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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Argentina

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This contribution is submitted by Argentina under Session IV of the Global Forum on Competition to be held on 1-2 December 2022.

More documentation related to this discussion can be found at: oe.cd/sctr.

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Remedies and Commitments in Abuse Cases

- Contribution from Argentina –

1. As a result of the roundtable on Remedies and Sanctions in Abuse of Dominance Cases of June 2006, the Secretariat of the OECD Competition Committee produced a document that states:

Remedies cure, correct, or prevent unlawful conduct, whereas sanctions penalise or punish it. Typically, a competition law remedy aims to stop the violator's illegal behaviour, its anticompetitive effects, and its recurrence, as well as to restore competition. Sanctions are usually meant to deter unlawful conduct in the future, and in some jurisdictions also to force violators to disgorge their illegal gains and compensate victims.

2. Therefore, remedies and sanctions resulting from an abuse of dominant position, in particular, and from an anticompetitive conduct, in general, can differ depending on which action the competition authority will carry out, in view of the evidence of the illegal practice committed and, above all, of the harm caused by its execution.

3. However, the boundary separating the objectives of one or the other is blurred since, for example, a remedy thought to restore competition in a market may, at the same time, have a deterrent effect on the alleged perpetrator of the anti-competitive practice. Similarly, a sanction aimed at compensating the victims of the practice may also have a corrective impact, undoing the harm caused by the practice.

4. The quantification of that harm is a significant factor to consider in evaluating the consequences of the violation because, in the case of anticompetitive conducts, both, sanctions and remedies, as well as voluntary undertakings, must counteract harm already committed.

5. Argentina's Act N° 27.442 on Defence of Competition (LDC, for its acronym in Spanish) —in force since 2018— includes, in its first section, practices framed as abuse of a dominant position as one of the infringements to the regulation. This type of anti-competitive conduct —like the other practices prohibited by the LDC— is a concern as it limits, restricts or distorts competition or access to a market, but also because it is detrimental to the General Economic Interest (IEG, for its acronym in Spanish), which introduces a central topic within the Argentine antitrust law. When determining the scope and severity of the harm that an anticompetitive activity may cause, the IEG is a metric to be considered. In this regard, and given that remedies and commitments seek to suspend, repair or mitigate the harm caused, the impact of the behaviour on the IEG is considered when taking actions to achieve these goals. The IEG was already present in the predecessors of the LDC: Act N° 22.262, enacted in 1980, and Act N° 25.156, enacted in 1999.

6. In order to analyse the different remedies and commitments that the Argentine competition authority —currently, the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) in conjunction with the Secretary of Commerce— has imposed or agreed with those responsible for anticompetitive practices framed as abuse of a dominant position, this note is structured as follows. The first section considers the current legal framework and the general aspects that the CNDC ponders when imposing a remedy or accepting a commitment. The second and third sections are devoted

to examining the remedies resulting from two cases of abuse of dominance investigated by the CNDC: Cervecería y Maltería Quilmes's case, in which the CNDC imposed behavioural remedies on the company, and the case of Prisma Medios de Pago's case, which concluded with the presentation of a divestiture commitment by the company, standing out as one of the few structural remedies in the history of the authority in the framework of an investigation for anti-competitive conduct. In the fourth section, certain conclusions on the subject are outlined.

1. Legal Framework

7. In Argentina, abuses of dominant position are one of the punishable infringements, as established by the LDC. Section 5 of the Act defines that an agent has a dominant position when:

(...) for a particular type of product or service it is the only supplier or demander in the national market or in one or more parts of the world or, when even not being the only one, it is not exposed to substantial competition or when, by the degree of vertical or horizontal integration, it is in a position to determine the economic viability of a competitor participating in the market, to the detriment of the latter.

8. Section 3 of the LDC defines the various behaviours that can be construed as abuse of dominant position practices.

9. Firstly, in line with most antitrust laws, the Argentine LDC does not sanction—nor does it monitor or control—companies that hold dominant power in a market, but rather those that, having dominant power, engage in practices that constitute an abuse of their position. In other words, it is a regulation that, in terms of the latest regulatory trends that seek to deal with the effects of digital markets on competition, urges the enforcement authority to act ex-post, that is, to investigate and sanction when there is evidence of an infringement.

10. Secondly, sanctions appear as one of the main consequences of any infringement of the LDC, both in the case of abuse of a dominant position and concerted practices, given that they are established as a consequence of illicit behaviour as soon as in the Section 1 of the Act.

11. Although the term "remedies" is not mentioned in the legislation, the first corrective measure listed in Section 55 of the LDC is configured in its objectives as such: the cessation of the anticompetitive acts or conducts and the removal of their effects. This is the most common remedy; it is ordered as a minimum by the CNDC in almost all cases of abuse of dominance investigated (though also in cases of concerted practices) that are punishable.

12. Other sanctions described in Section 55 include a fine as a monetary sanction for the economic agent—legal or natural person—who committed the offence and fines for natural persons in positions of authority who took part in the infraction. The LDC also contemplates disqualification from trading for one to ten years and suspension from the National Register of State Suppliers for up to five years in the case of companies participating as bidders in public procurement processes.

13. In terms of remedies, the primary objectives are usually to end the anticompetitive conduct that has been or is being implemented and restore the competitive conditions of the affected market to the pre-practice scenario. In addition to what was mentioned above, which provides for the cessation of the conduct and its effects, other references to such

measures can be found in sections 44 and 45 of the LDC chapter dedicated to regulate the procedure for investigating and sanctioning of anticompetitive conducts.

11. According to Section 44, the CNDC has the authority to impose on the alleged perpetrator of the anticompetitive practice the fulfilment of conditions, or to order the cessation or abstention of the anticompetitive conduct carried out to prevent the occurrence of harm or reduce its magnitude, continuation, or aggravation. The same section also establishes that, in cases where the conduct could cause severe damage to the competition, the authority may order the measures that, according to the circumstances, would be most appropriate to prevent such harm and, if necessary, the removal of its effects.

12. Section 44, in this regard, provides for the imposition of specific measures that collaborate in reducing or limiting the harmful effects of the practice, which may result in conditional remedial measures after the investigation of the conduct in question or, in cases of emergency, on an interim measure based on preliminary evidence. In both cases, these actions seek to remedy the harm caused by the unlawful practice, and they are imposed by the authority.

13. In these cases, the allegedly responsible party may appeal the CNDC's decision or call for the suspension, modification, or revocation of the measures ordered due to supervening circumstances or a lack of knowledge at the time of their adoption. This appeal must be filed and substantiated before the competition authority within fifteen working days of notification of the resolution. The authority must submit the appeal with its response to the competent judge within ten days of its filing and the file the administrative act appealed against.

14. In addition to Section 44, Section 55, paragraph c), states that:

Notwithstanding other sanctions that may be applicable, when acts that constitute abuse of a dominant position are verified or when it is established that a monopolistic or oligopolistic position has been acquired or consolidated in violation of the provisions of this law, the authority may impose the fulfilment of conditions aimed at neutralising the distortive aspects on competition or request the competent judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

15. The provision certainly strengthens the CNDC's authority to impose compliance with measures to mitigate damage, which may be issued in addition to other sanctions, while also adding the possibility that the competition authority may request a federal court to split up the offending company. This allows the chance to demand behavioural remedies and structural ones in the event of evidence of an abuse of a dominant position.

16. On the other hand, the voluntary submission of a commitment by the infringing company to the authority is provided for in section 45 of the LDC. This section provides that the alleged perpetrator of the anticompetitive conduct can commit to the immediate or gradual cessation of the investigated facts or the modification of related aspects. The offending undertaking must submit the commitment before the issuance of the case resolution by the CNDC. The commitment is subject to the authority's approval, which, if accepted, must suspend the proceedings. If, after three years, it becomes evident that all conditions have been complied with and there is no recurrence of the conduct, the proceedings must be closed. To corroborate compliance, the CNDC starts what is called a "verification incident", in the framework of which it may consult competitors, customers, suppliers, or any third party that the offending person may have harmed, about the evolution of the conditions of the market in which it operates, after the beginning of the commitment, especially, whether the conduct previously exercised has ceased. Verifying compliance

with a commitment is often a complex process, particularly in cases where the agreed measures are of behavioural nature.

17. The predecessor of the current LDC, Act N° 25.156, also considered remedies and commitments in the terms above, so there is a normative continuity with the current legislation. As for remedies and obligations and the convenience of applying this type of measures –in addition to or in replacement of other sanctions– there is nothing stipulated by the LDC, nor by the decree that regulates it, nor is there any guide that outlines their structuring. The CNDC follows a "case-by-case" approach to decide on sanctions and/or remedies when there is evidence of abuse of dominance.

2. Behavioural remedies: the Cervecería y Maltería Quilmes case

18. In 2016, the brewers Compañía Cervecerías Unidas S.A., Compañía Industrial Cervecera S.A. and Otro Mundo Brewing Company S.A. filed a complaint with the CNDC against Cervecería y Maltería Quilmes (CMQ) —a local subsidiary of Anheuser-Busch InBev— for many commercial dealings that the complainants described as abuses of dominant position, and that had already been investigated, verified and sanctioned by competition authorities of other countries such as Brazil, México, Uruguay, Colombia, Chile, Dominican Republic, Greece, among others.

19. CMQ is the leading participant in the beer market in Argentina, with a market share of more than 70% in the production and commercialisation of beers at the national level and with a portfolio of more than ten beer brands. The CNDC thus considered it held a dominant position in the market under analysis.

20. In addition, in the investigation carried out by the CNDC, it was corroborated that CMQ developed a set of loyalty strategies to generate exclusive beer retail spaces, generating a vertical market foreclosure for current and potential competitors. The set of loyalty instruments that gave rise to the anticompetitive conduct was reflected in the following practices:

- Exclusive sale of beers and other CMQ products in on-premise points of sale (bars, restaurants, etc.) in exchange for cash contracts, advertising, furniture and discounts on the portfolio of products marketed (beers, waters, flavoured waters, isotonic waters, soft drinks, energy drinks, etc.).
- Demands for exclusive and preferential shelf space in off-premise channels (supermarkets, self-service stores and department stores), surpassing their market share and, thus, their corresponding shelf space, in exchange for discounts and promotions.
- Exclusivity in refrigerators in the on-premise and off-premise segments.

21. The CNDC found evidence of all these practices and corroborated that they implied barriers to entry in the beer production and distribution market, thus proving the abuse of a dominant position of an exclusionary nature. The competition authority also verified that these commercial practices—although common in the beer market—were detrimental to the IEG since CMQ's dominant position made it impossible for competitors to engage in such conduct to the same extent and under the same conditions, which defined if the remaining competitors were excluded from or remained in the market.

22. In the midst of the investigation procedure, CMQ voluntarily submitted to the CNDC a commitment in which it proposed to refrain from proactively offering discounts,

promotions or any other benefits to on-premise outlets on the condition that they did not sell beers of competing companies.

23. After analysing the commitment, the CNDC decided to reject it, on the grounds that it was a partial instrument, which did not cover all of the alleged conducts—for example, completely ignoring the behaviours committed in the off-premise commercialisation channel—and that, therefore, it did not achieve the primary purpose, which was to remedy the harmful effects of the alleged practices that were harming competition and the general economic interest.

24. Instead, the CNDC decided to sanction the brewery with a AR\$150 million fine and to impose a series of behavioural corrective measures on the brewery intending to prevent the recurrence of all the sanctioned conducts, thus ceasing the damage to competition in the beer market and the consequent harm to the IEG.

25. CMQ had to comply with the following behavioural remedies:

- To avoid implementing any formal or informal commercial agreement with points of sale—both on-premise and off-premise— whose purpose or effect is to generate vertical restrictions on commercialisation channels to: obtain exclusivity of sale; make their products the first choice; eliminate competitors from menus or others; limit the display of competitors' products through exclusive space agreements on shelves; or require the exclusive use of refrigerators to refrigerate products in points of sale with limited space for the provision of more than a single refrigerator (such as kiosks and grocery stores).
- To maintain its beer brand's commercialisation strategy independently from the other beverages it distributes, avoiding cross-discounting between different products and tie-selling, making the marketing of one product conditional on the purchase of another.
- To establish exclusive advertising and promotion agreements for their beer brands, through the provision of furniture, marquees or other means, only under the following conditions: with contracts for a maximum duration of three years with the possibility of early cancellation after the first year and no automatic renewals; with no clauses prohibiting the sale of competing products, no preference orders in the product offering, and no requests for exclusion of competitors' products from menus.

3. Structural remedies: the Prisma case

26. In August 2016, the CNDC issued a market investigation report on credit cards, debit cards and electronic means of payment. The conclusion of that investigation—in addition to the issuance of specific pro-competitive recommendations addressed to the Central Bank of Argentina regarding the markets under investigation— was the opening of an ex officio investigation for alleged anti-competitive practices against the company Prisma Medios de Pago S.A. (Prisma). At that time, the firm was the only authorised processor and acquirer in Argentina of "Visa" branded means of payment. Later, complaints from the Argentine Chamber of Commerce and Services and the online sales platform MercadoLibre were added to the file.

27. In the investigation, the CNDC identified four relevant markets in Argentina: (i) the electronic payment instruments issuing market, (ii) the electronic payment instruments acquiring market, (iii) the electronic payments processing market, and (iv) the terminals or

interfaces for electronic payments provision market. The CNDC verified Prisma's participation in all four markets and concluded it held a dominant position in the acquiring and processing markets. It also found that Visa's exclusive licence granted to Prisma could constitute a barrier to entry or to expand (for current competitors) in the card acquiring market.

28. About the anticompetitive conduct carried out, the CNDC found indications of restrictions to competition by price, financing and the operation of third-party competitors, as described below:

- Price restriction in the acquiring market: Prisma, given its dominant position and lack of competition in the acquiring market, influenced the pricing of other brands. This is because, in order to incentivise issuers to issue cards of other brands, equally high interchange fees were required which, in turn, prevented the reduction of the fees charged to retailers, based on the reduced margin in acquiring;
- Financing constraint: Prisma's shareholders were the fourteen largest banks in the country. This corporate structure could function as a coordination mechanism to facilitate the setting of commercial policies common to all banks, including consumer financing conditions.
- Restriction of the operations of third-party competitors: there was an abuse of dominance by Prisma, such as degradation of the quality of its services, discriminatory treatment between customers and unjustified refusals to provide processing services.

29. In 2017, Prisma presented a commitment based on two central axes: on the one hand, the offer of a structural commitment consisting of the divestiture of Prisma by the shareholding banks of their stakes in the company, and, on the other hand, a behavioural commitment linked to the conditions for the provision of the electronic payment processing services and the electronic payment instruments acquiring services.

30. The CNDC accepted the submitted commitment, considering it suitable to address the identified competition concerns.

31. Indeed, the CNDC understood that the proposed divestiture eliminated the vertical integration between the banks as a whole and Prisma, reducing the barriers to entry into the acquiring market and, at the same time, eliminating the potential coordination mechanism among banks that could facilitate the concerted setting of commercial policies on consumer financing conditions.

32. With respect to the evidence found on existing restrictions to the operations of third party competitors attributed to Prisma as potential manifestations of abuse of its dominant position, the CNDC considered the following elements: (i) the proposed divestiture — together with other modifications in the sector carried out by the Central Bank (such as the interchange fee regulation)— generated a change in the market structure, significantly contesting Prisma's dominant position; (ii) the discontinuation of the immediate transfer service by Prisma contributed to other electronic payment service providers having access to bank balances and being able to operate on a level playing field; (iii) behavioural commitments linked to the conditions for the provision of electronic payment processing and acquiring services —such as offering the processing service on non-discriminatory terms and unbundling retailers fees— facilitated the entry and operation of non-integrated electronic means of payment providers.

33. In January 2019, 51% of Prisma's shares were sold to Advent. The same firm acquired the remaining 49% in March 2022.

34. This was a unique case for the CNDC, as it was the first time an investigation into alleged anticompetitive practices resulted in a divestiture of this significance. The measure truly dismantled a dominant position and significantly increased competition in the credit card and electronic means of payment market.

4. Conclusions

35. In sum, in Argentina, the LDC provides for the imposition —through the competition authority— of remedies on the infringing company or person, as well as the acceptance of commitments from the responsible party, in the framework of the investigation of all types of anticompetitive conduct, including cases of abuse of dominance.

36. The CNDC has a "case-by-case" approach to decide whether, upon evidence of an abuse of dominance, it will impose a sanction, a remedy, or both. The same approach is carried out in order to elaborate remedies, as no parameters for their structuring are stipulated in the LDC, nor in the decree that regulates it, nor has the CNDC so far drafted specialised guidelines on the subject.

37. However, in all cases, the authority issues an order to cease the conduct under investigation.

38. If remedies are ordered or commitments are accepted when investigating an abuse of dominance, they are usually behavioural. In this regard, the Prisma case described above stands out since the commitment, in addition to having behavioural measures, included the divestment of the offending company itself. That meant a significant change in the national electronic payment processing and acquiring services markets, in which illicit practices were found to have taken place.

39. To conclude, it should be noted that the monitoring of compliance with commitments and, in specific cases, with the remedies imposed by the authority tends to be a highly complex process in which the CNDC is working to introduce procedural improvements, so as to be able to have more complete information on the post-commitment scenario of the market affected by the abusive practices committed.