

**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 13 May 2020**

**Annual Report on Competition Policy Developments in Argentina**

-- 2019 --

**10-12 June 2020**

This report is submitted by Argentina to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 10-12 June 2020.

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## *Argentina*

### Executive Summary

This report addresses events that have occurred in the reporting year (1 January 2019 to 31 December 2019).

Section 2 explains competition decisions, both in terms of sanctions for anticompetitive practices and in terms of merger control. As regards anticompetitive practices, the report presents summary of one relevant case that have been solved in 2019:

- A commitment accepted in an abuse of dominance case in the long steel products market.

Concerning merger control, the report provides statistics on number, size and type of mergers notified and/or controlled under competition laws. It also provides a summary of three cases. It must be born in mind that, until one year after the new competition authority is in place, companies are allowed to notify the operation up to one week after its closing.

- Acquisition of Monsanto by Bayer
- Acquisition of Hamburg Sud by Maersk
- Acquisition of Time Warner by AT&T

Section 31 provides with instances in which the CNDC has been consulted by other public organizations in the design and/or implementation of regulatory changes.

Finally, Section 4 shows the CNDC's resources, both human and financial, as well as its organisational structure and Section 5 provides a brief summary of market studies and pro-competitive recommendations issued by the CNDC in 2019.

### 1. Changes to competition laws and policies, proposed or adopted

1. There have not been relevant changes to Argentina's competition law in 2019.

### 2. Enforcement of competition laws and policies

#### 2.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

##### *2.1.1. Summary of activities of competition authority*

2. In 2019 the CNDC opined on 61 cases related to anticompetitive conducts, both cartels and abuses of dominance and launched three ex-officio cartel investigations. No fines were imposed

3. In addition, the CNDC has published guidelines for the analysis of exclusionary abuse of dominance cases. A first version was submitted for public comments in September 2018. Comments have been received from many national and international organizations. The final version was published in May 2019 and is available on the CNDC's webpage.

### *2.1.2. Description of significant cases, including those with international implications*

#### *Abuse of dominance investigation in the steel products market*

4. A commitment from Acindar Industria Argentina de Aceros S.A. (Acindar), a steel company that produces in Argentina a wide range of long steel products, was accepted to settle an abuse of dominance investigation.<sup>1</sup> Acindar is a subsidiary of the multinational steel company ArcelorMittal. The procedure sought to analyse the potential effects on competition resulting from the design of Acindar's exclusive distribution network, including

- Automatic renewal clauses;
- Termination restrictions (“exit barriers”);
- Resale price maintenance clauses;
- Acindar's powers to access accounting information from its exclusive distributors; and
- Exclusive territory clauses.

5. The investigation was initiated ex-officio following a market study conducted by the CNDC, which concluded that some features of Acindar's exclusive distribution network could potentially infringe article 3 of Argentina's competition act.

6. In order to settle the case and close the investigation, Acindar proposed a commitment that would address the CNDC's concerns. The main terms of Acindar's commitments are:

- Elimination of penalties to exclusive distributors for sales below suggested prices.
- Elimination of benefits granted to exclusive distributors for sales above suggested prices.
- Elimination of all references to minimum resale prices or “target values” in Acindar's commercial relations with its exclusive distributors.
- Acindar will refrain from sharing information provided by, or obtained from its exclusive distributors.
- Acindar commits to change the way compensation of the exclusive distributors is set.
- New contract models with their distributors adjusted to the abovementioned terms will be implemented, and current agreements will be adjusted accordingly.

7. The CNDC determined that the commitment was admissible with regard to its formal requirements. As regards the scope of the commitment, the CNDC assessed that it would improve competition in the market as it would reduce exit barriers for exclusive distributors and reduce Acindar's interference with its exclusive distributors' commercial policy. In addition, the CNDC considered that the allocation exclusive territories for

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<sup>1</sup> Resolution SCI No. 785, dated 26 November 2019 and Opinion CNDC No. C. 1690, dated 30 October 2019.

Acindar's distribution network would not be a concern, because there would be always more than one distributor serving the same geographical area.

8. In sum, the CNDC considered that the proposal was appropriate and, therefore accepted the commitment, acknowledging that the commitment should not be taken as a recognition of a competition violation by Acindar, or grant immunity with respect to other potential infringements beyond the terms of the commitment.

9. Consequently, the procedure was suspended for a 3-year period, during which the CNDC will monitor compliance with the commitment agreement.

## 2.2. Mergers and acquisitions

### *2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws*

10. Argentina's Competition Law No. 27,442 (LDC) in its article 9 establishes the obligation to notify to the competition authority all operations of mergers and/or acquisitions for which the total turnover of the affected companies is above 100 million mobile units.<sup>2</sup> The value of the mobile unit is updated at the beginning of each year and in 2019 it was set at ARS 26.40. At the end of 2019, this was equal to USD 0.44 and EUR 0.39.

11. The LDC also includes provides for some conditions for those economic concentrations (as defined under article 7)<sup>3</sup> that, even when the abovementioned threshold is met, shall be exempted from the obligation to notify, which can be classified in two groups:

- Operations involving companies which conduct economic activities outside Argentina, whenever said activities shall not have effects in the Argentine market (article 4 of the LDC);<sup>4</sup>
- Exemptions to the obligation to notify (article 11 of the LDC), in particular, cases in which:
  - The purchaser already holds more than 50% of the shares of the acquired company;
  - The acquisition comprises bonds, debentures, certificates of indebtedness or shares without voting rights;

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<sup>2</sup> As established in article 9 of the LDC, total turnover is to be understood as the amounts resulting from the sale of products and the provision of services performed by the affected companies during the last year corresponding to their ordinary activities, after deduction of the discounts on sales, as well as value added tax and other taxes directly related to turnover.

<sup>3</sup> Under article 7 of the LDC, a concentration could be achieved either through merger of companies; bulk transfers; acquisition of ownership of interest in a legal entity that amounts to legal control or enables the purchaser to obtain substantial influence thereof; or by any legal act that either transfers the assets of a business or grants a "substantial" influence or "determining influence" in the government and administration of the business.

<sup>4</sup> In order to determine whether an operation involving companies that perform their business activities outside Argentina has effects on the domestic market, CNDC's case law establishes the criterion of "substantiality, frequency and predictability of exports to Argentina."

- The acquisition of a domestic company by a foreign company that does not own any shares or assets of another domestic company;
- The acquisition of a business under liquidation, which has not conducted business during at least the latest year; or
- The amount of the transaction or the assets acquired does not exceed 20 million mobile units, unless there has been more than one acquisition in the preceding 12 months and their total value exceeds that amount, or the value of the total of such acquisitions in the preceding 36 months exceeds 60 million mobile units. The transactions subject to the 12- and 36-months accumulations must have occurred in the same market.

12. During 2019 the CNDC received 62 merger notifications, compared with 105 merger notifications in 2018. In addition, the CNDC issued 96 merger opinions in 2019, all of them clearing the operation. Out of the 96 mergers cleared, 39 referred to conglomerate operations, 34 were operations with only horizontal effects, 8 were operations with only vertical effects and 15 had both horizontal and vertical effects.

### *2.2.2. Summary of significant cases*

#### *Acquisition by Bayer Aktiengesellschaft of Monsanto Company*

13. This is an international operation and consists of the acquisition by Bayer Aktiengesellschaft (Bayer) of Monsanto Company (Monsanto) in the seeds and agrochemical market.<sup>5</sup> Following this operation, and as a result of remedies imposed in the USA, Europe and other jurisdictions, BASF SE (BASF) acquired from Bayer those business lines that overlapped with Monsanto's.<sup>6</sup>

14. Globally, the operation was implemented through an Agreement and Merger Plan signed by Bayer, Monsanto and KWA Investment Co., a subsidiary fully controlled by Bayer, which will be merged with Monsanto, working the latter as an absorbing company that is a wholly owned subsidiary of Bayer. The operation implies the incorporation by Bayer of a portfolio of complementary products. While Bayer has a significant portfolio of agrochemicals, Monsanto stands out for its biotechnological developments.

15. In relation to the Argentina's market, this is a horizontal merger because Bayer and Monsanto are direct competitors in several business lines. However, in some products the operation could additionally have vertical effects. In particular, Monsanto and Bayer were effective or potential competitors in the following markets:

- Herbicide resistant soybean seeds based on glufosinate of ammonia;
- Soybeans;
- Non-selective herbicides; and

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<sup>5</sup> Resolution SCI No. 7, dated 1 February 2019 and Opinion CNDC No. IF-2018-64234286-APN-CNDC#MPYT, dated 10 December 2018.

<sup>6</sup> Resolution SC No. 137, dated 12 December 2018 and Opinion CNDC No. IF-2018-53649119-APN-CNDC#MPYT, dated 23 October 2018.

- Vegetable seeds (carrot, cucumber, lettuce, melon, onion, chili pepper, tomato and watermelon);
16. Vertical relations were identified among the insecticide brand “Poncho” (clothianidine) and another insecticide produced by Monsanto.
17. But for the remedies imposed in other jurisdiction, the operation would have brought up important competition concerns in Argentina. Indeed, prior to the CNDC’s decision, the operation had been subject to conditions in other jurisdictions.<sup>7</sup> In compliance with those conditions, Bayer globally divested certain assets and businesses in favour of BASF. This new operation was notified in Argentina in January 2018. Therefore, the CNDC jointly analysed both operations.
18. The divestment operation consists of the acquisition by BASF from Bayer of a series of assets, including vegetable seeds, extensive crop seeds (cotton, canola, soybeans, among others), non-selective herbicides, seed treatments, insecticides under the brand “Poncho 60 FS” and certain intellectual property rights and the incipient business of digital agriculture.
19. With this divestment, Bayer transfers to BASF all the assets related to its business of vegetable seeds, which eliminated the increase in market concentration that the original operation would otherwise have produced. On the other hand, the divestment of the insecticidal “Poncho 60 FS” eliminates the potential vertical effects, as the supply input structure remains unchanged.
20. Since the BASF/Bayer operation did not cause competition concerns, it was approved in Argentina in December 2018.
21. Regarding the Bayer/Monsanto operation, despite of the divestment, horizontal effects remained in some markets. However, the CNDC understood that there would be no reason to assume the operation would cause a significant increase in concentration.
22. As regards vertical effects, the CNDC considered that there would be no risk of foreclosure, due to the existence of sufficient alternatives.
23. As a result, the Bayer/Monsanto operation was approved in February 2019.

#### *Acquisition by Maersk of Hamburg Sud*

24. This is an international operation, resulting in the combination of container shipping activities between Maersk Line A/S (Maersk) and Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft Kg (Hamburg Sud), resulting from a “Business Combination Agreement” held between the parties.<sup>8</sup> Specifically, the notified operation consists of the acquisition of the 100% of Hamburg Sud’s shares by Maersk. The operation also included the acquisition of other companies belonging to the selling group, all of which are outside of Argentina.
25. Considering the activities and services provided by the maritime agents involved in the operation, the CNDC defined that the evaluation of the economic effects was limited to

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<sup>8</sup> Resolution SCI No. 783, dated 25 November 2019 and Opinion CNDC No. IF-2019-102100103-APN-CNDCMPYT, dated 14 November 2019.

the maritime container transport market to and from the port of Buenos Aires and its area of influence.

26. Regarding market shares by shipping company, the joint participation of the companies involved in the operation was assessed at 31.6%, while the HHI before the operation was equal to 1518 in 2017, which the CNDC considered as an indication of a moderately concentrated market. The operation would increase the HHI by 481 points.

27. The CNDC also calculated market concentration before and after the operation using Melnik, Shy and Stenbacka's Dominance Threshold indicator, to establish whether the operation may be creating or reinforcing a dominant position in any relevant market. In relation to the port of Buenos Aires and its hinterland, the CNDC estimated a Dominance Threshold of 47.61% after the operation, above the combined share of the merging companies.

28. Thus, regarding horizontal effects, the CNDC concluded that, although concentration in some specific maritime corridors would increase following the operation, horizontal effects would be small because shipping companies operating different routes could easily enter and become effective competitors. Other mitigating factors taken into account were the non-exclusive use of containerships of the notifying companies<sup>9</sup>, as well as the alliances in which they participate. Indeed, those two facts allow for greater competition because an entrant in a specific route would not need to send its own containership.

29. The CNDC also analysed potential vertical effects because a company owned by Maersk is the operator of a container terminals in the geographic market. In this case, the CNDC concluded that the likelihood of foreclosure was low because Maersk's container terminal only handled 11.2% of total container traffic in the port of Buenos Aires.

30. In view of the above considerations, the operation was approved.

#### *Acquisition by AT&T of Time Warner*

31. The operation consists of the acquisition by AT&T Inc (AT&T) of exclusive control over Time Warner Inc. (Time Warner). It is a global operation, with a focus on the United States, and has effects in Argentina through subsidiary companies. Once the operation is completed, all subsidiaries of Time Warner will become subsidiaries of AT&T.

32. In Argentina, AT&T performs the following activities: (i) retail service of Pay-TV by satellite (provided through DirecTV Argentina S.A., a subsidiary fully controlled by AT&A); (ii) provision of residential Internet services under the "DirecTV Net" brand in certain cities; (iii) provision of communications to business customers (through AT&T Communications Services Argentina S.R.L.). Likewise, AT&T, through DirecTV Argentina, develops other more limited and incidental activities that would not be central to AT&T's business in Argentina.

33. Meanwhile, Time Warner, through various subsidiaries in Argentina, is primarily engaged in the production of television programming content, licensing of broadcasting rights of television audiovisual content and the commercialization of Pay-TV signals.

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<sup>9</sup> They can buy warehouses on other ships and thus transport containers on ships of other shipping companies.



34. As indicated, the companies involved in the operation have activities throughout the value chain of the media sector. Although the operation is essentially vertical, since it results in an integration between companies operating production and distribution of TV signals, some very marginal horizontal effects have been also identified.

35. First, in the analysis of vertical effects, the CNDC examined the effects of the vertical relationship in the relevant markets of: a) signal production and marketing, and b) distribution of Pay-TV signals to end customers. In this case, concentration indicators show that the object company's share in the upstream market is below 20% and that the HHI in the downstream market is below 3000, so it was considered that the operation did not raise competition concerns.

36. With respect to the theories of harm to evaluate in vertical relationships, it was necessary to determine whether DirecTV would be willing to refuse to buy competing signals from Time Warner and how this could affect competition, as well as the effect of potentially blocking inputs ("programming blackouts"). Regarding the first scenario, it was not noticed that the merged entity does not have incentives to deploy a conduct of this kind, since a subscription offered by DirecTV containing only Time Warner signals would generate a loss of quality and variety, which would imply a competitive disadvantage compared to a wider and more varied offer from its competitors.

37. As to the second strategy analyzed, regarding the plurality and amount of content available, the development of new technologies that have modified user consumption habits, as well as the possibility of distributors to independently provide attractive offers of movie and series content for their users, allowed the CNDC to conclude that the vertical relation would not damage competition.

38. Based on the exposed considerations, the operation was approved.

### **3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

39. The CNDC is becoming an important source of consultations in the formulation and/or implementation of other public policies or regulations.

#### **3.1. Cooperatives providing electricity distribution services**

40. In many cities in Argentina, electricity distribution services are provided by local cooperatives, whose associates are inhabitants of said city. Those cooperatives usually have a legal monopoly to provide electricity distribution services. In addition to electricity services, cooperatives very often provide other local services, such as cemetery, local library, firefighting services, and so on.

41. The CNDC issued an opinion regarding an obligation imposed on cooperatives providing electricity distribution services to bill those services separately from other services they may provide.<sup>10</sup> The CNDC found the obligation reasonable, because it contributes to avoiding potential anticompetitive practices, such as tying and refusal to deal.

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<sup>10</sup> Resolution SCI No. 9, dated 6 February 2019 and Opinion CNDC No. IF-2019-05504373-APN-CNDC#MPYT, dated 28 January 2019.

### 3.2. Jet-fuel storage terminal in Ezeiza international airport

42. The Regulatory Body of the National Airport System (ORSNA, for its Spanish acronym) asked the CNDC to issue an opinion regarding two alternatives under study to operate jet-fuel storage terminals in the Ezeiza international airport.<sup>11</sup> Under both alternatives, there would be a unique terminal for storage and distribution of jet-fuel. They differ, however, on who would be operating such terminal: while alternative 1 provides for an operator independent from jet-fuel suppliers to be selected through a competitive tender, under alternative 2 the terminal would be operated by consortium of the three jet-fuel suppliers currently present in Ezeiza. The CNDC evaluated pros and cons of each alternative from a competition perspective and concluded that alternative 1 was preferable because, unlike alternative 2, promotes competition for the market, reduces the risk of anticompetitive exclusion of jet-fuel suppliers and eliminates incentives to sharing sensitive information among jet-fuel providers.

## 4. Resources of competition authorities

### 4.1. Resources overall

43. The CNDC is composed of five members: one president and four commissioners. According to the LDC two of the commissioners must be lawyers and the other two must be economists.

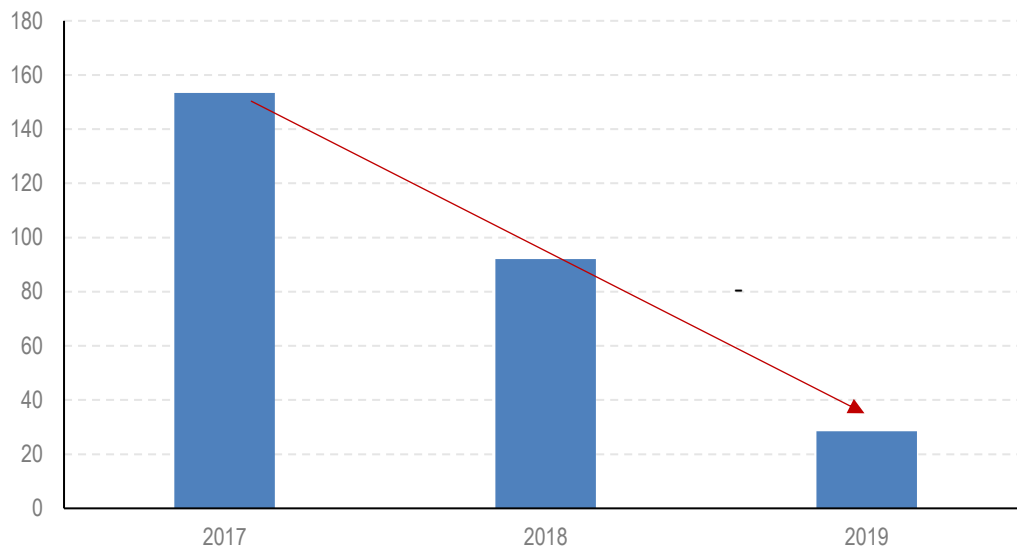
44. In addition, the CNDC is structured in four National Directorates (Economic Concentrations, Anticompetitive Conduct, Economic and Legal Studies and Competition Advocacy, each of which is in turn structured in two Directions), and a Direction of Registry.

45. The CNDC's total budget for the period from 1 January 2019 to 31 December 2019 was ARS 64,649,808.35, equal to USD 1,079,476 and EUR 961,585.<sup>12</sup> Figure 1 below shows the evolution of the CNDC's budget between 2017 and 2019.

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<sup>11</sup> Disposition CNDC No. 73 dated 20 August 2019.

<sup>12</sup> Exchange rate as of 31/12/2019: USD 1 = ARS 59.89 and EUR 1 = ARS 67.232514.

**Figure 1. CNDC's total budget in constant million ARS (2017-2019)**

46. The staff of the CNDC (excluding the president and the four commissioners) as of December 2019 was 84 people, of which 24 economists, 31 lawyers, 13 other professionals and 16 support staff. The evolution of human resources is shown in

**Table 1. Number of employees (2017-2019)**

Profession	2017	2018	2019
Economists	33	32	24
Lawyers	35	35	31
Other professions	13	14	13
Support Staff	23	20	16
<b>Total</b>	<b>104</b>	<b>101</b>	<b>84</b>

## 4.2. Human resources by activity

47. The allocation of professionals across antitrust activities is shown below in Table 2.

Table 2. CNDC's human resources by area (2017-2019)

Activity	2017	2018	2019
Enforcement against anticompetitive practices	31	28	25
Merger review and enforcement	29	21	23
Advocacy efforts	14	18	12
Administration and support activities	30	34	24
<b>Total</b>	<b>104</b>	<b>101</b>	<b>84</b>

## 5. Summaries of or references to new reports and studies on competition policy issues

### 5.1. New guidelines for exclusionary abuse of dominance cases

48. In May 2019, Argentina issued its first guidelines for cases of exclusionary abuse of dominance.<sup>13</sup> The aim of this document is to provide guidelines regarding practices that constitute infringements the Argentine competition act and to contribute to predictability in decision-making. The document focuses on exclusionary abuse of dominance cases and explains the conditions that need to be satisfied for a practice to be considered anticompetitive in Argentina. It also illustrates with the most common specific forms of exclusionary abuse.

### 5.2. Market studies and pro-competitive recommendations

49. In 2019 the CNDC has published two market studies:

- **Supermarkets:** The study focused on the relations between supermarkets and their supply chain. The CNDC recommended drafting a code of commercial practices to regulate the contractual relation between supermarkets and their providers. Disposition CNDC No. 34 dated 8 May 2019.
- **Pharmaceutical products:** The study focused on the wholesale distribution of pharmaceutical products and their vertical relations with producers and pharmacies. Disposition CNDC No. 113 dated 23 December 2019.

50. Other market studies are still ongoing.

<sup>13</sup> CNDC, *Guidelines for the analysis of cases of exclusionary abuse of dominance*, May 2019, available at [https://www.argentina.gob.ar/sites/default/files/guias\\_abuso\\_posicion\\_dominante\\_ev.pdf](https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf).