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The Standard and the Burden of Proof in Competition Law Cases – Note by Argentina

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1. In antitrust law, the standard of proof refers to the level of evidence required for a competition enforcement authority to consider the existence of an anticompetitive conduct proven. Sometimes, this standard may be challenged by the companies involved in anticompetitive acts, and analysed by judicial tribunals that assess such appeals. The courts' criteria may coincide with the evidentiary standard considered by the competition authority, or it may be a different one.

2. In Act No. 27.442 on the Defence of Competition (LDC, for its acronym in Spanish) there is no express mention of the standard of proof required to prove the different types of anticompetitive practices, although the legislation does differentiate between the standard of proof for the so-called "hard-core cartels" and that for other anticompetitive conducts, most notably abuses of dominance. With regard to other regulations, the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) has published the *Guide for the Analysis of Cases of Abuse of Dominant Position of an Exclusionary Type*, which, by defining the criteria for analysing this type of conduct, contributes to outlining the standard of proof, at least for these cases.

3. CNDC's jurisprudence on anticompetitive conducts consists of sanctions for abuse of dominance, as well as collusive practices, comprising market-sharing agreements and price agreements, including cases involving the exchange of commercially sensitive information between competitors. This jurisprudence, shaped by the CNDC's sanctioning decisions, provides an outline of the standard of proof in cases of anticompetitive practices, which, in short, consists of the level of proof required by the competition agency to prove the existence of the conduct, its participants, and the circumstances of time and place in which it occurred.

4. The objective of this contribution is to characterise the concept of the standard of proof and its application in the LDC to the different types of anticompetitive practices, and then to review a set of cases, assessing the standard used in each one and the results of such investigations. It will also analyse particular cases and the considerations of the courts of second instance that revised these decisions of the CNDC.

5. The first section of this note describes the concept of standard of proof and burden of proof, and the framework in which they are developed in the context of the LDC, analysing their applicability to different types of anticompetitive practices. The second section focuses on relevant cases of sanctions for abuses of dominance and cartels by the CNDC, with emphasis on the evidence used in each one, in order to outline general aspects of the standard of proof in the implementation of competition policy in Argentina. Finally, the third section presents the conclusions.

1. The Standard and Burden of Proof in the LDC

6. When analysing different types of anticompetitive practices, various challenges related to evidence gathering may be faced. In abuse of dominance cases, especially those of an exclusionary nature, the presence of a complainant often facilitates the collection of evidence, as the injured party can provide key information. However, in cartel cases, proof of infringement is more complex, as direct evidence is often required before the alleged infringers become aware of the investigation. In certain cases, where it is not possible to

obtain direct evidence to prove the existence of collusive practices, competition authorities must turn to other types of evidence to prove the anticompetitive conduct.

7. The first section of the LDC establishes that any agreement, conduct, act or economic concentration that has the object or effect of restricting competition or constitutes an abuse of a dominant position in a market, in such a way that it may result in harm to the general economic interest ―the interest protected by the LDC― is a prohibited and punishable act. The legislation generally frames the standard of proof for two groups of conducts, which the LDC classifies as practices that are restrictive and practices that are absolutely restrictive of competition.

8. The first group is mainly made up of abuses of dominance. Proof of the existence of this type of conduct requires, in the first place, proof of the existence of the dominant position itself, which Section 5 of the LDC defines as the presence of a single supplier or buyer in the market or the presence of an agent that, without being the only one, is not exposed to substantial competition or is in a position to determine the economic viability of a competitor participating in the market. Secondly, it implies proving the existence of some of the practices typified in Section 3 of the LDC, which include unjustified refusal to sell, predatory pricing, interlocking, among many others. Thirdly and lastly, it requires proving that the practice in fact constitutes a harm to the general economic interest. Based on this last criterion, in certain cases, economic agents could justify conduct that affects competition if they can demonstrate that it generates sufficient efficiencies, so that it is highly likely that consumers are not harmed in net terms.

9. According to the *Guidelines for the analysis of cases of abuse of dominant position of an exclusionary type*,[1] issued by the CNDC in 2018, when examining the existence of conduct of this type it is essential to consider various factors to assess the likelihood of exclusionary effects that constitute anticompetitive foreclosure of the market. Among these factors are: evidence of exclusionary effects, such as the exit of competitors from the market, the reduction of their market share or the increase of the dominant firm's share, or the slowdown of its loss of market share. Also relevant is evidence of an exclusionary strategy, which may include documents containing direct evidence of actions or plans to exclude competitors, prevent their entry into the market, or implement other exclusionary measures.

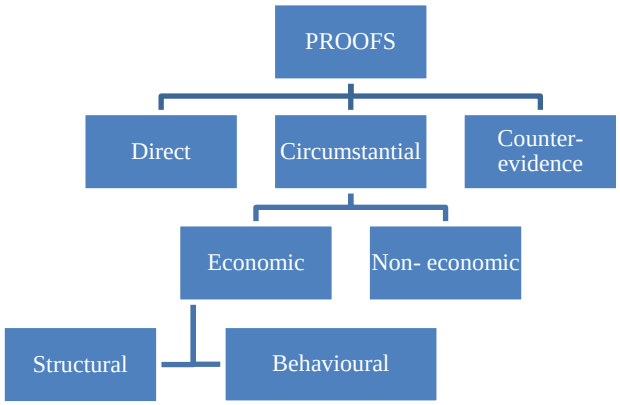
10. Collusive practices are coordinated horizontal conducts in which companies agree not to compete with each other, with the aim of increasing the joint profits of the group. This can be achieved through different actions, the most serious and presumably most damaging to the general economic interest being those that the LDC classifies in Section 2, as practices that are absolutely restrictive of competition, and which are limited to the four conducts known as hard core cartels: agreements between two or more competitors to fix prices, limit supply, share the market or fix bids in tenders or auctions.

11. Indeed, for this type of cases, the LDC has established a specific regulation, modifying its treatment with respect to the previous competition law, Act No. 25.156, which was in force until 2018. As previously mentioned, Section 1 of the LDC establishes the general principle that prohibits agreements between competitors, and Section 2 reinforces this prohibition by classifying them as practices that are absolutely restrictive of competition and stating that such practices are presumed to "harm the general economic interest'.

[1] Available at: https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_mayo_2019.pdf

12. Unlike other types of practices prohibited under the LDC, practices that are absolutely restrictive of competition carry a legal presumption that reverses the burden of proof. This means that it is the human or legal persons under investigation who must prove that such an agreement between competitors does not cause harm to the general economic interest, and the defence may be based, for example, on efficiency arguments.

13. There are various ways of proving the existence of collusive agreements, including: (i) direct evidence; (ii) circumstantial evidence; and (iii) counter-evidence.



14. The most common direct evidence includes documents, in any format, indicating the existence of an agreement between the parties involved, together with statements, both oral and written, from cartel members describing the operation of the cartel. In fact, this is evidence that clearly demonstrates the intent to collude and that indisputably confirms the existence of the collusive agreement and the prohibited conduct.[2]

15. Usually, obtaining direct evidence of a cartel is complex, as participants often avoid leaving explicit records of the agreements reached. In most of the cases in which the CNDC has sanctioned agreements between competitors, evidence was obtained through dawn raids on the investigated companies or on the business chambers that facilitated coordination between them. These raids were carried out without the prior knowledge of the investigated parties, which ensured the collection of key evidence. In this context, dawn raids have proven to be an effective means of evidence to investigate this type of anticompetitive practices. In other cases, as will be described below, the complaining companies provided direct evidence that was decisive in confirming the existence of the cartel.

16. When direct evidence of the collusive agreement cannot be obtained, circumstantial evidence plays a crucial role in proving the existence of the concerted practice. This type of evidence can be divided into two categories: economic and non-economic. The analysis of economic evidence can allow for an assessment of whether the level of competition or rivalry between the investigated parties is low or even non-existent. This economic evidence can be classified into two sub-types: (i) structural evidence, related to the distribution of the market itself and/or, (ii) behavioural evidence, related to certain observed behaviours that are not compatible with competition.

[2] See OCDE, Policy Roundtables; Prosecuting Cartels Without Direct Evidence of Agreement, Global Forum on Competition, 2006.

17. As mentioned above, this type of evidence is particularly important when there is no direct evidence of a collusive agreement, which requires a thorough analysis of the context and behaviour in the market to assess the existence of collusion. Structural economic tests involve the observation of factors that may facilitate collusion and include the study of the level of market concentration, high barriers to entry, the degree of vertical integration of firms and product homogeneity. On the other hand, behavioural economic tests include the analysis of any behaviour indicative of price or supply fixing, market sharing, or bid rigging, as well as a history of antitrust violations. In addition, facilitating practices are considered as those actions that could help competitors to coordinate more effectively, thereby increasing the likelihood of collusive agreements. This may include market characteristics that favour assiduous communication between competitors, or the existence of industry associations and chambers that help create settings for market suppliers to meet.

18. Although structural or behavioural evidence alone may not be sufficient to infer the existence of collusive agreements, it is essential to analyse and weigh all evidence together. This cumulative approach allows the different pieces of circumstantial evidence to reinforce each other, increasing their probative value. In this way, a comprehensive analysis is constructed enabling the identification of a collusive conduct, even in the absence of direct evidence, as has been pointed out in a 2006 OECD paper on cartel prosecution without direct evidence.[3]

19. Non-economic evidence refers to those elements which lead to the conclusion that the lack of competition between the investigated parties is the consequence of a non-compete agreement, based on the existence of some kind of contact or communication between the competitors. Such evidence, which should not exist in a market with effective competition, suggests that the cartel participants had some kind of interaction, although without detailing the specific content of the interaction. Such evidence includes records of telephone calls between competitors, travel to the same destination, or participation in joint meetings. In addition, any evidence that shows that competitors knew about the pricing strategy or some other fundamental business variable of the competition or that they discussed it at some point may also be considered.

20. Finally, the non-evidential test is applied in situations where there is a conscious parallelism in the behaviour of the undertakings, which alone is not sufficient to prove a cartel. In order to sustain the existence of a collusive agreement, the presence of 'plus factors' is required. These factors may be actions that contradict the individual interest of the undertakings, unless they are executed as part of a collective plan, or the creation of regular opportunities for communication between competitors.[4]

21. An example of such additional factors may be meetings between competitors. However, for these meetings to be considered as evidence of collusion, certain conditions must be met, such as that the participants are persons with the authority to negotiate prices. In addition, it is essential to have concrete evidence confirming that collusive actions, such as price fixing, were agreed through these meetings.

[3] OCDE, Policy Roundtables; Prosecuting Cartels Without Direct Evidence of Agreement, Global Forum on Competition, 2006.

[4] Cabanellas de las Cuevas Guillermo, Serebrinsky Diego Hernán, *Derecho antimonopólico y de Defensa de la competencia*, Tomo I, pp.373, 4ta. Edición.

2. Standard of Proof in Cases Sanctioned by the CNDC

22. This section presents a summary of some of the cases in which the CNDC has imposed sanctions for anticompetitive conducts, linked to the standard of proof described in the previous section. Cases involving exclusionary abuses of dominance, as well as collusive agreements related to market sharing, price fixing and the exchange of sensitive information between competitors will be reviewed. These cases illustrate how the CNDC has applied the standard of proof to sanction anticompetitive practices, highlighting the importance of additional evidence in the assessment of infringements.

2.1. Standard of Proof in Exclusionary Abuses of Dominant Position

23. The case that will be examined below has already been discussed in Argentina's contributions to OECD roundtables in December 2022[5] and June 2024,[6] through notes related to remedies and commitments in cases of abuse of dominance and on monopolisation, economic moat building and entrenchment strategies, respectively. In the first submission, the CNDC addressed the behavioural remedies imposed to the offending company, Cervecería y Maltería Quilmes (CMQ). In the second presentation, the focus was on the investigative tools that the CNDC used to demonstrate the existence of anticompetitive practices.

24. This case is addressed by focusing on the type of evidence used to support the allegations, highlighting how circumstantial evidence was used to prove the abuse of dominance by CMQ. This analysis allows us to examine the effectiveness of evidentiary methodologies in cases of anticompetitive conduct of an exclusionary nature in the beverage sector in Argentina.

25. In the referred case, the CNDC determined that CMQ effectively held a dominant position in the Argentine beer production and commercialisation market based on information provided by various sources, such as the complainant companies —the competitors, Compañía Cervecerías Unidas S.A. (CCU), Compañía Industrial Cervecera SA (CICSA) and Otro Mundo Brewing Company S.A. (Otro Mundo)—, CMQ itself and data obtained from the decision conditioning the economic concentration between Anheuser-Busch InBev and Sabmiller (the former being CMQ´s controlling company in Argentina), in 2018.

26. With regard to the conducts themselves, the CNDC found that CMQ implemented loyalty strategies aimed at securing exclusive retail beer outlets in both the on-premise and off-premise channels, which had the effect of vertically foreclosing the market to actual and potential competitors. To prove these anticompetitive practices, the CNDC relied on a wide variety of evidence, including:

- Testimony and documents submitted by executives of CMQ's competitors, such as CCU and CICSA.
- Information provided by supermarket chains that evidenced the existence of exclusivity agreements on the shelves.

[5] Available at : https://www.argentina.gob.ar/sites/default/files/2017/02/nota_argentina_ocde_-_remedios_y_compromisos_en_casos_de_apd.pdf

[6] Available at: https://www.argentina.gob.ar/sites/default/files/contribucion_moat_building_vf.pdf

- Notarised minutes taken at points of sale, where the managers confirmed the exclusivity agreements, as well as brochures promoting CMQ's loyalty programmes.
- Documentation obtained from CMQ's websites, which detailed loyalty programmes offered in exchange for exclusive visibility of its products.
- Photographic findings and interviews carried out by the CNDC in self-service stores in the Buenos Aires Metropolitan Area.

27. The CNDC determined that the loyalty strategies implemented by CMQ, instead of improving commercial conditions for consumers, acted as barriers to the entry of new competitors and restricted competition, generating direct harm to the final consumer. Through an economic analysis and review of international jurisprudence, it was concluded that these practices, aimed at hindering the growth of competition and preventing the entry of new players into the market, led to competing companies facing disproportionate costs to access display space, being unable to profitably replicate CMQ's discounts and bonuses, even at similar levels of efficiency. This limited consumer purchasing choices allowed CMQ to maintain its high and stable market share, preventing rivals from expanding and consolidating its dominant position. Moreover, the effect of these practices was further enhanced by targeting strategic customers, which increased the anticompetitive foreclosure of the market. The presence of these effects resulted on clear harm to the general economic interest.

28. The CNDC decided to sanction the brewer with a fine of 150 million Argentinean pesos and imposed a series of behavioural corrective measures on the company with the objective of preventing the repetition of all the sanctioned conducts, thus ceasing the damage to competition in the beer market and the consequent harm to the general economic interest.

29. The evidence gathered in this case, which could be categorised as circumstantial evidence of an economic nature, strongly demonstrated the exclusionary practices carried out by CMQ, contributing to the sanction imposed by the CNDC. Subsequently, the Federal Court of Appeals in Civil and Commercial Matters, by dismissing CMQ's appeal, ratified the measures and the fine recommended by the CNDC.

30. The CNDC has extensive experience in sanctioning exclusionary abuse of dominance conduct, applying a standard of proof similar to the one used in the CMQ case. This standard is based on indirect evidence of an economic nature, linked both to the dominant position of the undertaking complained of and to the anticompetitive practices carried out. The CNDC has sanctioned numerous cases of exclusionary abuse of dominance, particularly in health services markets, as discussed in Argentina's contribution to June 2024 OECD roundtable on competition and regulation in professional services. It has also sanctioned similar conducts in the telecommunications market,[7] among others.

31. Usually, evidence comes from various sources, such as the complainant, the complained company itself, customers or other relevant agents in the affected market, notarial findings or verifications carried out by the competition authority's own agents. This approach allows the CNDC to obtain a comprehensive view of the anticompetitive conduct and to ensure a rigorous and well-founded process to sanction such practices.

[7] Available at: https://www.argentina.gob.ar/sites/default/files/2023/01/dictamen_reso_artear_telecom.pdf

2.2. Standard of Proof in collusive agreements

32. Throughout the CNDC's history of investigating collusive agreements, in some cases, direct evidence was obtained through dawn raids, while in other cases, it was obtained thanks to the contribution of the investigated companies or the complainants. There were also certain cases where, in the absence of direct evidence, the CNDC relied on circumstantial evidence to sanction the companies under investigation. As it will be seen below, each of the investigations had its particularities and different outcomes when reviewed by the corresponding courts of appeal.[8]

33. Two of the most emblematic cartel cases sanctioned by the CNDC were in the cement and liquid oxygen markets. In the case of cement,[9] in 2005 the CNDC sanctioned five competing companies for carrying out an agreement to share the market and fix prices, in addition to exchanging competitively sensitive information, which was monitored through the Association of Portland Cement Manufacturers (AFCP, for its acronym in Spanish), which was also sanctioned.[10] The main evidence in this case was obtained through the raid carried out at the beginning of the investigation. The abundance and strength of the evidence gathered during the investigation made it possible to solidly prove the existence of the agreement, its characteristics and duration, and to identify its participants.

34. In particular, the CNDC proved the exchange of sensitive information between competitors by submitting evidence in the form of spreadsheets and documentation relating to the AFCP's statistical system. This system was so disaggregated as to allow each cement company to know the dispatches, production and imports of the others in a monthly report. On the basis of this evidence, the CNDC established that the companies participating in the agreement had access to this information.

35. Finally, the CNDC was able to prove the existence of meetings of the so-called 'Agreement Roundtables', which were held in hotels to control dispatch figures. The evidence included receipts for tickets, related expenses, and a review of the companies' accounting books, which added credibility to the facts that motivated the investigation.

36. The Court of Appeals that reviewed the decision confirmed the sanction imposed by the CNDC. In its ruling, it referred to the evidence collected, and held that, although it was difficult to prove the existence of a cartel through direct evidence, which implies an agreement of wills between bidders of the same good with the common objective of sharing the market, ―since it is not reasonable to expect that those involved in an unlawful conduct such as market sharing would sign a formal agreement and keep copies of it―, it was sufficient to verify the acts carried out to achieve that unlawful objective, or the shared means to fulfil what was agreed. In the judges' view, this clearly evidenced the achievement of the unlawful purpose that originally brought the infringers together.

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[8] For more details, see the article *"Estándar Probatorio en Casos de Colusión. Aspectos Conceptuales y Experiencia Argentina*", written by Ana Julia Parente, available in the 2024 yearbook of the National Commission for the Defence of Competition of Dominican Republic (ProCompetencia). Available at: https://procompetencia.gob.do/anuario-procompetencia/.

[9] Available at: http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/513_1.pdf

[10] The fines applied amounted to $138.7 million for Loma Negra S.A., $100.1 million for Minetti S.A., $34.6 million for Cementos Avellaneda S.A., $7.3 million for Petroquímica Comodoro Rivadavia S.A. and $28.5 million for Cemento San Martín S.A. In the case of the AFCP, the fine imposed amounted to $0.5 million.

37. In the case of liquid oxygen,[11] in 2005 the CNDC sanctioned four companies producing and marketing medical oxygen for concerted actions to allocate customers and fix prices.[12] Competitors agreed on who would submit the winning bid in each tender, using tactics such as bid suppression, supplementary bids, rotating bids and subcontracting. The CNDC was able to prove bid suppression, as in 50% of the tenders for the purchase of medical oxygen only one company submitted a bid. In addition, the existence of complementary bids in several tenders issued by different establishments was also proved.

38. From the documentation seized in the dawn raids on the companies, it was found that some competitors agreed to submit bids that were either too high to be accepted, or contained special terms that ensured their rejection by the buyer. In addition, e-mails were found which explicitly showed market sharing and agreement between the companies on whether or not to participate in certain tenders. The e-mails themselves revealed that the companies agreed on the prices to be offered in certain tenders. In addition, abundant evidence showing how the companies gave each other customers as a form of compensation or exchange was gathered throughout the investigation. Finally, diaries documenting meetings between managers of different oxygen supply companies, as well as memoranda, were seized in the raid. All this, together with other evidence, confirmed the existence of a concerted conduct between the companies.

39. The Court of Appeals held that resorting to circumstantial evidence when direct evidence is practically impossible to obtain does not violate the legal order, given that it is unreasonable to expect collusive arrangements to be documented in detail by their authors. In this context, the Court emphasised that indirect evidence revealing partial aspects of the agreement and thus its existence, such as emails and handwritten notes seized during the raids, should not be ruled out.

40. In addition, the Court conducted a detailed analysis of the language used in internal communications between competitors. Words such as ‘protection’, ‘exchange’, ‘let's agree’, ‘compensation’, and ‘divestiture’, particularly in reference to customers, were interpreted as indicative of collusion. The way these terms were used in mailings and meetings reflected, according to the Court, an underlying intention to coordinate anticompetitive actions. Finally, the sanction imposed by the CNDC was upheld.

41. In other cases investigated by the CNDC, direct evidence of the existence of the collusive agreement was provided by the complainants. In an investigation in the health services sector, the CNDC found an agreement between private hospitals to fix tariffs for medical services between 2011 and 2012. The cartel members, grouped in an association of clinics, sent a signed note to the complainant (a prepaid medicine company) proposing a fee increase, which was signed by both members of the association and other non-member clinics.

42. During the investigation, the CNDC found that these firms represented virtually all market operators. In addition, it was found that the fees charged by the sanatoriums under investigation were identical, and that price negotiations with the health fund administrators were carried out jointly through the association. These elements made it possible to sanction them in 2017, a sanction that was later confirmed by the Court of Commerce.[13]

[11] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/cond_697.pdf

[12] The CNDC fined Air Liquide with a $24,9 million fine, Praxair with a $26,1 million fine, AGA with a $14,2 million fine and Indura with a $5,1 million fine.

[13] A fine of $0.5 million was imposed on the association of clinics, and 15 private clinics and sanatoriums, were sanctioned with individual fines ranging from $0.5 million to $3.5 million.

43. In a case related to the wheat flour production market,[14] the complainant submitted the document supporting the anticompetitive agreement, called 'General Agreement on Free Competition', signed by a significant number of mills and whose execution could be proved during the investigation of the case. The terms of the agreement emerged from this document, namely that three associations and certain mills had agreed to refrain from marketing flour below the reference costs indicated therein. At the same time, it emerged from the agreement that its violation would give rise to the imposition of sanctions and fines that were perfectly differentiated in the content of the document, resulting in a clear monitoring and punishment mechanism typical of this type of practices.

44. In addition to the written proof of the existence of the agreement, the CNDC had access to the minutes of the associations' Board of Directors that accredited its implementation, execution and how they negotiated the proposals to reach the common goal. This was complemented with documentation demonstrating the implementation of the agreement, the manner in which it originated, and records of the meetings held by the directors of the milling companies and the associations for its implementation and execution. On the basis of this evidence, in 2022, the CNDC sanctioned three milling associations and one company in the sector for a total of $445 million.

45. In a similar case in the city of San Carlos de Bariloche, a 'Memorandum of Understanding' was presented as evidence revealing that three discotheque-owning companies had agreed to jointly fix the prices of tickets offered to tourist agencies that marketed packages for graduation trips.[15] These companies issued a single, regularly updated price list used in negotiations with the agencies. It was also found that the agreement included a market sharing by slots, formalised in the above-mentioned memorandum, in force from 2004 to 2017. Based on this evidence, in 2022 the CNDC sanctioned two of the companies participating in the cartel, Alliance S.A.S. and Grisú S.A., with fines of $150 million and $90.3 million, respectively. With respect to the third company participating in the cartel, Powerlink S.R.L., insofar as it was the one that provided the direct evidence, and since the reform introduced by the LDC with the incorporation of the Leniency Programme and the power of graduation of penalties established in section 56 of the same law, the CNDC did not apply a pecuniary fine to this company.

46. A particularity of this case was that the CNDC found that monetary sanctions and cease and desist orders were not sufficient because of the market structure and the dominant position of the cartel leader, which had both the ability and the incentives to engage in collusive practices. Through a thorough analysis, the CNDC concluded that the company's position, reinforced by leases and acquisitions, made it very difficult for new entrants to compete. It therefore recommended structural measures to dismantle the leading company's control over other discotheques in the market and to facilitate the entry of new competitors, thus avoiding the perpetuation of oligopolistic power and protecting the general economic interest.

47. In a case related to automotive companies in the province of Tierra del Fuego, the CNDC based its decision on circumstantial evidence, the only evidence that could be gathered during the investigation.[16] Based on this evidence, in 2014, a group of automotive

[14] Available at: https://www.argentina.gob.ar/sites/default/files/2022/03/cond-1637-dictamen-reso.pdf

[15] Available at: https://www.argentina.gob.ar/sites/default/files/2022/11/dictamen_merged_reso_conc_1670.pdf

[16] Available at: https://cndc.produccion.gob.ar/sites/default/files/cndcfiles/C1234parte1.pdf

companies and importers were sanctioned for colluding to sell 'zero kilometre' vehicles to local dealers at prices similar to those applied in the rest of the country. This conduct was unjustified, according to the CNDC's analysis, given that in Tierra del Fuego the companies were exempt from paying national taxes, which evidenced an agreement to keep prices artificially high.

48. When the sanctioning decision in this case was appealed, the Court of Appeals considered that there was no direct evidence to support the accusation. The Court underlined that, in order for a fact to be considered proved by circumstantial evidence, it was necessary for such evidence to be multiple, clear, precise, serious and concordant. In addition, the Court pointed out that, under the LDC, it was necessary to demonstrate the concurrence of wills between the companies not to compete with each other.

49. In another case based on circumstantial evidence in 2014, the CNDC sanctioned two intercity passenger transport companies for colluding in price fixing between the cities of Victoria (Santa Fe province) and Gualeguay (Entre Ríos province).[17] For five years, both companies dominated the market with shares of between 40% and 50%, while a third company had a marginal share of 2% to 4%. The investigation revealed simultaneous and symmetrical tariff increases between the two companies, evidencing a conscious parallelism in an oligopolistic market. The CNDC based its sanction on economic evidence, grounded on the market structure and parallel behaviour in key variables such as prices and market shares, which was not compatible with genuine competition. On the basis of this evidence, the existence of a collusive agreement was concluded.[18]

50. In addition, the CNDC's analysis considered factors that facilitate the formation and maintenance of price agreements and that were proved in the referred case, such as the high concentration of the market, the homogeneity of the service, the low price elasticity of demand, the similarity of costs among the participating companies, the existence of barriers to entry, and the accessibility to relevant information on prices and quantities traded in the market, which allowed the companies to monitor compliance with the agreement.

51. The Court of Appeal upheld the sanction imposed by the CNDC. Although no specific direct evidence of the agreement between the two companies was presented, the Court considered that the circumstances of the case were sufficient to infer the existence of such an agreement. The simultaneity and identical magnitude of the tariff increases by the two market leaders were highly suspicious, making it implausible that the two companies acted independently in implementing these tariff decisions in a market with oligopolistic characteristics.

3. Final Remarks

52. In sum, the Argentinean case law shows that sanctions for collusive practices have generally been supported by direct evidence, both on the agreements themselves and on the exchange of sensitive information. However, in two cases the CNDC applied sanctions based on circumstantial evidence. In one case, the Court of Appeal reversed the decision, considering that the indications were not clear, precise, serious and consistent. In the other case, the Court upheld the sanction, considering that the proven circumstances were

[17] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/cond_915.pdf

[18] Each company participating in the cartel were fined $0,7 millions: La Costera Criolla S.R.L and Empresa Messina S.R.L.

sufficient to infer the existence of the agreement. In the case of conduct for abuse of dominance of an exclusionary nature, the standard of proof is usually based on indirect evidence of an economic nature, linked both to the dominant position of the accused company and to the anticompetitive practices carried out.