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Interim Measures in Antitrust Investigations – Note by Argentina

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More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Interim measures are procedural remedies aimed at ensuring the practical effectiveness of a final decision on a case or matter. Their purpose is to prevent the right - whose recognition or action is sought- from losing its virtuality or effectiveness during the time that elapses between the initiation of a proceeding and the final decision that is adopted.
2. Those measures are especially useful within the specific scope of the defence of competition as they allow situations requiring prompt or urgent intervention to be addressed. They are intended to correct market distortions or to prevent damage or its worsening in the face of the imminent danger that the damage can no longer be remedied at a later stage or that the final decision to be adopted becomes abstract.
3. Not only does the function of the competition authority materialise by sanctioning anticompetitive conducts, but also avoiding or diminishing damages, its worsening and the continuity of those practices which may damage the general economic interest, legal good protected by the Argentine Act for the Defence of Competition (LDC).
4. Thus, public policy rules, such as the LDC, specifically regulate these tools to prevent detrimental situations and to foresee possible damage. According to the jurisprudence of the National Commission for the Defence of Competition of Argentina (CNDC), it is not required to have incontrovertible demonstrative evidence to prove a risk of damaging consequences, but it is enough if there is a reasonable conviction about the occurrence of possible damage.
5. The first part of this Note analyses the legal framework and its evolution. The second part addresses aspects that allow the issuing of interim measures to advocate and preserve competition. Moreover, the third and fourth sections address two recent precedents of interim measures issued by the Competition Authority of Argentina in studies carried out due to possible anticompetitive practices. The fifth and last part analyses interim measures in notification processes of economic mergers.

1. Legal framework

6. Interim measures have always had express regulation in Argentine antitrust law.
7. First, it consisted of preventive imprisonment, seizure of assets, and restrictions to avoid that the defendants in competition infringement cases could leave the country without previous authorization.
8. In 1994, the Argentine National Constitution was reformed, and it added -among the new rights and guarantees- the defence of competition in its section 42. Therefore, from that moment on, this guarantee does not only have a legal *status* but also constitutional rank.
9. The aforementioned modification in the regulatory system involved the substitution of the previous LDC (Act 22 262) for a new regulation on the matter, Act 25 156. With the enactment of this regulation, a depenalization process took place as regards the defence of competition—which also comprised interim measures.
10. Section 35 of the aforementioned Act regulated them with a certain laxity by establishing that at any point of the proceeding, the competition authority could: (a) impose

compliance of conditions to be established (i.e. impose obligations of granting or doing a determined action); (b) impose the cessation or order to refrain from the harmful conduct (obligations of not doing through discontinuance of burdensome behaviour or prevention of its occurrence) and; (c) when facing burdensome damage to the competition system, impose measures that, according to the circumstances, are more appropriate to prevent such damage (preventive function *stricto sensu*)¹

11. Under this rule, the enforcement authority has issued interim measures with different content, and there is a wide administrative jurisprudence on the matter.²

12. The current Act 27 442 was enacted on 9th May 2018, and it regulates—in its Section 44—the interim measures in the following terms: *"At any stage of the proceedings, the Court for the Defence of Competition may impose compliance with the conditions it establishes or order the cessation or abstention of the conducts provided for in Chapters I and II, in order to prevent the occurrence of damage, or reduce its magnitude, continuation or aggravation. When serious harm may be caused to the competition system, it may order the measures that, according to the circumstances, are the most appropriate to prevent such harm, and if necessary, remove its effects. An appeal with devolutive effect may be lodged against this decision, in the manner and under the terms provided for in sections 66 and 67 of this Act. In the same way, it may order, ex officio or at the request of a party, the suspension, modification, or revocation of the measures ordered by virtue of ensuing circumstances or circumstances that could not have been known at the time of their adoption."*

13. The wording of the regulation is similar to its predecessor, with certain differences. First, Act 25 156 referred to harmful conduct, while the current law makes a precise reference to conduct prohibited in Chapters I and II of the LDC, i.e., practices which are absolutely restrictive of competition (in which there is a legal presumption that they affect the general economic interest) and practices which are restrictive of competition (in which harm to the general economic interest must be proven). Secondly, under the current act, measures may be ordered not only to prevent harm from occurring or to diminish its magnitude, continuation, or aggravation but also to remove the effects of an injury that is already occurring at the time the measure is ordered.

14. These measures, as it used to be under the previous Act, may be ordered ex officio or at the request of a party. As the law provides for them to be ordered at any stage of the procedure, they can be ordered before the first summons in an investigation about possible anti-competitive practices (summons to provide explanations) or even after that stage, in case more information is needed to decide if they are appropriate.

15. By their very nature, these measures are not usually issued at an advanced stage of the investigation process, as this would distort their very purpose.

¹ Even if Act 26 993 was partially reformed in September 2014, the regulation of interim measures was not modified.

² Cases "Círculo Odontológico de Jujuy S/Infringement to Act 25.156", "Asociación chaqueña de anestesiología s/ infringement to Act 25.156"; Federación Odontológica de la Prov. De Córdoba s/ Infringement to Act 25.156; "Agremiación Médica Platense s/ infringement to Act 25156.; Colegio Médico de la Prov. De Buenos Aires y otros s/ infringement to Act 25156"; "Fox Sports Latin América s.a. s/infringement to act 25156"; HTMF Liberty y Fox S/ infringement to Act 25156"; Hbo Ole Partners, A&E Mundo LLC Distribution LLC y otros s/ infringement to Act 25156", "Monsanto Argentina S.A.I.C. S/ infringement to Act 25156", "Marítima Meridian S.A. y Betelgeuse Shipping Services S.A. s/CNDC's request for action and "Alliance SRL y Grisú S.A. s/infringement to Act 25156" among others.

16. Interim measures can be challenged by those who are obliged to comply with them, through the filing of an appeal. That is to say, to guarantee due process, the LDC enables judicial review. This appeal has a devolutive effect, which means that, despite the challenge of the measure, its effects are not suspended until the judicial issue is resolved. Therefore, if the authority becomes aware of or verifies non-compliance with the measures ordered, it can impose a fine.

17. The *Tribunal de Defensa de la Competencia* (Defence of Competition Court) is the body empowered to order injunctive relief. However, since it has not yet been created, the CNDC issues a non-binding opinion advising whether the measure is admissible or not, and the Secretary of Domestic Trade issues the respective order.

2. Particular aspects to be considered for the issuance of interim measures in antitrust matters

18. One topic that doctrine and jurisprudence have intensively debated over is whether interim injunctions issued in the scope of the defence of competition should be treated and analysed differently from generic injunctions that may be issued in other branches of law.

19. Special consideration should be given to the fact that precautionary measures in this area do not protect a private or particular interest but are issued for a clear and specific purpose: to protect the legal interest protected by the LDC, i.e., the general economic interest.

20. This means that, when analysing the appropriateness of a measure of this type, the competition authority will consider necessary, but not sufficient, the existence of the generic requirements of any precautionary measure—likelihood of prevailing on the merits (*verosimilitud en el derecho*) and showing of irreparable injury if relief is not granted (*perigo en la demora*). This is so because the benefit, in its issuance, will not be exclusively for the party requesting it, but for society as a whole. This particular aspect has been given special consideration both by the competition authority and by the courts reviewing such decisions.

21. In the case "*Cooperativa Villa Urquiza y otros*", the National Chamber of Appeals in Civil and Commercial Matters stated that it was essential to assess the actions or conducts that distorted competition or market access when issuing the measure. Accordingly, in "*Agremiación Médica Platense*", the Federal Court of Appeals of La Plata stated that there was no evidence to support that the resolution of the Association was beneficial to the community, but that if applied to its full extent, it could lead to an excessive imposition of conditions in health care with a direct impact on the welfare of consumers.

22. More recently, in the "*Practicaje Independiente S.A.*" case, the courts remarked that the issue under discussion, within the framework of the antitrust regime, must be approached from a broad perspective, since the primary objective of antitrust legislation is the protection of the general economic interest and not the complainants in particular, although they could benefit from the resolution that, in the end, is issued for the conduct under investigation.

23. Finally, in the "*Grisú S.A.*" case, the judges stated that precautionary measures in competition law have a special immediate purpose that exceeds the exclusive private interest. Indeed, they considered that the general economic interest is the necessary element to adopt a precautionary measure under this specific legal scope. The harm must affect the competition system, and the economy in general, as a legal interest protected by this branch

of law, and the exclusive statement of personal harm suffered by the requesting one is insufficient.

3. Preliminary injunction in the case “WHATSAPP/ FACEBOOK”

24. In application of the aforementioned concepts, in May 2021, the CNDC initiated an *ex officio* investigation against WHATSAPP INC., its parents and its controlling companies, for alleged abuse of dominant position and, immediately thereafter, it ordered a preliminary injunction.

25. To contextualise the case, FACEBOOK INC. had acquired a controlling interest in WHATSAPP INC. in 2014 and, at that time, both companies made public statements indicating that WhatsApp privacy policies would remain unaltered.

26. In view of the changes to the terms of service and privacy conditions that WHATSAPP intended to carry through on May 2021, the CNDC started the investigation, in a context where other competition agencies were also looking into the alleged abuse of dominant position of these companies.

27. To determine the appropriateness of the measure, information regarding the update of the terms of service and privacy conditions of the WHATSAPP application, as well as the information WHATSAPP shared with FACEBOOK companies, was analysed.

28. In addition, and considering that the investigation is framed as an alleged abuse of dominance, in order to determine that FACEBOOK preliminarily holds such a position, the CNDC described the characteristics of the digital platform markets and stated that the markets of two or more non-transactional sides (or advertising platforms), in which FACEBOOK and its subsidiaries participate, have a high penetration of users in Argentina through its social networks Facebook and Instagram, and the WhatsApp messaging platform.

29. Regarding the specific grounds for the measure, the CNDC considered that, if the exchange of users' information (as a consequence of the change in the privacy conditions of the WHATSAPP application scheduled for May 15th, 2021) were to be verified, a user database with a level of detail that cannot be replicated by other companies would be created, which could lead to potential exclusionary and exploitative conduct.

30. Moreover, in digital platform markets, unreasonable data collection and sharing could give a competitive advantage to dominant players and result in exploitative effects on users and market foreclosure of competitors, i.e., practices with the potential to affect the general economic interest.

31. The CNDC particularly analysed the imminence of the harm to the legal right protected by the LDC. First, it analysed the importance of preventing the user from having to choose between accepting the terms of service and the privacy policy imposed by WHATSAPP or suffering the degradation of the functionalities and the subsequent blockage of the application. On the other hand, the CNDC considered the asymmetry of information in the contract between the user and the application, and the fact that both FACEBOOK and WHATSAPP are the only sponsored applications with "zero rating", i.e., where the user can browse without consuming data.

32. Having analysed the elements set out above, on May 14th, 2021, the Secretariat of Domestic Trade ordered -following an opinion issued by the CNDC- the Argentine subsidiary of FACEBOOK INC. and/or certain companies of the FACEBOOK and WHATSAPP group to refrain from implementing and/or to suspend the update of the terms

of service and privacy policy of the WhatsApp application in Argentina, for 180 days or until the end of the investigation, whichever comes first; and to refrain from exchanging data in the sense established in the update, even in the cases in which WhatsApp users had accepted it.³

33. Although the measure was judicially challenged, recently, on April 26th, 2022, it has been confirmed by Chamber II of the National Chamber of Federal Appeals for Civil and Commercial Matters, constituting an important precedent of legal support for the measure ordered, the elements that supported it and the evidence used to dictate it.

34. In its decision, the Court stated that its analysis would be limited to assessing whether the measure was justified to avoid potential and hypothetical damage to the general economic interest, which it ultimately affirmed.

35. The sentence emphasised that the core of the issue was that the modifications introduced by the company entailed a significant exchange of data and that it had not been demonstrated so far in which specific cases the transfers of information between the companies were necessary, which could constitute an anti-competitive conduct.

36. Considering the procedural status of the ongoing investigation, the validity of the advance guardianship measure issued on May 14th, 2021, has recently been extended by the CNDC and the Secretariat of Domestic Trade until the completion of the investigation.⁴

4. Injunction not to innovate in the case “DOW”

37. In September 2021, the CNDC initiated an *ex officio* investigation, due to the fact that the DOW group had announced the closure of its production plant located in the province of Santa Fe, which mainly produces polyoxy propylene glycol and glycol ethers, critical inputs for some strategic industries in Argentina such as automotive, mattresses and household appliances.

38. The CNDC assessed the incidence and possible impact that this decision could have on the general economic interest, considering that the company was the only producer of polyoxy propylene glycol, with the capacity to supply almost 100% of the national consumption. The assets produced in that plant were of the utmost importance since the company had a preponderance in the production and supply of the product, not only in Argentina but also at regional level within MERCOSUR. In this context, the CNDC considered that the interruption of the production unit's activities could constitute a supply restriction when considering a scenario in which the facilities were acquired by a competing firm, guaranteeing the supply of the input produced in the country under conditions of greater competition than those that would arise from the plant's closure.

39. On the other hand, as it was assessed, the effects of dismantling the plant and disposing of the assets would make it impossible to return the situation to its previous state, should this happen.

40. In their resolution, the CNDC and the Secretariat of Domestic Trade analysed the implications that the company's decision could have on the general economic interest, whose constituent elements include productivity, technical level, geographical distribution of domestic production, international trade, employment and consumer welfare.

³ Available in: <https://www.boletinoficial.gob.ar/detalleAviso/primera/244442/20210517>

⁴ <https://www.boletinoficial.gob.ar/detalleAviso/primera/259872/20220328>

41. Within this context, an injunction was ordered to prevent the company from altering or modifying the productive assets of the plant, whose closure it had announced, unless the action taken was based on its maintenance, repair or improvement, and until the merits of the case were resolved.

5. Interim measures in economic mergers processes

42. Although the regulation of precautionary measures in the LDC is found in the chapter corresponding to the anti-competitive conduct procedure, its nature and purpose have motivated the competition authority to use this tool also in merger proceedings.

43. The objective of the interim measures, in this case, is to prevent the consolidation of structures which, arising from the concentration, may have the potential to affect the general economic interest.

44. In three Objection Reports, the CNDC and the SCI have ordered injunctions, under the terms of Section 44 of the LDC, to preserve the inalterability of the situation of the companies, ordering them to maintain their separate businesses in the state they were before the notification of the concentration, and until the conflicts raised in the Objection Report are resolved.⁵

45. Such reports have been incorporated by the current LDC and constitute an intermediate instance of the economic concentration analysis procedure. They are issued when the competition authority realises that the notified transaction has the potential to affect the general economic interest (for example, because it creates or strengthens a dominant position, aggravates a situation of high concentration that already exists, considerably increases the market power of the entity

46. In these cases, the content of these reports constitutes the main basis for ordering the measure because it contains the demonstration that, *a priori*, the transaction implies a competition problem, and correlatively, that there is a certain danger that the joint market structure will be consolidated making more difficult the effectiveness of the structural remedies that could potentially be ordered in a final decision on the transaction.

6. Conclusion

47. In recent years, interim measures have undergone a remarkable evolution due to several factors. They are a very useful tool which the CNDC has historically applied in different types of investigations.

48. The administrative and judicial courts' jurisprudence has been improving the design of precautionary measures, which have taken different characteristics depending on the type of process in which they are ordered, the characteristics of the relevant market, the factual assumptions that support the decision, the evidence that can be gathered and the precedents in the matter.

49. As for the CNDCC, it will be essential to adapt the interim measures to the new situations and cases that arise, to adequately justify the requirements for proceeding, the

⁵ Merger MIRGOR/BRIGHSTAR, ARCOR/ INGREDION y QUILMES/TEMPLE. In this case, the order did not take place since, after the CNDC's Objection Report, the economic merger was withdrawn by the parties, which was an ex-ante notification.

possible damage, its imminence and especially its impact on the general economic interest, so that, in the subsequent judicial review instance, these decisions can be confirmed.