COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA

DRAFT VERSION OF THE NEW ARGENTINE MERGER CONTROL GUIDELINES

(English version)

Preliminary version for comments

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PRELIMINARY NOTE

The Argentine Merger Control Guidelines were written in 2001 in order to facilitate the interpretation and enforcement of Act N° 25,156, and were passed by Resolution 164/2001 of the Secretary of Competition, Deregulation and Consumer Protection of Argentina. After 16 years of work, the National Commission for the Defense of Competition has considered useful to revise the abovementioned guidelines, in order to update them and to include some criteria defined by that Commission, and also some new concepts that have appeared in the international scene.[*]

For this purpose, this Commission appointed its Department of Economic and Legal Studies to make a bibliographic survey about that topic, and to revise the characteristics and provisions included in the merger guidelines that exist in other countries. The survey included many different jurisdictions, such as the European Union, Germany, the United Kingdom, the United States of America, Brazil, South Korea, Australia and the Common Market of Eastern and Southern Africa, among others.

This analysis allowed identifying a series of important elements that were not present in the guidelines approved by Resolution 164/2001. Additionally, in a second round, the research included the identification of the main criteria used in the opinions issued by this Commission throughout the years, which were not included in the guidelines, either.

In the process of revision of the Merger Control Guidelines, this Commission nevertheless considered that it was important to keep the original structure of Resolution 164/2001, since the proposed amendments did not imply a radical change in the evaluation criteria but a continuation of the spirit of those guidelines. That is why, in this draft version put under consideration of the general audience, the modifications to the original text are highlighted in yellow, so that the reader can clearly identify the proposed changes, and the parts of the text that keep their original wording.

This revision of the Merger Control Guidelines is part of a process of general update of the procedures for merger analysis carried out by the National Commission for the Defense of Competition. In the future, this process will also include issuing a fast-track procedure for merger analysis, and a series of guidelines about the definition of the concept of merger, the calculation of business turnover thresholds to notify a merger, the corresponding due dates for notification, the exemptions to notify a merger, and other issues derived from the Argentine antitrust merger case law.

Esteban M. Greco
President of the National
Commission for the Defense
of Competition, Argentina

[*] These guidelines have been translated into English to facilitate their reading by non-Spanish speaking readers. The only official version of the Argentine merger control guidelines, however, will be the Spanish version.

Contents

I. INTRODUCTION

The aim of this document is to describe the general criteria that will be followed by the enforcement authority of Act 25,156 (the "Enforcement Authority"), for the analysis of mergers notified under the provisions of that act and its regulation. While these general guidelines are not binding for the enforcement authority, they will make their decisions more predictable for individuals and firms.

Section 7 of Act No. 25,156 prohibits those mergers "whose object or effect is or may be to restrict or to distort competition, so that it can cause harm to the general economic interest".

Most mergers, however, do not cause any harm to the general economic interest. This happens because mergers often reduce the costs of the merging firms, or improve the quality of their products or their services. Notwithstanding, sometimes a merger may cause harm to the general economic interest when it creates or strengthens market power in a way that is capable to restrict supply and/or to increase the price of a good.[1] This is because all the units of a good consumed in a competitive market economy generate a positive net social value. Society values these consumed units more than the cost needed to produce them; otherwise, the goods would not be consumed, since the price that consumers would be willing to pay for them (which reflects the consumers' valuation) would be less than the price asked by producers (which, in a competitive environment, reflects the cost of producing a good). Therefore, when the supply of a good is restricted by the exercise of market power, the units that previously generated a positive net social value are no longer consumed, and society as a whole is damaged.[2]

In order to determine whether the market power of the undertakings involved in a merger increases as a result of that merger, the evaluation will mainly be oriented towards competition through prices.[3] Specifically, the analysis will be made to determine whether prices are likely to be higher as a result of the merger.

Two typical hypotheses that imply a possibility to exercise marker power and to harm consumers as a result of a merger are the following:

— When a merger creates or strengthens the market power unilaterally enjoyed by the merging firms. In this case, the merging firms will be able to influence the prices and quantities that are traded in the market. Given this, these firms will be able to increase their profits through an increase in the prices of the relevant products (unilateral effects).

— When a merger generates favorable conditions so that, in coordination with other undertakings that participate in the market, the merging firms have the possibility of exercising market power (coordinated effects).

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[1] However, there are cases in which a merger strengthens the market power of a firm, but at the same time generates efficiency gains such that the post-merger price ends up being lower than the pre-merger price. In such cases, it is considered that the merger does not create harm to the general economic interest. This exceptional situation will be discussed in Chapter VI, which deals with the issue of efficiency gains.

[2] The general economic interest could also be adversely affected in the opposite case, i.e., when a merger strengthens the market power of a group of buyers, obtaining supra-competitive profits at the expense of their suppliers.

[3] In order to simplify the presentation, these guidelines will refer to the impact of the merger on market prices. However, when a merger takes place within a market in which the main dimension of competition is not the market price (e.g., markets in which firms compete mainly through the variety of their products, or through innovation in their services or quality levels), the impact of the merger on these non-price variables will also be considered, in order to capture the main benefits due to the competitive process.

It is therefore possible that a merger, which does not allow firms to unilaterally increase prices, facilitates price coordination in the relevant market. This may occur because of the reduction of the number of competing undertakings that a merger generates. The (explicit or tacit) coordination of prices between firms depends on specific conditions for each market. For this reason, it is important to analyze the relevant market conditions that, in each case, may facilitate the design and successful implementation of pricing strategies.[4]

When analyzing the impact of a merger on the general economic interest, one must also take into account the possible efficiency gains derived from that merger (such as the creation of economies of scale or scope),[5] and the benefits that those gains imply for consumers in Argentina.

Mergers can be classified as horizontal, vertical or conglomerate.[6] A merger is horizontal if the merging firms act in the same market as sellers or buyers of substitute goods or services. Instead, a merger is vertical if the merging firms act in different stages of the production or provision of the same good or service. Note that this definition of a vertical merger does not require that the merging parties have an effective business relationship between them (i.e., it is not necessary for one party to actually be a customer of the other party). Finally, a conglomerate merger implies a situation where the merging firms are not related neither horizontally nor vertically.[7] In general, these guidelines refer to horizontal mergers, but they are also applicable to other types of mergers. Particular considerations are made in this respect in Chapters VIII and IX.

Another group of transactions which will receive a separate treatment by the Enforcement Authority are the mergers with minor impact on competition. Those mergers will be analyzed using a fast-track assessment procedure, which is outlined in Chapter X of these guidelines.

II. MEASUREMENT OF CONCENTRATION IN THE RELEVANT MARKET

II.1. MARKET DEFINITION

In order to establish whether a merger lessens competition, it is often necessary to delineate the market that will be affected by the merger. This market, which is called the relevant market, has two dimensions: the product market and the geographic market.

In some cases, however, a merger can be evaluated without need to define explicitly the relevant market affected by it. This situation usually occurs in cases of mergers with minor impact on competition, since in those cases, under several possible and reasonable market

[4] The information to be used for determining whether a market favors the existence of concerted actions will include considerations regarding the degree of information available to the different market competitors, the most common pricing and marketing practices, the homogeneity of the relevant product, and the characteristics of the buyers and sellers that operate in that market.

[5] Economies of scale arise when the unit cost of production of a good decreases as the quantity of that good increases. Similarly, economies of scope arise when the cost of jointly supplying two different goods is smaller than the sum of the costs of independently supplying each of the two goods. The latter concept is applicable, for example, to cases where the merging firms have complementary production lines.

[6] Strictly speaking, if the merging firms supply more than one product, then a merger can be horizontal and vertical at the same time.

[7] For example, a steel producer that acquires a food distribution company.

definitions, the merging firms' shares are likely to be so small that the merger is not capable of affecting competition.

The relevant product market

The relevant product market for a merger includes all those goods and/or services that are considered substitute for those people who buy those goods or services, given the characteristics of the product, its prices, and the purpose of its consumption. If the good produced by the merging firms is substitutable by other goods, then the market power of those firms will be limited by the behavior of consumers. Indeed, those firms will not be able to unilaterally increase the price of their product without noticing a significant transfer of their consumers to other alternative goods. This is because substitute goods compete to capture consumer demand, and this implies that all those goods should be considered to be part of the same market.

In order to consider the possible response of consumers to an increase in the relative price of a good or service, the following elements, among others, will be taken into account:

a) evidence that consumers have shifted or may shift their consumption to other goods in response to a change in relative prices or in other relevant variables (e.g., quality);

b) evidence that producers develop their business strategies assuming that there is demand substitution between different products when there are changes in the relative prices or in other relevant variables;

c) the time and cost implied for consumers to shift their demand to other goods.

After surveying the abovementioned information, the relevant product market will be defined as the smallest group of products on which a hypothetical monopolist of all of them would find profitable to impose a small but significant and non-transitory increase in price.[8]

Prices are particularly important for defining relevant product markets. In principle, merger analysis must consider current market prices at the time of the merger. However, if the price of a product has been set in a monopolistic environment, then consumers are likely to see other goods (of higher utility) as substitutes for that product, provided that those goods have been priced competitively. But if the product under analysis had also been priced competitively, then the other goods would not have been perceived as substitutes by consumers. In such a case, a proper product market definition should not include the goods that are substitutes for the analyzed product only because that product was priced in a supra-competitive manner.

The following is an example of the procedure to be used in order to define a relevant product market. Let us suppose that two firms producing soft drinks decide to merge, and this merger generates the need to analyze whether different flavors of drinks belong to the same market. The practical question to ask is whether consumers of flavor A would be willing to consume another flavor in a scenario of a permanent increase in price of 5% to

[8] Although the exact concept of a small but significant and non-transitory price increase may vary according to the special features of the analyzed market, it can be considered that, in general, such an increase can be measured using a range of 5% to 10%, which is kept for a period of at least one year.

10% for that flavor. If a considerable number of consumers change their consumption to the flavor B soft drink, so that the price increase of flavor A is not profitable because of this loss in sales, then the relevant product market must include at least flavors A and B. This process must continue until the permanent increase in prices in the whole set of goods (in this case, flavors A and B) does not cause a significant change in the quantity demanded by consumers, and therefore the price increase becomes profitable.

In addition to substitution on the demand side, substitution on the supply side may also be taken into account for market definition. This requires that there are undertakings which have the ability to redirect their production and to supply goods that are similar to those of the merging firms, in response to a small but significant and non-transitory increase in prices. When this occurs, then the additional output supplied may discipline the competitive behavior of the merging firms.

The relevant geographic market

Once the relevant product market has been delineated, the relevant geographic market should be defined. The latter is the smallest region within which it would be profitable for a single supplier to impose a small but significant and non-transitory increase in the price of a product.

It is particularly important for the definition of a relevant geographic market to analyze the existence of substitution on the demand side. If consumers in the area in which the merging firms operate can purchase the good in a nearby area, then both areas can be considered as part of the same market.

Supply-side substitution criteria may also be applied, especially when there is a firm that supplies its products in a given geographic area but can easily enter into another area in which other undertakings operate. In those cases, it may be appropriate to consider both areas as a single relevant geographic market.

The necessary information required in order to define a relevant geographic market, may include the following elements, among others:

a) evidence that consumers have shifted or may shift their consumption to other locations in response to a change in relative prices or in other relevant variables;

b) evidence that producers develop their business strategies assuming that there is demand substitution between different locations when there are changes in the relative prices or in other relevant variables;

c) the time and cost implied for consumers to shift their demand to other locations.

After surveying the abovementioned information, geographic market definition will begin by considering the regions in which the merging firms operate. After that it will be analyzed the existence of demand substitution between the firms' products or services and the goods supplied in other locations.

It should be taken into account that geographic market definition must be made for each particular case. Thus, there is neither a general rule nor a single procedure to be used for this purpose.

While in most cases the relevant geographic markets have a national or local dimension, there are situations when the relevant geographic market has a supra-national dimension. This occurs, for example, when there is a significant level of parallel imports and exports between one country and another one (so that the firms operating in the first country allocate a substantial volume of their sales in the other country, and the firms operating in the second country are also significant suppliers in the first country).

Multi-sided platform markets

When the merging firms participate in multi-sided platform markets, some additional problems regarding market definition may appear. This is due to the fact that these platforms are markets in which participants belonging to different "sides" do not interact directly between each other (and, instead, they do so using the platform). In addition, the platform itself is the one that allows for a process of value generation, through the interaction between participants that are on different sides of that platform. For example, in a market of real estate brokerage services, on one side of the platform there are some real estate sellers, while on the other side of the platform there are buyers interested in acquiring such real estate (and their connection with the sellers is established through the real estate brokers).

Depending on the type of platform involved, it is possible that each side is considered as a separate relevant market, or that the market is defined as the platform itself. This is because substitution between different suppliers on the same platform (or between different platforms) may be very different for participants on one side or the other, and this is an argument that favors the idea of taking each side of the platform as a different market.[9]

II.2. IDENFITICATION OF THE UNDERTAKINGS THAT OPERATE IN THE RELEVANT MARKET

After defining the relevant market, it is important to identify the undertakings that operate in it. Firstly, the list will include all the firms that produce or sell goods of domestic or foreign production in the relevant market at the time of the merger.

Additionally, other firms that are not supplying the product at the time of the merger can also be included, provided that they can enter the relevant market with relative ease if favorable conditions occur (for example, after an increase in the price of the product). Those undertakings will be called “immediate potential competitors”, and will be used to define the degree of supply-side substitution.[10]

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[9] For example, the markets for newspapers and magazines can be seen as platforms in which participants are readers (on one side), and advertisers who publish advertisements (on the other side). From a reader's point of view, it may happen that two different publications have a degree of substitution that is greater or smaller than the degree of substitution perceived by an advertiser (who is evaluating to publish an advertisement in one of those newspapers or magazines).

[10] An example of supply-side substitution to define the relevant market is paper. This product is supplied in different qualities, from standard paper to high quality paper to print art books. From the point of view of demand, paper of a certain quality cannot generally substitute paper from another quality, since each quality corresponds to a specific use (e.g., an art book cannot be printed using poor quality paper). However, papermaking plants can easily and quickly adjust quality in the production of paper. If there are no problems in the distribution of paper of different qualities, the relevant market definition can include paper in general and not each quality of paper as a separate market. In this way, all paper

Entry will be understood to occur with relative ease if no major sunk costs have to be incurred in order to enter a market.[11] Conversely, firms that face significant difficulties to sell the product in the relevant market will not be considered immediate potential competitors,[12] and the same will occur with firms that must build new production or distribution facilities to compete in the same market.

There may also be potential competitors that cannot easily enter the relevant market because they must incur in sunk costs or because they need more time to enter. Those potential entrants will be considered as more distant potential competitors, and their inclusion in the analysis will be explained in Chapter IV (in a section about the existence of entry barriers).

II.3. MARKET SHARE CALCULATION

The market shares of all the undertakings that are currently participating in the relevant market, and those of the firms identified as immediate potential competitors, will be calculated on the basis of their level of sales, their production, or the production capacity that is or could be allocated to the relevant market.

Market shares may be expressed in monetary units (revenue shares) or in physical units (volume share). They can also be measured using production capacity or reserves (the latter in the case of natural resources). The choice of one way or another to calculate shares will depend on the best possible way to estimate the competitive ability of firms, given the particular characteristics of the market under analysis.

Revenue shares will generally be used in those cases in which firms engage in product differentiation. Volume shares, conversely, will generally be used in cases where the product is homogeneous, and the undertakings are distinguished mainly on the basis of their buyers or groups of buyers. On the other hand, the installed capacity of production will be used as a complementary data, in those cases in which there is excess capacity, if this information seems to be more accurate to reflect the relative positions of firms in the relevant market.

The time dimension of the data used can also vary due to the characteristics of the market. Relevant information can be collected monthly, annually, or it may come with a frequency that is deemed necessary in order to adequately reflect the main variations in market shares.[13] Generally, the relevant data to be used covers a few years before the analyzed merger, but this may vary according to the nature of the relevant market.

Market share analysis will typically be carried out assuming that a merger between firms with reduced market shares is very unlikely to generate competition problems that cause harm to the general economic interest. This is why, in general, it can be considered that a

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qualities should be included in the definition of the relevant market, and their sales could be added in order to estimate the size of the market and the shares for each papermaking firm.

[11] Sunk costs are those derived from the acquisition of tangible and intangible assets whose cost cannot be recovered outside the relevant market; i.e., assets whose residual value is practically zero outside the relevant market.

[12] For example, if the required investment in advertising to establish a brand is significant, it can be understood that the introduction of new competition is not feasible in a relatively short period of time.

[13] For example, in markets where sales are sporadic, it may be appropriate to estimate market shares using time periods that are longer than one year.

merger between undertakings with a combined market share of less than 20% should not give rise to any concern in terms of reducing competition, since in that situation there is a whole set of non-merging firms that covers more than 80% of the relevant market.

II.4. CONCENTRATION AND MARKET SHARES

The level of concentration in a market is a function of the number of undertakings that participate in it and their corresponding shares. A high degree of concentration in the relevant market, or a significant increase in concentration due to a merger, is a necessary but not a sufficient condition for that merger to be challenged. On the contrary, if concentration in the relevant market fails to reach sufficiently high levels after the merger, then existing competition should in general be able to limit the exercise of the market power that the merging firms may acquire.

The main tool designed to measure market concentration is the Herfindahl-Hirschmann Index (HHI).[14] This index is defined as the sum of the squares of the firms' market shares, and it has the property of giving a greater relative weight to the shares of the largest firms in the market. HHI values may vary from 0 (completely fragmented market) to 10,000 points (monopoly market).

In order to determine the extent to which a merger may lessen competition in the relevant market, pre-merger and post-merger concentration levels will be analyzed. Additionally, the recent past trend of concentration levels can also be assessed. However, if it is believed that concentration levels underestimate or overestimate the potential impact of a merger,[15] then concentration analysis shall be supplemented with reasonable predictions regarding changes in the relevant market in the near future.

It is very unlikely that a merger lessens competition in a market where the post-merger HHI level is below 2000 points, since that implies a level of concentration which is equivalent to the concentration of a market with five equally important undertakings.

Another situation that can also be used to rule out possible anticompetitive effects refers to cases with small increases in the value of the HHI. If the HHI increases less than 150 points, this can also be considered as an indicator that the merger under analysis does not raise competition concerns. This is because the effect of that merger would be equivalent to the one of a merger between two firms whose shares were 8.7% each, and it would therefore imply the emergence of a new undertaking whose total share would not exceed 18% of the market.

The abovementioned criteria can also be combined to rule out anticompetitive effects in some circumstances. It can be considered that competition problems are unlikely if the joint market share of the merging firms is less than 30% and, in addition, one of the following two conditions is met:

— the post-merger HHI is below 3000 points, or

[14] This index is named after economists Orris Herfindahl and Albert Hirschman, who proposed similar indicators in two different papers published in 1950 and in 1945, respectively.

[15] For example, HHI can overestimate the impact of a merger in a market in which technological innovation is pervasive, especially when this implies a high obsolescence rate for the goods and services currently traded.

— the HHI increase is less than 250 points.

III. EVALUATION OF POSSIBLE THEORIES ABOUT THE HARM DUE TO A MERGER

Besides analyzing changes in market concentration, there are certain additional factors that will be considered in order to determine the competitive harm that a merger might generate. Those factors come from different theories about the harm that a merger is able to produce to competition, thus creating damage to the general economic interest. The theory of harm that the Enforcement Authority will consider in each case will depend on the type of merger under analysis, and also on the characteristics of the relevant market.

In general, it can be considered that the likely negative effects of merger come from the emergence of either unilateral or coordinated effects.[16] Those effects will be separately analyzed in the following sections of this chapter.

III.1. UNILATERAL EFFECTS

Creation or strengthening of a dominant position

The creation or strengthening of a dominant position in a certain market is one of the main unilateral effects that may arise from mergers. According to Section 4 of Act No. 25,156, an undertaking has a dominant position "when it is the only buyer or seller in a certain market, or when, not being the only one, it does not face substantial competition". Additionally, Section 5 of Act No. 25,156 mentions several criteria to establish the existence of a dominant position, such as low substitutability between products, regulatory constraints that limit access to other products in the market, and existence of countervailing power from the competitors of a certain firm.

A dominant position can also be evaluated using quantitative criteria based on firms' market shares.[17] Those criteria can be used, for example, to dismiss cases of creation or strengthening of a dominant position when none of the merging parties is the largest firm in the relevant market. Moreover, those criteria can also be used to analyze cases in which a merger generates a change in the relative distance between the largest and the second largest undertaking in a market.

Substitution between goods in differentiated product markets

Another unilateral effect on competition that may possibly be significant is the one that arises from substitution between goods in differentiated product markets. In those markets,

[16] In fact, this is the case for horizontal mergers. In vertical and conglomerate mergers there could also be cases of anticompetitive market foreclosure, as will be seen in Chapters VIII and IX of these guidelines.

[17] One of these criteria has been proposed by economists Arie Melnik, Oz Shy and Rune Stenbacka ("Assessing Market Dominance"; *Journal of Economic Behavior and Organization*, vol 68, pp 63-72, 2008). It establishes a "dominance threshold" based on the observed market shares of the two largest firms in the market.

there are differences between the products sold by different suppliers, which may be due to their geographical location, their brand name, or other characteristics of those products (technical specifications, quality, service level, etc.).

In markets with differentiated products, the analysis will consider the possibility that a merger creates or strengthens the merging parties' market power when the products supplied by those parties are close substitutes. In contrast, if those products are distant substitutes, the possibility of adverse competitive effects is reduced, even if the merging firms operate in the same relevant market.

An example of this type of phenomena occurs in markets with quality differentiation. A merger between suppliers of products of similar quality (e.g., two luxury automobile brands) is likely to produce a larger competition effect than a merger between suppliers of products of different quality (e.g., a luxury automobile brand and a low-cost automobile brand).

In order to measure the effect of mergers on differentiated product markets, several quantitative tools can be used, such as the Upward Pricing Pressure Index (UPPI)[18]. This index seeks to estimate the effect of a merger on the prices of the different products sold by the merging firms in a market, in order to approximate those firms' incentives to increase prices after the merger. If the value of this indicator is negative for all the analyzed products, then it can be considered that the merger is not likely to generate a significant competition risk in the market.

One of the most important elements of the UPPI formula is the so called "diversion ratio". This ratio measures the proportion of lost sales of a product, due to a possible price increase, which is captured by the other product. Thus, a larger diversion ratio indicates a higher probability that at least one of the merging parties will unilaterally increase prices, since a significant part of that diversion will induce an increase in the sales of the products supplied by the other merging party.

Characteristics of the remaining competitors in the relevant market

Another element to be considered when analyzing unilateral effects is whether, after a merger, the individual initiative of the remaining competitors in the market will be able to constrain the exercise of market power by the merging firms. In order to do that, the most common business practices used in the relevant market will be evaluated, especially those related to pricing and discount policies, innovation in marketing and distribution techniques, and provision of complementary services. In those markets where competition in any of those variables is significant, and where the majority of competitors use them, the potentially harmful effects resulting from a merger may be mitigated. Conversely, in those markets where competitors tend to accept stability and tend to follow the leading firms' strategies, the potentially harmful effects resulting from a merger will probably be aggravated.

[18] This indicator was originally proposed by economists Joseph Farrell and Carl Shapiro ("Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition"; *B.E. Journal of Theoretical Economics*, vol. 10, no. 1, 2010), and derives from a formula that includes the margin between the price and the cost of the merging products, the relative prices of those products, the efficiency gain induced by the merger, and the diversion ratio between firms.

Removal of a vigorous and effective competitor

Whenever a merger may result in the removal of a “maverick” (i.e., a competitor whose behavior is likely to be vigorous and effective in the relevant market), the potential harm to the general economic interest will be aggravated. It should be noted that it is not necessary for an undertaking to be one of the largest firms in the market in order to be a maverick, since this characteristic is mainly related to the disruptive role that the firm exerts on the current degree of competition. In order to determine if the removed competitor is vigorous and effective, the following considerations will be analyzed:

i) the degree of innovation exhibited by the removed competitor in comparison to the supplied products, the distribution and marketing techniques, etc.,

ii) the aggressiveness of the pricing and discount strategies used by the removed competitor;

iii) the removed competitor's history regarding its behavior towards the price leadership of another undertaking, or its adherence to certain attempts to stabilize the market;

iv) the evaluation of the behavior of the removed competitor, in order to determine whether it acts as a competitive force in a market prone to interdependent action;

v) the evaluation of the recent performance of the removed competitor, in order to determine if it has increased its market share or if it holds a position that allows it to do so in the near future.

Monopsony power

Although the most common form of market power exercise that occurs as a result of a merger is related to the monopoly power of a firm or group of firms (that is, to their market power as sellers), it is also possible that a merger creates or strengthens the monopsony power of the participating undertakings (that is, their market power as buyers). In particular, a monopsony represents the "mirror case" of a monopoly, since in that market structure there is a single buyer that faces several smaller sellers. In this case, unlike monopoly, monopsony tends to generate a downward pressure on prices received by the monopsonist's suppliers, and this may have an ambiguous impact on the general economic interest.

To determine the relative importance of a buyer with monopsony power, it is possible to compare the volume of their purchases of the relevant product with the total amount of purchases of that product in the market. As a general rule, it is unlikely that the merging parties will exercise monopsony power if they do not have a dominant position as buyers of the product under analysis. In addition, it must be considered whether a merger can lead to the exit of suppliers from the market, whether it can reduce the production of the concerned input, and whether it is possible that it generates a reduction in the investment made in new products or production processes, in the short run or in the long run.

III.2. COORDINATED EFFECTS

Explicit and tacit collusion

The main coordinated effects that a merger can generate are those that facilitate collusion between undertakings operating in the same market, either explicitly or tacitly. Explicit collusion consists of an agreement between competitors for fixing prices or market shares, or allocating customers, or engaging in any other type of conduct that involves an agreement not to compete. This type of coordination is generally a violation of Section 1 of Act No. 25,156.

Tacit collusion, on the other hand, is an expression that refers to a market equilibrium in which competitors, even without an agreement, behave as if such an agreement existed. Each firm, however, chooses price and quantity individually, so in principle tacit collusion is not punished under Act No. 25,156. This does not mean, however, that tacit collusion cannot restrict or distort competition in a market, and therefore, in order to assess the effects of a merger, it may be relevant to analyze whether that merger facilitates or deters the occurrence of tacitly collusive behavior.

In general, the probability of collusive behavior increases when a market possesses certain characteristics that facilitate agreements between competitors, and/or the sustainability of those agreements. These characteristics include the number of firms in the market, the similarity between their scales of production, and the homogeneity of the product supplied by them.

A merger may have influence on the abovementioned characteristics, making collusion easier or more difficult. For example, a horizontal merger typically reduces the number of firms in a market, but it may also influence the scale of the firms operating in that market, making them more or less similar to each other.[19]

Relative size of firms

The relative size of firms should be considered when analyzing a merger. If there is an undertaking with a high market share together with several other undertakings with smaller shares, then the largest undertaking can behave as a market leader, and use that position to lead a price-fixing agreement. This possibility is reinforced by the "punishment ability" of the largest firm. Conversely, a merger among small firms can increase competition, because it reduces asymmetries among undertakings, and it may lessen the leading position of the largest undertaking and it may allow for the emergence of a vigorous competitor. Due to that, the specific conditions of each market must be analyzed, in order to determine if harmful effects are likely to occur.

[19] The first situation happens, for example, when the merger creates a new undertaking whose scale of production is similar to that of the firm with the largest market share. The second situation may occur if the largest firm acquires a smaller one, and thus increases the asymmetry of scale between that firm and the remaining competitors.

Information flow in the relevant market

If the likely competitive harm arising from a merger is mainly related to the possibility of concerted actions between competitors, the level of the information flow in the relevant market will have to be assessed. For the purpose of this guidelines, information flow is defined as the amount of information concerning competitors that any market participant can easily access (e.g., information on price levels and sold quantities, on the degree of innovation, on the quality and characteristics of the products or services supplied by firms, etc.). The relevance of this factor arises from the difficulty to design and to implement an agreement between competitors in markets with low information flows, since this condition hinders the ability to detect and "punish" violations to such an agreement.

Usually, the information flow in a market increases with the existence of the following aspects: “basing point” pricing schemes, public availability of prices, homogeneity of the relevant product, and information exchanges between competitors about prices and production levels, innovations, etc. (through trade associations or specialized publications).

Output capacity utilization

The expression “excess capacity” refers to the difference between the maximum level of effective production by the undertakings operating in a market, and the quantity that is actually produced and sold in that market over a given period of time. A market that has significant excess capacity is less likely to promote tacit collusion, particularly if small firms hold a considerable share of that excess capacity. In this case, small firms have strong incentives to increase production whenever large firms attempt to restrict supply and thereby increase prices in the market. However, under certain circumstances, excess capacity can serve as an incentive to sustain a collusive horizontal agreement, since the consequences of an eventual punishment would be more burdensome. For this reason, the level of capacity utilization must be analyzed for each particular case.

Minority shareholding

Although mergers refer to situations in which one or more undertakings come under common control (and this typically implies an acquisition of a majority shareholding), there are cases wherein holding a relatively small share in other firms is capable of negatively affecting the incentives to compete.

First, holding a minority share in the capital of a firm can entitle another undertaking to learn and to express opinions on the activities and decisions of that firm. This influence can be used to induce the firm to compete less aggressively, or to coordinate its behavior with other firms controlled by the group holding the minority position.

Second, minority shareholdings may create incentives not to compete effectively. This effect comes from the fact that part of the sales that are lost by increasing the prices of the products supplied by an undertaking are redirected towards the firm in which that undertaking has a minority share, and this may result in a less intense competition between

them (compared to a situation in which there are no cross-shareholdings between the firms).

Finally, holding a minority share in another undertaking may grant access to competitively sensitive information about the latter firm. This factor can favor explicit or tacit coordination between those firms.

IV. BARRIERS TO ENTRY IN THE RELEVANT MARKET

Even if a merger significantly increases the level of concentration in a market, it may not adversely affect the general economic interest if there are no barriers that prevent the entry of new competitors into that market. The threat of entry of new competitors constrains the ability of the existing firms to raise their prices. However, for the threat to be credible, it is necessary that entry can occur in a timely, likely and sufficient way.

Identification of new competitors begins with an evaluation of all the undertakings that seem to have a competitive advantage to enter the relevant market, such as:

— firms that sell the relevant product in geographic areas surrounding the analyzed market;

— firms using a similar technology to that necessary to supply the relevant product;

— undertakings operating in related "upstream" or "downstream" markets; and

— firms using similar distribution and marketing channels, or similar promotion and marketing techniques, than the ones used in the relevant market.

Once these undertakings have been identified, entry barriers' analysis requires a survey of the necessary effort that a firm must make to produce and/or to sell the relevant product, including elements related to planning and designing product launching, to establishing the necessary managerial capacity, to procuring legal authorizations, to installing production or marketing facilities, to spending in advertising and promotion, and to satisfying quality requirements demanded by the legal regulatory framework. Recent experience concerning the entry of new competitors in the relevant market will also be considered as a point of reference for this analysis.

In particular, the three fundamental aspects to be evaluated regarding the possible entry of new competitors into the relevant market will be the following:

a) Timeliness

First, the analysis will assess the time that a competitor needs to enter the market and to exert a significant influence on prices. Relevant market entry is considered to be timely if the time required, since the decision to enter is taken until the relevant product is actually marketed, does not exceed the time required by the existing firms to adapt their behavior to the presence of new competitors. In each case, the corresponding time dimension will also be related to the nature of the production or marketing process in the relevant market.

b) Likelihood

Secondly, the analysis will consider whether it is likely that, in the post-merger scenario, new competitors will find entry profitable. In order to assess that, it is necessary to estimate the expected sales level of a new competitor, which will depend on its ability to satisfy demand if existing producers were to reduce their level of production. Such ability may be

limited by: (i) a decreasing trend in demand; (ii) medium- or long-term contractual relationships between buyers and existing firms; and (iii) pricing policies of incumbents aimed to respond to the entry of a new competitor.

c) Sufficiency

Even if entry can be timely and likely in a certain market, it is also necessary that it is significant enough to influence prices in the relevant market. In addition, when the potential harm of the merger is not uniform throughout the market, the characteristics and variety of the products supplied by an incoming competitor must be adequate to countervail the particular competitive concerns caused by the merger.

The presence of the following factors, among others, will reveal the existence of barriers that may deter the timely, likely and sufficient entry of new competitors:

1. Legal or factual restrictions that: (a) limit the ability to provide the relevant product (for example, to certain types of institutions or individuals), (b) impose additional costs to new competitors (compared to those that have to be faced by incumbent firms); or (c) require authorizations for the provision of the relevant product.

2. High sunk costs to enter the relevant market, such as: product design and testing, installation of equipment, hiring and training staff, developing distribution channels, and necessary investments to overcome any advantage derived from product differentiation that incumbent firms may have (especially in cases when the quality of the marketed goods has to be verified through use, and this implies that brands and reputation are important for consumers). The fact that incumbent firms have already sunk some important fixed costs can also mean that their pricing decisions will not take into account those costs. This asymmetric situation generally implies greater risks and lower profits for a new competitor. In general, as the proportion of sunk costs within entry costs increases, the risk and uncertainty faced by new competitors will also increase, and the likelihood of entry will correspondingly decrease.

Finally, the merger itself can create entry barriers, whenever it suppresses a significant source of essential resources or an important distribution channel. This creation of new entry barriers can also occur if, as a consequence of a merger, the minimum scale required for effective entry increases significantly.[20]

V. FURTHER ISSUES

V.1. COMPETITION FROM IMPORTED GOODS

Competition from foreign goods that can be imported into Argentina will also be considered in the analysis aimed at identifying potential competitors.

In order to estimate the influence that imports could exert in the relevant market, one of the main aspects to be considered is the level of tariffs. Whenever tariffs are low enough to allow imported products to compete in the relevant market, the impact that this competition may have will be analyzed on the basis of the general considerations contained in these

[20] This could happen, for example, if significant excess capacity results from the merger, and it acts as a barrier to entry for potential competitors.

guidelines.

The level of tariff rates will in principle be analyzed at the time of the merger, but its expected evolution will also be considered. In order to do this, special consideration will be given to tariff reductions that have been agreed under international integration or cooperation, provided that they refer to the near future.

In addition to tariffs, the following factors (among others) can significantly impair competition from imported goods:

— transport and insurance costs;

— other taxes and customs' costs (e.g. logistic costs in ports);

— regulations imposing standards or conditions regarding minimum quality, product identification, permits or special licenses;

— logistic limitations that reduce the imports of the relevant product or its subsequent distribution;

— difficulties related to procurement of spare parts or after-sale services for the imported goods;

— state policies aimed at promoting the buying of domestically produced goods instead of imported ones;

— uncertainty regarding expected fluctuations of the exchange rate;

— formal or informal arrangements concerning world market divisions within multinational firms operating in Argentina, or between different multinational firms;

— licenses, franchises or "non-competition agreements" between foreign firms and their local subsidiaries;

— capacity restrictions that may exist in other countries, and their possible impact on imports towards Argentina.

V.2. COUNTERVAILING BUYER POWER

The market power of the undertakings that participate in a merger can be countervailed by their competitors, but also by the buyer power of their customers. This frequently occurs in input markets in which the customers are firms rather than consumers. In general, the countervailing buyer power of customers will be effective if demand is more concentrated than supply. This concentration could be measured using the HHI index mentioned in section II.4 of these guidelines. Countervailing buyer power, however, can also be influenced by other factors besides market concentration, such as the following ones:

a) The ability of customers to switch, or to credibly threaten to switch, their demand, or a part of it, to another supplier;

b) The ability of those customers to impose substantial costs on the supplier, for example, by refusing to buy other products produced by it;

c) The ability of customers to enter the market themselves, or to sponsor market entry by

other suppliers.

Countervailing buyer power may sometimes be possessed by some customers and not by others. It cannot be assumed that such buyer power sufficiently offsets the potential adverse effects of a merger if it only ensures that a particular segment of customers, with particular bargaining strength, is shielded from significantly higher prices after the merger.

It is also possible that countervailing buyer power diminishes or disappears as a consequence of a merger. This may happen if a merger between suppliers reduces the buying power of customers because the merger itself generates the disappearance of a credible source of supply for the relevant product.

V.3. ANCILLARY RESTRAINTS

In general, merging firms have the power to reach agreements that seek to regulate their rights and obligations. This power includes the possibility of establishing ancillary restraints, among which there may be certain agreements and clauses that restrict competition between the merging parties. In general, such restraints produce no harm to market competition, but in some cases they may have an impact on the general economic interest.

In order to determine the possible harm to the general economic interest due to ancillary restraints, the Enforcement Authority will consider the global evaluation framework suitable for the merger under analysis. In this context, it will consider whether those restraints are limited in scope to the merging parties, and also if they are limited to the products or services and the geographic coverage of the merger. 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 "good will" or certain types of "know how").

VI. PRODUCTIVE EFFICIENCY GAINS GENERATED BY A MERGER

In most cases, a merger that increases the probability of exercising market power will cause an increase in prices and a reduction in output, which can both be considered harmful to the general economic interest. Nonetheless, there are exceptional cases in which the efficiency gains derived from a merger are such that, despite market power increase, prices end up being lower than before the merger. This would occur when, as a cause of a reduction in the variable unit cost of a product, the pre-merger price of a product is higher than the expected post-merger price.[21] In a case like this, if a merger is prohibited, then this would prevent consumers from enjoying lower prices (assuming that this price-reduction scenario is sufficiently likely).

[21] Such a situation could arise in the case of a merger that significantly reduces the cost of transport of a product, so that the unitary variable cost of that product drops by a relatively large amount. In that case, despite a post-merger increase in the profit margin, the unit variable cost reduction may countervail that increase, and the post-merger price of the relevant product can be lower than the pre-merger price.

As a consequence of all this, the existence of efficiency gains, and the impact that those gains may have on consumers living in Argentina, may imply that a merger does not harm the general economic interest although it increases market power.

The analysis of efficiency gains will follow the following standards:

a) Only the efficiency gains that are directly generated by a merger, and cannot be reached without it, will be considered. For this to occur, it must be shown that there are not realistic and affordable alternatives that preserve the invoked efficiency gains and be less harmful than the merger under analysis.

b) It must be proven that efficiency gains are likely and rapidly obtained. It must also be verified that those gains would improve the incentives and abilities of the merging firms to compete with other undertakings.

c) Speculative, vague and unverifiable efficiencies will not be considered.

d) Cost reductions that imply transfers between two or more economic agents will be considered as efficiency gains. That is the case of cost reductions that do not imply real resource savings and come from the increase in the bargaining power of the merging firms. For example, if the merging firms increase their ability to reduce their workers' salaries, those reductions in costs will not be considered to be productive efficiency gains.

The same reasoning applies to cost reductions that the merger can cause due to tax reasons.

e) Efficiency gains, conversely, can be accepted in the following cases, among others:

— When quantity, quality and variety of the products supplied by the merging firms are maintained using with a lower quantity of resources.

— When quantity, quality or variety of the products supplied by the merging firms are increased using with the same quantity of resources.

— When a merger allows reducing financial costs or increasing the probability of accessing the capital market.

VII. FAILING FIRMS

For the purposes of these guidelines, a firm is considered to be failing when, due to financial or economic difficulties, it will almost certainly be forced out of the markets where it is currently operating. One of the ways in which that firm may exit those markets is through a horizontal acquisition, by which the failing firm is acquired by a competitor.

In the case of a failing firm's acquisition by a competitor, the Enforcement Authority may authorize that acquisition even though it generates anticompetitive effects. This exception would apply if the exit of the failing firm caused a greater harm to competition than the acquisition itself. This can occur, for example, if the alternative to the acquisition is the complete disappearance of the failing firm without being replaced by the entry of a new competitor.

To determine the applicability of this exception, the Enforcement Authority will mainly analyze the following elements: (i) if the difficulties experienced by the failing firm will

cause its immediate exit of the market; (ii) if there are alternative purchasers that would raise lower anticompetitive effects in the market; (iii) if the failing firm's exit will generate a greater harm to its consumers than its acquisition by a competitor.

VIII. VERTICAL MERGERS

Vertical mergers are those in which the merging firms operate in vertically related markets. All the general considerations established in these guidelines are applicable to vertical mergers. Nevertheless, there are also some particular factors that must be taken into account for the case of vertical mergers, such as the ones that may create harm due to anticompetitive market foreclosure. Some examples of this are the following cases:

a) A vertical merger can be harmful when it implies the removal of an independent supplier, and this removal hampers or limits the access of the merging firms' competitors to an "upstream" market, or to goods sold in it. This could occur if the merging firms are able to raise prices, to reduce quality, to make supply conditions less favorable, to delay the products' supply, or to refuse to supply those products at all.

b) A merger can also be harmful if it eliminates an independent distributor, and this significantly prevents or limits the access of the merging firms' competitors to a "downstream" market, or to the customers that purchase goods in it. This could occur if, as a result of a merger, a manufacturer gains control over an important customer or distribution channel.

c) Another case of possible harm to the general economic interest occurs if a merger significantly increases the barriers to entry of new competitors. This is especially important if a potential competitor that wishes to enter either the upstream or the downstream market becomes obliged to enter both markets simultaneously, and this implies a significant cost increase for that potential competitor.

A vertical merger can also increase the incentives to collude in either the upstream or the downstream market, generating coordinated anticompetitive effects. This may occur if a merger facilitates collusion between firms that are vertically integrated, if it gives access to sensitive information about competitors, if it reduces the countervailing power of other firms, etc.

As in the case of horizontal mergers, the potential effects of vertical mergers can sometimes be approximated through the analysis of market shares and concentration indices. In general, a concentration between undertakings whose shares are relatively small is very unlikely to generate competition problems that cause harm to the general economic interest. For this reason, a merger between a supplier and a customer whose shares are both below 30% (as a seller and as a buyer of the relevant product, respectively) should not give rise to any concern in terms of reducing competition. Such concerns should not arise, either, if the HHI concentration indices are below 3000 points, both on the supply side and on the demand side of the market, as well as in cases where these conditions are combined (i.e., a market share below 30% on the demand side and an HHI below 3000 points on the supply side, and vice versa).

Another element that reduces the potential anticompetitive effects of a merger is the

existence of a prior vertical relationship between the merging firms (e.g., when those firms are a manufacturer of a product and an exclusive distributor of that manufacturer). In such cases it may occur that the merger does not generate any new restrictions on competition, since such restrictions were already present in the pre-existing economic relationship between the merging firms.

IX. CONGLOMERATE MERGERS

Conglomerate mergers are those in which the merging firms do not operate in the same relevant market, or in markets that are vertically integrated. In principle, these mergers will not be objected and will only be considered potentially harmful in some particular cases. Those cases refer to situations in which a potential competitor is removed from the market, and to situations in which there is a significant "portfolio effect".

Removal of a potential competitor

This case occurs if a firm enters a market by acquiring a pre-existing undertaking, instead of doing it independently (particularly if the market exhibits a high level of pre-merger concentration). If that firm could have directly entered the market timely, likely and with enough scale, then this conglomerate acquisition can be assimilated to a horizontal merger, since it implies the removal of a potential competitor of the acquired firm. In that case, the acquisition should be evaluated following the general criteria used for horizontal mergers, since it could eventually generate harm to competition due to some unilateral or coordinated effects.

Portfolio effects

An undertaking can enjoy portfolio effects when its joint participation in several different markets allows it to capture greater profits than the ones that could be obtained by several different firms that separately operated in those markets. In general, portfolio effects are related to the possibility of reducing costs through the use of economies of scope. However, it is also possible that these effects occur as a result of "market power extension" practices, by which an undertaking that has monopoly power in one market extends that power into another market.[22]

In those cases, it is possible that a conglomerate merger generates harm to competition related to market foreclosure, similar to the one created by certain types of vertical mergers. Notwithstanding, as a general rule, it can be considered that the market power extension

[22] A particular case of market power extension occurs when the merging firms begin to "tie" the sales of their products after the merger. Such behavior implies that the purchase of a good requires the simultaneous purchase of goods. In some cases, it may also imply that the merging firms can restrict the actions of some current competitors or prevent the entry of potential competitors. In those cases, a conglomerate merger may allow a firm with a dominant position in one market to extend that position to other markets which are artificially linked with it. Such behavior is specifically stated as an example of anticompetitive conduct in Section 2, Sub-Section i) of Act 25,156.

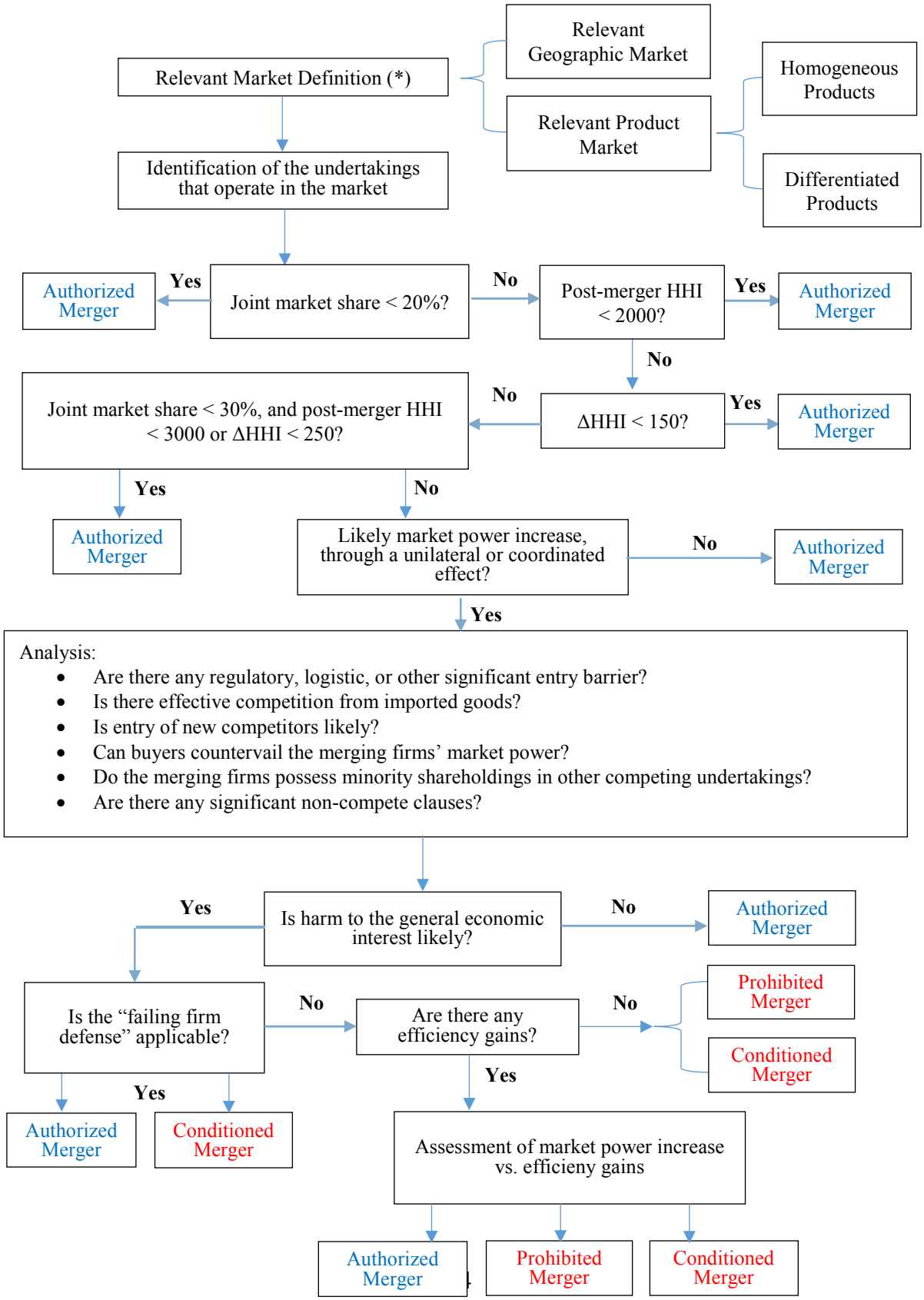
hypothesis is only reasonable if one of the merging firms has a dominant position in one market, and it is able to extend that position to another market in which another of the merging firms is operating.

X. MERGERS WITH MINOR IMPACT ON COMPETITION

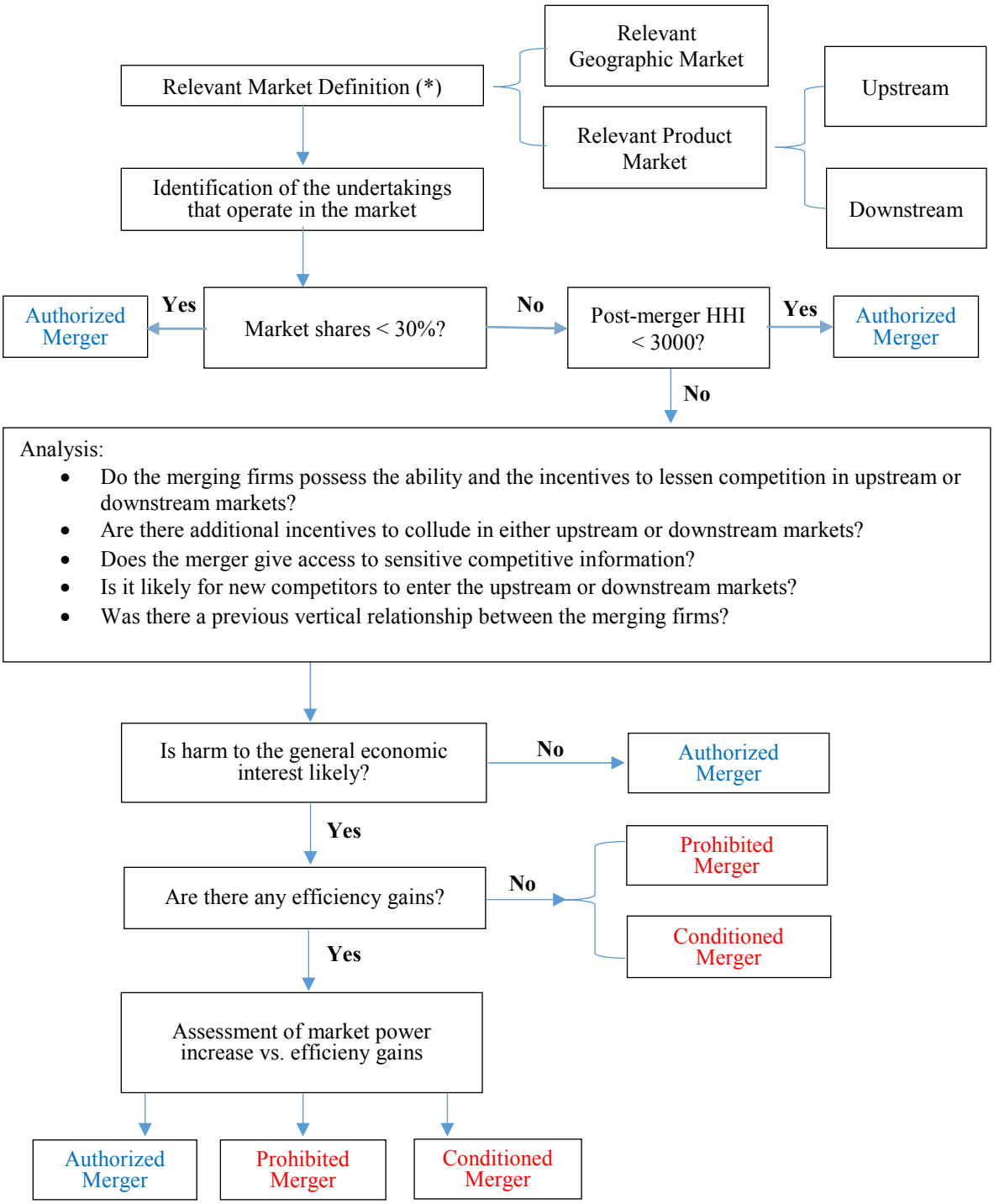
Although these guidelines are generally applicable to any merger, the necessary level of analysis will be substantially different according to the degree of complexity of each merger. In particular, for mergers with minor impact on competition, the Enforcement Authority will apply a fast-track assessment procedure. In those cases, the majority of the topics treated in these guidelines will not be applied, and the analysis will be limited to classify mergers according to their type (horizontal, merger or conglomerate) and, eventually, to measure the merging firms' market shares. In those cases in which such fast-track procedure is used, therefore, the only parts of these guidelines that will be systematically applied are sections II.3 and II.4, together with the last two paragraphs of Chapter VIII and the first paragraph of Chapter IX.

XI. SCHEMES FOR MERGER ANALYSIS

XI.1. SCHEME FOR THE ANALYSIS OF HORIZONTAL MERGERS



XI.2. SCHEME FOR THE ANALYSIS OF VERTICAL MERGERS



(*) Not strictly needed for mergers with minor impact on competition.

XII. GLOSSARY

This glossary includes a series of expressions used in these guidelines, and its aim is to clarify the use of those expressions in those guidelines. It should therefore not be interpreted that the definitions that appear below are necessarily applicable to other documents and decisions issued by the Enforcement Authority, nor to the interpretation of Act N° 25,156.

Buyer power: Market power possessed by the buyers of a product.

Collusion: Agreement between competitors not to compete in a market.

Coordinated effects: Effects derived from a merger that creates or strengthens incentives for the merging firms to collude with the other undertakings that operate in a market, be it explicitly or tacitly.

Differentiated products: Products that consumers consider "similar, but different", due to the existence of a certain characteristic that tells those products apart (brand, physical appearance, warranty, etc.). This product differentiation allows producers to keep a certain degree or market power on the goods that they supply.

Entry barrier: Any phenomenon that hinders the entry of a competitor into a market. In general, it also implies the existence of asymmetry between the costs or the profits obtained by incumbent firms versus the costs or the profits accrued by firms that are currently out of the market.

Herfindahl-Hirschman Index (HHI): Index that measures the degree of market concentration. It is calculated as the sum of the squares of the shares of all the firms that participate in a market.

Market power: Capacity possessed by a firm, or by a group of firms, to influence on market prices.

Mergers with minor impact on competition: Mergers that do not create major concerns in terms of lessening or reducing competition, and therefore do not generate harm to the general economic interest. This category includes most conglomerate mergers, and some horizontal and vertical mergers which affect a small share of the relevant market.

Merging firms: Undertakings that take part in a merger, either directly or indirectly. This concept therefore includes firms that belong to the same economic group than the undertakings that are actually participating in the merger under analysis.

Potential competitor: A firm that is currently out of a market, but can enter it with relative ease.

Substitute products: Products that consumers perceive as similar and comparable, so that an increase in the consumption of one of them implies a decrease in the consumption of the other product. In general, an increase in the price of a substitute product also implies, as a counterpart, an increase in the consumption of the good that substitutes it.

Sunk cost: A cost that has already been incurred and cannot be recovered in the future, independently of the realization of a certain project. Sunk costs include the time, the money and all other resources that have been disbursed in a project, investment or in another activity, and cannot be recovered.

Tied sale: A situation in which the sale of a certain good or service is made on condition that the buyer also purchases another good or service.

Unilateral effects: Effects produced by a merger when it creates or strengthens the market power of the merging firms, giving them an additional ability to increase prices, or to reduce their products' supply, or variety, or quality.

Unit cost: The cost that comes from dividing the total cost of a firm by the number of units produced or sold by that firm. If the concept is applied only to variable costs, i.e., to the costs that vary with the output of a firm, then the concept is known as "unit variable cost".

Upstream/Downstream: These terms refer to the location of a firm into the value chain of a product. The closer to the final consumer of that product, the more "downstream" a firm is into that value chain. On the contrary, the closer to primary resources a firm is, the more "upstream" that firm is into that value chain.

Upward pricing pressure: Effect that a merger can have to induce the merging firms to increase their prices as a result of the merger itself.