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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session II: Interim  
Measures**

**- Contribution from Argentina -**

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This attached document from Argentina is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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## *Session II: Interim measures*

### *– Contribution from Argentina –*

1. Interim protection measures are temporary procedural remedies aimed at ensuring the effectiveness of a final decision in a specific case. Their purpose is to ensure the right that is being protected remains effective from the start of proceedings until a final decision is issued. In this regard, the interim protection measure means it is possible to order the alleged infringing party to act in a certain way (which may include carrying out a specific act, stopping a certain activity or refraining from behaving in a certain way) at the preliminary stage of an investigation or proceedings. Thus it anticipates the action that could be ordered at the end of the investigation or proceedings, because there is sufficient evidence at an early stage to prove there is a danger that must be prevented.
2. These measures are particularly useful in the field of antitrust, as they allow for rapid intervention in situations that require it. They are intended to correct problems in the markets or prevent greater damage when there is an imminent danger that the situation will be unable to be remedied later, or that the final decision will become abstract.
3. The competition authority's role is not only to impose sanctions for anti-competitive conduct in order to deter it, but also to avert or limit any damage, prevent it from growing worse and bring to an end any ongoing anti-competitive conduct, thereby protecting the general economic interest defended by Argentine Antitrust Law No. 27,442 (AAL).
4. By virtue of this, public order laws, such as the AAL, regulate these measures to prevent harmful situations and anticipate possible damage. According to the National Commission for the Defence of Competition (CNDC in Spanish) jurisprudence, indubitable evidence to prove there is a risk of damage is not required in order to impose these measures. In principle, a reasonable belief there could be damaging consequences will suffice.
5. The first section analyses the regulatory framework relating to interim measures, and addresses certain specific cases where they can be issued in antitrust matters. The second section reviews several recent cases involving investigations into possible anti-competitive practices in which injunctions were issued by the Argentine Competition Authority. The note concludes with our final comments.

### **1. Regulatory framework**

6. Interim protection measures are regulated in Article 44 of the current AAL, passed on 9 May 2018, as follows:
7. At any stage of the proceedings, the Tribunal for the Defence of Competition may impose compliance with the conditions it establishes or give directions to bring to an end or refrain from the conduct set out in Chapters I and II, in order to avert or limit any damage or prevent it from continuing or growing worse. When there is a risk that serious damage could be caused to the competition system, it may order the measures it considers would be most appropriate to the circumstances to prevent such damage and, in this case, eliminate any consequences. This ruling is appealable for adjudication by a higher court or administrative authority, in the manner and under the terms provided for in Articles 66 and 67 of the AAL. Likewise, it may order, ex officio or at the request of a party, that the measures ordered be suspended, amended or revoked, by virtue of supervening

circumstances or circumstances that could not have been known at the time the measures were adopted.

8. The wording used in the current law is similar to Law 25,156, which was in force until 2018, with some notable differences. Firstly, the previous law referred to harmful conduct, while the current law makes a precise reference to conduct prohibited in Chapters I and II of the AAL, i.e. practices that completely restrict competition (in which there is a legal presumption that they affect the general economic interest) and practices that restrict competition (in which the harm to the general economic interest must be proven). Secondly, under current law, measures may be directed not only to avert or limit damage, prevent it from continuing or growing worse, but also to remove the consequences of any damage that is already occurring at the time the measure is ordered.

9. As was the case under the previous law, Article 44 of the AAL authorises the enforcement authority, currently the CNDC together with the Secretary of Trade and Industry, to impose conditions or order the cessation of conduct at any stage of an investigation. This is done in order to avert or limit damage, prevent it from continuing or growing worse. According to the AAL, these measures may be issued *ex officio* or at the request of a party. The affected parties must comply with them once they are issued, but may appeal the ruling.

10. Since the law establishes that the measures can be issued at any stage of the proceedings, they may be ordered before the first summons in an investigation about possible anti-competitive practices (when the alleged infringers are notified about the proceedings in progress so that they can submit explanations about the conduct identified), or even after that stage, if further information is needed to decide if they are appropriate. However, by their very nature, these measures are not usually issued at an advanced stage of the investigation, since this would diminish their very purpose.

11. Parties who must comply with interim protective measures may appeal them by filing an appeal. In this regard, the AAL guarantees due process by allowing for judicial review. This appeal can be heard and adjudicated by a higher court or administrative authority, which means that, despite the appeal, the effects of the measure are not suspended until it is judicially resolved. Therefore, if the authority discovers or establishes that the measures ordered are not being complied with, it may impose a fine for non-compliance.

12. It is important to emphasise that antitrust interim protection measures do not protect private interests, but rather seek to protect the general economic interest, which is the legal interest protected by the AAL. In analysing whether such a measure is appropriate, the competition authority will consider the general requirements that are necessary, but not sufficient, for any interim measure, namely credibility in law and danger in delay. This is because the benefit of issuing the measure will not be exclusively for the person requesting it, but for the benefit of society as a whole. This particular aspect has been especially valued both by the competition authority and by the courts of justice that review these decisions.

## 2. Recent cases involving interim protection measures

13. Looking at the CNDC's track record in recent decades in relation to interim measures, they are predominantly used in the context of investigations into anti-competitive conduct, specifically in proceedings for alleged exclusionary practices. In these cases, there is a danger that any delay in eliminating a competitor from the market may cause irreparable harm to competition. However, the authority has also ordered interim measures in economic concentration processes. Considering the measures issued in the last five years

(from 2019 to the present), we see that eight interim protection measures were issued in investigations into anti-competitive conduct, and five in proceedings concerning economic concentrations.<sup>1</sup>

14. In general, no specific markets are identified in which interim measures are most effective. The appropriateness of applying this type of measure is assessed on a case-by-case basis. Latterly, and in recent decades, interim measures have been issued in several markets. However, one sector is identified in which these measures predominate: health services.<sup>2</sup> Given the nature of this type of market (being linked to human health), the CNDC has issued interim measures in cases involving a refusal to provide medical services. In these cases, the danger of delay is accentuated, causing damage to the market with direct consequences on human health.

15. In this section, we will analyse the most recent cases in which interim protection measures have been applied in antitrust investigations. Most of these cases concern alleged abuse of a dominant position. However, in one case an interim protection measure was issued in the context of an investigation concerning an alleged horizontal agreement.

### 2.1. Interim protection measure to stop a refusal to sell a pay TV sports signal

16. In November 2022, the Argentine Internet Chamber filed a complaint before the CNDC against the company Tele Red Imagen S.A. (hereinafter, Tele Red) for allegedly refusing to supply the TyC Sports sports signal nationwide to companies that were members of the Chamber, since June 2019.

17. The Argentine Internet Chamber brings together organisations that provide Internet access services, telephony, data-centre solutions, online content and subscription broadcasting services through physical links. Tele Red is a sporting events production and operations company. It also distributes sporting events content produced by third parties and provides advertising production services.

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<sup>1</sup> See the anti-competitive conduct cases filed as: "Cooperativa de Electricidad, Servicios Públicos y Viviendas Limitada San José, Partido de Coronel Suárez" [San José Electricity, Public Services and Housing Limited Co-operative, Coronel Suárez District], "C. 1755-Asociación Sanjuanina De Cirujanos S/Infracción Ley N° 27.442" [C. 1755 - Sanjuanina Surgeons Association on Infringement of Law 27,442], "Cond. 1756 - Telecom Argentina S.A" [Cond. 1756 - Telecom Argentina S.A.], "Cond. 1774 - Ministerio de Desarrollo Productivo s/solicitud de intervención" [Cond. 1774 - Ministry of Productive Development on application for intervention], "Cond. 1767 - WhatsApp Inc. s/ infracción Ley N° 27.442" [Cond. 1767 - WhatsApp Inc. on infringement of Law 27,442], "Cond. 1776 - Visa Inc, Visa International Service Association, Prisma Medios de Pago S.A.U. and First Data Cono Sur S.R.L.", "Cond. 1810 - Tele Red Imagen S.A. s/ infracción Ley 27.442" [Cond. 1810 - Tele Red Imagen S.A. on infringement of Law 27,442] and "C. 1848 - Reyes Hernán Leandro y otros (medicina prepaga) s/solicitud de intervención" [C. 1848 - Reyes Hernán Leandro and others (prepaid medicine) on application for intervention]. Interim measures in the context of proceedings concerning economic concentrations were issued in the following acquisition transactions: Mirgor/Brightstar, Arcor/Ingredion, Quilmes/Temple, Discovery/Warner and Mondelez/Georgalos.

<sup>2</sup> See the files entitled "Círculo Odontológico de Jujuy S/Infracción Ley 25.156" [Jujuy Dental Circle on Infringement of Law 25,156], "Asociación chaqueña de anestesiología s/ infracción Ley 25.156" [Chaqueña Anaesthesiology Association on infringement of Law 25,156], "Federación Odontológica de la Prov. De Córdoba s/ Infracción Ley 25.156" [Dental Federation of the Province of Córdoba on Infringement of Law 25,156], "Agremiación Médica Platense s/ infracción Ley 25.156" [Platense Medical Association on infringement of Law 25,156], "Colegio Médico de la Prov. De Buenos Aires y otros s/ infracción Ley 25.156" [Medical College of the Province of Buenos Aires on infringement of Law 25,156], among others.

18. In its complaint, the Chamber indicated that the conditions established by Tele Red for selling the TyC Sports sports signal were impossible for companies that are members of the Chamber to comply with, which could constitute a violation of the competition regime.

19. On 21 May 2024, within the framework of the investigation for alleged anti-competitive conduct, the CNDC issued an opinion advising the Secretary of Trade and Industry of the Ministry of Economy to approve an interim protection measure directing Tele Red, among other measures, to stop refusing to supply the aforementioned sports signal and sports events for which TyC Sports holds exclusive broadcasting rights.<sup>3</sup>

20. The measure also ordered the company to supply the sports signal and any sports events it broadcasts exclusively to companies that are members of the Argentine Internet Chamber under fair commercial, economic and content conditions and market conditions, as established by the AAL.

21. Tele Red must comply with the interim protection measure as soon as it is issued until a final decision is made in the ongoing investigation into alleged anti-competitive behaviour, which is still in progress at the CNDC.

## 2.2. Interim protection measure issued to prepaid medical care companies

22. On 17 April 2024, within the framework of an investigation that began in mid-January 2024 into alleged concerted practices, the CNDC issued an opinion advising the Secretary of Trade and Industry of the Ministry of Economy to approve an interim protection measure ordering a group of prepaid medical care companies, their umbrella organisation – the Argentine Health Union – and its president until mid-April 2024, to comply with a series of requirements intended to prevent damage to the competition regime.<sup>4</sup>

23. The investigation was opened following a complaint filed before the authority for an alleged price agreement under the terms of Article 2 a) of the AAL, due to increases to premiums for prepaid medical care plans by a group of healthcare companies from January 2024.

24. It is worth noting that the structure of the Argentine health system comprises three coexisting subsystems: (i) public, which is universal, since access to health protection is a constitutional right in Argentina; (ii) social security, which provides coverage to those with registered employment status or who are registered under the "Simplified Regime for Lower-Rate Taxpayers"; and (iii) the private sector, which offers voluntary coverage to those who choose to pay for it, either directly or through contributions.

25. The private system is made up of 674 prepaid medical care entities that, according to data published in 2022, provide coverage to a total of 6.8 million people. However, the ten entities with the highest volume account for 83% of members.

26. Firstly, the interim measure established a limit on the price of premiums for medical care health plans. In addition, the measure ordered that any exchange of information related

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<sup>3</sup> The ruling on this measure can be viewed at the following link: <https://www.argentina.gob.ar/noticias/medida-preventiva-para-que-la-empresa-que-controlaba-la-senal-tyc-sports-cese-toda-negativa>.

<sup>4</sup> The ruling on this measure can be viewed at the following link: <https://www.argentina.gob.ar/noticias/medida-preventiva-para-que-las-principales-empresas-de-medicina-prepaga-recalculen-los>.

to prices, services to be provided, costs or any other commercial information, whether in the context of Argentine Health Union meetings or otherwise, should cease.

27. Furthermore, the aforementioned prepaid medical care companies were urged to submit information to the CNDC about the nominal prices of each health plan offered, the revenues obtained by each health plan and the number of members in each plan, from December 2023 onwards, and to provide a monthly update.

28. It was originally expected that the measure would apply for six months from when the legal entities or individuals concerned were notified about it. However, at the beginning of June 2024, following an agreement reached with the Superintendence of Health Services and a larger group of prepaid medical care companies than those affected by the interim protection measure recommended by the CNDC, the Secretary of Trade and Industry rescinded the measure. The decision to suspend the interim protection measure was made once the agreement between the Superintendence of Health Services and the companies had been officially approved. This does not mean the CNDC's investigation into alleged collusive practices, which is still ongoing, will be halted.

### **2.3. Interim protection measures in the credit card market**

29. In November 2023, the competition authority issued an interim protection measure within the framework of the action brought before the CNDC by the Argentine Fintech Chamber, in which it denounced the Payment Intermediary Foreign Exchange Operators (PIFO) scheme and the Expanded Merchant Location Pilot Program (EMLP) implemented by the companies that manage MasterCard and Visa credit cards respectively.

30. According to the complaint filed with the authority, the implementation of these programmes caused potential competition problems, since they implied, on the one hand, an increase in the fees applicable to processing cross-border transactions and, on the other hand, the use of commercially sensitive information of potential competitors for anti-competitive purposes.

31. As part of the investigation, the CNDC found that MasterCard never implemented the PIFO programme, nor did it modify its commercial and/or contractual conditions. Furthermore, it had not changed its conduct since the complaint was filed with the authority.

32. With regard to Visa, the CNDC identified that the credit card brand enters into contracts with acquirers and merchants that are presumed to establish territorial exclusivity clauses. These practices could be operating as a vertical restraint, typical of contracts between suppliers and customers of a good or service, where one (or both) party(ies) agree(s) not to trade with the other party's competitors.

33. In this regard, Visa was suspected of a possible abuse of its dominant position, based on discriminatory behaviour and under the threat of denying access to its network. In particular, an excessive and unjustified increase in fees applied to cross-border transactions through Visa's contractual clauses was noted. Discrimination between local and foreign acquirers was also observed, allowing rates not regulated by the Central Bank of Argentina to be applied, in addition to coercion to accept unfavourable business terms, directly affecting the welfare of consumers.

34. The CNDC established a theory of harm related to an arbitrary and significant increase in fees that only applied to international merchant transaction processing, along with the imposition of territorial restrictions that would disadvantage local digital payment facilitators. In addition, the investigation identified discrimination against local payment

facilitators and less favourable cross-border business terms for consumers making transactions abroad who do not have credit cards.

35. By virtue of this, on the recommendation of the CNDC, the then Secretary of Trade decided to issue an interim protection measure. This ordered companies linked to Visa credit cards (Visa Inc., Visa International Service Association, Prisma Medios de Pago S.A.U. and First Data Cono Sur S.R.L.) to suspend the execution or implementation of any contractual clause that prevents a payment facilitator in Argentina from processing transactions from merchants abroad for purchases made by consumers in Argentina, until the CNDC issues a decision on the merits of the matter. These companies were also ordered to refrain from implementing any commercial policy that limits the number of sub-merchants in cross-border transactions and to remove from the register any overseas merchants that are affiliated with local payment facilitators, and to block access to the Visa network for cross-border transactions involving such merchants. The CNDC's investigation into the alleged anti-competitive conduct described above is still ongoing.

### 3. Concluding remarks

36. In conclusion, interim protection measures are an extremely useful tool that the CNDC has historically applied in different types of investigations. An analysis of the cases in which this type of measure was applied reveals a tendency towards intervention in situations involving alleged abuse of dominant position with potential exclusionary effects, where the remedies implemented were primarily interim injunctions. These cases usually involve eliminating competitors in the market, resulting in severe damage to competition. However, they are also used in situations involving exploitative abuse and horizontal agreements in connection with investigations into alleged anti-competitive conduct, and interim protection measures have also been issued in the context of control analysis procedures for economic concentration transactions. The effectiveness of these measures is not limited to a particular market, but depends on a detailed analysis of each individual case, assessing the urgency and potential severity of the damage.

37. The evolution of precautionary systems in recent years highlights the importance of adapting these measures to changing circumstances and to new situations arising in the economic sphere. The CNDC has historically used these tools successfully in various investigations, refining their design through administrative and judicial jurisprudence. To ensure interim measures are valid and effective, it is crucial that the CNDC adequately justifies the reasons for issuing them, the potential damage and its imminence, as well as the impact on the general economic interest. This careful approach allows decisions to be upheld in cases of judicial review, thus guaranteeing the protection and promotion of competition in the markets.