# THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

**Editors**
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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# PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'. Nobel Prize economist Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets



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out a prediction for future developments. From those thoughtful contributions, we identify three themes in 2018 enforcement.

**Scrutiny of digital platforms**

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.



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On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

**Focus on pharmaceutical sector**

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

*a* The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

*b* The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

*c* When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to



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reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

**Standard-essential patents**

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

*a* The 'no licence, no chips' policy is anticompetitive.

*b* Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

*c* Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

*d* Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this seventh edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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Cleary Gottlieb Steen & Hamilton LLP
London
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**Chapter 1**

# ARGENTINA

*Camila Corvalán*[1]

## I INTRODUCTION

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, which was inspired by the provisions of the antitrust law in the United States. This Act was replaced by Act No. 12,906, which was in turn replaced by Act No. 22,262 in 1980.

The enforcement of Act No. 22,262 resulted in the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC), which focuses on targeting and sanctioning anticompetitive conduct.[2] Finally, on 25 August 1999, this Act was abrogated and replaced by Act No. 25,156, which was complemented by regulations regarding the procedures established in them.[3] Some of the sections of Act 25,156 were modified in September 2014 under Act No. 26,993.

On 24 May 2018, a new Antitrust Law entered into force, Law No. 27,442 (the new Antitrust Law), which is the current law. On the same day, the new Antitrust Law was complemented by Decree No. 480/2018. This new Law has implemented substantial changes in the antitrust system, in both the analysis of anticompetitive conduct and merger control review. With this new Law, Argentina has moved forward as regards antitrust legislation.

Further to the aforementioned specific regulations, the Argentine Constitution promotes effective competition and efficiency among markets in Argentina and intends to protect consumers' welfare.

Currently, and with the enactment of the new Antitrust Law, the authority that will enforce the new Antitrust Law and its complementary regulations is the National Competition Authority (ANAC). Further, the Anticompetitive Conducts Trial Secretariat, the Economic Concentrations Secretariat and the Antitrust Tribunal will operate within this new independent authority. However, until the ANAC is established, the enforcement of the new Antitrust Law is in the charge of the Secretariat of Domestic Trade, with the aid of the CNDC, currently led by its president, Esteban Greco.

Further, the CNDC is also still the agency that investigates both anticompetitive conduct and merger and acquisition procedures as a formal requirement of the Secretariat, which has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or *ex officio*,[4] until the ANAC is created.[5]

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1 Camila Corvalán is a senior associate at Beccar Varela.

2 Section 6 of Act No. 22,262.

3 Resolutions 40/2001, 26/2006 and 164/2001.

4 Section 20 of the new Antitrust Law.

5 Section 80 of the new Antitrust Law.



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The investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end with a non-binding recommendation to the Secretariat, which will make the final decision in the case, subject to analysis (this applies to both merger and acquisition reviews and investigation procedures). The decisions of the Secretariat may be appealed by parties to the judicial courts.

## II YEAR IN REVIEW

In 2018, according to public sources,[6] the antitrust authorities closed investigations in 21 anticompetitive cases. These 21 cases involved the analysis of claims and investigations of possible anticompetitive conduct (including but not limited to abuse of dominant position). As in 2017, the majority of the cases were closed because the antitrust authorities accepted the explanations given by the companies under investigation.

Notwithstanding the above, the antitrust authorities opened new investigations. In 2018, the antitrust authorities, through the CNDC, opened two market investigations.

Regarding the *PRISMA* case[7] (in which the CNDC stated, as a result of an analysis regarding the credit card and electric payments markets, that the company has a dominant position in some sub markets), in 2017, the Secretariat approved the proposal filed by the company.

PRISMA is currently owned by Visa International and 14 private banks that operate locally in Argentina. The proposal filed by PRISMA obliges the company to divest 100 per cent of the shares and prohibits more than one bank operating in Argentina to be a shareholder of the company, so as to prevent vertical integration. Further, the proposal states that PRISMA cannot commercialise other brands of credit card until there is another company that commercialises VISA in the Argentine market. According to the Secretariat, this proposal will promote competition in the markets that were involved in the investigation. This is the first time in the history of the competition authority that an investigation has resulted in a divestment of assets.

Further, in 2018, the Antitrust Authority imposed a fine of 42,732,771 Argentine pesos on Sociedad Argentina de Autores y Compositores de Música (SADAIC) for excessive pricing. The file was initiated as a result of a claim made by Federación Empresaria Hotelera Gastronómica, an Argentine entity that represents hotels and gastronomic activity, in relation to the tariffs that SADAIC applies to hotels for the reproduction of music through TV sets. The Federation alleged that SADAIC was imposing unilateral and arbitrary tariffs that were abusive (the tariffs were not calculated on the basis of real hotel rates and did not take hotel occupancy into consideration), and this was later proved by the CNDC. After a long analysis, the Antitrust Authority concluded that the prices fixed by SADAIC were abusive and so recommended that the Executive Power enact a new regulation establishing guidelines to fix prices based on the criteria of reasonableness, non-discrimination, transparency and equity.

6 www.argentina.gob.ar/defensadelacompetencia.

7 *Prisma Medios de Pago*, concerning a request for confidentiality in the main proceedings; *ex officio* investigation against Prisma Medios de Pago SA and its shareholders under the terms of Articles 1 and 2(a), (f), (g), (h), (j), (k) and (l) of Act No. 25,156 (1613), File No. s01: 0306673/2017.



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## III MARKET DEFINITION AND MARKET POWER

According to Argentine legislation and usual practices, the analysis of anticompetitive acts, conduct or behaviour follows a procedure in which, as a first issue, the definition of the scope of the relevant product and geographic market involved in the investigation is highlighted. Following this, the antitrust authorities focus mainly on the analysis of market power and market shares of the companies involved in the case. Further to the analysis of the market shares of the companies, the antitrust authorities also focus their attention on barriers to entry, efficiency gains, technological advantages, chains of commercialisation and market power, among other things.

The relevant market in an investigation will comprise two basic dimensions: the relevant market of the product involved, and the relevant geographical market where the conduct, act or behaviour is taking place. The assessment of the impact of an investigation will be largely determined by the relevant market definition, the market power involved and the market shares of the companies involved in the case.

The relevant market of the product shall comprise all products and services that consumers consider interchangeable or substitutable by reason of their characteristics, price and intended use. More precisely, sets of products or services constitute the same relevant market when said services or products are substitutes from both the demand[8] and supply[9] side.

Having reached the stage of defining the relevant market for a product, the next step is to do the same in geographical terms. Defining a geographic market involves the same considerations mentioned above for the definition of the relevant market for the product, with the difference that the substitution estimate, in this case, is in terms of physical distances or capabilities of displacement, for the users as well as the producers.

The above-mentioned definitions will be followed by the analysis of market power and market shares of the companies involved in the investigation, as well as the analysis of barriers to entry into the market previously defined.

8 From the point of view of substitution of demand, which is to say from the perspective of the user or consumer, the analysis will look to determine for each of the products and services offered by the companies involved the degree of substitution that exists between them and goods and services offered by other companies. So that the replacement on the demand side is effective, consumers must evaluate the products as being able to meet the same needs, under similar consumption opportunities. It is worth mentioning that substitutability from the user's point of view depends, then, on the attributes of the product or service and the similarities or differences that are observed from those offered by other vendors. The degree of substitution given in these attributes is usually the result of a qualitative analysis that assesses the extent to which consumers or users of a service provided by a supplier 'replace' that supplier when it raises its prices close to 10 per cent in a steady or non-transitory manner.

9 Once current competitors are determined and identified on the demand side, the CNDC analyses a second aspect in its determination of the relevant market for the product associated with the probability of a new supplier entering the market in the short or medium term. This issue is known technically as 'supply-side substitutability'. This probability of entrance to the market involves the following factors: that other players exist, possibly at an international level, that potentially have an interest in entering the market, if conditions are checked for this; and most important, the level of barriers to entry to the market.



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## IV ABUSE

### i Overview

The new Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the new Antitrust Law is applied not only to acts and behaviours that occur in the Argentine territory, but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market.

With the enforcement of the new Antitrust Law, certain practices are considered *per se* illegal; this is new in the Argentine antitrust system, taking into consideration that, before the enforcement of the new Antitrust Law, all anticompetitive conducts were analysed by the rule of reason criterion. These practices, which are considered *per se* illegal, must be deemed null and will not generate any kind of effect. Practices considered *per se* illegal are listed under Section 2 of the new Antitrust Law, as follows:

*a* fixing, directly or indirectly, the price of the purchase or sale of products or services;

*b* establishing obligations of manufacturing, distributing, buying or commercialising a limited amount of goods, or providing a limited number, volume or frequency of services;

*c* dividing, distributing or horizontally imposing areas, portions or segments of the markets, clients or supply sources; or

*d* establishing or coordinating submissions or abstentions in public tenders.

Section 1 of the new Antitrust Law establishes that acts or behaviours relating to the production or trading of goods and services that limit, restrict or distort competition or constitute abuse of a dominant position in a market in a way that may result in (potential or actual) damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of the Law.

Further, Section 3 of the new Antitrust Law provides a detailed list of anticompetitive conduct that could be considered unlawful by the competition authorities. The types of anticompetitive conduct that will be analysed by the rule of reason criterion are:

*a* fixing, agreeing or manipulating, directly or indirectly, the price for the sale or purchase of goods and services in the market, as well as exchanging information for the same purpose or to the same effect;

*b* establishing obligations to produce, process, distribute, purchase or commercialise only a restricted or limited quantity of goods, or rendering a restricted or limited number, volume or frequency of services;

*c* agreeing upon the limitation or control of the technical development or investments bound to the production or commercialisation of goods and services;

*d* preventing or precluding third parties from entering or staying in a market, or excluding them from a market, or rendering this difficult;

*e* regulating goods or services markets, by agreeing to limit or control research and technological development, the production of goods or the rendering of services, or rendering difficult the investments bound to the production or distribution of goods and services;

*f* subordinating the sale of an asset to the acquisition of another or to the use of a service, or subordinating the rendering of a service to the use of another or the acquisition of an asset;



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*g* submitting a purchase or sale to the condition of not using, acquiring, selling or supplying goods or services produced, processed, distributed or commercialised by a third party;

*h* imposing discriminatory conditions to the acquisition or alienation of goods or services, with no reason grounded on commercial uses and customs;

*i* refusing, without justification, to meet specific orders for the purchase or sale of goods or services, made in the conditions standing in the market involved; or

*j* suspending the supply of a dominant monopoly service in a market to a user of public utilities or public interest service.

The two basic offences under Section 3 of the new Antitrust Law are the limitation, restriction or distortion of competition or access to the market, and the abuse of dominant position. To be illegal, the two offences must be able to cause damage to the 'general economic interest';[10] this concept, while included in the new Antitrust Law, is not defined in the text of the Law, and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term 'general economic interest' is mostly likened to 'consumer welfare', which may be damaged if a conduct, act or behaviour has the potential to cause an increase in price or a reduction of the offer of the relevant product defined within the framework of an investigation.

Section 3 of the new Antitrust Law details 12 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. This list is not exhaustive; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 5 of the new Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the new Antitrust Law as follows:

> *For the purpose of this Act, one or more persons are understood to have a dominant position when for a certain type of product or service it is the only one to supply or demand in the national market or in one or more parts of the world or, when not being the only one, it is not exposed to a material competition or, when due to the degree of vertical or horizontal integration it is in a position to determine the economic viability of a competitor sharing the market, in detriment of the latter.*[11]

To establish the effective existence of dominant position, Section 6 details a number of circumstances that shall be taken into account at the moment of analysing the position:

*a* the extent that the good or service involved can be replaced by other goods or services, either of local or foreign origin, and taking into consideration the conditions of the substitution and the time required to do so;

*b* the existence of regulatory restrictions that limit access to products, the offer of products or demand in the markets involved; and

*c* the extent that the allegedly responsible party may unilaterally have influence in the formation of prices or restrict the supply or demand in the market, and the extent to which its competitors are able to counterbalance such power.

Dominant position is not forbidden by the new Antitrust Law – the prohibition is only focused on the abuse of such dominant position. The abuse of dominant position is a unilateral

10 This concept was confirmed by the Supreme Court of Justice in *In Re A Gas and Others v. AGIP Argentina SA and Others,* concerning infringement of Act No. 22,262.

11 Section 5 of the new Antitrust Law.



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conduct and, therefore, is not reliant on any kind of contract or agreement with competitors or third parties. According to the antitrust authorities, unilateral conduct 'stumbles upon the difficulty of determining to what extent such conducts are part of a valid or competitive behaviour or constitute or result manoeuvres whose meaning is simply to create impediments to entry or reside of competitors in a market'.[12] Further, in May 2019, the CNDC published a guide for the analysis of exploitative abuse of dominant position. The aim of the guide is to establish different guidelines for foreseeable decisions.[13]

### ii Exclusionary and exploitative abuse: price discrimination

Practices that imply abuse of a dominant position usually involve those practices that obstruct the entry of potential competitors in the market and those that exclude existing competitors. Strictly, the abuse of a dominant position can be raised by exploitative or exclusionary conduct, acts or behaviours.

Abuse of a dominant position based on exclusionary conduct, acts or behaviours triggers a concern for the antitrust authorities that is based principally on the exclusion of one or more competitors in the market involved. In cases of abuse of dominant position based on exploitative conduct, the concerns of the antitrust authorities include price discrimination, imposition of exploitative prices, and any other conduct that tends to differentiate prices and commercial conditions between competitors in the same market.

The new Antitrust Law provides no guidelines on what market shares give rise to the existence of a dominant position in one or several markets.

In general terms, and considering the provisions established in Section 5 of the new Antitrust Law, a company is considered to have a dominant position when it is the only supplier of certain goods or services or when, as a consequence of the vertical or horizontal degree of integration, it is able to determine the economic feasibility of a competitor or participant on the market.

In effect, the CNDC has held that a position of dominance is the economic power that a company has to prevent effective competition from being maintained on a relevant market, thus enabling it to act to a great extent independently from its competitors, customers and consumers. It has also stated that a dominant position does not necessarily derive from an absolute dominance that may enable a company to exclude all competition, but it is enough for it to have a strong position that may allow it to act in a highly independent way.

Notwithstanding the above-mentioned as to the lack of a precise criteria in the Argentine legislation, the CNDC frequently adopts foreign criteria and precedents, namely the ones adopted by the EU Competition Commission, when considering the analysis of precedents.

In practice, such criteria may be used as guidelines when determining what shares may enable a company to act independently from its competitors. Following the practical approach usually adopted by the EU Competition Commission, it is possible to argue that shares lower than 30 per cent do not normally imply a position of dominance, while shares higher than 50 per cent do.

Defining what relevant markets are according to this analysis is no easy task. In most scenarios, the antitrust authorities may deem it necessary to perform a specific economic analysis on the products involved and the geographical areas in which such products are offered.

12 Secretary of Trade, CNDC, *Clorox Argentina SA,* concerning infringement of Act No. 25,156 (Case 1122).

13 www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_mayo_2019.pdf.



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As previously mentioned, there is no specific prohibition in the new Antitrust Law for having a position of dominance, just for the abuse of it. Therefore, companies that have a dominant position should avoid participating in what may be considered as abusive conduct. Such conduct may include, but is not limited to:

*a* refusing to accept orders without objective reasons that justify such refusals;
*b* selling at prices that are equal to or below cost;
*c* imposing abusive contractual conditions;
*d* lowering prices temporarily (predatory pricing);
*e* applying temporary discounts or better conditions in specific areas with the aim of eliminating actual or potential competitors;
*f* applying different prices or sales conditions in similar scenarios (price discrimination); and
*g* subordinating the purchase or the sale (or the purchase or sale under certain conditions) to the condition of not using, buying, selling or providing goods or services offered by a third party, or subordinating the purchase of goods or services to the purchase of other goods or services.

The most important case in Argentine competition history regarding the abuse of a dominant position involved exploitative conduct, specifically, price discrimination, in 2002.[14]

Yacimientos Petroliferos Fiscales (YPF) is one of the largest suppliers of liquefied petroleum gas (LPG) in Argentina, and was also the largest exporter of said product. The issue in this case was the pricing policy of YPF concerning its wholesale of LPG. The CNDC objected that YPF commercialised LPG in the local Argentine market at a higher price than it did in the markets where the company exports the product. In addition, YPF prohibited the foreign companies that buy the product from re-exporting the product into Argentina.

In this case, the former Secretariat of Trade took into consideration the recommendation of the CNDC for the fine imposed, which amounted to 109 million Argentine pesos. The decision of the former Secretariat of Trade was questioned by YPF in the courts; the fine was confirmed by the Supreme Court.

## V REMEDIES AND SANCTIONS

### i Sanctions

Penalties for anticompetitive conducts are detailed in Section 55 of the new Antitrust Law.

Infringements of the new Antitrust Law regarding the abuse of a dominant position may result in harsh consequences for both the infringing company and its individual employees. Under the current legislation, penalties for infringing the new Antitrust Law are determined as follows: fines will increase to the higher of:

*a* 30 per cent of the turnover of the business associated with the infringement in the previous fiscal year, multiplied by the number of years of the infringement (the latter with a cap of 30 per cent of the total Argentine consolidated turnover of the infringing parties in the previous fiscal year); or
*b* twice the amount of the economic benefit caused by the infringement.

14 *National Commission for the Defence of Competition v. Yacimientos Petroliferos Fiscales.*



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In the event that both methods can be used, the method that achieves the higher amount for the fine will be used.

Further, if the foregoing criteria cannot be applied, fines will be imposed by the ANAC with a cap of 200 million *unidades móviles*.[15] In the case of a repeat offence, offenders' fines may be doubled. As well as the fine, the ANAC may require the immediate ceasing of the acts or conducts and, if considered necessary by the ANAC, the removal of offenders' effects.

To determine the sanctions, the authorities take into account, among other things:

*a* the loss suffered by all the individuals and companies that have been affected by the unlawful activity;

*b* the benefit obtained by all the individuals and companies that were involved in the activity;

*c* the market positions of the companies involved in the investigation;

*d* the accounts of the companies involved in the investigation;

*e* the duration of the conduct subject to investigation;

*f* an estimation of the inflated prices generated by the conduct subject to investigation;

*g* the characteristics of the products involved and their contribution to the welfare of society; and

*h* the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The CNDC has stated in a precedent[16] that when sanctioning collusive conduct, penalties should be established for an amount that 'may compensate society for the damage caused; and be superior to the benefits obtained by the companies involved in the case'.

The logic behind the pecuniary fine is that the imposition and the amount of the fine act as disincentives for those considering engaging in anticompetitive conduct.

In the case of a re-offence, the fine could be doubled. Without prejudice to other penalties that may correspond, when verified acts that constitute abuse of a dominant position or where it is noted that a monopolistic or oligopolistic position in violation of the provisions of the new Antitrust Law has been achieved, the Secretary of Trade may enforce conditions aimed at neutralising the distorting aspects of competition or ask the judge that the offending companies are dissolved, liquidated, deconcentrated or divided.

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of a surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

In addition to all the sanctions described above, the individuals or legal entities that are injured by acts and behaviours forbidden by the new Antitrust Law may sue for damages in a court of competent jurisdiction in accordance with the laws of Argentina.

Finally, any agreements or terms and conditions that infringe the new Antitrust Law may be declared null and void.

15 The *unidad móvil* is a coefficient updated annually by the Argentine inflation index. The value of one *unidad móvil* is currently fixed at 26.40 Argentine pesos.

16 CNDC, *Oficina anticorrupción*, concerning an intervention request (Case 1142), 4 December 2015.



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### ii Behavioural remedies

As mentioned above, the antitrust authorities may enforce conditions aimed at neutralising the distorting aspects of competition or may ask a judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

## VI PROCEDURE

Abuses of dominant position cases usually occur through a filing made by any natural or legal person. Notwithstanding this, an investigation may also be initiated *ex officio* by the antitrust authorities.

Complaints must be filed before the antitrust authorities, detailing, among the formal requirements, the complaint subject, the facts that ground the complaint and the legal basis considered for filing the claim.

The procedure will be initiated by communicating the investigation to the denounced company, who will have the possibility of answering it in relation to the facts or the legal basis investigated by the antitrust authorities.

Once the defence has been filed, the antitrust authorities may consider the explanations satisfactory or conclude that there is no merit in continuing with the investigation. Otherwise, the denounced company will be notified to submit its disclaimer and to offer evidence to be produced.

The complainant should cooperate with the investigation, and the antitrust authorities may require information from other competitors in the relevant market. Further, the authority may convene a public audience review at any step of the procedure if the investigation merits it or to obtain more information on the investigation.

The antitrust authorities may enforce precautionary measures, such as ordering the cessation of the injurious conduct while the analysis of the investigation is taking place. This decision can only be taken when the antitrust authorities judge that the competition regime may be affected (at the complainant's request or *ex officio*). This last decision, regarding a precautionary measure, may be appealed by parties.

After the evidence is produced, the antitrust authorities must decide the case in 60 days, ending the administrative claim. Nevertheless, once the resolution is notified and published in the Federal Register, interested parties may appeal it.

Despite this, the new Antitrust Law gives the opportunity for the denounced company to make an arrangement with the antitrust authorities by which it commits to cease immediately the conduct that affects competition. In this last case, the antitrust authorities will investigate the enforcement of the arrangement for three years.

## VII PRIVATE ENFORCEMENT

Regarding private enforcement, Section 62 of the new Antitrust Law provides that 'any person damaged by anticompetitive practices may bring an action for damages in accordance with civil law before a judge having jurisdiction over the matter'.

Two relevant cases that involved claims for damages, and had previously been sanctioned by the CNDC, were initiated as a consequence of anticompetitive conduct. One was a cartel case and the other focused on an abuse of dominant position.



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The first[17] was rejected by the judge for lack of legitimacy. In the second case,[18] the judge estimated that the damages amounted to 13,094,457 Argentine pesos plus the costs of the process.

The new Antitrust Law includes new provisions regarding private enforcement; the changes focus on establishing a more efficient and faster procedure. The parties in a case should file the claim once the administrative decision imposing a sanction is final. The administrative decision will be binding on the civil judge and the case will be heard under expedited procedural rules. Further, parties who have benefited from leniency applications will be exempted from civil liability. This last rule has the following exceptions: claims by defendants' purchasers or their direct and indirect suppliers, and cases in which the defendants could not obtain complete redress of their claim from parties who have not benefited from leniency applications.

## VIII FUTURE DEVELOPMENTS

Further, as a first step after taking office as the president of the CNDC, Esteban Greco undertook CNDC internal audits. He has also released the results of internal audits that were performed with regard to anticompetitive conduct. Mr Greco acknowledges that the antitrust authorities in the past have failed to comply with the terms established under the new Antitrust Law as regards conduct and merger control cases. Specifically regarding anticompetitive cases, he has stated that conduct cases that were initiated with an aim differing from the protection of market competition will be dismissed and closed.

17 *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others*.

18 *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others*, Supreme Court of Justice Decision of 2 October 2015.



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**Appendix 1**

# ABOUT THE AUTHORS


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*Beccar Varela*


Camila Corvalán is based in Beccar Varela's Buenos Aires office and practises in a broad range of antitrust matters, including investigations of anticompetitive conduct as well as merger and acquisition control. She is also involved in antitrust litigation cases before judicial courts.

Ms Corvalán received her college degree from the Catholic University of Argentina. She graduated with honours. Ms Corvalán took her graduate studies at the same university, and specialised in competition law in Madrid, Spain. She worked as an editor of the Argentine journal *El Derecho* in parallel with her office work. For the past few years, Camila has been committed to women's empowerment and has spent many hours in various women's organisations undertaking activities to promote gender and diversity. Camila is a member of the board of the Argentine Forum of Women Entrepreneurs.


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