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Monopolisation, Moat Building and Entrenchment Strategies – Note by Argentina

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1. An 'economic moat' is a concept spread by the American investor Warren Buffett, which refers to competitive advantages that protect a company from competitive pressure, allowing it to maintain its profitability over the long term. From an antitrust perspective, an economic moat is determined by the competitive advantages that allow a company to protect its monopoly or dominant position over the long term.
2. Among the competitive advantages that can build an economic moat we can mention patents, economies of scale, regulatory barriers, brand positioning, network effects and significant transaction costs for customers. All these elements can act as barriers to entry and allow a firm to maintain a dominant position in a specific market.
3. Patents, copyrights and trademarks can provide legal barriers that make it difficult for potential competitors to replicate the incumbent firm's products or services. Economies of scale give firms a cost advantage that allows them to offer their products or services at lower prices than competitors, reinforcing their market power and, in some cases, leading to natural monopolies. On the other hand, strong brand positioning can create loyalty among consumers, which reduces the likelihood that they will switch to a competitor in the face of a price increase, thereby increasing the firm's profitability. Finally, network effects occur when the value of a product or service increases as more people use it, in many cases making it difficult for suppliers with fewer users to compete in that market.
4. There are sectors in which certain types of economic moats are more frequent. Brand positioning tends to be more common in FMCG industries, while in the pharmaceutical industry technology patents are prominent (although brands are also used as a competitive advantage). Network effects are particularly relevant in telecommunications markets and, over the last decades, predominantly in digital platforms and services, while economies of scale can be found in all types of sectors
5. The most typical cases of economic moats are utilities (electricity, natural gas, water), telecommunications (telephone services, cable TV and internet) and other transport infrastructure services (railways, airports, roads), which tend to be natural monopolies. This is because declining average costs in these sectors mean that a single firm can supply all demand more efficiently than several firms competing with each other.
6. Entrenchment strategies, on the other hand, relate to a firm's actions aimed at strengthening existing competitive advantages or defending its dominant position against competitive threats by raising barriers to market entry.
7. While both economic moats and entrenchment strategies aim to protect a company's dominant position, moats focus on the underlying advantages that brought a company to that position. These advantages are built up over time and tend to be long-lasting, linked to fundamental aspects of the company. In contrast, entrenchment strategies, even though they may be sustained over time, tend to be more transitory in nature. They arise in response to specific market conditions or specific competitive threats and can be adapted to changes in the competitive environment.
8. Based on the foregoing, we can conclude that entrenchment strategies are more related to actions taken by dominant firms, while economic moats may be related to those competitive advantages that led the firm to gain dominance.
9. In order to explore how the concepts of economic moat and entrenchment strategies are linked to antitrust theory and how they are captured by current competition law, this

article is organised as follows. The first section describes Argentina's regulatory competition framework and how this determines the approach that the National Commission for the Defence of Competition (CNDC, for its acronym is Spanish) can make of economic moats and entrenchment strategies. The second section will first analyse a case of entrenchment strategies in a mass consumer products market, characterised by the strong brand positioning of the sanctioned company, with a focus on the investigative tools used by the CNDC to prove the anticompetitive practices linked to these strategies. Secondly, a case of entrenchment strategies in the telecommunications market will be analysed, followed by the final remarks in the last section.

1. Economic Moats and Entrenchment Strategies from an Antitrust Perspective: The Legal Framework in Argentina

10. Act No. 27.442 on the Defence of Competition (LDC, *for its acronym in Spanish*) does not forbid the existence of dominant position, but the abuse of it.

11. In particular, and in accordance with the Section 5 of the LDC, a firm has dominant position when:

(...) for a particular type of product or service it is the only supplier or demander within the national market or in one or more parts of the world or, where it is not the only one, it is not exposed to substantial competition or, where because of the degree of vertical or horizontal integration it is in a position to determine the economic viability of a competitor participating in the market, to the detriment of the latter.

12. In accordance with Section 6 of the LDC, in order to state the existence of dominant position in a determined market, the following circumstances must be considered:

- The extent to which the good or service in question is substitutable with other goods or services, whether of domestic or foreign origin; the conditions for such substitution and the time required for substitution;
- The extent to which regulatory restrictions limit the access of products or suppliers or demanders to the relevant market;
- The degree to which the alleged offender can unilaterally influence price formation or restrict supply or demand in the market and the degree to which its competitors can counteract such power.

13. Thus, economic moats can be captured by the LDC when assessing what constitutes a dominant position, which implies analysing the competitive conditions of the markets and evaluating, among other aspects, the existence of barriers to entry and the substitutability of the products or services concerned.

14. The assessment of entry barriers to a particular market is relevant when investigating an abuse of dominance, but also when analysing the economic effects of a merger, especially when such a merger has the potential to create harmful effects in a specific market. In this sense, economic moats are relevant for the analysis of both anticompetitive conduct and economic concentrations.

15. Regarding entrenchment strategies, when these actions are channelled to the market as anticompetitive conducts, they can typically take the form of an abuse of a dominant position, and are therefore business actions that can be detected and sanctioned in the current legal framework.

16. Therefore, the analysis of an alleged anticompetitive practice linked to entrenchment strategies is generally carried out within the framework of the Section 3 of the LCD, which describes the various practices associated with abuses of dominance. In general terms, the entrenchment strategies susceptible of being sanctioned are related to practices that exclude competition.

17. The following practices described in Section 3 more explicitly cover these strategies, although this does not exclude that other types of conducts may be aimed at foreclosing competing undertakings:

- Preventing, hindering or obstructing third parties from entering or remaining in a market or excluding them from it,
- Imposing discriminatory conditions for the purchase or sale of goods or services without reasons based on commercial customs and practices;
- Unjustifiably refusing to meet specific orders for the purchase or sale of goods or services made under the conditions prevailing in the market concerned;

18. On the other hand, another action that could be typified as an entrenchment strategy and that does not fall under what the regulation defines as an abuse of dominance of an exclusionary type, has to do with the phenomenon known as nascent acquisitions and killer acquisitions. These practices have been the subject of increasing debate in recent years, especially in the area of digital markets, and involve the acquisition of emerging firms by dominant companies with the aim of preventing future competition. As they are by nature acquisitions and merger transactions, this type of behaviour is intended to be captured by the sections of competition law and specific regulations that deal with merger control analysis.

19. In Argentina, in 2023, with the approval of the new *Regulation for Mergers Notification*, the CNDC formalised the creation of a summary procedure (PROSUM) for those transactions that are less likely to have significant negative effects on competition. At the same time, it established the eligibility criteria for a merger to be processed under this procedure and the exceptions to the general criteria.¹ In this sense, those transactions that, even though they comply with all the requirements of the PROSUM, are covered by any of the exceptions, are excluded from the summary procedure and, by opposition, are included in the ordinary procedure.

20. Considering the practice of acquiring emerging companies and in order to implement the need for a more detailed review of those transactions that may involve the acquisition of an nascent competitor, the CNDC included, among other criteria for exclusion from PROSUM, the following: when the merger combines two major innovative entities; when a company already established in a market intends to acquire a small but highly innovative company, although not yet reaching its technological ceiling, either to use its technology or to deactivate it; when the operation could significantly increase the parties' market power, due to the combination of technological, financial or other resources, although the combining entities do not operate in the same market.

¹ <https://www.argentina.gob.ar/normativa/nacional/disposici3n-62-2023-388895>

2. Recent Relevant Investigations on Anticompetitive Practices Related to Entrenchment Strategies

2.1. An Entrenchment Strategy Based on Loyalty Programmes Reveals Exclusionary Practices on the Brewing Market

21. The case we will examine below was already described in Argentina's contribution to the OECD Global Forum in December 2022, in a note on remedies and commitments in cases of abuse of dominance.² On that occasion, the CNDC focused on the behavioural remedies presented by the company involved in the conduct, Cervecería y Maltería Quilmes (hereinafter, CMQ). However, on this occasion, we will focus on the investigative tools employed by the CNDC to prove the occurrence of the anticompetitive practices.

22. In 2016, the brewing companies Compañía Cervecerías Unidas S.A. (hereinafter, CCU), Compañía Industrial Cervecera S.A. (hereinafter, CICSA) and Otro Mundo Brewing Company S.A. filed a complaint at the CNDC against CMQ, a local subsidiary of Anheuser-Busch InBev, for many commercial practices that the complainants classified as an abuse of dominant position. These practices had already been investigated, verified and sanctioned by the competition authorities of several countries, including Brazil, Mexico, Uruguay, Colombia, Chile, Dominican Republic, Greece, among others.

23. The CNDC found that CMQ held a dominant position in the domestic beer production and trading market, with a market share of more than 77% and a portfolio of more than ten beer brands. This information was obtained from various sources, including the complainant firms, which provided such information based on reports from a renowned international consultancy firm, from the complained CMQ itself, which also provided information from the same source, and based on the data published in the CNDC's approval opinion of the transaction between Anheuser-Busch InBev and Sabmiller in 2018.

24. Furthermore, a large difference was observed between the market share of the market leader and the runner-up, which reinforced the hypothesis of dominance. Market concentration was another aspect considered when assessing the existence of CMQ's dominant position. According to the *Guidelines for the Control of Economic Concentrations* elaborated by the CNDC,³ it is considered that the level of market concentration, measured through the Herfindahl Hirschman Index (HHI), should not exceed 2000 points to rule out potential restrictions to competition. In this case, the index was three times the established threshold, which showed that the Argentine beer market was highly concentrated and that CMQ was not exposed to substantial competition.

25. Regarding the practices denounced, the investigation carried out by the CNDC corroborated that CMQ developed a set of loyalty strategies with the purpose of generating exclusive beer retail spaces, which resulted in a vertical foreclosure of the market for current and potential competitors.

26. The beer retail market is divided into two distinct and necessary channels to reach end consumers: the *On-Premise* channel and the *Off Premise* channel. In the *On-Premise* channel, which accounts for 25% of sales, beer is sold for consumption on the premises, such as pubs, restaurants, pizza shops, clubs and beer gardens. On the other hand, the *Off-*

² Available at:

https://www.argentina.gob.ar/sites/default/files/2017/02/remedies_and_commitments.en_.pdf.

³ See guidelines at <https://servicios.infoleg.gob.ar/infolegInternet/anexos/305000-309999/308818/res208.pdf>.

Premise channel, which accounts for 75% of sales, includes stores where products are purchased for *Off-premise* consumption, such as supermarkets, self-service stores, grocery stores and kiosks.

27. The anticompetitive practices sanctioned by the CNDC were reflected in the use of loyalty instruments in both channels.

28. In the *On-Premise* channel, CMQ implemented loyalty policies through exclusivity agreements, where it provided furniture, refrigerators and coolers on loan, and discounts and free merchandise to points of sale. In exchange, it demanded and obtained exclusivity in the sale of its products, a practice difficult to replicate by equally efficient competitors. These agreements resulted in an anticompetitive vertical restraint, backed by written or verbal exclusive advertising and promotion agreements, which in practice guaranteed the exclusive sale of CMQ's beers. In addition, CMQ offered significant discounts on its beers, as well as rebates on other products in its portfolio, such as waters, soft drinks and energy drinks, which were difficult to match or replicate by competitors who did not have such a product range.

29. In the *Off-premise* channel, CMQ entered into shelf and fridge agreements, offering discounts and other benefits in exchange for expanding the space dedicated to its products and/or guaranteeing the exclusivity of its portfolio, to the detriment of its competitors.

30. In order to demonstrate the anticompetitive practices, the CNDC resorted to various sources of information as evidence of CMQ's participation in the market and the execution of the practices mentioned above, such as the ones detailed below:

1. Information on CMQ's market share submitted by its main competitor, CCU, using as a source the consultancy firm A.C. NIELSEN ARGENTINA S.A. and economic reports by antitrust experts.
2. Testimonies and documents provided by executives from the commercial area of its competitors, CCU and CICSA.
3. Information requested from the main supermarket chains in the country, with the aim of determining the existence of exclusivity agreements on the shelves. This investigation revealed that, where such agreements were in place, they covered all the shops of each chain in the country, with differential agreements for different shop sizes and formats.
4. Notarised records in several points of sale, with testimonies from the managers of these establishments, confirming the existence of exclusivity agreements, together with copies of brochures related to the loyalty programmes implemented by CMQ.
5. Documentation obtained from CMQ's websites, which included the loyalty programmes as consideration for exclusivity in the gondola and refrigerator spaces.
6. Inspections carried out by CNDC staff in self-service stores in the Buenos Aires Metropolitan Area, which included questionnaires to their managers and photographic material.

31. The CNDC considered that the benefits provided to those stores that participated in CMQ's loyalty agreements did not translate into improved trading conditions transferable to the final consumer, as they mainly consisted of discounts and point-of-sale items, and rewards for shop owners, among others. These loyalty programmes reflected an attempt to monopolise the different types of shops at the expense of competitors.

32. Within this context, given CMQ's dominant position in the beer market, such loyalty programmes operated by obstructing market entry and restricting competition,

causing harm to the final consumer. This led to an obstacle to competition from competing undertakings, who faced disproportionate costs for display space and were unable to replicate the discounts, rebates and loyalty programmes in a cost-effective manner, even at efficiency levels equivalent to CMQ. As a result, consumer purchasing choices were limited. CMQ tailored its loyalty proposition for each type of retailer in order to effectively exclude competition.

33. Although the brewing process does not present significant barriers to entry, the CNDC noted that nationwide distribution requires greater operational capacity and entails higher logistical costs, which can only be assumed at a certain scale. However, it noted that the main obstacle for current or potential competitors was the difficulty in entering or increasing the share of their products in mass and traditional beer sales channels. In this respect, CMQ's commercial strategy, given its dominant position in the beer production market, by creating sales outlets and exclusive spaces for the sale of its products, created a vertical foreclosure of the beer production and distribution market for its current and potential competitors.

34. The CNDC emphasised, with respect to the *Off-Premise* channel, that the allocation of display space within the supermarket is crucial to establish the conditions of competition between the different suppliers, as it determines the visibility of the products and their attractiveness to consumers. The existence of agreements to keep a percentage of the shelf space occupied by a certain product makes it more difficult for end consumers to access competing products.

35. The CNDC concluded that, due to CMQ's dominance, all the above-mentioned commercial practices in the point-of-sale beer marketing segment damaged the display and marketing of competing products, whether existing or new entrants. This resulted in a hindering of the competitive mechanisms by creating artificial barriers to entry and development of other market players, which in turn affected the consumer by limiting purchasing choices.

36. On the basis of the above, it can be concluded that CMQ achieved a significant market share in the beer market thanks to, among other actions, solid investments aimed at increasing its portfolio of beer brands and strengthening the presence of those brands—with important marketing, advertising and commercialisation campaigns—, being Quilmes its flagship brand, widely recognised and rooted in the Argentine culture. This recognition gives it a notable competitive advantage as it is present in the minds of consumers. In addition, its extensive distribution network covers a wide range of outlets throughout the country, which facilitates the access of its products to the public. These advantages, among others, could have contributed to the construction of an economic moat that protects its dominant position from competitive pressure, without initially distorting competition. However, the practices sanctioned by the CNDC could be qualified as entrenchment strategies, as they represented a response of CMQ to protect its position in the face of the competitive challenges posed by CCU and other brewers, by seeking to raise the barriers to entry for these competitors.

37. The CNDC reproached the exclusionary character of these practices in the domestic beer market and the consequent harm to consumers they generated and sanctioned CMQ for these conducts. It is important to note that the anticompetitive character of an entrenchment strategy depends on the specific market conditions, which justifies a detailed case-by-case analysis to determine whether these practices constitute a violation of the LDC.

2.2. Entrenchment Strategies in the Pay-TV Market: A Vertical Practice of Exclusionary Nature

38. In 2018, the company AMX Argentina S.A. (AMX), specialising in mobile telephony services, but also operating in the fixed telephony, internet and pay-TV markets, filed a complaint against a set of companies operating in the value chain of the audiovisual sector, including the content production and television signal production company Arte Radiotelevisivo Argentino S.A. (Artear).

39. AMX entered the Argentine market offering mainly mobile telephony services under the *Claro* brand, and then expanded into the other services mentioned above. The conduct started when AMX began to offer pay-TV services to households. At the time of setting up its signal grid and contracting Artear's signals, the latter asked AMX to pay a fee for a minimum number of cable TV subscribers, which was excessive for the contracting company, as it was an entrant in the market. In this regard, it should be noted that Artear holds the broadcasting rights to two of the highest rated channels in Argentina. The investigation revealed these facts on the basis of testimonial statements provided by the complainant and other market players, including TV operators and signal distributors.

40. Considering that Artear belongs to the largest media conglomerate in Argentina, that this economic group controls Telecom Argentina S.A. (Telecom), which provides the same services as AMX, and that Telecom has a dominant position in the pay-TV market, the CNDC ex-officio incorporated Telecom into the investigation.

41. In this sense, the rationality of the conduct laid in the fact that AMX was competing with Telecom in the pay-TV market, being an entrant in that market, but an established competitor in the mobile telephony market, and one of the only companies in Argentina with the capacity to replicate the quadruple play convergent service provided by Telecom (pay-TV, fixed and mobile telephony and internet).⁴ In this way, by hindering AMX's entry into the pay-TV market, the entire economic group to which Artear and Telecom belong benefited.

42. Artear's commercial proposal to AMX to distribute its signals was virtually an unjustified refusal to sell. Artear's proposed contract raised the cost of AMX's pay-TV service, making the operation unfeasible. In this regard, the CNDC noted that the impossibility of having Artear's signals limited the growth of AMX's share in the pay-TV markets under investigation. This created a barrier to entry for AMX and other potential competitors, creating discriminatory contracting conditions that disadvantaged those operators with a small market share.

43. The conduct involved benefits for the economic group linked to the limitation of AMX's entry and expansion in the pay-TV market due to the lower competitive pressure that the latter was in a position to exert on Telecom, since it did not have Artear's signals in its grid. Thus, the imposition of these discriminatory commercial conditions led to an increase in competitors' costs and implied the creation of artificial barriers to entry, which could be assimilated to a refusal to sell the signals. This situation limited AMX's access to the quadruple play market.

44. The CNDC considered that, in the case that Artear was not vertically integrated with Telecom, it would have had the incentive to sell its content or signals to as many pay-TV providers as possible. Indeed, by increasing the number of customers, Artear would have been less threatened by the existence of a company with buying power that could set

⁴ The other company in Argentina with the capacity to replicate the quadruple play service is Telefónica de Argentina. S.A.

a lower price. However, the vertical integration, together with Telecom's market power in the downstream pay-TV market, gave Artear a strong incentive to refuse the provision of its signals to AMX. This is explained by the maturity of the market, in which Telecom holds a market share of more than 50%, which implies that new subscriptions to a new competitor in the pay-TV service represent subscriber losses for Telecom itself.

45. While the conduct carried out by Artear may have resulted in a detriment to its revenues, this was largely offset by the limitation imposed on AMX's competitive ability in the pay-TV market, in which Telecom holds a considerable share. The CNDC noted that the magnitude of these requirements had the objective and effect of raising costs for any new entrant with sufficient capacity to challenge Telecom's share, making it difficult for them to grow and remain, and ultimately foreclosing them from the pay-TV services market. It was therefore concluded that the direct effect of this conduct was exclusionary, resulting in the obstruction of the entry and permanence of potential competitors in the pay-TV and convergent services market (quadruple play), which limited the number of pay-TV service providers and affected the free choice of end-consumers.

46. In this case, as in CMQ, we are faced with an entrenchment strategy that was based on vertical practices of an exclusionary nature. Its objective was to obstruct or hinder the entry and permanence of competitors in the pay-TV market, which is where Telecom holds a dominant position, in order to protect that position from a competitor (and other potential competitors) that acted as an entrant in that market but was an established competitor in other adjacent markets.

3. Final Remarks

47. Throughout this text, we have addressed the interrelationships and differences between economic moats and entrenchment strategies, as well as how they can be approached by the competition authority in its task of enforcing the LDC. Although the competition law does not explicitly refer to these concepts, the CNDC has experience in investigating anticompetitive practices related to them, as we have detailed in the previous sections. When assessing whether an entrenchment strategy infringes the LDC, it is relevant to carry out a detailed analysis of the practice in question, the market in which it takes place and its structure, as well as the company's commercial relations with other actors in the value chain.