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ROUNDTABLE ON "PRICE DISCRIMINATION"

-- Note by Argentina --

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

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ARGENTINA¹

1. In Argentina, article 1 of the Competition Act (Act 25,156, from 1999) mentions abuse of dominance as one of the possible sources of antitrust violation, and the interpretation of the law is that both exclusionary and non-exclusionary (i.e., exploitative) abuses are included into that general concept. Following that idea, the Argentine competition case law has pursued price discrimination cases that have to do with exclusionary and non-exclusionary discrimination, and in both issues there are situations in which several firms have been penalized.

2. Price discrimination is also shown as an example of a possible antitrust violation through a specific provision that appears in article 2 (section “k”) of the Argentine Competition Act. Indeed, among the possible anticompetitive conducts that article 2 defines, there is one that refers to “imposing discriminatory conditions for buying or selling goods or services without reasons grounded in ordinary commercial uses and customs”, and that provision is interpreted as including price discrimination cases (both exclusionary and exploitative).

3. In the Argentine competition law, however, no conduct is considered as a *per se* antitrust violation. This also applies to price discrimination, which, in order to be penalized, has to fulfil the general provision that requires to be interpreted as a case of abuse of dominance that could generate “harm to the general economic interest” (Act 25,156, article 1). In the following sections of this contribution, we will comment on several price discrimination cases that the National Competition Commission of Argentina (CNDC) has analysed throughout the years. This includes both exclusionary and exploitative discrimination cases. We will also comment on some general principles that could be derived from the decisions taken in those cases.

1. Exploitative price discrimination

4. The leading antitrust case about exploitative price discrimination in Argentina is “CNDC v. YPF” (2002), in which the largest Argentine oil and gas company (YPF) was fined for having discriminated between the domestic and foreign markets of a particular product (which was liquefied petroleum gas, LPG). That product was sold by YPF at substantially higher prices in the domestic market, where it held a dominant position, and the price gap was not explained by cost or volume differences, or by any other reasonable justification. According to the analysis that the CNDC made in that case, YPF had a dominant position in the Argentine LPG wholesale market, which allowed it to set prices above competitive levels. On the contrary, in the foreign market, YPF’s position was closer to the one of a price-taking firm, so that market was used to channel the remaining of its LPG production, which was not demanded in the domestic market.

5. It is worth mentioning that in this case there were also ancillary exclusionary practices that facilitated price discrimination. These were instrumented through clauses forbidding selling the exported

¹ This work was prepared by Germán Coloma, with important contributions made by Esteban Greco and Lucía Quesada.

LPG back in the Argentine market, and this impeded arbitrage between domestic and foreign markets and kept domestic prices higher.

6. The decision made in the YPF case established the criterion that a firm abuses its dominant position in the domestic market if its domestic price is higher than its export price. This was actually the case here, mainly because YPF's exports were substantial and not seasonal, and this was taken as a signal that the firm was an established supplier in both markets. The case was also important due to the amount of the fine imposed (ARS 109 million, which at the time when the fine was paid were equivalent to USD 36 millions), and also because the original decision was reaffirmed by a court of appeals and ultimately by the Argentine Supreme Court.

7. The standard set by the YPF case has been applied in other Argentine antitrust cases which, however, did not end in fines. In "M. Larribite v. Profertil" (2004), for example, the CNDC found a difference between the domestic and export prices of a certain agrochemical product (urea), but that difference was not deemed to be due to exploitative price discrimination but to seasonal variations (because the product was exported in a season when it was not demanded in the domestic market). In that market, however, the actual competitive pressure was actually given by the import parity price, which was the one that was actually correlated with the domestic price.

8. YPF was again one of the accused firms in another price discrimination case: "J. Schiavi v. YPF and others" (2012). In that case, the defendants were a group of oil companies that sold diesel oil to public transportation companies at substantially higher prices than those charged to ordinary customers. The price difference was not based on cost conditions, but on the fact that public transportation buses could not refill their fuel tanks at ordinary gas stations due to logistic limitations. That allowed YPF and the other oil companies (Shell, Esso and Petrobras) to profit from the lower demand elasticity of public transportation companies, therefore making an exploitative abuse of their position in the market. The case finally ended without a fine, but with a cease-and-desist order to stop price discrimination against the public transportation firms, and also with a recommendation to the regulatory transportation and energy authorities to monitor the price differences between different types of gas stations.

9. Another case of alleged exploitative price discrimination that was not penalised is "R. Lloveras v. Cablevision" (2002). In this case, a cable TV operator was accused for pricing its service at a higher price in markets in which it did not face competition, while setting a lower price in other similar markets in which it faced competition from another cable TV operator. The CNDC, however, did not consider illegal the behavior of the defendant, basically because the gap was explained by a (non-predatory) price reduction in the market where it faced the entry of a new competitor. This can be seen as a change of criterion in relationship to the YPF's LPG case, but it can also be interpreted as an alternative criterion to be used in a different situation. Here the analysis was applied to a case where Cablevision reduced its price in a certain market because it faced the entry of a new competitor, and that was considered to be a "competitive response" (and not anticompetitive price discrimination).

10. Finally, in another case ("CADAM v. Luncheon Tickets", 2007), the accused firm was not penalised because it did not have a dominant position in the relevant market, and it was therefore impossible that it was responsible of an abuse of dominance. The fact that it set different prices for different customers was therefore not seen as an anticompetitive practice, because it was interpreted that the difference was due to factors different from the exercise of market power. That criterion, recommended by the CNDC, was later accepted by the Secretary of Commerce and also by a sentence from the National Criminal Economic Court of Appeals of Argentina (that reaffirmed the original decision).

2. Exclusionary price discrimination

11. The Argentine antitrust case law has also dealt with a number of cases of alleged exclusionary price discrimination. The first of those cases was “Acindar v. Somisa” (1982), in which a state-owned steel company (Somisa) was accused by a private firm (Acindar) of setting different prices for the same product in order to favour several customers that were actually Acindar’s competitors. The case was important because it established the criterion that state-owned enterprises were subject to the Argentine competition act provisions, but it nevertheless ended without a penalty for Somisa. The explanation here was that in this case price discrimination was part of a “partial vertical integration strategy” that Somisa implemented, as a way to compete with Acindar (which was fully integrated in the relevant markets).²

12. Another interesting case of exclusionary price discrimination is “Fanski v. Catedral Alta Patagonia” (1998), which ended with a settlement between the CNDC and the defendant (Catedral Alta Patagonia). That firm was (and still is) the exclusive licensee of the lifting system in the main Argentine ski resort, and it was therefore dominant in the market of lifting services in that resort. The price schedule established for those services, moreover, exhibited a large difference between prices charged to ordinary skiers, independent ski instructors, and instructors belonging to a specific ski school that had an agreement with Catedral Alta Patagonia. Because of that, independent ski instructors were put in an unfavourable position to compete with the “official” Catedral Alta Patagonia school, and that was the reason why in this case price discrimination was considered to be exclusionary. When the case was already under way, however, Catedral Alta Patagonia offered to charge the same prices to independent instructors and ordinary skiers, and that was considered by the CNDC to be an effective means to solve the main antitrust concerns in this case.

13. Another case that ended with a settlement is “AAAVYT v. Aerolíneas Argentinas and others” (1999), in which one of the practices analysed was “second-degree price discrimination” related to the services that travel agencies offered to the main Argentine airline (Aerolíneas Argentinas) when selling its plane tickets. For those services, Aerolíneas Argentinas had established a system which included “loyalty payments”, related to the share of Aerolíneas Argentinas’ tickets in the agencies’ revenues. Those payments were considered to have the potential of reducing the capacity of other Argentine airlines to compete with Aerolíneas Argentinas, and that reduction was important due to the dominant position that Aerolíneas Argentinas held in the Argentine air transport market. However, when Aerolíneas Argentinas accepted to suppress its system of loyalty payments, the case was closed without a penalty.

14. The CNDC, however, did recommend imposing a penalty in “Editorial Amfin v. AGEA” (1998), which was about alleged exclusionary price discrimination from the firm that owned the most important newspaper in the city of Buenos Aires (*Clarín*). That discrimination had to do with a 15% price reduction for advertisers that published their products in *Clarín* and not in other Buenos Aires newspapers, and the CNDC considered it to be a strategy to raise *Clarín*’s competitors’ costs. The CNDC’s opinion in this case was endorsed by the decision of the Secretary of Commerce of Argentina, but it was later reversed by a court of appeals, which understood that the analyzed price reduction was in fact a business strategy that did not distort market competition.

15. A similar situation occurred in “Queruclor v. Clorox” (2015), where a company that produces chlorine bleach (Queruclor) accused Clorox, the main supplier in the Argentine chlorine bleach market. Among the various complaints that Queruclor made about Clorox’s behaviour, there was the existence of

² In this case, Somisa was actually using a business strategy in which the price that it charged to its customers was a fraction of the price that those customers ended up receiving when they sold their final products. This was a way in which Somisa shared profits with those customers, and in that aspect it resembled a situation of vertical integration.

loyalty and exclusivity rebates that Clorox allegedly made to several supermarkets and wholesale distributors. Those rebates implied a form of price discrimination between distributors that only bought the chlorine bleach supplied by Clorox, and distributors that bought both Clorox and Quercuor products. This was seen as an incentive to withdraw from buying Quercuor's products that could have had the potential of excluding Quercuor from the chlorine bleach market. This price-discrimination argument was one of the elements that the Secretary of Commerce took into account when he imposed a fine of ARS 50 million to Clorox (which were equivalent to USD 6 million at the time that the fine was set).

16. Another exclusionary price-discrimination case that ended with a penalty was "COPCA v. Telecom Argentina" (2014), which was about a local public utility company (COPCA) that competed against a national telephone company (Telecom Argentina) in the fixed telephony market of a small city in the province of Cordoba. The alleged anticompetitive practice was price discrimination between the direct customers of Telecom Argentina in that city and the customers that bought its services through the local firm. By performing such discrimination (which implied a harm to the telephone users who were customers of COPCA), Telecom Argentina was actually deterring the local firm from the city's telephony market, and it partially excluded it from that market. As a consequence of that, the CNDC recommended imposing a fine and a cease-and-desist order of the discriminatory practice, and that recommendation was adopted by the Secretary of Commerce in the decision that closed the case.

3. General principles derived from the CNDC case law

17. One general principle that clearly appears from the analysis of the Argentine antitrust case law is that price discrimination can be analysed as both an exclusionary and an exploitative kind of anticompetitive conduct. In the cases of exploitative price discrimination, we have seen that all the relevant situations represent examples of "third-degree price discrimination" (where different groups of customers pay different prices for the same product or service). On the contrary, in the cases of exclusionary price discrimination, we find situations in which there is also second-degree price discrimination (i.e., situations in which the same customer pays different prices if he/she chooses to buy different quantities of the same product or service).

18. In both exploitative and exclusionary cases, however, price discrimination has to be considered as a particular situation of abuse of dominance, and this implies that price discrimination behaviour carried out by non-dominant firms is not considered as an antitrust violation (as can be illustrated by the decision taken in the Luncheon Tickets case). Price discrimination by itself, moreover, is not considered to be a *per se* antitrust violation even in cases where the firm that is doing it has a dominant position in a market. This is because the Argentine Competition Act does not have *per se* antitrust violations, and all cases have to be analysed taking into account the principle that, in order to be illegal, an anticompetitive practice has to produce harm to "the general economic interest" (Act 25,156, article 1).

19. When applying that principle to price-discrimination cases, the CNDC has also analysed if the suppression of the discriminatory conduct was likely to harm the economic agents that were profiting from it. In the YPF case, for example, the buyers that were favoured by the discriminatory prices were foreigners who had the option of buying the product anywhere in the world, and they were not likely to be harmed by a non-discriminatory regime in which the price that they should pay were the same as the price paid by local buyers. In the Cablevision case, conversely, it was possible that an obligation not to discriminate between buyers in different cities ended up implying that the dominant firm decided to charge a higher price to all its customers, and therefore it was possible that the proposed remedy was actually harmful instead of beneficial.

20. The standard to analyse price-discrimination cases, however, has in general been stricter in exclusionary cases than in exploitative cases. In exclusionary price-discrimination cases, the CNDC has

never required that actual exclusion had occurred, but only that price discrimination had a potential exclusionary or harmful effect towards competitors of the dominant firm, and that discrimination could not be explained using competitive arguments. That was the situation in the Catedral Alta Patagonia, Aerolíneas Argentinas, Clorox and Telecom Argentina cases. On the contrary, in the Somisa case, the alleged price discrimination was actually part of a strategy of vertical integration that Somisa used to compete against the firm that accused it of an antitrust violation (Acindar), and that was a clear “competitive argument” that Somisa had to justify its behaviour. In the *Clarín* case, finally, the CNDC considered the dominant firm’s behaviour as an anticompetitive practice, but the criterion followed by the court of appeals that later analysed the case was to see it as a competitive strategy that could also be used by other newspapers that operated in the market.

21. Another principle that can be derived from the Argentine case law on price discrimination is that, in this area, the antitrust law has never been applied using “non-economic arguments”.³ Those kinds of arguments have been used in Argentina to analyse cases of price discrimination in other areas of law (e.g., labour law, public utility regulation) but they have never been considered as relevant in the area of competition law. In that area, the principle of using the “general economic interest” as a guideline to evaluate whether a practice is legal or illegal has effectively limited the use of other types of assessments based on non-economic grounds.

Case index

AAVYT v. Aerolíneas Argentinas and others (1999), Decision 755/99, Secretary of Industry, Commerce and Mining.

Acindar v. Somisa (1982), Sentence of the National Criminal Economic Court of Appeals, Section A, 22/10/1982.

CADAM v. Luncheon Tickets (2007), Sentence of the National Criminal Economic Court of Appeals, Section A, 05/07/2007.

CNDC v. YPF (2002), Sentence of the Argentine Supreme Court, 02/07/2002.

COPCA v. Telecom Argentina (2014), Decision 124/14, Secretary of Commerce.

Editorial Amfin v. AGEA (1998), Sentence of the National Criminal Economic Court of Appeals, Section B, 09/11/1998.

Fanski v. Catedral Alta Patagonia (1998), Decision 421/98, Secretary of Industry, Commerce and Mining.

M. Larribite v. Profertil (2004), Decision 20/04, Secretary of Technical Coordination.

R. Lloveras v. Cablevision (2002), Decision 78/02, Secretary of Competition, Deregulation and Consumer Protection.

Queruclor v. Clorox (2015), Decision 65/15, Secretary of Commerce.

J. Schiavi v. YPF and others (2012), Decision 6/12, Secretary of Commerce.

³ This does not mean that “non-economic arguments” have never been used in other Argentine antitrust cases, especially during the period 2003-2015. Those cases, however, were usually related to merger control procedures.