COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST AND INTERNATIONAL LAW ON THE DRAFT GUIDELINES FOR THE ANALYSIS OF CASES OF ABUSE OF DOMINANCE ISSUED BY THE ARGENTINIAN COMISION NACIONAL DE DEFENSA DE LA COMPETENCIA

November 2, 2018

The views stated in these Comments are presented on behalf of the American Bar Association Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

Introduction

The Sections of Antitrust and International Law (the “Sections”) of the American Bar Association respectfully submit these comments on the Draft Guidelines for the Analysis of Cases of Abuse of Dominance (the “Draft Guidelines”) issued by the Argentinian Comision Nacional de Defensa de la Competencia (the “Commission”). The Sections appreciate the Commission’s efforts to provide guidance on its enforcement of Argentina’s new antitrust law, Act No. 27,442 (the “Act”), and hope these comments will assist the Commission in furthering its goal of informing businesses of its approach to dominance issues. The Sections are available to provide additional comments or to participate in consultations as the Commission may deem appropriate.

Executive Summary

The Sections strongly support the Commission’s initiative to provide guidelines to explain important aspects of its approach to enforcing the Act. These enforcement guidelines will provide valuable insight and guidance to businesses and their counsel, furthering their understanding of the Commission’s perspective. The Sections respectfully suggest that certain elements of the Draft Guidelines could be refined to further improve their utility.

The Sections recommend adjustments in Section II of the Draft Guidelines discussing the existence of a dominant position. Namely, additional information would be helpful regarding the Commission’s views on product substitution in market definition and the circumstances in which the Commission will consider entry or expansion as timely, likely and sufficient to negate a finding of dominance. Additionally, the Sections suggest further clarification regarding the use of market shares as a “signal” of dominance and “perfectly competitive market” comparisons to establish dominance. Finally, the Sections recommend that the Commission provide guidance on what market share levels may be considered a “safe harbor” under which dominance is unlikely to be found.

The Sections further suggest that the Commission clarify the Draft Guidelines’ approach to “harm to the general economic interest.” In particular, the Sections suggest that the Draft Guidelines clarify whether a finding of abuse of dominance depends on whether conduct has actually caused harm to competition or is likely to do so in a specific market.
The Sections also recommend that the Draft Guidelines provide further clarification regarding the Commission’s calculation and use of “consumer surplus” and “total market surplus” concepts since these standards do not always coincide and clarify the Commission’s consideration of procompetitive justifications in evaluating potential harm to the general economic interest. As a general matter, empirical evidence indicates that unilateral conduct and vertical restraints are often competitively neutral or even procompetitive.\(^1\) In general, the standard in the U.S. focuses on maintaining competition and promoting consumer surplus, but giving appropriate weight to efficiencies and cost saving that are at least in part passed on to consumers.\(^2\) The Sections believe the U.S. approach is balanced and eliminates potentially complex and unreliable attempts to quantify the “total market surplus” described in the Draft Guidelines.

\(^1\)For example, when suppliers seek to impose vertical restraints, “not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.” Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008); see also James C. Cooper et al., Vertical Antitrust Policy as a Problem of Inference, 23 INT’L J. INDUS. ORG. 639, 642, 658 (2005) (surveying the empirical literature, concluding that although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition,” and, “in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects”); Daniel P. O’Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72–76 (2008) (“[W]ith few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons” and “[vertical restraints] are unlikely to be anti-competitive in most cases.”); James C. Cooper et al., Does Price Discrimination Intensify Competition? Implications for Antitrust, 72 ANTITRUST L.J. 327 (2005); William J. Baumol & Daniel G. Swanson, The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power, Symposium on Competitive Price Discrimination, 70 ANTITRUST L.J. 661 (2003).

\(^2\)It has been suggested that the cost to consumers arising from type I errors (i.e., a “false positive” of enforcement against or discouragement of procompetitive behavior) might be greater than those attributable to type II (i.e., a “false negative” of a lack of enforcement against anticompetitive conduct) errors because “the economic system corrects monopoly more readily than it corrects judicial errors.” Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 15 (1984). In particular, the cost of over-deterrence is likely greater in circumstances where experience and the economic literature has identified and substantiated credible efficiency justifications for the conduct alleged to violate the antitrust laws. Concerns of type I errors have guided U.S. Supreme Court decisions. See Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc., 555 U.S. 438, 451 (2009) (“To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.”); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007) (“[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.”); Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” (internal quotations omitted)).
With respect to abusive pricing enforcement, the Sections note that such forms of abuse of dominance have not been accepted in all jurisdictions and that authorities have been cautious about applying such laws. Accordingly, the Sections encourage the Commission to take a limited approach, applying this aspect of the Act only in extraordinary circumstances and provide additional guidance to that effect.

The Sections note that resale price maintenance (“RPM”), addressed in Section V.7.1. of the Draft Guidelines, is analyzed in the U.S., the EU and many other jurisdictions as an agreement in restraint of trade, rather than as an abuse of dominance. This approach tends to focus enforcement efforts on conduct—including RPM—that diminishes or threatens interbrand, rather than intrabrand, competition. Assessing RPM as an abuse of dominance could result in mistakenly punishing a manufacturer’s control over the distribution of its products that actually enhances interbrand competition and consumer choice. For that reason, the Sections believe it is more consistent with the objective of competition law to analyze RPM as a vertical agreement and assess whether it unreasonably restrains trade under a rule of reason analysis. If the Commission does not adopt this approach, the Sections recommend further clarification on how the Commission will analyze RPM as a potential abuse of dominance, including the Commission’s views on unilateral pricing policies and maximum resale prices.

Additionally, the Sections recommend refining Section V.5. of the Draft Guidelines, addressing predatory pricing. The Sections note that predatory pricing claims are approached with caution by U.S. courts because low prices are beneficial to consumers absent evidence that higher pricing will occur in the long run once competition has been eliminated or substantially reduced (assuming new entry does not occur to defeat the anticompetitive price increase). The Draft Guidelines describe elements of a predatory pricing claim that are similar to such claims in other jurisdictions, but the Sections recommend that the Commission also use well-accepted economic tests that are familiar to and understood by enterprises that are evaluating whether their pricing strategies might be considered predatory. And because low prices by themselves -- without the subsequent exclusion of competition and exercise of market power -- benefit consumers, the Sections in particular recommend that the likelihood of recoupment from below-cost pricing (i.e., by later being able to recoup lost profits from charging anticompetitively high prices) should be a predicate to any finding of unlawful “predatory” pricing.

Finally, the Sections recommend additional clarification in Section V.2. of the Draft Guidelines, addressing price discrimination. Specifically, the Sections note that there are often competitively benign or procompetitive reasons for differential pricing. The Sections commend the Commission for providing examples of justifications for differential pricing that would avoid a price discrimination claim (such as sales during different time periods and cost-based differences in pricing). In addition, the Sections recommend clarifying that price discrimination is only actionable where it causes harm to competition, not simply to individual customers or competitors. For example, charging different prices to customers who are in different geographic markets or otherwise do not compete with each other should not adversely affect competition. Relatedly, the Sections question whether comparing the volume of products sold to higher and lower priced customer groups respectively is necessarily a useful measure for assessing whether price discrimination has harmed the general economic interest.
I. Dominance

Definitional Guidance. Section 5 of the Act states that a dominant position is defined by the lack of “substantial competition.” Section 6 requires consideration of three factors to establish the existence of a dominant position: (i) competition from substitute goods or services to those offered by the undertaking, (ii) the presence of barriers to entry or expansion due to regulatory restrictions, and (iii) whether the undertaking has the ability to unilaterally influence prices or to restrict supply or demand and the degree to which competitors can counteract this power.

The Sections commend the Commission’s elaboration of the Section 6 factors in Section II of the Draft Guidelines. However, the Sections respectfully suggest that additional clarifications could be helpful. First, the Sections recommend that the Commission consider explaining the degree of substitution for the products of the firm at issue and the likelihood and timing of new entry to preclude a finding of dominance. Second, the Sections recommend that the Commission consider guidance about how the Commission views the magnitude of costs and ability to recoup investment in determining whether a significant barrier to entry exists. In particular, the Draft Guidelines suggest that if existing competitors have already faced similar entry costs, a dominant position may exist. However, such circumstances could also be evidence that the barriers are not sufficient to prevent further entry or expansion by other competitors if, for example, additional firms would be willing to enter because they similarly expect to be able to recoup their investment based on the size of available market demand and reasonably likely sales.

Use of Market Shares. The Sections agree with the Commission’s guidance that an undertaking will have a dominant market position only if it is able profitably to maintain prices above or output below competitive levels for a significant period of time. To measure market shares, the Draft Guidelines recognize the need to define markets, and indicate the Argentine Merger Control Guidelines approach should be applied. One important difference between evaluating market definition for a merger and for abuse of dominance is that the latter is much more likely to experience prices already being at the monopoly level. This makes market definition analyses more difficult using the hypothetical monopolist test in the Argentine Merger Control Guidelines. There are good economic substitutes by definition for a dominant firm pricing at the monopoly level, and the Argentine Merger Guidelines recognize that. Explicit recognition of this problem and some discussion on how to address this difficult issue would help, perhaps by indicating a greater willingness to use direct economic tests of market power in addition to market share.

3Draft Guidelines at 4.

4Draft Guidelines at 4, n. 1.

5Merger Control Guidelines at 4.

The Sections also agree that high market share is not a sufficient factor to establishing the existence of a dominant firm. However, the Draft Guidelines suggest that a significant gap in market shares between undertakings can “signal” a dominant position. Firms may achieve a high market share, including one at a significant difference to other competitors, at a particular point in time based on temporal market conditions. For example, the introduction of a new product can result in a high market share, but that market share may be temporary and might be expected to erode over time such that a presumption of dominance is not merited. Indeed, this sort of market dynamism often enhances consumer welfare and ought not to be discouraged. Therefore, the Sections recommend that the Commission clarify that a gap in market shares between a leading firm and other firms would not, on its own, be sufficient to establish dominance with respect to the larger firm.

Perfectly Competitive Market Comparisons. The Sections caution that part of the Commission’s alternative explanation of dominance might lead to confusion about the implications of a dominant position. In particular, the Draft Guidelines state that a dominant firm by definition faces competition that is “not strong enough” as compared to a hypothetical perfectly competitive market. The Sections acknowledge that the hypothetical perfect competition model of economics is helpful in understanding the basic concepts of market power, but respectfully suggest that its use in the context of the Draft Guidelines is not appropriate and should be removed. The model does not translate across all industries because competitive dynamics differ, and thus, it is not inherently determinative of dominance.

Dominance is determined based on monopoly power. While related, market power and monopoly power are not the same. Market power is generally defined as the ability to raise prices above what would be charged under conditions of perfect competition, i.e., the ability of a firm to exert some control over the price it charges. (Analogously, market power may also be defined in terms of a firm’s ability to reduce quantity, quality, or other product characteristics below the level that would prevail under conditions of perfect competition. The discussion here follows the usual convention of focusing on price.) Few firms are pure price-takers facing perfectly elastic demand (i.e., the situation under which any increase in price would eliminate all demand for the product). Virtually all products that are differentiated from others (including

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7 Id. at 4.

8 Id.


10 The demand elasticity (elasticity of demand) refers to how sensitive the demand for a good is to changes in other economic variables, such as prices and consumer income. Demand elasticity is calculated as the percent change in the quantity demanded divided by a percent change in another economic variable. A higher demand elasticity for an economic variable means that consumers are more responsive to changes in this variable.
patents) have some degree of market power, if only because consumer tastes, seller reputation, or location confer upon their sellers at least some degree of pricing flexibility. This degree of market power is unavoidable and understood not to warrant antitrust intervention.

Monopoly power, which is relevant to claims of abuse of dominant position, is generally understood to mean the power to control market-wide prices or to exclude competition. In other words, market power may be defined as power over one’s own price, while monopoly power is defined as power over market prices. Monopoly power may also be defined as the ability to exclude competitors from the market since such power characteristically allows the firm to control market-wide prices. Finally, monopoly power must be more than fleeting; it must be durable.

Safe Harbor. The Sections agree with the Commission’s conclusion that market shares can be “suitable to discard the existence of a dominant position.” However, limiting this safe harbor to instances where a firm does not have the largest share as stated in the Draft Guidelines could still lead to potential over-enforcement because even companies with leading shares can lack the substantial market power required for a dominant position.

The Sections encourage the Commission to consider a safe harbor based on a specific market share level, which would provide more clarity to businesses. Under U.S. law, dominance is seldom found where an entity’s market share is less than 50 percent. Attempted


12See, e.g., Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 695-96 (10th Cir. 1989) (“If the evidence demonstrates that a firm’s ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.”); see also U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (Jan. 12, 2017), available at www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

13Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) (“[F]ifty percent is below any accepted benchmark for inferring monopoly power from market share.”); Cohlma v. St. John Med Ctr., 693 F.3d 1269, 1282-84 (10th Cir. 2012) (20 percent “woefully short”); AD/SAT v. Associated Press, 181 F.3d 216, 229 (2d Cir. 1999) (“a 33 percent market share does not approach the level required for a showing of dangerous probability of monopoly power”); Morgenstern v. Wilson, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994) (30 percent market share insufficient); United Airlines v. Austin Travel Corp., 867 F.2d 737, 742 (2d Cir. 1989) (31 percent market share insufficient); Dimmitt Agri Indus. v. CPC Int’l, 679 F.2d 516, 529-31 (5th Cir. 1982) (market shares in range of 16 percent to 25 percent insufficient). The risks of abuse of dominance are typically at much higher share levels, on the order of 70 percent or more based on U.S. cases. See, e.g., United States v. Dentsply Int’l, 399 F.3d 181, 187 (3d Cir. 2005) (market share of 75-80 percent is adequate to establish a presumption of dominance); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 n.2 (6th Cir. 2002) (market share of 74-77 percent sufficient to infer dominance); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002) (64
monopolization cases in the U.S. typically require a market share of greater than 30 percent.\textsuperscript{14} The European Commission is unlikely to find dominance in Article 102 TFEU unless a firm has a market share of at least 40 percent, while market shares higher than that may be a “preliminary” and “useful first indication” to be interpreted in light of other relevant market conditions.\textsuperscript{15} Accordingly, the Sections suggest a safe harbor based on market shares below at least 40 percent.

II. General Economic Interest

Actual Harm vs. Prospective Harm. Under Section 1 of the Act, conduct is unlawful only when it may be detrimental to the general economic interest. Section IV of the Draft Guidelines, however, suggests differing standards of harm. On the one hand, Section IV states that, to violate the Act, conduct “must also generate economic harm to the suppliers, the customers or the competitors of [the] dominant undertaking” in question.\textsuperscript{16} Elsewhere, the Draft Guidelines suggest that a standard less than actual harm to competition is sufficient: abuses of dominance will be forbidden “as long as they may harm the general economic interest”; “the conduct must be able to cause harm to the general economic interest.”\textsuperscript{17}

These differing articulations of the harm to the general economic interest could create uncertainty and lead to perverse results by constraining conduct that is competitively neutral and does not harm competition or consumers. The Sections would recommend adopting a standard focused on competitive process and consumer welfare. The Sections suggest that enforcement with respect to conduct that has already occurred generally would be appropriate only when there is evidence of actual harm. Harm to competitors should only matter when it is coincident with harm to competition. Harm to a single seller in a case involving an allegation of monopsony power should only matter if there is harm to the broader competition for the purchase of the relevant goods or services.

\textsuperscript{14} Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421,1438 (“When the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price.”). M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168 (4th Cir. 1992) (with respect to attempted monopolization, “claims of less than 30% market shares should presumptively be rejected; (2) claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable.”).


\textsuperscript{16}Draft Guidelines at 5.

\textsuperscript{17}Id. at 1.
To the extent that the Commission desires to enforce Section 1 for attempted abuse of dominance, the Sections suggest that a high standard be used with respect to the element of harm. Under U.S. law, an attempted abuse of dominance is only established when there is a specific intent to monopolize and a dangerous probability of achieving monopoly power.\textsuperscript{18}

**Consumer vs. Total Market Surplus.** The Sections recommend that the Commission clarify further how it will calculate and use “consumer surplus” and “total market surplus” measures in its enforcement activities.\textsuperscript{19} The Draft Guidelines highlight that the Commission will “distinguish between situations of harm to the general economic interest and situations in which harm is related to particular interests of certain economic agents.”\textsuperscript{20} This is consistent with U.S. law, where the focus is on a harm to competition—i.e., the competitive process—and not merely an individual competitor or economic actor.\textsuperscript{21} However, “consumer surplus” in the Draft Guidelines appears to mean an analysis of a firm’s direct customers\textsuperscript{22} and also of end-user customers that may not be direct customers of a dominant firm (i.e., where the Draft Guidelines discuss how vertical conduct may impact a supplier or retailer differently from downstream consumers).\textsuperscript{23} The consumer welfare standard recognized in the U.S. is quite different than a “total market surplus” standard, which is the addition of producer profits to consumer surplus in a market. Reconciling these concepts with the Draft Guidelines’ statement that the harm must be to “suppliers, customers or competitors of the dominant undertaking”\textsuperscript{24} and providing guidance on how conflicts between consumer and total market surplus calculations will be resolved will be helpful to companies operating in Argentina. As discussed above, the Sections recommend a standard focused on harm to the competitive process and consumer welfare.

**Impact of Procompetitive Justifications.** The Draft Guidelines do not clearly state when justifications will be considered, though they are suggested as a consideration for total market


\textsuperscript{19}The Draft Guidelines state that “[f]rom an economic point of view, the general economic interest has been identified with the concepts of ‘consumers’ surplus’ and ‘total market surplus’. The last concept includes consumers’ surplus and also the different undertakings profits, and it could eventually include as well the surpluses and profits obtained by other economic agents (including workers) that operate in the different upstream and downstream related markets.” Draft Guidelines at 7.

\textsuperscript{20}Id.

\textsuperscript{21}See, e.g., United States v. Microsoft, 253 F. 3d 34, 58 (D.C. Cir. 2001); United States v. Dentsply Int’l, 399 F.3d 181 (3d Cir. 2005).

\textsuperscript{22}The Draft Guidelines state that “if certain conduct reduces both total market surplus and consumers’ surplus, then it can be considered that such conduct clearly causes harm to the general economic interest.” Draft Guidelines at 7. The Draft Guidelines go on to suggest that with a vertical practice that “causes harm to a supplier or a retailer (but with no effects on consumers), the consumers’ surplus is not affected” and cost efficiencies could render vertical conduct “far from reducing total market surplus, . . . [i]t causes an increase in that surplus.” Id.

\textsuperscript{23}Id.

\textsuperscript{24}Id. at 6.
surplus calculations. In the United States, a monopolist may rebut allegations of anticompetitive conduct by establishing that it had a valid business justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare. Undertakings can offer procompetitive justifications and, ultimately, the conduct is an abuse of dominance only if there is, on balance, an anticompetitive harm. It is unclear whether the total welfare standard discussed in the Draft Guidelines would be applied in the same way. The Sections recommend that justifications be included more explicitly in Section IV of the Draft Guidelines as a general defense available to rebut a finding of competitive harm.

Worker Harm. The Sections note that the Draft Guidelines suggest harm to workers could be a type of harm to the general economic interest. The Sections caution, however, that the relevant market for an undertakings’ products (i.e., as a seller) typically would be materially different from the relevant market for that undertakings’ workers (i.e., as a buyer). Furthermore, just because there is dominance downstream does not automatically mean there would be dominance with respect to upstream purchases of labor or other inputs. The Sections recommend the Commission consider removing the reference to “workers” or add clarification as to how the Commission would assess concurrent harms in an upstream and downstream market.

III. Abusive Pricing

The Sections recognize that the Act specifically references abusive pricing as a possibly anticompetitive practice. However, because an underlying principle on which the Act is based is that companies have the right to freely set their prices, the Sections would recommend including an introductory statement in Section V.1 that only very exceptionally could a price be challenged as excessive and that simply increasing price, even if the price increase is significant, should not normally qualify as excessive pricing. Consistent with this recommendation, the Sections also suggest that the Commission should further define (and limit) the concepts used under Section V.1. of the Draft Guidelines such as “significant” or “excessive” in order to reduce legal uncertainty that the use of such broad terminology could generate. For example, it is helpful that

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25The Draft Guidelines state that “[i]f . . . there are elements that allow the Enforcement Authority to believe that such [vertical] practice reduces the cost of providing the good or service under analysis (for example, through taking advantage of economies of scale or scope), then it will be considered that, far from reducing total market surplus, the practice under analysis causes an increase in that surplus. Therefore, in such situation, the conduct would not be fulfilling the requirement of being able to cause harm to the general economic interest, and thus it should not be considered to be violating Act No. 27,442.” Draft Guidelines at 7.


28Draft Guidelines at 7.
the Draft Guidelines state that prices not significantly different than average total costs would not be abusive. However, workable competition in an oligopoly or differentiated product market implies prices being set above marginal costs absent alleged abusive pricing, and these prices are potentially above accounting measures of average total cost.

An excessive pricing claim is not cognizable under U.S. antitrust law, although it is recognized by other jurisdictions, including Europe, China, Korea, and India. Nevertheless, enforcement agencies such as the European Commission have “been extremely reluctant to make use” of the provision.”29 The U.S. approach recognizes that: “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.”30 High margins and pricing can be the result of innovation and attract new competition, and thus, standing alone, are not cause for antitrust enforcement activity.31

IV. Resale Price Maintenance

Section V.7.1. of the Draft Guidelines addresses the Commission’s analysis of resale price maintenance. The Sections acknowledge the Draft Guidelines’ introductory statement in Section I that vertical restraints may arise as a consequence of agreements between suppliers and

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29Opinion of Advocate General Wahl, Biedrība ‘Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība’ v. Konkurences padome, Case C-177/16, [Apr. 6, 2017] E.C.R. [Provisional text], ¶ 3, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=189662&occ=first&dir=&cid=756879 (“Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.”). Such “extraordinary” circumstances have yet to include decisions by DG Comp involving IPRs where it is particularly difficult to assess a “fair” price, given that there is no marginal cost to which the price may be compared and IPRs are highly differentiated products making price comparison difficult, if not impossible. Douglas H. Ginsburg, Bruce H. Kobayashi, Koren W. Wong-Ervin & Joshua D. Wright, Excessive Royalty’ Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate, CPI ANTITRUST CHRONICLE (Mar. 2016) at 1.

30Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); see also D.C. Circuit in Rambus (“high prices and constrained output tend to attract competitors, not to repel them”).

31This point is particularly important in matters involving intellectual property rights (IPRs). IPR holders may need relatively high margins (prices above marginal cost) merely to recoup their upfront investment and compensate for the substantial risks associated with seeking to create and commercialize intellectual property. Prices well above their low or even zero marginal cost are normal features of competitive markets in such industries. In other words, a price above marginal cost in such an industry may result in no more than the competitive rate of return on the investment necessary to create the IPR. Relatedly, the lines between markets may be not be clearly delineated in high-tech markets involving IPRs. To infer a firm has market power based merely upon its high market share or its ability to charge a price greater than marginal cost is to invite frequent errors.
customers, rather than in an abuse of dominance setting, but note that in the United States, resale price maintenance cases are typically analyzed under an “agreement in restraint of trade” framework rather than as an abuse of dominance.\footnote{See, e.g., Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).} Although some jurisdictions—internationally and certain U.S. states—treat resale price maintenance as presumptively unlawful or as a hard-core restraint of trade,\footnote{See, e.g., Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty and Functioning of the European Union to categories of vertical agreements and concerted practices (making RPM presumptively unlawful in the European Union); MD. CODE ANN., COMM. LAW § 11-204(b) (making RPM \textit{per se} illegal in the State of Maryland).} the Sections observe that in federal courts in other jurisdictions, such as Canada and U.S., and most states in the United States, weigh resale price maintenance cases under a balancing test similar (though, again, in an agreement-in-restraint-of-trade framework) to that articulated by the Commission in the Draft Guidelines.\footnote{See \textit{Leegin}, 551 U.S. at 897-98 (United States); Competition Act R.S.C. 1985 c. C-34, § 76 (Canada).} For this reason, the Sections commend the Draft Guidelines’ detailed discussion of the factors that the Commission will consider in such cases.

Because the Draft Guidelines utilize the abuse of dominance framework to analyze resale price maintenance, the Sections also recommend that the Commission provide its guidance regarding unilateral pricing policies (sometimes called \textit{Colgate} policies in the United States based on the U.S. Supreme Court’s decision in \textit{United States v. Colgate & Co.} (1919)), which do not require an agreement and are instead unilaterally announced and administered by suppliers that, in turn, refuse to do business with resellers that depart from it. In the United States, unilateral pricing policies may be lawful on the grounds that no agreement to fix or set minimum prices exists and firms can choose not to do business with other firms.\footnote{See \textit{United States v. Colgate & Co.}, 250 U.S. 300, 307 (1919).} But businesses and counsel in Argentina would benefit from additional clarity in the Draft Guidelines regarding how such policies would be analyzed from an abuse of dominance perspective.

Furthermore, the Sections recommend that the Commission clarify that the setting of a maximum resale price should not be treated as an abuse of dominance except where it is in fact a disguised minimum resale price. In \textit{State Oil Co. v. Kahn}, the U.S. Supreme Court decided that there “is insufficient economic justification for per se invalidation of vertical maximum price fixing.”\footnote{Id. at 18.} Since then, challenges to maximum resale price maintenance in the United States have been rare and been limited to when the maximum resale price is set so low as to be predatory or a sham to disguise minimum resale price maintenance.\footnote{See \textit{Origami Owl LLC v. Mayo}, 2015 U.S. Dist. LEXIS 103755, at *20-21 (D. Ariz. 2015).}
Empirical evidence analyzed by economists indicates RPM agreements are more often than not procompetitive.”

Both price and output effects are relevant to the analysis because, “[f]rom a consumer welfare perspective, measuring the effect of minimum RPM on price alone tells us little about the competitive effects of minimum RPM because both procompetitive and anticompetitive theories predict higher prices, all else equal. Analyzing the effect of minimum RPM on output, where the theories offer predictions in opposing directions, resolves this problem.”

V. Predatory Pricing

Section V.5. of the Draft Guidelines addresses conduct commonly known as predatory pricing and begins with a definition from the language of the Act: selling goods or services “at prices lower than their costs, without reasons based on commercial uses and customs, with the aim of excluding competitors in a market.” The Draft Guidelines state that in order to determine whether prices are lower than costs, “unit variable cost, or another economic or accounting concept” appropriate for the specific circumstances will be used.

They go on to state that several economic concepts will be considered, including opportunity costs and social marginal cost. Finally, the Draft Guidelines state that if a pricing scheme is predatory, “the predator will eventually be able to raise prices above its competitive level in future periods.”

The Sections encourage further elaboration and articulation of the circumstances in which predatory pricing will be considered anticompetitive. Doing so will provide greater guidance to enterprises, consistent with the objectives of sound competition policy and without discouraging low pricing practices that generally are beneficial to consumers, even when other competitors may find it difficult to compete with those low prices. Although U.S. law treats predatory pricing as anticompetitive in certain circumstances, it has approached predatory pricing carefully. This is because competition on price remains “the very essence of competition,” and so “[e]ven if the ultimate effect of the [price] cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.” Thus, low prices are generally a boon to consumers, even when they result in

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41Id. at 16.

42Draft Guidelines at 17.

43Id. at 18.

44Id. at 20.

45Id.

46Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993); see also INT’L COMP. NETWORK UNILATERAL CONDUCT WORKING GROUP, PREDATORY PRICING ANALYSIS PURSUANT TO
losses by another individual competitor, and, without more, do not harm the competitive process or consumers.\textsuperscript{47}

The Sections also suggest that the Draft Guidelines simplify and clarify discussions of economic cost-based tests, and not attempt to measure difficult to quantify indirect costs, such as opportunity and social marginal costs. For example, the Draft Guidelines state that “[i]n all cases, the analysis will attempt to estimate the opportunity cost of the abovementioned good or service,”\textsuperscript{48} but provide no guidance for firms and counsel regarding how this estimate will be used or analyzed. The Sections are not aware of “opportunity cost” being used as a measure of costs for purposes of assessing predatory pricing and are concerned that using such a measure that is not well defined or understood may introduce significant uncertainty for firms in assessing what level to price products to avoid predatory pricing risks. The Draft Guidelines go on to state that “when a predator is selling below the price which is expected in a competitive context, this market price is also below the social marginal cost of providing the good or service . . . therefore inducing an artificially high consumption rate for that good or service, which in turn reduces the total surplus generated in the market under analysis.”\textsuperscript{49} In light of the benefits of low pricing articulated above, the Sections suggest that the Draft Guidelines consider and clarify the meaning of “social marginal cost” and its relevance to the predatory pricing analysis. Again, the Sections are concerned that the use of a measure such as “social marginal cost” to assess whether pricing is predatory could introduce uncertainty and deter firms from lowering their prices and prevent consumers from enjoying the benefits of lower prices.

The Sections recommend that the Commission articulate its approach using well-understood cost-based tests that may help enterprises internally determine whether their pricing conduct is likely to be considered an abuse of dominance. One useful set of thresholds suggested by various U.S. courts is a sliding-scale approach that turns on the relationship of price to the seller’s average total costs (“ATC”) and average variable costs (“AVC”): (1) prices at or above ATC fall clearly outside the domain of problematic “below-cost pricing,”\textsuperscript{50} (2) prices at or above

\textsuperscript{47}Brooke Grp., 509 U.S. at 225 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’” (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); see also Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (“[C]utting prices to get more business is the essence of competition.”).

\textsuperscript{48}Draft Guidelines at 18.

\textsuperscript{49}Id. at 19-20.

\textsuperscript{50}See, e.g., United States v. AMR Corp., 335 F.3d 1109, 1117 (10th Cir. 2003) (pricing above total costs has been “implicitly ruled out” by the Supreme Court as a basis for predatory pricing liability); McGahee v. Northern Propane Gas, 858 F.2d 1487, 1496 (11th Cir. 1988) (recognizing “average total cost as the cost above which no inference of predatory intent can be made”); Henry v. Chloride, Inc., 809 F.2d 1334, 1346 (8th Cir. 1987) (“[A]t some point, competitors should know for certain they are pricing legally, and

AVC but below ATC are presumptively legitimate and (3) prices below AVC are presumptively illegitimate—*with the burden of proof being on the party challenging either presumption*.\(^{51}\)

Additionally, the Sections agree with the Draft Guidelines’ statement that “truly predatory” pricing schemes allow the predator to eventually raise prices to above competitive levels in the future,\(^ {52}\) but recommend that the Commission adopt the likelihood of recoupment of losses from below-cost pricing as a mandatory element to a finding of predatory pricing. Consistent with the notion that competition laws protect the competitive process, not individual competitors, an intent to cause competitors to exit the market or discourage entry, does not without more harm the competitive process or consumers, who benefit from lower prices.\(^ {53}\) On the other hand, the possibility of recoupment of the losses from pricing below cost is important because recoupment by the predating firm through the subsequent imposition of anticompetitively high price is what causes consumer harm, not the below-cost pricing itself.\(^ {54}\) Unsuccessful predation, i.e., below-cost pricing that does not result in recoupment of the losses, no matter how malicious, is “in general a boon to consumers.”\(^ {55}\) As currently drafted, the Draft Guidelines already require, among other conditions, that the conduct result in the possibility that the dominant firm “can increase its market share and obtain greater market power” and that such market power can be “effectively exercise[d] and impede the entrance of new competitors.”\(^ {56}\) It would be logical for the Commission to clarify that the possibility of recoupment is a predicate for such effect or likely effect, while also making clear that an anticompetitive purpose is an

\(...) this point should be average total cost.”) (citation omitted); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1056 (6th Cir. 1984) (same standard).

\(^{51}\) *See, e.g.*, Tri-State Rubbish v. Waste Mgmt., 998 F.2d 1073, 1080 (1st Cir. 1993) (observing that pricing below variable cost is the “normal test of predation”); Kelco Disposal v. Browning Ferris Indus., 845 F.2d 404, 407 (2d Cir. 1988) (noting that prices below “reasonably anticipated average variable cost[] are presumed predatory”); *Henry*, 809 F.2d at 1346 (holding AVC “to be a marker of rebuttable presumptions”); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1981) (holding that the plaintiff bears the burden of showing that prices above AVC but below ATC are “predatory,” and that the plaintiff establishes a prima facie case of predatory pricing by proving that the defendant’s prices were below AVC).

\(^{52}\) Draft Guidelines at 20.

\(^{53}\) *Brooke Grp.*, 509 U.S. at 225 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’” (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); see also Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (“[C]utting prices to get more business is the essence of competition.”).

\(^{54}\) *Brooke Grp.*, 509 U.S. at 224 (“Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.”).

\(^{55}\) *Id.; see also* Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975) (arguing that where barriers to entry are low, it is costly to lower prices to predatory level because new entrants can correct the market).

\(^{56}\) Draft Guidelines at 18.
insufficient basis for liability for this category of conduct. Additionally, it would be helpful for the Commission to clarify that merely obtaining greater market power in this context is not sufficient; a violation must involve the unlawful maintenance of a dominant position.

VI. Price Discrimination

Section V.2. of the Draft Guidelines addresses guidance on analyzing price discrimination by dominant firms. While the Sections recognize that price discrimination is recognized as a potential abuse under the law, the Sections note that flexibility in pricing is crucial to competition in any market-based economy. Differential pricing does not necessarily reflect a lack of competition or anticompetitive conduct. To the contrary, it can be an indication of robust competition. Indeed, the U.S. experience with the Robinson-Patman Act, which prohibits certain forms of price discrimination relating to goods, but not services, has been that regulation of price discrimination “has had the unintended effect of limiting the extent of discounting generally.”

The welfare effects of price discrimination are mixed, which supports the use of an effects-based approach that recognizes both the anticompetitive uses of price discrimination and the ubiquitous use of price discrimination to improve efficiency, grow markets, intensify competition, and enhance consumer welfare. For example, differential pricing can improve efficiency, grow markets, intensify competition, and enhance consumer welfare. Differential pricing can allow firms to expand output, which can be welfare enhancing. Profit-maximizing firms facing distinct consumer demands for a product may reduce prices for the more price-sensitive customers and increase price to the less price-sensitive customers relative to uniform pricing. Differential pricing can therefore enable the firm to reach consumers that would otherwise not purchase the product. Price discrimination may also intensify competition by enabling firms to selectively meet competitor’s prices.

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58ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS (2007), 311, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Indeed, the U.S. Antitrust Modernization Commission, which recommended repeal of this U.S. law, asserted that it “inhibit[s] entry” and “requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.” Id. at 320.


In addition, differential pricing helps a firm with fixed costs to recover its outlays and is sometimes necessary for a firm to recover those outlays.\textsuperscript{61} Indeed, an important aspect to consider in evaluating differential pricing in licensing as compared to differential pricing for physical goods is the nature of intellectual property (IP) development. The innovation process typically involves large upfront investments in research and development yet very low marginal costs at the production stage. Economists have observed that differential pricing can be an important mechanism for recovering fixed costs under these circumstances.\textsuperscript{62}

Therefore, the Sections would urge that price discrimination should require more than differential pricing and should be actionable only where there is harm to competition. Relatedly, the Sections recommend that the Commission clarify the Draft Guidelines’ statement that “selling at different prices is only included under the discrimination category if such differences are related to the demand of the good or service under analysis, and not due to differences in the cost of supplying different customers.”\textsuperscript{63} While the Draft Guidelines mention that cost-based differences in price will not be considered anticompetitive price discrimination, the Sections recommend that the Commission provide further guidance to distinguish between competitively benign or procompetitive differential pricing and price discrimination. For example, sales at different prices to customers that are in different geographic markets or otherwise do not compete should not be actionable.

Finally, the Sections would encourage further clarity in the final paragraph of Section V.2. which addresses methods for assessing whether price discrimination has adverse competitive effects. The Sections would recommend focusing on the potential exclusionary potential of price discrimination. In fact, price discrimination absent exclusionary effects will typically increase output and increase the sum of consumer surplus and producer profits. On the other hand, assessing the relative volume of sales to the two groups with different prices (as the Draft Guidelines propose) typically does not help distinguish competitive versus anticompetitive discrimination. Absent the alleged price discrimination, it is likely that the price would be somewhere between the prices being charged to the two groups, and not the price charged to one group or the other.

VII. Tying

The Sections in general support the Draft Guidelines discussion of tying. However, similar to the comments above on price discrimination, the U.S. experience finds the primary and appropriate focus of the competitive concerns to be on the potential for exclusionary abuse.\textsuperscript{64}


\textsuperscript{62}Id.; see also Carl Shapiro & Hal R. Varian, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK (1999).

\textsuperscript{63}Id. at 10.

\textsuperscript{64}The Draft Guidelines recognize this potential exclusionary effect of tying at 14.
Consumers frequently benefit from tying behavior, as also mentioned in this section of the Draft Guidelines, and competition would only likely be harmed if competitors are significantly hampered from competing or are excluded from the market.

**Conclusion**

The Sections appreciate the opportunity to comment on the Draft Guidelines and commend the Commission for its work in providing guidance on the new competition law in Argentina. The Sections remain available to clarify any of the recommendations herein.