Argentina: Competition Authority

Rodrigo Luchinsky and Lucía Quesada
National Director of Competition Advocacy

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In summary

Guidelines are pieces of soft law that are used by competition authorities to improve predictability, reduce the authority's discretion and help the private sector comply with competition law. During the past two years, Argentina's competition authority has issued four competition guidelines. First, the guidelines for merger control explain the criteria and tools that the National Commission for the Defence of Competition (CNDC) uses to assess horizontal mergers. Second, the guidelines for business and professional associations explain the risks that those organisations bear regarding competition law and what they can do to minimise these. Third, the guidelines for analysis of exclusionary abuse of dominance cases explain when a practice would be considered an abuse of dominance and when efficiencies can be a valid defence. Finally, the guidelines for market studies establish the objectives and methodology that external consultants should follow for market studies commissioned by the CNDC.

Discussion points

- Market definition in merger and abuse of dominance cases
- Efficiency defence
- Compliance by business associations
- Methodology for market studies

Referenced in this article

- Guidelines for horizontal merger control
- Competition guidelines for business and professional associations

- Guidelines for analysis of exclusionary abuse of dominance cases
- General guidelines for market studies

Guidelines are pieces of soft law that are used by competition authorities for two main purposes. On the one hand, they may be used to explain to the private sector how the authority interprets certain aspects of the law and what the private sector can do to comply with competition law. On the other hand, guidelines may also be used to clarify how the authority will enforce competition law and the criteria that it will use to analyse a particular case.

During the past two years, Argentina's competition authority has issued four competition guidelines that serve both purposes: (i) updated guidelines for horizontal merger control; (ii) competition guidelines for business and professional associations; (iii) guidelines for analysis of exclusionary abuse of dominance cases; and (iv) guidelines for market studies.

This article explains each of those guidelines and how they help the private sector comply with competition law and understand competition enforcement in Argentina.

Guidelines for horizontal merger control

In April 2018, the National Commission for Competition Defence (CNDC) updated its guidelines for analysis of horizontal M&A operations.[1] The objective of these guidelines is to clarify the criteria that are used by the CNDC and the Secretary of Domestic Commerce for the analysis of operations notified before the competition authority.

Merger control was introduced in Argentina in September 1999, with the enactment of Act 25,156. In November 2001, following international trends, Argentina's competition authority issued its first guidelines for merger control. Since then, there have been many new developments for merger analysis. Moreover, Argentina has accumulated a great deal of jurisprudence whose systematisation could be useful to lawyers and future merging parties.

To update its merger guidelines, the CNDC reviewed both the provisions included in merger guidelines of other jurisdictions and the main criteria used in its own jurisprudence throughout the years, with the purpose of identifying those elements that were missing from Argentina's 2001 guidelines. Therefore, the new merger guidelines, although maintaining the basic principles and structure of the old guidelines, introduce additional tools for analysis and provide for some flexibility in cases with minor competition effects. In addition, the CNDC submitted a first draft for public consultation in July 2017 and, as a consequence, received comments from many different institutions that contributed to improving the draft. Below, we comment on the innovations introduced in the updated guidelines, as compared to the previous version.

The first set of innovations relates to market definition. The updated guidelines state that not all merger cases will require a market definition. In particular, a market definition will not be needed when 'under several possible and reasonable market definitions' the impact of the operation on competition is minor. They also clarify the role of supply substitution in defining relevant product and geographical markets. Finally, a special reference to market definition in cases of multi-sided or platform markets is made. The guidelines explain that there is no one-size-fits-all criterion for defining relevant markets in platform cases. Instead, depending on the type of platform involved, it may be that each side is considered as a separate relevant market, or that the platform as a whole is defined as a unique relevant market.

As regards market shares and concentration, the new guidelines provide thresholds to explain when an operation is unlikely to cause competition concerns. For instance, an operation in which the combined market share of the merging parties is below 20 per cent should not give rise to competition concerns. Similarly, when the post-merger Herfindahl–Hirschman Index (HHI) is below 2,000 points or when the post-merger increase in the HHI is below 150 points and the combined market share of the merging firms is below 50 per cent, it is unlikely that the operation will lessen competition in the market.

One important innovation of the updated guidelines concerns the possible theories of harm that the CNDC may consider when an M&A operation is analysed. On the one hand, the guidelines make explicit reference to the possibility of using quantitative indicators such as the 'dominance threshold' to assess the potential creation or strengthening of a dominant position or the 'upward pricing pressure index' to assess the potential price effects of a merger in markets with differentiated products. On the other hand, two possible theories of harm that were not included in the 2001 guidelines have been made explicit in this update. First, the theory by which an M&A operation may have an impact on the factors that facilitate collusion, facilitating or hampering tacit or explicit collusion in the market. Second, the softening of competition that may occur when a firm holding a minority share of one firm acquires control of a competing firm.

The updated guidelines also clarify the criteria that the CNDC uses to evaluate possible defences. First, the guidelines establish that, for efficiency gains to be a valid defence:

- they must be directly generated by the merger and cannot be reached through less harmful alternatives;
- efficiencies are likely, will be rapidly reached and will enhance the ability of the merging firms to compete in the market;
- efficiencies are not speculative, vague or unverifiable; and
- cost reductions that imply transfers between two or more economic agents will not be considered as efficiency gains.

Second, in the case of a failing firm's acquisition by a competitor, the CNDC may authorise an operation that restricts competition. To evaluate this defence, the CNDC will take into account:

- whether the difficulties experienced by the failing firm will cause its immediate exit from the market, in a context where its tangible and intangible assets will also disappear;
- whether there are alternative buyers that would generate lower anticompetitive effects in the market; and
- if the failing firm's exit will generate a greater harm to consumers than its acquisition by a competitor.

Finally, although the guidelines refer to horizontal mergers, the final chapters comment very briefly on some criteria for vertical or conglomerate mergers. For vertical mergers, the guidelines explain that if market shares of both the merging firms are below 30 per cent, or if the HHI is below 3,000 points in both vertically related markets, the operation is unlikely to raise competition concerns. As for conglomerate mergers, the exceptional cases in which they may be considered anticompetitive are those in which the operation eliminates a potential competitor from the market or it generates potential market foreclosure due to portfolio effects.

Competition guidelines for business and professional associations

In December 2018, the CNDC published the first competition guidelines for business and professional associations.[2] In this case, the CNDC followed the lead of other competition agencies, such as the Spanish competition commission, the Chilean competition prosecutor and the UK competition authority. The main objective of these guidelines is to draw a line between the freedom of association with legitimate purposes, recognised as a constitutional right in Argentina, and the obligation to comply with competition law. In Argentina, as in many other countries, business and professional associations fall under the scope of Argentine competition law.[3] Argentina's jurisprudence has a number of cases in which business or professional associations have been fined for violating competition law.
These guidelines relate to business associations or groups of companies or individuals with a common economic interest. Business associations are conceived as vehicles to achieve legitimate purposes such as promoting capacity-building activities, collaborating with the government on public policies related to the economic sector they represent, promoting technological progress and disseminating best industry practices. Professional associations, on the other hand, group professionals of the same discipline and have powers to regulate certain aspects of the professional activity. Both business and professional associations, by bringing together companies or individuals that compete in the market, may become a favourable environment for anticompetitive practices and, hence, must be vigilant and ensure compliance with competition law. The

greatest concerns regarding the behaviour of these associations relates to information sharing, price-fixing agreements, market allocation and bid rigging.

The guidelines, therefore, build on international best practices and the CNDC's own case law analysis to provide recommendations to business and professional associations to ensure compliance with competition law. In addition, the associations become allies of the competition authority by promoting member compliance.

An association may be directly responsible for infringing competition law when it recommends certain anticompetitive practices to its members. It may also be indirectly responsible when its own actions facilitate competition law infringement by its members. This would be the case, for example, if the association shares information about prices, production levels or sales that the members then use to devise a collusion agreement. [4]
The guidelines provide some examples of risky situations for an association, such as:

- recommendations to fix prices, allocate markets or clients, rig bids or limit output;
- information sharing among members;
- decisions that affect entry to, or exit from, a market;
- coordination of boycotts;
- decisions about standards; and
- decisions about advertising.

To cope with those risks, the guidelines provide a list of 'dos and don'ts'. Among the 'dos', the CNDC recommends that the associations:

- set up internal policies and compliance programmes and foster the adoption of similar policies among their members;
- avoid purchases, sales or fee collections in the name of, and under instruction of, members;
- adopt best practices for meetings, including detailed agendas and minutes;

- safeguard non-discrimination and impartiality principles for membership; and
- consult with the competition authority in case of doubt.

On the other hand, among the 'don'ts' recommended by the CNDC, associations should not:

- set up rules that prevent members from making independent decisions;
- issue recommendations regarding prices, discounts or output;
- promote or facilitate sensitive information sharing;
- promote boycotts or relationships with non-member competitors; or
- set industry standards with no technical support.

Finally, in terms of information sharing, the guidelines provide criteria to determine whether it is safe to share a particular piece of information. In particular, the guidelines highlight that it is safe to share information about technological progress or best industry practices and aggregate and historical information about market variables, such as prices, production or sales. On the contrary, it is risky to share commercial information, in particular firm-level, recent or future projections.

Guidelines for analysis of exclusionary abuse of dominance cases

In May 2019, the CNDC published its first guidelines for the analysis of cases of exclusionary abuse of dominance.[5] The document provides guidelines regarding practices that may constitute abuse of dominant position as understood by Argentine competition law. The purpose of these guidelines is to clarify the tools and criteria that the CNDC uses to analyse those cases and the factors taken into account regarding whether a particular practice would be legal. Hence, the guidelines are based on the CNDC's experience in investigating abuse of dominance cases since its creation in 1980, as well as similar guidelines in other jurisdictions. The document has also benefited from comments to the first draft, which was submitted for public consultation in September 2018.

Although the document distinguishes between exploitative and exclusionary practices, the guidelines concern only the latter. As a first step, the guidelines list the conditions that a practice must satisfy to

constitute an abuse of dominance in Argentina, which include: (i) the company must hold a dominant position in a relevant market in Argentina; (ii) the conduct must constitute an abuse of that dominant position; and (iii) the conduct must produce harm to the general economic interest. Each of these elements is explained in the document, to provide guidance on how the CNDC interprets them.

With regard to the existence of a dominant position, article 5 of Argentina's Competition Law states that a firm holds a dominant position in a market when it is the only supplier or purchaser in that market or, if not the only one, it is not subject to substantial competition. The guidelines, therefore, clarify the criteria that are used to determine whether competition is substantial. Because a dominant position must be defined relative to a relevant market, the market definition section of the merger guidelines is valid to define markets in abuse of dominance cases. The guidelines explain that a high market share for a sufficiently long period of time is a necessary, although not sufficient, condition for the existence of a dominant position. In addition, the difference between the firm's market share and that of its largest competitor is also relevant, since the smaller the difference, the lower the likelihood of a dominant position being held.

Holding a dominant position in a market is not itself an infringement of Argentine competition law. Only the abuse of such dominant position is illegal. According to the guidelines, for a dominant firm's practice to be illegal, it must have the potential of damaging the general economic interest. This implies assessing the likely effect of the practice on consumers, either directly through higher prices, lower variety or lower quality, or indirectly through lower innovation. In addition, the CNDC will evaluate whether an at-least-as-efficient firm might be able to replicate the practice under investigation. If the answer is yes, the practice would not be considered illegal. The guidelines explain that it is not necessary for the CNDC to prove that the practice has caused actual damage to the general economic interest. Instead, it is enough to come up with a reasonable theory of harm and show that there is no reasonable theory demonstrating that no harm is being caused. In this sense, efficiencies may be a reasonable justification for a particular practice. The CNDC will consider an efficiency explanation valid when efficiencies are a direct consequence of

the practice and cannot be achieved through less damaging means; are likely to occur; and will overcome any potential negative effect of the practice. However, efficiencies will not be a valid explanation if the practice eliminates all or most existing or potential sources of competition.

The last section of the guidelines provides some examples of practices that may constitute an abuse of dominance according to Argentina's Competition Law and provides guidance on how each case would be assessed by the CNDC. Specifically, the guidelines discuss refusal to supply and margin squeeze; tying and bundling; predatory pricing; vertical restraints, including resale price maintenance; and exclusivity arrangements.

Guidelines for market studies

In March 2020, the CNDC approved guidelines for market studies that the CNDC may commission to external consultants.[6] The purpose of the guidelines is to set a framework of analysis and a quality standard that will regulate the relationship between the CNDC and the external consultants. As a first step, the guidelines describe the objectives of a market study. Market studies are intended to provide a diagnosis of how competition works in a particular market or sector and to identify potential barriers to competition. Once the barriers have been identified, the consultant will make a proposal of potential changes in the market that would be needed to overcome those barriers. The proposal may consist of:

- regulatory changes, when the study finds one or several pieces of regulation that distort competition in the market;
- changes in how one or several market participants behave or conduct business; or
- new norms or regulations, when the study identifies certain market failures that may be corrected through an appropriate regulation.

In addition to the general objectives stated above, the guidelines also establish specific objectives that would contribute to the framework of analysis, such as:

- the identification of the components of the value chain, including the main products, economic agents and factors that determine demand and supply;
- the definition of relevant antitrust markets and the potential market power in each of these;
- an estimation and recent evolution of concentration levels;
- competition assessment of the relevant regulatory framework;
- collection, systematisation and analysis of sector-related data; and
- analysis of vertical and horizontal relations among economic agents in the market.

As for the methodology for analysis, the guidelines are based on international best practices to produce evidence of the competitive conditions that prevail in the sector under analysis. On top of the specific objectives, the market study will review and analyse the experience of other competition agencies in cases related to the sector under analysis, including antitrust investigations, mergers and acquisitions and market studies, as well as studies of other international organisations, such as the Organisation for Economic Co-operation and Development, that could provide additional insight to the case.

The guidelines also require the external consultant to prepare a work plan together with a calendar of activities and deadlines for deliverables that will have to be approved by the CNDC at the beginning of the project. Deliverables consist of a preliminary report, a final report and a presentation before the CNDC's staff. Finally, the guidelines establish a general structure for market studies to ensure consistency across different studies.

Conclusion

Predictability is a fundamental asset for competition authorities because it provides clarity and reduces uncertainty on how the law will be enforced. Competition guidelines constitute one tool to increase predictability and limit the authority's discretion. Argentina has followed the lead of other competition agencies in drafting competition guidelines. In addition to the four new guidelines discussed in this article, the CNDC has two additional projects in the pipeline: a document providing guidance on M&A notification

and exceptions to notification; and a document explaining how the CNDC carries out market investigations and what is to be expected from those procedures.

Notes

[1]CNDC, Argentine Merger Control Guidelines, April 2018, available at **www.argentina.gob.ar/sites/default/files/lineamientos_concentraciones_economicas.pdf**.

[2]CNDC, Competition Guidelines for Business and Professional Associations, December 2018, available at **www.argentina.gob.ar/sites/default/files/guia_para_camaras_y_asociaciones.pdf**.

[3]Article 4 of the Argentine Competition Law establishes that the provisions 'are applicable to any individual or firm, state-owned or privately owned, for profit or not-for-profit, engaged in economic activities within all or part of the country and those engaged in activities abroad so long as their actions and agreements may have effects in the domestic market'.

[4]In relation to the cartel in Argentina in 2005, the cement business association was also fined for providing the means to information sharing that was crucial for the design and enforcement of the cartel. See Resolution SCT 124/2005, dated 25 July 2005, available at **http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/513_1.pdf**.

[5]CNDC, Guidelines for the Analysis of Cases of Exclusionary Abuse of Dominance, May 2019, available at **www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante.pdf**.

[6]CNDC, General Guidelines for Market Studies, approved through CNDC Disposition 8, dated 6 March 2020, available at **www.argentina.gob.ar/sites/default/files/lineamientos_generales_para_estudios_de_mercado.pdf**.

Rodrigo Luchinsky

National Commission for the Defence of Competition

Rodrigo Luchinsky has been president of the CNDC since January 2020. He holds a doctorate in commercial law from the University of Buenos Aires (2011) and an LLM from Columbia University School of Law (New York, Leo S Rowe Pan American Fund Fellow of the Organization of American States, 2004) and has an honours degree in law from the University of Buenos Aires (2001). He is a professor of civil and commercial societies and elements of commercial law at the University of Buenos Aires Law School and a professor of financial regulation at the School of Economics and Business of the National University of San Martin. He has written several publications, including ; ; and . In addition to practising law, he has exercised functional and professional responsibilities in the government of the City of Buenos Aires, the Ministry of National Security, the General Inspectorate of Justice and the National Securities Commission.

Lucía Quesada

National Commission for the Defence of Competition

Lucía Quesada is the national director of competition advocacy at the CNDC. She was a senior economist at Compass Lexecon from 2012 to 2016, where she worked on advising clients on competition and regulatory issues, as well as on damages assessment. She worked in several economic sectors, such as electricity, ports, oil and gas, steel, waste management, and food and beverages. She was an assistant professor of economics at the Torcuato Di Tella University from 2005 to 2012 and at the University of Wisconsin-Madison from 2003 to 2005. She has authored several publications related to competition and regulation, including papers on certification intermediaries, reputation as a collusion deterrent, petroleum contracts and contract renegotiations. She has been a graduate and undergraduate professor of microeconomics, industrial organisation and contract theory at the Torcuato Di Tella University, the HEC School of Management, the University of Wisconsin-Madison, the University of San Andrés and the University of Buenos Aires. She holds a PhD in economics and an MA in economic theory from the University of Toulouse, an MA in

economic policy from the University of Buenos Aires and a degree in economics from the University of Buenos Aires.

Rodrigo Luchinsky

View full biography
Author | president
rluchins@produccion.gob.ar

National Director of Competition Advocacy

Lucía Quesada

View full biography
Author | National Director
lucia.quesada@gcrauthor.com

National Director of Competition Advocacy