I. Introduction

The American Bar Association Sections of Antitrust Law and International Law (“Sections”) welcome the opportunity to offer the following comments on the English translation of the proposed revisions to the Argentine Merger Control Guidelines (“Revised Guidelines”) released for comment in July 2017 by the National Commission for the Defense of Competition (“Commission”) amending the current version of the guidelines that have been in force since 2001.¹

These Comments reflect the Sections’ experience and expertise with respect to the application of merger control laws in the United States, the European Union, and numerous other jurisdictions and with respect to important related international best practices, notably the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures (“ICN Recommended Practices”) and the Organization for Economic Cooperation and Development’s Recommendation on Merger Review (“OECD Recommendation”).²

The Sections recognize and applaud the substantial thought and effort reflected in the Revised Guidelines; the Sections understand that the original version of these guidelines was published in 2001, and that the proposed revisions have been prepared “to update them and to include some criteria defined by [the] Commission, and also some new concepts that have appeared in the international scene.”³ The Sections commend the Commission for its desire to increase transparency by issuing updated public guidelines on this important topic, and offer these Comments to share insights gained from their experience and to provide suggestions to enhance the effectiveness of the Revised Guidelines and their conformity with international best practices.

¹ National Commission for the Defense of Competition, Draft Version of the New Argentine Merger Control Guidelines (English version) (Preliminary version for comments, July 2017 Draft). In these Comments, all references to the Guidelines shall be to the English version provided by the Commission. The Sections greatly appreciate the preparation of this translation, which has facilitated timely preparation of these Comments.


³ Guidelines, supra note 1 at page 2.
For ease of review, the Sections have organized these Comments to correspond to the topic headings in the Revised Guidelines.

II. Specific Comments

1. Section II.1 - Market Definition

a. Product utility

Section II.1 of the Revised Guidelines focuses on the ability of customers to substitute products for those of the merging parties. Although the Sections support such an approach, it is not entirely clear to the Sections why the word “higher” has been inserted on page 6. Products of the same, higher, or even lower utility can be part of the same market, depending on prices and various other factors. The Sections respectfully suggest that the phrase “(of higher utility)” be deleted from the Revised Guidelines.

b. Supply-side considerations

Although this is not the approach taken in the U.S. Merger Guidelines at present, the Sections commend the proposal to add supply-side considerations to the market definition section of the Revised Guidelines. Such considerations would in particular be relevant in cases where firms are able to quickly reposition their resources in order to supply products that compete more directly with those of the merging firms. In this respect, we note that the previous version of the U.S. Horizontal Merger Guidelines considered that, if a company could reposition within a period of one year, that company could be treated as a market participant from the supply-side.  

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c. Multi-sided markets

The Sections commend the proposal to expressly address multi-sided product markets, in particular because improved technologies continue to increase the frequency and importance of such markets.

The Sections note that the Revised Guidelines do not provide detailed guidance regarding the assessment of multi-sided markets in particular cases. This seems appropriate, however, because proper application of antitrust analysis to such markets can be a complex issue and highly fact-dependent. Moreover, a variety of thoughtful but distinct perspectives on the issue remain to be resolved, and further research and analysis will probably continue to suggest important refinements in approach.

d. Supra-national geographic markets

The Revised Guidelines currently set out general principles for establishing the relevant geographic market, which the Sections welcome. However, the explanation of supra-national markets provided may suggest that a different standard of analysis is appropriate as compared with
national or local geographic markets in that there is a focus on the existence of parallel exports and imports between Argentina and another country. In the Sections’ view, it would be desirable to clarify that the same general principles, including supply-side substitution, are applicable when assessing supra-national markets as are used when considering national or local markets.

2. Section II.3 - Market Share Calculation

The Sections commend the proposal in Section II.3 of the Revised Guidelines to use market shares in order to filter out mergers that are unlikely to raise competitive concerns. The Sections generally view the use of a market share filter as an efficient way to identify mergers that are competitively benign, but note that market definition will affect the analysis and the market share threshold may not be applicable to all transactions.

For example, the Sections note that it may be difficult to use the market share analysis in multi-sided markets or in bidding markets where shares may shift significantly from one bid cycle to the next. Moreover, the U.S. and other jurisdictions recognize that market shares are typically used as an initial screen and additional analysis of likely competitive effects is needed for mergers that presumptively raise concerns.

3. Section II.4 - Concentration and market shares

The Sections welcome the proposal to provide further guidance on using the Herfindahl-Hirschmann Index (“HHI”) to measure market concentration.

The Revised Guidelines suggest that competition concerns are less likely to be present in transactions which have a post-merger HHI level of less than 2,000 points (3,000 points where the parties’ combined market share is less than 30%), and/or where the HHI increases by less than 150 points (250 points where the combined market share is less than 30%). This is relatively similar to the position in the U.S. where: (i) mergers involving an increase in the HHI of less than 100 points are deemed unlikely to have adverse competitive effects and ordinarily require no further analysis, (ii) mergers resulting in unconcentrated markets (< 1,500 points) are deemed unlikely to have adverse competitive effects and ordinarily require no further analysis, (iii) mergers resulting in moderately concentrated markets (1,500 - 2,500 points) that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny, (iv) mergers resulting in highly concentrated markets (> 2,500 points) that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny, and (v) mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed likely to enhance market power.

4. Sections III.1 and III.2 - Unilateral and coordinated effects

a. General Comments

The Sections commend the Commission’s proposal to set out a more detailed discussion of unilateral and coordinated effects of a transaction and the proposed explanation of monopsony power in the Revised Guidelines. The Sections note that the Commission has used the concept of “dominant position” in several places and we suggest it would be helpful to clarify how this differs from references to “market power”. The Sections suggest that the issue should be approached in conformity with the ICN Unilateral Conduct Working Group Recommended Practices on
Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, which sets out the following distinction, “Market power is defined generally as the ability to price profitably above the competitive level. Dominance/substantial market power is a high degree of market power both with respect to the level to which price can be profitably raised and to the duration that price can be maintained at such a level.”

b. **Upward Pricing Pressure Index (“UPPI”)**

The Sections commend the proposal in Section III.1 of the Revised Guidelines to apply the UPPI in order to analyze the competitive effects of a merger. Indeed, such an approach would be consistent with the current merger review methodologies used, for example, in the U.S.

The Sections also note that there are other methods for evaluating the potential competitive effects of a transaction, which are discussed in the U.S. Horizontal Merger Guidelines (e.g., natural experiments, simulations, etc.). The Sections respectfully suggest that it may be useful to refer to such other methods in the Revised Guidelines, especially because the UPPI methodology may not be appropriate to assess certain types of transactions (e.g., in transactions where repositioning of product offerings seems likely).

c. **Coordinated effects**

In the section of the Revised Guidelines on coordinated effects, there are references to both actual collusion, which is an offence in Argentina and most other jurisdictions, and "tacit collusion", which is not. However, the subsequent discussion uses general references to "collusion", "collusive behaviour" and "agreement" in ways which may suggest a narrower approach than the increasingly common terminology of "coordinated effects". The Sections respectfully suggest that it should be clarified that no such narrowing of approach was intended, i.e., that mergers that are likely to result in coordinated effects may be unlawful even absent actual collusion.

The framework for the analysis of coordinated effects places heavy emphasis on two factors which the Sections believe are not reliable predictors of the likelihood of coordinated effects occurring; the number of firms and capacity utilization. The Sections instead recommend that the Commission place more emphasis on whether (a) the merger would lead to a significant increase in concentration and result in a moderately or highly concentrated market; (b) the relevant market has characteristics that are conducive to coordinated conduct; and (c) there is a credible basis to conclude that the merger may enhance the risk of coordination. For example, the Sections consider that the vigorous competitor / maverick issues discussed in the unilateral effects section would be relevant here.

d. **Minority shareholding**

The Revised Guidelines propose to add a new subsection dealing with minority shareholdings. While the Sections appreciate that, in certain circumstances, minority shareholdings may raise

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6 See e.g., U.S. Horizontal Merger Guidelines, Section 7.1.

7 Guidelines, *supra* note 1 at pages 15-16.
competition law concerns, the Sections believe that the proposed guidelines on treatment of minority shareholdings would be materially improved if they were expanded to include a discussion of: (1) the circumstances in which minority interest acquisitions will require mandatory pre-notification to the Commission under the Competition Act 25,156 (the “Act”); and (2) the analytical framework to be used by the Commission when assessing minority shareholding acquisitions. Each of these issues is discussed in greater detail below.

As regards mandatory pre-notification of minority shareholding acquisitions, the Sections understand that section 6 of the Act provides that an acquisition of “substantial influence” over an undertaking may be considered equivalent to an acquisition of control and thus, assuming the other merger notification criteria were satisfied, a minority shareholding acquisition could require pre-notification if the acquirer obtained “substantial influence” over the target. The Sections further understand that one example of “substantial influence” could be the acquisition of veto rights over the “competitive strategy” of the target. However, it is the Sections’ understanding that there remains in the legal and business communities some uncertainty surrounding the scope of the concept of “competitive strategy”, and around other potential examples of “substantial influence”. As a result, the Sections respectfully suggest that “substantial influence” be defined in the Revised Guidelines so as to provide legal certainty to parties to minority acquisitions as to whether their transactions are subject to the mandatory pre-notification requirements in Argentina. For example, the Commission could consider adopting the criteria used to assess joint control in the EU.8

The Sections also suggest that the Guidelines could be expanded to provide an overview of the analytical framework to be used by the Commission to assess whether minority acquisitions raise competition concerns. The current Guidelines do helpfully point out some of the competition law concerns that may arise in minority shareholding transactions (e.g., reduced incentives to compete; access to competitively-sensitive information; etc.) but, in the Sections’ view, merging parties would benefit from an understanding of how the Commission’s assessment of a minority shareholding transaction may differ from the assessment of a traditional acquisition of voting control (as described in the existing Guidelines). The Canadian Competition Bureau, for example, has addressed this issue in some detail in its 2011 Merger Enforcement Guidelines (which updated a previous set of 2004 guidelines), which may serve as a useful reference tool for the Commission in this instance.9 The European Commission has also dealt with this topic in its guidelines on control of concentrations between undertakings.10 In addition to benefiting the legal and business communities in Argentina and abroad, expanding the guidelines in this way would be consistent with the standards established by the ICN’s Recommended Practices.11

11 ICN Recommended Practices, supra note 2 at Recommended Practice VIII.B (the Commentary to this Recommended Practice indicates that agencies should publish “supplemental materials” that “provide insight into the substantive principles and criteria (i.e., the analytical framework) that the competition agency uses in applying the law.”)
5. **Section V.2 - Countervailing buyer power**

The Sections commend the proposal in Section V.2 of the Revised Guidelines to add a section regarding countervailing buyer power.

6. **Section V.3 - Ancillary restraints**

The Revised Guidelines address for the first time the issue of ancillary restraints. The Sections commend this approach towards a clearer stance on ancillary restraints, which has been a matter of great debate in Argentine merger control.

On a preliminary note, the Sections observe that the review of ancillary restraints does not necessarily have to be carried out within the context of merger control proceedings. The Sections further note that since the U.S. agencies do not issue decisions to approve transactions under the HSR Act (but rather parties are free to close the transaction upon termination or expiration of the statutory waiting period), the agencies do not explicitly approve ancillary restraints in their merger review process either.

The particularities and practice of merger control by the Commission have created expectations that ancillary restraints will be reviewed closely within the merger control proceedings, and that the Commission must explicitly “approve” such restraints as a part of that review. The Sections strongly suggest that specific guidelines be issued on the matter, in order to (i) eliminate this link between merger control and ancillary restraints’ analysis and (ii) provide that these guidelines can be applied as a self-assessment by any party conducting business in Argentina, whether such restraints fall under the merger control regime or not.

Until recently, the issue of ancillary restraints had been determined by case law setting out that these types of provisions could not be longer than (i) two years in the case of transactions entailing goodwill or (ii) five years in cases where know-how was transferred. The latter principle created situations in which greater efforts were placed on demonstrating to the Commission the effective transfer of know-how than on analyzing the merits of the transaction itself. Joint ventures were allowed to agree to non-compete provisions in relation to the joint undertaking for its lifetime.

This approach appears to have resulted in more resources being dedicated to analyzing ancillary restraints than to the underlying merger transactions. Indeed, most of the cases that have been conditionally approved in Argentina to date have required an amendment to an ancillary restraint provision. This has led to certain situations where parties had already closed the transaction being reviewed by the Commission and the ancillary provision had lapsed, yet they were required to amend the provision in order to reduce an already lapsed term.

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Furthermore, the scope of review later increased to include confidentiality provisions (such as those corresponding to standard clauses for the safeguarding of information acquired in a due diligence process) that had no effect on competition at all.

This situation was modified in 2016 when the Commission issued a statement that “ancillary restraints should be analyzed under the framework of the overall assessment of the effects that the transaction would have on the market”\(^\text{13}\), citing case law to the effect that if the transaction itself does not harm competition in the market, the same conclusion should apply to any ancillary restraints.\(^\text{14}\).

The Sections believe it would be helpful to provide specific guidance on the permissible duration of ancillary restraints. The current draft of the Revised Guidelines states that: “Finally, the authority will analyze whether the duration of the relevant clauses is reasonable in terms of their specific objectives (e.g., the transfer of intangible assets such as goodwill or certain types of know-how).” In order to provide more certainty for merging parties, the Sections respectfully suggest that the Commission identify the factors that the parties should consider in their self-assessment and provide specific parameters for the appropriate duration of these provisions.

In that regard, the EU Notice on Ancillary Restraints,\(^\text{15}\) for example, provides that restrictions that are directly related and necessary to a transaction (including restrictions that meet certain criteria, and do not exceed a certain duration) will be automatically covered by a merger approval decision, while the U.S. system analyzes the restraint on a case-by-case basis in the context of the transaction. The Sections would recommend providing parties with guidance on safe harbors (e.g., the five year term permitted under previous case law), with possible extensions based on the specific facts of the transaction, while giving the parties the ability to justify the competitive benefits of restraints falling outside of any safe harbors.

Additionally, the Sections would recommend specific guidance on what types of ancillary restraints are subject to review in the merger review process. For example, the Sections believe it would be inappropriate to treat standard confidentiality clauses as an ancillary restraint that is subject to review in this process.

### 7. Section VI - Productive efficiency gains generated by a merger

The Sections respectfully suggest that certain amendments to Section VI of the Revised Guidelines, dealing with efficiencies, could in effect make it too difficult for parties to a merger to justify transactions by reference to efficiencies. In particular, sub-section (c) of Section VI of the Revised Guidelines states that only efficiency gains that are “rapidly obtained” would be considered by the Commission. This is an unusually high standard relative to international agency practice, which tends to give efficiencies less weight the longer they take to achieve, but does not discount them altogether unless they are “rapidly obtained”. The European Commission, for

\(^{13}\) SAPA Holding-Norks Aluminium case, June 23, 2016.

\(^{14}\) See, for example, Civil and Commercial Federal Court of Appeals of Buenos Aires, Chamber I, December 15, 2015, Clariant Participations Ltd. y otros c/Defensa de la Competencia s/Apel. Resol. Comisión Nac. Defensa de la Competencia (Case 25.240/15/CA2).

example, takes the following approach: “In general, the later the efficiencies are expected to materialize in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely.” 16 A similar approach is adopted in the U.S. where “[d]elayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.”17

The Sections consider that the U.S. and European approach is preferable; many efficiencies can only be realized after a reasonable post-merger implementation phase and efficiency analysis in merger review should account for this. Assigning less weight to efficiencies whose impact may be longer-term and therefore less certain seems appropriate. There should not however be an automatic cut-off where efficiencies are not “rapidly obtained”.

Further, sub-section (c) also states that claimed efficiencies need to “improve the incentives and abilities of the merging firms to compete with other undertakings”. In this respect, the Sections recognize that the benefits of efficiencies are more likely to be passed on to consumers where the merged entity continues to experience competitive pressure. However, to require proof that efficiencies will enhance incentives to compete seems to place a very high (if not impossible) burden on the parties, and could negate the use of efficiencies as a relevant factor in merger analysis.

8. Sections VIII and IX - Vertical and conglomerate mergers

a. General comments

The Sections agree that the Revised Guidelines should remain focused on horizontal mergers between firms that directly compete.

In the U.S., for example, the Non-Horizontal Merger Guidelines have not been revised for over three decades. There are several reasons advanced to explain this: (i) there is no consensus as to how non-horizontal mergers should be analyzed, (ii) any changes could encourage more active enforcement than is merited, and (iii) the administrative costs of revising the current guidelines may be greater than the resulting benefits. The first two of these arguments correctly caution against overly aggressive public enforcement, but the third argument, on the other hand, may underestimate the benefits of revising the guidelines, especially if significant vertical and conglomerate mergers may be expected, in which case a more detailed discussion on vertical and conglomerate mergers in the Revised Guidelines may be appropriate. Such revisions would also provide transparency in terms of the Commission’s policy towards non-horizontal transactions, which would be assist businesses in to assess how the Commission would treat potential vertical transactions. For example, the EU’s 2008 non-horizontal merger guidelines and the UK’s 2010 merger assessment guidelines are models to consider. Both have adopted well accepted principles and mainstream approaches to the assessment of vertical mergers.

In the context of non-horizontal mergers, one of the key issues to consider is what kind of economic theories and analysis to use in assessing the impact of such transactions on the market. The


17 U.S. Horizontal Merger Guidelines, footnote 15.
proposed changes in Sections VIII and IX of the Revised Guidelines expand the discussion of vertical mergers (between firms in a customer-supplier relationship) and conglomerate mergers (between firms producing complementary, neighboring, or unrelated products), but could benefit from more specific guidelines on how the Commission will assess whether a vertical merger would create a risk of anticompetitive market foreclosure. By definition, input foreclosure occurs when the upstream division of a newly-integrated firm either stops supplying inputs to competitors of its downstream division, or continues to sell only at a substantially increased price. Customer foreclosure occurs when the downstream division of a merged firm stops purchasing inputs from competitors of the upstream division and the loss of the downstream division as a customer denies the competitors of the upstream division needed scale or otherwise harms their ability to compete effectively with the upstream division. However, for input or customer foreclosure to be credible, it must be profit maximizing for the merged firm to forgo selling inputs to downstream competitors or to obtain inputs from an external supplier.\(^\text{18}\)

In particular, an analysis of unilateral effects from input foreclosure should examine the incentive and ability of the vertically merged firm to impose upstream price increases (or reductions in service) on downstream rivals for the purpose of shifting sales to the merged firm’s own downstream subsidiary. As a threshold question, a merged firm’s ability to increase prices will depend on its competitive position vis-à-vis other suppliers of the relevant product after the merger (i.e., whether it will have market power). In assessing the profitability of a post-merger price increase, the most important considerations are: the size of the price increases that targeted downstream rivals would pass on, the amount of diversion from them to the merged firm’s downstream subsidiary, and the profitability of the diverted volume. The analysis would compare the potential loss in profits to the merged firm’s upstream unit (because its sales to downstream rivals would decline) to the increased profits from higher upstream and downstream prices as well as increased downstream sales.

b. **Efficiencies**

Section VIII of the Revised Guidelines sets out a detailed assessment of the potential anticompetitive effects of vertical mergers. The Sections believe that Section VIII could also benefit from a discussion regarding some of the main efficiencies that often form a key rationale for vertical integration. Such efficiencies are a common driver of vertical mergers (including conglomerate mergers where the primary concern is potential competition between the merging parties) and any analysis of competitive concerns arising from vertical mergers should give appropriate weight to this rationale.

By way of example, vertical mergers can lead to the elimination of double marginalization. They can also lead to the internalization of distribution efficiencies depending on each party’s distribution footprint. Both efficiencies have the potential to be of considerable benefit to customers.

Section VIII highlights the issue of input foreclosure. The Sections stress that any anticompetitive potential for input foreclosure ought to be weighed against merger-specific efficiencies and against

countervailing market forces, such as (i) the ability of downstream firms to switch to alternative sources of supply and (ii) the existence of buyer power.

It is crucial that, in circumstances where vertical integration may raise competitive concerns, such concerns are assessed in light of the efficiencies that are created by the integration. To this end, the Sections believe that the Revised Guidelines could offer more guidance to assist merging parties in identifying efficiencies from vertical integration, as well as an explanation as to how the Commission will weigh any potential efficiencies against potential anticompetitive effects.

c. Potential competition

The Sections commend the revisions in Section IX of the Revised Guidelines dealing with potential competition. The Revised Guidelines appear to recognize economic models dealing with foreclosure by bundling of a system’s components to explain potential anticompetitive effects of a conglomerate merger, and the Revised Guidelines appear to follow these models (Nalebuff,19 Denicolo20 and Choi21). The Revised Guidelines appropriately recognize, moreover, that a variety of market circumstances may controvert such concerns (e.g., absent dominance, where competitors are reasonably capable of offering product combinations that constitute reasonable customer alternatives).

III. Conclusion

The Sections appreciate this opportunity to comment on the Revised Guidelines. The Sections would be pleased to respond to any questions that the Commission may have regarding these comments or to provide any additional comments or information that may assist the Commission in finalizing the Revised Guidelines.


20 Vincenzo Denicolo, Compatibility and Bundling with Generalist and Specialist Firms, 48 J. INDUS. ECON. 177, 186-87 (2000).