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Ex-Ante Regulation and Competition in Digital Markets – Note by Argentina

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

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1. This contribution addresses the role of ex – ante regulation in digital markets, a topic that will be discussed at a hearing in the forthcoming OECD Competition Committee meeting in December 2021.
2. According to data from the National Institute of Statistics and Census (INDEC) of Argentina and estimates from the World Bank, more than 90% of Argentina's population lives in urban areas. In terms of Internet connectivity, although it is high on average (a penetration index of 68% of households), it shows high disparity between provinces: on the one hand, the Autonomous City of Buenos Aires leads the way in Internet penetration, with more fixed Internet connections than households (a penetration index of about 108%); on the other hand, there are more than nine provinces with less than 50 fixed Internet connections for every hundred households, following a study conducted by the Argentine Internet Chamber in 2020. Overall, the country shows a majority of urban population and moderate access to the Internet, providing a fertile context for digital markets to mature.
3. In the last twenty years, we have seen a consistent development of digital platforms, which have especially experienced a high paced growth over the last decade. While in most western countries the big tech companies that thrived in producing whole digital ecosystems are Google, Amazon, Facebook (which includes other social apps, like Instagram and WhatsApp), and Apple —sometimes referred to as the GAFAs—, in Argentina only Google and Facebook have proven a significant penetration. Aside from these two global technological firms, other regional and national companies have entered and further consolidated in Argentina by offering different digital services. This is the case, for example, of Mercado Libre, an e-commerce platform that was founded in 1999 in Argentina and became the undisputed leader in this segment, extending its business to over 17 countries in Latin America and expanding their operations to digital payment services by developing an electronic wallet called Mercado Pago. More recently, many other companies have entered the digital payment services market in Argentina, like Ualá, Moni and Nubi, amongst others.
4. The COVID-19 pandemic and the subsequent circulation restrictions that were put in place during 2020 and 2021 only accelerated an already growing worldwide trend: the digitalization of economic transactions and social interactions. In this context, digital platforms and digital services providers received an important uplift to their businesses.
5. The novelty and dynamism of digital markets are raising numerous challenges to national and supranational regulators (including Argentina's competition authority), which seem to be a few steps behind its rapid development. In this sense, there are plenty of concerns and they involve a wide range of aspects: the rules on personal data privacy, user and consumer rights, taxation, work organization and workers' rights, the control of the media, hate speech and freedom of expression, and issues regarding the conduction of the democratic process. In this scenario, competition concerns are significant —considering the rise in the market power of large digital platforms and the global scope of their operational basis— and, in many cases, they intertwine with some of the other worrisome facets. One of the main questions that competitive agencies and other regulatory agencies must tackle is: how to regulate digital platforms and digital service providers to guarantee a competitive environment which is fair to other enterprises and consumers, without losing the efficiency, dynamism, and innovation that characterizes digital markets.

6. To discuss the convenience of regulatory alternatives for digital markets, this note is structured as follows. The first section examines current competition regulation in Argentina, the challenges that digital markets pose to the regulatory framework, and the tools available to the National Commission of Competition Defense (CNDC) to address digital competition problems. The second section discusses the extent to which sectorial regulations, while not specifically aimed at solving competition matters, can still be effective at designing certain parameters to ensure a competitive environment for digital companies and traditional firms to coexist and further develop and innovate. The third section analyses the actions taken by the CNDC against Facebook/WhatsApp regarding the instant messaging application's recent update of its terms of use, which could potentially be framed as an anticompetitive practice. Finally, the fourth section summarizes the main challenges ahead for the CNDC in addressing digital competition issues.

1. The status quo. The current competition regulation in Argentina, the challenges raised by digital markets, and the best existing tools available to deal with them

7. In line with most of the current competition regulation worldwide and international standards regarding this subject matter, the Act N° 27.442 of Competition Defense (LCD) in Argentina, determines the practices and agreements that are anticompetitive and can result detrimental to the general economic interest and, therefore, prohibited. In general terms, this defines two main lines of analyses for the CNDC (and most of the competition authorities in the world, for that matter).¹ In the first place, it comprehends the investigation of all those practices or agreements that have the object or effect of limiting, restricting, distorting, or disrupting competition or access to the market or that constitute abuse of a dominant position in a market. This includes horizontal conducts or agreements between competitors (usually referred to as “cartels”) and single firm conducts or practices oriented to monopolize the market. Secondly, it comprises the review of certain mergers and acquisitions that, although they are not agreements prohibited *per se*, they can potentially create a concentrated market structure that could favor anticompetitive conducts.

8. Given the existing regulation and its implementation through the competition authority, why are digital markets raising competition concerns and, at the same time, eluding the traditional perspectives and solutions to these issues? In overall terms, we can say that the fast-moving pace that characterizes digital markets and the number and complexity of the issues arising within them, make it challenging for the current regulations and competition enforcement regimes to deal with them properly. Indeed, the considerable position attained by large tech firms in some of these markets seem to be quite persistent and difficult to contest by competitors due to the network effects that are at the core of how these platforms operate and grow.

9. More specifically, when it comes to merger and acquisition's analysis, it is important to consider that the big companies that are controlling digital markets —many providing “core platform services”, which include search engines, social networking services, messaging services, operating systems, and online intermediation services—, mostly paved their way and secured a large position by being the first and/or the most innovative firm to enter the market, but also by developing acquisition strategies that have

¹ In 2018, the National Congress enacted Act 27.442. The new Act created the National Competition Authority (NCA), which is divided into the National Antitrust Tribunal, the Antitrust Conducts Secretariat and the Concentrations Secretariat. At the time of writing, the new authority has not yet been put in place. Argentina's CNDC is a decentralized body under the purview of the Secretariat of Domestic Trade of the Ministry of Productive Development. In this, the agency acts as a technical body in charge of the investigational and prosecutorial functions, whose procedures are currently regulated by the aforementioned Act.

been difficult to challenge by competition authorities. When many of these companies acquire other firms, they are usually small start-up undertakings (sometimes they have made none or little revenue) or, in many cases, enterprises that offer a product or service that is not yet provided by the buyer or is not significant in their current service portfolio. In this scenario, mergers and acquisitions reviews fail to notice the competition concerns that these operations may entail. Thus, these cases slip below the notification thresholds or, when notified, they become difficult to address given the little evidence to prove its potential harm, if framed, for instance, as a “killing acquisition” or “nascent acquisition” case. Consequently, although merger and acquisition reviews can provide a prospective analysis of the future development of a determined market, they are not sufficient when it comes to digital markets. The transformations that these markets can have in a short period of time and, the threats to competition that may arise resulting from what seemed like a non-threatening operation, are very hard to foresee.

10. At the same time, the traditional perspective of analysis when assessing the harm that may result from a merger or acquisition, which puts the potential effect on prices at the center of the economic analysis, has shown some limitations when it comes to examining concentrations in digital markets. As stated by the Economic Commission for Latin America and the Caribbean (CEPAL) in a recent document,² a strict definition of relevant markets (following the SSNIP criteria) has underestimated the effects of data-driven mergers and acquisitions, generating conglomerate effects involving a variety of adjacent or neighboring markets. Moreover, mergers and acquisitions in digital markets also imply a challenge—for the traditional approach—in identifying whether the economic operation involves horizontal or vertical integration. This makes it difficult to determine the nature of the economic effects and their subsequent analysis.

11. Regarding the investigation of potentially anti-competitive practices, it is important to consider that many of these digital markets have particular characteristics that can hinder a fast and effective identification and investigation of abuse of market-dominant position. For instance, one of the most challenging aspects is the fact that consumers of digital services do not perceive themselves as such, but as users, since they do not hire a service in exchange for a price or fee but, instead, provide personal data to these digital platforms. The use that platforms make of this data has been a matter of controversy over recent years, becoming a major concern for consumer rights protection agencies and personal data protection agencies, as well as to competition authorities. In this respect, the decision made by the German authority to prohibit Facebook from “harvesting” user’s data across social media apps to enhance their digital targeted advertising, for finding it an anticompetitive practice, has set an important precedent regarding the interpretation of antitrust laws.³ However, the terms and conditions that digital companies impose on users, and the use they

² Da Silva, Filipi and Nuñez, Georgina (2021). “La libre competencia en la era digital y la pospandemia. El impacto sobre las pequeñas y medianas empresas”. CEPAL. Available online: https://www.cepal.org/sites/default/files/publication/files/46663/S2100020_es.pdf.

³ In 2019, the German Federal Cartel Office found that the way Facebook was handling user’s data -which consisted in combining data it collected about users across its different platforms, including WhatsApp and Instagram, as well as from outside websites and third-party apps, in order to offer more targeted advertising- constituted an abuse of their dominant position in social media. The decision was appealed by Facebook, but in 2020, it was ratified by the German Federal Court of Justice.

make of the data they collect remains opaque, creating an obstacle to determine what could be framed as an anti-competitive practice.⁴

12. Also, in this regard, it is important to consider that many small and medium-sized enterprises rely on these digital platforms—search engines, social media apps, online marketplaces—to promote and sell their products, which function as intermediaries between businesses and consumers. Companies must accept the terms and conditions imposed by the platforms. The lack of transparency on how their content is ranked and displayed (mediated by an algorithm set by the platform) and the limited access companies have to data about their consumers also contribute to a poor understanding of how digital companies may be abusing their market position.

13. Because of these matters, amongst many others, the investigation of anti-competitive practices may not be sufficient to better comprehend and solve the competition concerns that digital markets pose.

14. Another aspect to consider has to do with the scope in which digital companies operate. Large digital platforms run on a global scale and many digital service providers also operate on a global or regional basis. This is not different from many other firms operating in other economic sectors. However, it remains a challenge for national competition authorities, like the CNDC, to handle competition concerns regarding globally established companies, even more so when they hold a strong position in the markets where they are active. Effective remedies often depend on a cooperative and coordinated effort with other competition regulators.

15. Many competition authorities around the world are proposing a pro-competitive approach and an ex-ante regulation framework—complementing the existing enforcement regime—to tackle competition concerns arising from digital markets. In this regard, we can mention the pro-competitive regulatory framework put forward by the Competition and Markets Authority from the UK, Section 19a incorporated in the German Competition Act, and the Digital Markets Act and Digital Services Act proposed by the European Commission.

16. In this context, the CNDC has to make use of the most effective pro-competitive tools it has available. Market investigations arise as a fundamental resource to gather information on digital markets and to better understand their logic and structure. As these investigations are ex-officio actions, the CNDC can order its implementation if it has sufficient reason to consider necessary an exhaustive examination of one or several markets and the enterprises that are part of them. In most cases, market investigations provide the background information to support pro-competitive recommendations of a general or sectorial nature regarding the modalities of competition in the markets, to issue opinions in matters of free competition regarding regulations, circulars, and administrative acts—pursuant with Section 28, paragraphs h) and i), of the Defense of Competition Act, which defines the powers of the competition authority— and, even, to draft new regulatory projects for the modernization and improvement of the conditions of competition, as it is stated in the Section 77, Chapter XIII of the aforementioned Act.

⁴ To this respect, in the third section we will address the actions taken by the CNDC regarding the new terms and conditions that WhatsApp (Facebook) intended to impose on users in 2021, and the competition concerns it raised.

2. New sectorial regulatory frameworks on the road towards more competitive environments. The case of Payment Services Providers in Argentina.

17. In Argentina, the irruption and growth of digital platforms and providers of digital services during the last few years have prompted a variety of claims from consumers, workers, and competitors that were met by different regulatory measures. Although not specifically targeted to alleviate competition issues, many claims were still effective at demanding enterprises to adequate to certain parameters to ensure a competitive environment. In this respect, an example we can mention is the new regulation issued by the Central Bank of Argentina (BCRA) for the so-called “payment service providers” (PSP).

18. According to 2020 BCRA’s Financial Inclusion Report,⁵ in line with the global trend during the pandemic, the Argentine population increased the use of electronic payment methods, causing a great boost in remote payments, and a reduction in the number of cash withdrawals for the first time in recent years. In this context, the increase in the number of accounts offered by PSPs (“non-bank accounts”) was remarkable, rising from 3% of the adult population in March 2019 to 24% in December 2020 (more than 8 million people). In addition, according to information issued by Argentina’s Fintech Camera (CAF), the number of virtual accounts experienced a growth of 43%, during the first semester of 2021.

19. On the one hand, financial technology firms were at the forefront of the development of the digital services segment regarding payment methods, contributing to the sector with a significant degree of innovation and encouraging traditional banks to further develop their digital services to keep up with the latest trends, like the QR payment system. Virtual wallets and accounts and digital means of payment also helped to extend financial inclusion, by incorporating people who, because they were outside the banking system, were also excluded from the entire financial system. On the other hand, several complaints emerged from the banking sector, arguing that there were regulatory and fiscal asymmetries in favor of unregulated services, such as PSPs. Regulatory complaints were mainly directed at the different requirements faced by banks and PSP firms regarding the transparency and accountability of customers’ money that remained unused in their banking and virtual accounts, respectively.

20. In response to these claims, in January 2020 the BCRA issued two Communications. First, Communication A 6859 established that PSP companies had to hold the money from their users in checking or savings accounts within authorized financial entities, a change that limited the investment that PSP firms could make with the “floating” money (unused money left by users in digital wallets).⁶ Through Communication A 6885, the BCRA established that payment service providers had to enlist in a “register for payment service providers that offer payment accounts” and “be framed in an informative and surveillance regime to monitor their evolution”, to be under the supervision of the Superintendency of Financial Institutions, a subdivision of BCRA that monitors banks and other financial institutions. Moreover, the regulation also established that, in their advertising, PSPs had to include a legend stating that they were “limited to offering payment services and that the funds are not guaranteed by the deposits held by financial

⁵ Available online: <http://www.bkra.gov.ar/PublicacionesEstadisticas/informe-inclusion-financiera-022020.asp>.

⁶ Available online: <http://www.bkra.gov.ar/pdfs/comytexord/a6859.pdf>.

entities”.⁷ Finally, the new regulatory framework consolidated when the BCRA, according to Communication A 6929 of March 2020, established a reporting regime for PSPs, delimiting the information to be submitted to the Central Bank and the frequency of such submissions.⁸

21. The PSP new regulatory framework is an example of how sectorial regulations can help create a competitive environment for “brick and mortar” businesses to coexist with new digital firms, without generating significant disincentives to innovation within the market but, on the contrary, letting traditional services companies carry out the catch-up process and incorporate new technologies into their usual operating logic. This type of regulation can be implemented more quickly and efficiently in regulated markets, such as the banking sector. However, digital platforms and digital service providers extend into many unregulated markets and may even comprise a market that contains a variety of markets in themselves. As such, competition regulations specific to digital markets are an important aspect of antitrust discussions today and are at the center of concerns of competition authorities around the world. Even in the case of regulated markets, it would be desirable for competition authorities (like the CNDC), to have a better understanding of digital markets in order to collaborate with other government agencies in the design of new sectorial regulations that encompass competition matters.

3. The discretionary use of personal data as a potential anti-competitive practice: CNDC preliminary action against Facebook/WhatsApp

22. At the beginning of 2021, WhatsApp, the instant messaging application, anticipated an update of its terms of service and privacy policy. The new conditions gave the enterprises that are part of the Facebook group (Facebook, Instagram, and WhatsApp) the possibility to make use of Facebook as a technology provider and to manage responses on their behalf, in the context of interactions or communications (messages) being exchanged with WhatsApp users. This gave Facebook the opportunity to process WhatsApp users’ information, and combine data from their different platforms.

23. According to the “Information we collect” section of WhatsApp’s Privacy Policy, the user data collected included: access to address books, phone numbers, transaction data (e.g., if using Facebook Pay or Stores on WhatsApp), service-related information, information about interaction with companies while using the service, information about mobile devices and IP addresses, as well as other data provided by the user or automatically collected by the application.

24. According to the company’s announcement, if the user did not accept the new terms of service by May 15, they would initially experience limitations in the functionality of the application and, after a few weeks, the application would stop operating and all stored data would be lost.

25. In Argentina, WhatsApp has a penetration that exceeds 76% of mobile phones in the country. Other messaging applications still have low penetration rates, so a user cannot replace it without losing this means of communication with many of their contacts. This generates an obvious asymmetry in the bargaining power between the user and WhatsApp. Users would mostly be forced to accept the new terms of service, thus enabling WhatsApp

⁷ Available online: <http://www.bkra.gov.ar/pdfs/comytexord/a6885.pdf>.

⁸ Available online: <https://www.bkra.gob.ar/Pdfs/comytexord/A6929.pdf>.

to collect excessive personal data and share it with the group's other platforms, such as Facebook and Instagram.

26. In this context, on May 13th 2021, the CNDC initiated an ex-officio investigation against Facebook/WhatsApp for a potential infringement of Sections 1 and 3 of the Defense Competition Act. The CNDC concluded that WhatsApp's new privacy policy could harm competition and the general economic interest, all in violation of Section 1 of the aforementioned regulation. In the published report, the CNDC stated that Facebook and Instagram could take advantage of WhatsApp users' data, which, added to the most modern information processing technologies, would enable the group to reinforce their already prevailing position in other markets, such as online advertising, raising barriers to entry or making the survival of their non-integrated competitors difficult, and ultimately monopolizing the market to the detriment of the general economic interest.

27. The CNDC advised the Secretariat of Domestic Trade of the Ministry of Productive Development to issue an injunction for Facebook to suspend the implementation of the new WhatsApp terms of service and privacy policies announced for May 15. Since then, and for the duration of the injunction, the CNDC has continued to investigate the use that Facebook will make of the data obtained from WhatsApp users, which, could presumably be used for commercial purposes.

28. The actions taken by the CNDC are in line with the ones taken in other countries. The announcement of the new terms of use and privacy policy by WhatsApp has triggered broad investigations into the functioning of these markets in many countries, such as India, Brazil, and Turkey.

29. In this regard, an important precedent that we have already mentioned was the action taken by the German Authority in 2019. The German Federal Cartel Office found that Facebook's collection, combination, and crosslinking of user's data across social media apps to enhance their digital targeted advertising, consisted of an anticompetitive practice. The competition authority considered that the way Facebook was handling users' data—which consisted in combining data collected from users across its different platforms, including WhatsApp and Instagram, as well as from outside websites and third-party apps, to offer more targeted advertising—constituted an abuse of their dominant position in social media.

30. Finally, it is also important to recall that, although the Federal Trade Commission (FTC) of the United States approved Facebook's acquisition of WhatsApp in 2014, the organism also warned the companies that WhatsApp had to adhere to its current privacy practices after the merger, including a promise not to use WhatsApp users' data for targeted ads, as they could otherwise be in violation of Section 5 of the FTC Act, which prohibits unfair methods of competition. It was also established that companies had to obtain user consent if they were to use any of the data collected by WhatsApp in different ways than they were currently doing so and that the FTC would continue to monitor the companies' practices to ensure that Facebook and WhatsApp honor the promises they had made to their users.

4. The challenges ahead for the CNDC

31. The penetration of digital platforms and digital services in our daily life is a process that has developed over the last 15 years, accelerating during the last two years on account of the pandemic and the new lifestyle it imposed. The great benefits of digitalization and the dynamism that has been provided across multiple markets, without geographic

limitations, shaped an initial honeymoon period that more recently has given way to a new phase: the acknowledgment of the many harms that may come from this new digital life.

32. In this context, competition issues have not been an exception. An ever-evolving understanding of digital markets dynamics has brought to light many concerns regarding the damaging impact that some common practices and regular operative behaviors in digital markets have on the general economic interest.

33. The CNDC has many challenges ahead. In the first place, there is a need to further develop a comprehensive approach towards digital markets and the different competition issues that arise among them. It is also necessary to keep on gaining a better understanding of how digital markets are structured and function, using the available tools, like market investigations. Secondly, cooperation appears as an essential aspect to better address digital market concerns. This implies not only instances of cooperation with other regulators, governmental organisms, and other policy-makers in Argentina, but also a closer exchange of information and ideas with other competition authorities. These short-term, present-oriented measures are fundamental on the road to building a solid platform to design the future: a new pro-competitive regulatory framework that complements the current ex-post enforcement regime, to better handle competition concerns in digital markets and promote more competitive digital environments.