 442 - which were inspired by European Community Law, and which seek to avoid anticompetitive distortions that markets may suffer. In this legislative path, in 1999 the procedure for the prior control of concentrations and mergers was incorporated. In effect, the repealed Act 25 156 constituted the first comprehensive body for the defence of competition with a clear and precise definition of its purpose and the administrative procedures contained therein and incorporated economic concentrations as a specific procedure through which qualitative and quantitative parameters were established regarding the mergers that are the subject of a request for prior authorization. The aforementioned rule was replaced by Act 27 442 of 2018, which introduced some changes, including the so-called objection report that will be analyzed in the following paragraphs.

2. Objection Report of Act 27.442.

In May 2018, Argentina passed a new antitrust law that modified aspects related to the procedure for the analysis of mergers and acquisitions of companies. Within the framework of this reform, it introduced the so-called objection report. Its purpose is to carry out a preliminary analysis of the operations that generate some type of concern from the point of view of the competition.
In fact, the third part of section 14 of the aforementioned rule provides that *"In cases where the Competition Defence Court considers that the notified operation has the potential to restrict or distort competition, so that it may be detrimental to the general economic interest, prior to making a decision, its objections will be communicated to the parties through a well-founded report and will ask them to be at a special hearing to consider possible measures that mitigate the negative effect on competition. That report must be simultaneously made available to the public."*

3. Source of Law.

The objection report incorporated into the Argentine antitrust law receives various mechanisms contained in other legal systems. In effect, in Section 6 of the Merger Regulation (EC) N ° 139/2004, under the title "examination of the notification and initiation of the procedure", it is established in section 1.c) that *"Without prejudice to the provisions in paragraph 2, if the Commission finds that the notified concentration falls within the scope of this Regulation and* ***raises serious doubts as to its compatibility with the common market****, it will decide to initiate the procedure. Without prejudice to the provisions of section 9, the procedures shall be concluded by decision, in accordance with the provisions of paragraphs 1 to 4 of section 8, unless the companies concerned have demonstrated to the satisfaction of the Commission that they have abandoned the merger(…)."*
On the other hand, section 18 of the aforementioned Regulation that regulates the hearings of the interested parties and third parties, provides that:

> *1. Before adopting the decisions provided for in section 6, paragraph 3, section 7, paragraph 3, section 8, paragraphs 2 to 6, as well as in sections 14 and 15, the Commission shall provide individuals, companies and associations of companies affected the opportunity to express, at all stages of the procedure up to the consultation of the Advisory Committee, their observations regarding the objections made against them.*
> *2. Notwithstanding the provisions of paragraph 1, exceptionally the decisions pursuant to paragraph 3 of section 7 and paragraph 5 of section 8 may be adopted, on a provisional basis, without providing the affected persons, companies or associations of companies with the opportunity to express their observations in advance, provided that the Commission offers them the opportunity to do so as quickly as possible after the decision has been taken.*
> *3. The Commission will base its decisions solely on the objections with respect to which the parties have been able to formulate their allegations. In the course of the procedure, the rights of defense of the interested parties will be fully guaranteed. Access to the file will be possible at least for the parties directly interested, as long as the legitimate interest of companies to protect their trade secrets is respected.*
> *4. If the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. The natural or legal persons that justify a sufficient interest and, in particular, the members of the administrative or management bodies of the affected companies or the recognized representatives of the workers of the mentioned companies, will have the right, if they request it, to be heard.*

In the European procedure, when the case cannot be resolved in phase 1, it requires an analysis in a second phase. There a more in-depth study is carried out in relation to the effects that the merger may have on the competition. In these cases, there is strong concern that the merger may generate distorting effects and restrict competition. Consequently, information is required in order to gain a deeper understanding of the market, its operation and its participants. Once a detailed study has been carried out, and if it is verified that the merger has the potential to generate restrictive effects on competition, it sends a statement of objections to the notifying parties, informing them of the Commission's preliminary conclusions, which may be answered and disputed by the parties[1].
To a large extent, the analysis carried out in Argentina since 1999 is similar, with the exception of the incorporation of the objection report (statement of objections in European regulations) which constitutes a new instance of the procedure, and whose highlights we will discuss below.

4. Proceedings in economic concentrations within the Argentine law of competition.

Act 27 442 on the Defence of Competition establishes a special procedure for the so-called economic concentrations consisting of an approval regime for all those operations that meet certain characteristics. To establish which the concentrations that are subject to this obligation are, three criteria are taken into consideration: (i) type of acts involved; (ii) magnitude of such acts; and (iii) effects of those acts in Argentine territory. The obligation to notify only applies if the aforementioned criteria are jointly met.
If an economic concentration is subject to the obligation to be notified, then that notification, in accordance with section 9 of Act 27,442, must be made prior to the conclusion of the agreement, the publication of the purchase offer. or exchange, or the acquisition of a controlling interest. However, temporarily, until a year has elapsed since the National Competition Authority is put into operation, concentrations may continue to be notified within a week from the acts just described, which was the form established under the repealed Competition Act 25.156. Therefore, until this occurs, the same system continues to govern the term for notification as under the previous law.
In this context, objection reports acquire special relevance. First, because they allow the competition authority to carry out a preliminary analysis on operations that may have a distorting effect on competition, since the prior authorization system is not yet in force. It should be noted that concentrations subject to the obligation to be notified do not produce legal effects either between the parties or with respect to third parties until the transaction has been approved, either expressly or tacitly.

5. Procedure under section 14.

In those economic concentrations that have the potential to restrict or distort competition, the authority must, first of all, issue this report where the problems affecting the markets involved in the operation must be identified. Thus, the issuance of the report

is a mandatory instance where the problems detected must be recorded with adequate precision. The aforementioned report must be made available to the general public[2].
Second, the report must be notified to the parties of the operation so that they can make a discharge and offer the evidence they deem appropriate in the exercise of their right of defence. This instance gives the notifiers the opportunity to dispute and disprove the objections raised and offer possible solutions.
Finally, the competition authority must convene a special hearing in order to consider possible measures to mitigate the negative effect on competition.

5.1. Constitutional guarantees of due process incorporated into the analysis of concentrations and mergers.

In Argentina the defence of competition has constitutional rank. The normative mandate established by the National Constitution in its section 42, and by the legislator through Act 27 442 that regulates the matter, orders the protection of the competitive process based on the observance of specific procedures that established how public policy should be implemented in competition matters. The mentioned procedures must be carried out in safeguarding the guarantees of due process established in the National Constitution. Some of the guarantees that are reinforced with the incorporation of this new procedure are detailed below.

- *Description of the problems detected.*

The objection report must clearly state the competition problems that are verified in the operation, what the detected problems consist of and how they affect the competitive process. Therefore, the purpose of this new instance is to report summarily and clearly and precisely the essential facts on which this concern is based.
Although the procedure established in the repealed law 25 156 protected the right of defence of the parties in the process, it is true that the inclusion of the objection report incorporated a phase that allows the competition authority to make known, prior to the adoption of a decision, the concerns that the operation generates.
The objections incorporated into the report circumscribe the area in which the measures to mitigate the problems of the operation must be adopted. Therefore, the interested party must be informed of the reasons that led the competition authority to formulate it and the probative grounds for it in an expressly, clearly, comprehensively and sufficiently way.

- *Right of Defence.*

The issuance of the report allows the parties to an operation to offer all the evidence they deem pertinent to distort the analysis produced by the competition authority.
This situation amplified the possibility of exercising their right of defence for the parties of an economic concentration in protection of due process. In effect, this new instance grants the opportunity to participate actively and to be heard based on a defence aimed at challenging the objections raised. In this way, the objection report is constituted as a guarantee that allows the exercise of defence in a process that must end with a well-founded and fair decision, where the parties can defend themselves from the assessments contained in the report. However, it is important to highlight that this guarantee - that broadened the right of defence - does not necessarily lead to a favorable solution as regards the parties' interests.

- *Right to be heard.*

Once the objection report has been issued, and the discharge has been made, the procedure establishes that a hearing must be held to consider possible measures to mitigate the negative effect on competition. This hearing constitutes an essential element of the procedure where the parties have the opportunity to make their allegations manifest prior to the adoption of a decision by the competition authority.
This hearing, which makes it possible in the course of the administrative procedure to publicize their points of view on the solutions that would allow solving the problems described in the objection report, stands as an essential element of the right of defense in court.

- *The objection report does not end the process*

Argentine law provides three solutions to the processes of notification of economic concentrations. Those instances are plain and simple approval; the subordination of the act to the fulfillment of the conditions established by the same authority; or the ban[3].
The objection report operates as an intermediate instance. As indicated in the preceding paragraphs, it constitutes a tool that allows the competition authority to circumscribe the problems detected, offer the parties of the operation the right to be heard, to offer and produce evidence, and to obtain a decision founded. Therefore, it is the instance prior to the adoption of a well-founded decision. But it by no means ends the concentration analysis process. The competition authority, - due to its objections, the defense made, and the measures offered by the parties to the operation to mitigate the distorting effects that the operation may generate - must adopt a decision based on all those elements within the framework of the developed administrative procedures.

6. Objection Reports that have been issued.

6.1. Disney Fox Merger[4].

Within the framework of the international merger consisting of the acquisition of exclusive control by The Walt Disney Company over Twenty-First Century Fox, INC. In the Argentine Republic, the activity of the companies includes (i) the distribution and licensing of films in movie theaters, (ii) the licensing of films and other audiovisual content on linear and non-linear television and home entertainment, (iii) the commercialization of pay television signals, (iv) the sale of advertising space, (v) the licensing of intellectual property rights for manufacturers of consumer products and (vi) the licensing of music. In addition, Disney produces one radio signal and live entertainment.

The objections made by the Argentine competition authority were limited, mainly to the market for the production and commercialization of basic sports signals at the national level.

In this market, the operation implies that the company, once merged, would have 7 of the 9 basic sports channels and almost two-thirds of the total rating in sports channels, in addition to the Fox Sports Premium channel that transmits Argentine Foorball Super League matches. It also follows that as a result of the operation the number of competitors would go from three to two.

Regarding the Herfindahl-Hirschman (IHH) index, in this case the post-operation value of the IHH amounts to 5166 points, which shows a highly concentrated market. In turn, the variation of the HHI is higher than 2000 points, which could generate a reinforcement of the market power of the company resulting from the operation.

To these quantitative variables it is important to add some qualitative elements. In general terms, the characteristics of the negotiation between the signal producer and the distributor are determined by the evaluation that the audience makes of the signal. If a signal is valued by users for the quality of its content, the distributor will want to have that signal on its grid because its product - the signal package - will be more valued by users. Furthermore, if a distributor does not have a certain signal on its grid, it runs the risk that users will choose another service provider. Another risk of particular relevance is that negotiations can lead to what the industry knows as a “blackout”.

The position that the merged entity would acquire in the sports genre could have as a consequence an increase in its negotiating power to include the rest of its signals on other topics in the operators' basic packages, which could generate: (i) the reduction in the amount of signals from other marketers due to a limit in the grid, (ii) the increase in the price of all the Disney / Fox signals, with the consequent increase in the paid television subscription to the final consumer, and (iii) that, given the increase in the cost of programming, the distributor seeks to reduce the rest of the programming costs by paying less to Disney / Fox competitors, which could affect the quality of the content by reducing competition.

The merger transaction under analysis would eliminate a relevant competitor in the sports signals market since ESPN and FOX SPORTS signals are the closest competitors in the mentioned market. The substantial increase in concentration as a result of the operation would imply a significant increase in the market and negotiating power of the notifying companies, with the possibility of potential increases in the prices of signals and subscriptions paid by final consumers.

In addition, given that companies market their signals in a packaged way, the increase in market power in sports signals could be transferred to the rest of their pay television signals to the detriment of consumers, who also for this reason could see the value of the pay television subscription and they could receive a smaller, less varied offer and with lower quality products.

6.2 Syngenta Nidera Merger[5].

Within the framework of the international merger consisting of the acquisition of exclusive control by COFCO INTERNATIONAL NETHERLANDS B.V. by the firm SYNGENTA CROP PROTECTION AG, which indirectly implied the acquisition of NIDERA SEEDS ARGENTINA S.A.U., the Argentine competition authority issued an objection report. Both SYNGENTA CROP and NIDERA SEEDS HOLDING are present in the agriculture business. At the international level, both companies are mainly active in the research and development of varieties and hybrids of cereals and oilseeds, and in the production and marketing of the seeds resulting from such varieties and hybrids. In the Argentine Republic, the activity of the companies includes (i) research and development of seeds (soy, wheat, corn and sunflower), (ii) licensing of biotechnological events (soy, corn and cotton), and (iii) the production and commercialization of the seeds resulting from the research and development stage. Furthermore, in the case of the companies involved on the acquiring side, they are engaged in the production and commercialization of agrochemicals (herbicides, insecticides, fungicides, adjuvants and seed cures).

In the objections raised, the Argentine competition authority indicated that Syngenta is the leading company in research and development, production and marketing of sunflower seeds, while Nidera is the second. Consequently, it was highlighted that if the operation is approved, the merged companies would reach around 60% of the sunflower seeds market, significantly increasing market power.

Indeed, Syngenta leads the Argentine market in the commercialization of seeds and holds between 40% and 45% of the operations, respectively. Nidera, for its part, is the second largest operator in the market with between 15% and 20% of participation. Together, both companies reach 60% of pre-marketing and 65% post-marketing operations in our country.

The report highlighted that 90% of the sunflower seeds produced in Argentina are used to make oils and flours. While 5% are destined for exports, and the remaining 5% for seeds and balanced.

6.3. Mirgor/Brightstar Merger[6]

The economic concentration operation, held locally, consisted of the transfer of all the shares of BRIGHTSTAR ARGENTINA S.A. and BRIGHTSTAR FUEGUINA S.A by MIRGOR S.A.C.I.F.I.A. Both MIRGOR and BRIGHTSTAR are dedicated to the manufacture of mobile phones in Argentina. Indeed, MIRGOR manufactures Samsung brand mobile phones, while BRIGHTSTAR manufactures Samsung and LG brand mobile phones. If the MIRGOR operation is approved, it will manufacture close to 100% of SAMSUNG telephones in Argentina and close to 57% of the telephones sold on the local dial.
From the results of the Herfindahl and Hirschman Index (IHH), it was observed that the market was highly concentrated prior to the operation –with a value of 3,052 points-. Consequently, this situation would worsen in the event of approval, yielding a post-operation value of 4,412 points. Therefore, the competition authority considered that this situation, together with the participation that MIRGOR would reach, constitute relevant indications that the new economic entity would acquire strong market power as a result of this operation.

7. Preliminary Conclusions.

The objection reports are a novel tool of Argentine antitrust law. Its implementation is very recent and the results it has produced so far are encouraging. On the one hand, they allowed the competition authority, prior to defining the administrative procedure, to take into account the concerns that the operation generates. In this context, the parties can make a defence to dispute the objections raised. Once these two instances have been completed, an oral process begins where the proposed solutions that allow a solution to the problems listed are heard. Finally, the competition authority issues a decision based on all the evidence produced and the objections raised. This new incorporation constituted a significant advance that gives the parties to the operation an active role in resolving the effects caused by the operation. Although it is the competition authority that has the power to define the mechanisms and conditions aimed at solving the problems that the operation generates in the markets involved, it is true that companies now have an instance that allows them to defend themselves within the framework of administrative actions and offer possible solutions to the problems raised.

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[1] In relation with the Commission communication regarding admissible solutions under EC Regulation 139/2004 and 802/2004, it establishes in point 6 that under the Merger Regulation it is the responsibility of the Commission to demonstrate that a concentration would significantly hamper competition. The Commission will communicate the competition problems to the parties, so that they can formulate proposals for appropriate and pertinent solutions. In turn, it is clarified in the footnote that the Merger Regulation has formal measures when the parties are informed about the competition problems detected by the commission (decision 6.1 (c) statement of objections).

[2] Decree No. 480/2018 establishes in section 14 that the objection report will be notified to the parties to the operation and published on the website of the National Competition Authority. The parties may make the considerations they deem appropriate or offer a solution to the situation raised.

[3] Section 8 of Act 27 442 provides that economic concentrations whose object or effect is or may be to restrict or distort competition, in such a way that it may be detrimental to the general economic interest, are prohibited.

[4] https://www.argentina.gob.ar/sites/default/files/2017/02/io-conc1692.pdf

[5] See https://www.argentina.gob.ar/sites/default/files/2017/02/io-conc1654.pdf

[6] https://www.argentina.gob.ar/sites/default/files/2021/06/dictamen_y_resolucion_io_mirgor.pdf

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The National Commission for the Defence of Competition is a technical body that assists the Secretary of Domestic Commerce, the enforcement authority of Argentine competition law. It writes technical opinions on competition cases that the authority considers before making its final ruling.

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