

## Antitrust & Competition: An updated review of the situation in Argentina<sup>1</sup>

This article is intended to be an updated report of the Antitrust and Competition field in Argentina over the last months. The COVID-19 crisis is still a challenge for both the Antitrust Authority and competitors. We hereby propose an updated review of the situation in Argentina with respect to the latest news and measures taken by the Argentine government.



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<sup>1</sup> This article is not intended to be a full legal report, and it does not constitute legal advice. You should consult with a counsel to determine applicable legal requirements in a specific situation.

This article has been done with the collaboration of the Competition & Antitrust Law associates David E. Kahansky and Laura V. Rimini.

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## 1. Argentine Antitrust Authorities

### (i) New appointments

Merger control review and anticompetitive practices investigations are still entrusted to a double tier structure under the jurisdiction of the Minister of Productive Development composed by the Argentine Antitrust Commission (“CNDC”, for its acronym in Spanish) -technical analysis- and the Secretary of Domestic Trade (*Secretaría de Comercio Interior*) -issues final resolutions in all matters related to the Antitrust Act- (the “SDT”, and together with the CNDC, the “Antitrust Authority”).

The Antitrust Authority continues as an interim enforcement agency, until the appointment of the National Competition Authority (the “NCA”), the National Competition Tribunal (the “Competition Tribunal”), the Secretariat of Anti-competitive practices and the Secretariat of Economic Concentrations as stated by the Antitrust Act No. 27,442 (the “Antitrust Act”).

Further to the information included in Section 1 of our previous articles published on May 21, 2020, and June 25, 2020, regarding the appointments at the CNDC of new commissioners in January, May and June 2020<sup>2</sup>, note that there is still room to appoint one (1) more commissioner to complete all the members of the CNDC.

Additionally, Ana Julia Parente was appointed as General Director of Economic and Legal Studies of the CNDC on September 21, 2020 pursuant to Administrative Decision No. 1735/2020, as from September 1, 2020. On the other hand, Juan Ignacio Díaz was appointed as Director of Legal Studies of the General Direction of Economic and Legal Studies of the CNDC on September 24, 2020

<sup>2</sup> The current secretary of the SDT, Mrs. Paula Irene Español, has been appointed on December 27, 2019 by means of Decree No. 93/2019 of the National Executive Branch. Likewise, Mr. Rodrigo Sebastián Luchinsky is the new President of the CNDC as from January 21, 2020 (appointed by means of Decree No. 94/2020 of the National Executive Branch) and the Argentine President Fernández has appointed three (3) new Commissioners. By means of Decrees No. 479/2020 and No. 480/2020 (dated May 16, 2020), Mr. Pablo Lepere and Mr. Guillermo Marcelo Pérez Vacchini have been appointed as from March 19, 2020

by Administrative Decision No. 1747/2020, as from September 1, 2020.

### (ii) NCA appointment process is declared void

On October 6, 2020, the Ministry of Productive Development published Resolution No. 527/2020 by means of which the competitive bidding that had been carried out to appoint the members of the NCA was declared absolutely null and void. It was considered that certain irregularities had taken place during the process, for instance, delegation of powers not allowed by law, the late and remote signing of certain minutes by the SDT, the lack of a quorum at many meetings of the selection board, among others.

It should be noted that section 18 of the Antitrust Act determined the creation of the NCA as an autonomous body within the National Executive Branch. On April 24, 2019, the SDT issued Resolution No. 146/2019 that called for the competitive bidding to select the members of the NCA. Within the NCA shall act the Competition Tribunal, the Secretariat of Anti-competitive practices and the Secretariat of Economic Concentrations. The Competition Tribunal will have five (5) members and each Secretariat shall have its own secretary.

After the evaluation process of candidates, the corresponding shortlists had been approved and all the required steps had been completed, the SDT sent to the National Executive Branch the details of the candidates so that it could make the selection of those to be sent to the Senate for its approval. Former President Mauricio Macri had sent a list of elected candidates to the Senate, but the new

and April 23, 2020, respectively. Online Link: <https://www.theworldlawgroup.com/writable/documents/news/WLG-Antitrust-Summary-2019-May-2020.pdf>. And Mrs. Balbina María Griffa has been appointed as new Commissioner on June 10, 2020 pursuant to Decree No. 530/2020, as from February 19, 2020. Online Link: <https://www.theworldlawgroup.com/writable/documents/news/WLG-Antitrust-UPDATE-June-25-2020.pdf>.

government of President Alberto Fernández withdrew the requests for Senate resolutions.

The National Executive Branch used Decree No. 36/2019 for the withdrawal of the competitive bidding results. This decree ordered a review of the public administration personnel selection processes carried out during the last two (2) years since the entry into force of the decree (i.e., until December 14, 2017) in order to analyze their legality. However, a review of Decree No. 36/2019 shows that it merely suspends the entry into force of Decree No. 788/2019, which approved a number of agreements reached by the Negotiating Commission for the General Collective Labor Agreement for the National Public Administration, but does not refer to the process of appointment of the NCA members. It should be noted that the appointment of NCA members is regulated in accordance with the complex procedure set forth in the Antitrust Act and its Regulatory Decree No. 480/2018.

Therefore, currently, the CNDC is still working as a “technical advisory body” and the SDT as the interim enforcement authority of the Antitrust Act until the appointment of the members of the NCA. Furthermore, the CNDC is with new members appointed by President Alberto Fernández.

The Antitrust Act also established a Specialized Court within the Federal Civil and Commercial Court of Appeals, located in the City of Buenos Aires. The new Specialized Court will act as a competent court of appeals; and as a judicial reviewing body of all administrative resolutions issued by the Antitrust Authority with effects in the City of Buenos Aires. Currently, the process of the Public Tender No. 415 to integrate the Specialized Court is in progress. A provisional order of merit has already been published and the personal interviews with the candidates have been carried out. However, the deadline for the conclusion of the procedure was May 28, 2019.

This situation, together with the recent appointments abovementioned, confirms that the Government has made no progress in finally appointing the members of the NCA, the Competition Tribunal, nor the Secretariats of Economic Concentrations and Anti-competitive practices as stated by the Antitrust Act.

Due to the lack of progress in the appointment of the NCA, a writ of protection (*acción de amparo*) was initiated to claim that the National Executive Branch should resume the necessary proceedings for these appointments. It was filed by Elisa Carrió, Hernán Leandro Reyes, Maximiliano Carlos Francisco Ferraro and Juan Manuel López (all members of the opposition party).

## 2. Suspension in all dockets

All procedural deadlines in all dockets –e.g. investigations and economic concentrations- have been suspended as from March 16, 2020 until October 25, 2020. It is expected that the suspension will be extended as long as the mandatory isolation and lockdown persists<sup>3</sup>.

Through Resolution No. 260/2020 issued by the SDT on September 1, 2020, it was established that the suspension of procedural deadlines will be maintained while the provisions of Decree 298/2020 remain in force. The latter ordered the suspension of the terms of the National Law of Administrative Procedures No. 19,549, the Regulation of Administrative Procedures and other special procedures due to the pandemic.

As there must still be a minimum provision of services, the Antitrust Authority activity is limited to urgent matters. Accordingly, the CNDC is working in accordance with the procedure published on its website<sup>4</sup> for the admission of urgent filings, which shall be made by sending the applicable documentation via e-mail in accordance

<sup>3</sup> Decree No. 260/2020 issued by the National Executive Branch, in relation to the mandatory isolation, as amended and extended from time to time.

<sup>4</sup> Please visit:

<https://www.argentina.gob.ar/defensadelacompetencia/presentacione-s-urgentes-covid>

with the instructions therein<sup>5</sup>, or by means of the TAD platform if applicable.

This means that, once a filing of an economic concentration is made, the CNDC suspends all procedural deadlines in the new docket.

Since January 17, 2020, there have been no updates in the CNDC's website so far, nor in the Public Registry of economic concentrations which must be updated in such website.

Notwithstanding the suspension, several filings and/or replies to requests for information by the CNDC in economic concentrations filings have been done, in accordance with this new online procedure.

In this context, we are not aware of any resolution in connection with merger control, advisory opinions or anticompetitive conducts initiated in 2020, other than the ones mentioned in Section 2 of our former report dated June 25, 2020<sup>6</sup>. In addition, as far as we know, no material progress was made in relation to the existing proceedings.

### 3. Implementation of remote procedures for antitrust proceedings

On August 18, 2020, the Resolution No. 231/2020 ("Resolution 231") of the SDT was published in the Official Gazette. The Resolution 231 provided that all administrative filings before the SDT or the CNDC, either within the legal framework of the previous or the current Antitrust Act, that are related to the notification of economic concentrations and/or requests for advisory opinions, must be made and sent through the use of the remote procedures platform ("TAD").

In addition, the CNDC published on its website certain guidelines for the use of the TAD platform<sup>7</sup>.

The guidelines specified that preliminary proceedings and investigations related to anticompetitive practices are not included in the TAD platform.

Notifications from the CNDC will also be made electronically. The parties will be considered notified at the moment in which the electronic notification reaches its TAD platform, without prejudice to the moment in which the user actually opens said notification. The parties involved in a file processed by the TAD platform may access to the file at any time, which will imply the notification of any act prior to the date thereof.

It is important to note that the TAD platform allows the submission of documentation at all times and in real time. Without prejudice to this, the administrative working days and hours of the CNDC's desk are maintained for all files under its analysis that are not covered by the TAD platform.

### 4. New local Competition Bill

The Legislature of the City of Buenos Aires will discuss a bill that aims to strengthen the fight against bid rigging or cartelization in bidding processes (the "Bill"). The Bill aims to avoid agreements between companies submitting offers to bidding processes within the government of the City of Buenos Aires.

The Bill entrusts the contracting governmental agencies of the City of Buenos Aires with the obligation to initiate an administrative investigation upon the detection of signs of abuse of a dominant position, bid rigging, or collusive conduct.

If the administrative investigation indicates the potential commission of an anti-competitive conduct, the government of the City of Buenos Aires shall inform the Antitrust Authority. Likewise, if such procedure shows the potential commission

<sup>5</sup> The e-mail shall be sent between 9:30 am and 1:30 pm, with "URGENT PRESENTATION" as its subject. It must have signature scanned in color, and if its attachments are larger than 5 MB, a link to download them should be included.

<sup>6</sup> Online Link: <https://www.theworldlawgroup.com/writable/documents/news/WLG-Antitrust-UPDATE-June-25-2020.pdf>.

<sup>7</sup> Please see: <https://www.argentina.gob.ar/defensadelacompetencia/manualestad>

of crimes set forth in the Criminal Code, the government of the City of Buenos Aires shall file a criminal complaint.

Besides, if the bill is passed, the government of the City of Buenos Aires shall have powers to initiate other relevant administrative, civil or criminal actions.

The Bill also modifies the Public Contracting Law No. 2095 of the City of Buenos Aires, incorporating the obligation of companies in public tenders to submit an affidavit stating that their offer has not been agreed with potential competitors. The government may terminate the contract and claim damages in case such affidavit is proved false.

## 5. Update on the current regulatory situation

### (i) COVID-19 impact and measures

The Argentine Government, has taken several actions in order to face and prevent the effects of the COVID-19 pandemic. In relation to competition and antitrust matters, it is still implementing most of the measures taken as from March 2020.

First of all, although the Antitrust Act is fully in force, and individuals and companies must comply with it, all procedural deadlines in all dockets are suspended as mentioned above.

In addition to the measures we have mentioned in former antitrust status reports, in accordance with the Antitrust Act, the Supply Act No. 20,680 (the "Supply Act"), and the Decree No. 274/2019 ("Fair Trade Regime"), the SDT is still implementing maximum prices on some critical products, forcing their supply, and controlling the entire chain of production, distribution, and commercialization of several products in order to assure they are producing at the maximum of their installed capacity. The SDT has also initiated investigations

in relation to several markets, and intervened in the marketing of certain medical goods.

In addition, the SDT extended the terms provided in the "contractual and legal" guarantees of products and services until the end of the mandatory isolation<sup>8</sup>.

### (ii) Current application of maximum prices and the Supply Act

Over the last months, the SDT –together with the corresponding enforcement or local authorities– has taken several measures in order to control the compliance of maximum prices and supply regulations, as described herein.

Resolution No. 100/2020 jointly issued by the Ministry of Productive Development and the SDT ("Resolution 100"), which applies, among others, to producers, distributors, and retailers, established maximum retail prices for certain products. Such resolution's term was extended and will continue in force from March 20, 2020, until October 31, 2020<sup>9</sup> (term which may be further extended). During this term, the food products, drinks, personal hygiene, and cleaning products companies –subject to the provisions of Resolution 100– are obliged to keep their prices back to the values in force on March 6, 2020.

It should be noted that the SDT (or any other authority previously authorized by them) can initiate an administrative proceeding in connection with the increases in price and the compliance of the Antitrust Act, the Fair Trade Regime and the Supply Act.

By means of Resolution No. 199/2020, dated June 29, 2020 issued by the SDT, the Under-secretariat of Actions for the Defense of Consumers ("Under-secretariat of ADC") has been appointed as supervisor of the implementation and compliance of the Supply Act, the Consumers Defense Act No. 24,240 and Resolution 100.

<sup>8</sup> Please see: <https://www.argentina.gob.ar/noticias/extienden-los-plazos-de-las-garantias-de-productos-y-servicios-0>

<sup>9</sup> By means of Resolution No. 254/2020 issued by the SDT.

This resolution also allows the Under-secretariat of ADC to determine new updated maximum prices of the products included in Resolution 100. For this, the companies affected -or the corresponding associations that represent such companies- must verify the variations on their costs structure, and must prove that the current maximum prices substantially affected their economic and financial situation since March 6, 2020.

In this sense, on July 14, 2020 the Under-secretariat of ADC has fixed new maximum prices for several products under the scope of Resolution 100, and allowed an increase up to the proposed percentage, on the prices in force at March 6, 2020.

Additionally, on October 7, 2020, the Under-secretariat of ADC has allowed a new increase, up to the proposed percentage, on the prices currently in force. The price increases benefit the entire chain of production, distribution, and commercialization of the products subject to such Resolution 100.

Furthermore, on July 1, 2020 by means of Resolution No. 202/2020, the SDT –based on the Supply Act- established maximum prices in United States Dollars to one of the medicine products of BIOGEN (ARGENTINA) S.R.L.<sup>10</sup> as the SDT considered that the company was commercializing the product at an abusive and unreasonably high price. The SDT also affirmed that this unreasonable price had no relation with the structure of costs related to the production of the medicine, nor with the price established for that product in other countries of the region. The SDT has also ordered the CNDC, to initiate a market investigation in relation to this product to determine potential anticompetitive conducts.

As informed by the SDT, between March 23 and June 11, 2020, more than 15,000 inspections have been carried out to control prices and supplies in connection with business, distributors, suppliers, and industries throughout the country (mainly

local businesses). Up to this date, the SDT informed that around 20,000 inspections have been carried out along the whole country.

As a result of these inspections, 300 preventive closures were ordered and more than 3,500 minutes records were filed, and the SDT reported that the fines will be imposed after the corresponding procedures (beyond the measures already ordered by the SDT to correct the price distortion such as, for example, the return of the excess in price or the distribution of the goods in stockpiling). In other words, according to the SDT report, only about 1.5 percent of the inspected establishments were closed down.

### (iii) Fair Trade Regime regulation

On August 24, 2020, the SDT published its Resolution No. 241/2020 of (“Resolution 241”), by means of which it regulated the Fair Trade Regime, established by the Decree No. 274/2019.

Through Resolution 241, the SDT delegated some of its powers in connection with the Fair Trade Regime to the Undersecretariat of Policies for the Internal Market and others to the National Direction of Policies for the Development of the Internal Market.

The Resolution 241 also provided the supplementary nature of the Fair Trade Regime with respect to the Antitrust Act, which prevails over the first.

Furthermore, in addition to regulate the procedures under the Fair Trade Regime, Resolution 241 provides the application of the remote procedures platform TAD for the proceedings in connection thereof.

Regarding the sanctions for violations of the Fair Trade Regime, Resolution 241 provides that the SDT shall impose sanctions in administrative units, the amount of which will be updated annually. Finally, if the conduct to be fined under the Fair

<sup>10</sup> The maximum price for the injectable medicine “Nusinersen (Spinraza®) 12mg/5mL” has been set on Twenty Seven Thousand United States Dollars (USD 27,000). Such value shall be paid in Argentine Pesos

(\$) at the seller exchange rate established by the Banco de la Nación Argentina at the close of the immediate preceding business day of the effective payment date.

Trade Regime has also been sanctioned under some other specific regime, the SDT shall consider for the graduation of sanctions those established in those other processes. The purpose of the Regulations is to avoid unreasonable or excessive punishment.

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For any concerns or questions, please contact:



**Gabriel H. Lozano**

Competition & Antitrust Law  
Partner

[gabriel.lozano@bruchou.com](mailto:gabriel.lozano@bruchou.com)



**Dolores M. Cedrone**

Competition & Antitrust Law  
Associate

[dolores.cedrone@bruchou.com](mailto:dolores.cedrone@bruchou.com)



**Juan José Romano Blanco**

Competition & Antitrust Law  
Associate

[juan.romano.blanco@bruchou.c](mailto:juan.romano.blanco@bruchou.c)