ARGENTINE MERGER CONTROL GUIDELINES (as approved by Decision 208/2018 of the Secretary of Commerce)[*]

CONTENTS

I. INTRODUCTION 2
II. MEASUREMENT OF CONCENTRATION IN THE RELEVANT MARKET 3
II.1. MARKET DEFINITION 3
II.2. IDENFITICATION OF THE UNDERTAKINGS THAT OPERATE IN THE RELEVANT MARKET 6
II.3. MARKET SHARE CALCULATION 7
II.4. CONCENTRATION AND MARKET SHARES 8
III. THEORIES OF HARM 8
III.1. UNILATERAL EFFECTS 9
III.2. COORDINATED EFFECTS 11
IV. BARRIERS TO ENTRY IN THE RELEVANT MARKET 13
V. FURTHER CONSIDERATIONS 15
V.1. COMPETITION FROM IMPORTED GOODS 15
V.2. COUNTERVAILING BUYER POWER 16
V.3. ANCILLARY RESTRAINTS 17
VI. PRODUCTIVE EFFICIENCY GAINS GENERATED BY A MERGER 17
VII. FAILING FIRMS 18
VIII. VERTICAL MERGERS 18
IX. CONGLOMERATE MERGERS 20

[*] These guidelines have been translated into English to help their reading by non-Spanish speaking people. The only official version of the Argentine merger control guidelines, however, is the Spanish version approved by Decision 208/2018 of the Secretary of Commerce of Argentina on April 11, 2018.

I. INTRODUCTION

The aim of this document is to describe the general criteria that will be followed by the enforcement authority of Act No. 25,156 (the "Enforcement Authority"), for the analysis of mergers notified under the provisions of that act and its regulation. These guidelines will be used by the Enforcement Authority to contribute to the predictability of its decisions, regardless of the possibility of using other complementary methods that may be developed in the future.

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 do not create or increase the market power of the merging firms, provided there is a significant number of competitors in the market or conditions that facilitate the entrance of new firms. 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 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.

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. Nonetheless, when a merger affects a market in which competition is not, mostly, express through prices (for example, markets in which firms compete for product variety, innovation, additional services or quality of the product or service), the Enforcement Authority will also evaluate the impact of the merger on other non-price variables that are important in the competitive process.

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).

[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.

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),[2] and the benefits that those gains imply for consumers in Argentina.

Mergers can be classified as horizontal, vertical or conglomerate.[3] 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 related neither horizontally nor vertically.[4]

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.

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 definitions, the effect on the general economic interest is insignificant.

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

[2] Economies of scale arise when the average 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.

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

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

part of the same market.[5]

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;

d) the characteristics of the consumers of those goods, their possible division in segments or "nests", and the existence of price discrimination between those segments.

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.[6]

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 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 second good would not be perceived by consumers as a substitute of the first one. 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. In this case it must be determined if different soft-drink flavors 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 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.[7]

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, in a relatively short term, and to supply goods that are

[5] Note that this definition is based on the idea that the products included in the same relevant market must be substitutes from a functional perspective and also from an economic perspective (for a large enough number of customers).

[6] Although the exact concept of a small but significant and non-transitory increase in price 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%, in real terms, which is kept for a period of at least one year.

[7] In some cases, if the available information is enough, this kind of analysis may be performed using econometric demand estimations, which allow to calculate price-elasticity values for the different prices and products involved.

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.

Additionally, it must be considered that the definition of the relevant product market will be performed in each particular case and that, as a consequence of this, it may occur that two different merger operations, referred to the same economic sector, could be analyzed using different market definitions.[8]

A particular kind of market that admits different definitions is the one that involves the so-called "multi-sided platforms". These platforms are markets in which participants belonging to different "sides" do not interact directly between each other. Instead, those participants do so by using the corresponding platform. This is actually what allows for a process of value generation by means of a platform, which depends on the interaction between people located on different sides of that platform.[9] Depending on the type of platform involved, it is possible that each side is considered as a separate relevant market, or else 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 located on one side or the other. [10]

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

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[8] An example of this may be the acquisition of a producer of a set of goods (for example, carbonated soft drinks) by another producer that provides the same goods. In this case, it may be possible to consider the set of goods as a unique relevant market. If the acquired undertaking only provides one specific good (for example, orange-flavored soft drinks) then, probably, it is better to limit the relevant market product to this specific good, without including other carbonated soft drinks (unless there is a strong substitution between orange-flavored drinks and other carbonated soft drinks).

[9] For example, in a real-estate brokerage service market, real-estate sellers are located on one side of the platform, while real-estate buyers are on the other side of the platform.

[10] For example, the markets for newspapers and magazines can be seen as platforms in which participants are readers (on one side), and firms that 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 a potential advertiser (who is evaluating to advertise in one of those newspapers or magazines).

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;

d) the volume of the traded product that is transported form one area to another.

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.

While in most cases the relevant geographic markets have a national or sub-national 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 sell 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).

Additionally, merger analysis should take into account that geographic market definition must be made for each particular case and, as a consequence, it may occur that two different mergers, referred to the same economic sector, are analyzed using different geographic market definitions.[11]

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.[12]

Entry will be understood to occur with relative ease if no major sunk costs have to be incurred

[11] An example of this may be the acquisition of a producer of a good, that operates nationwide, versus the acquisition of a producer of the same good that only operates in a certain area of the country. It is possible that, in the first of those cases, the relevant market has a national dimension, and in the second case it has a sub-national dimension.

[12] 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. 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 qualities could 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.

in order to enter a market.[13] Conversely, firms that face significant difficulties to sell the product in the relevant market will not be considered immediate potential competitors,[14] 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 can be expressed in monetary units (e.g., total revenue shares) or in physical units (e.g., sales' volume shares, production capacity shares, reserve shares, etc.). The choice of one way or another to calculate market 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.

In relation to the time dimension of the data, statistics can be collected monthly, annually, or with a frequency that is deemed necessary in order to adequately reflect the main variations in market shares.[15] 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 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.

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[13] 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.

[14] 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.

[15] 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.

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).[16] 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. Whenever concentration levels are believed to underestimate or overestimate the potential impact of a merger,[17] 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, especially when, at the same time, the merging firms have a relatively low joint market share. In particular, if the HHI increases less than 150 points and the joint market share is less than 50%, this can 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.

III. THEORIES OF HARM

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.

[16] 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.

[17] 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.

When assessing the possible harm to competition that a merger may cause, the Enforcement Authority will adopt a decision with a prospective and preventive approach, as this analysis takes place before the merger produces effects in the relevant market. This implies a clear difference with the analysis of anticompetitive conduct, which is generally performed after damage to the general economic interest has occurred.

In general, it can be considered that the likely negative effects of merger come from the emergence of either unilateral or coordinated effects.[18] 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 absence 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.[19] Those criteria can be used, for example, to dismiss cases of creation or strengthening of a dominant position when the merging firms have a lower joint market share than another undertaking that operates in the same 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, 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.

[18] 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.

[19] 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.

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).

If adequate information is available, then the effect of mergers on differentiated product markets can be measured using several quantitative tools such as the Upward Pricing Pressure Index (UPPI).[20] 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.

Besides the UPPI, there are other indicators that can be used to evaluate the substitution between varieties in differentiated product markets. Whenever information is available, substitution can be evaluated by applying simulation procedures, natural experiments, consumption surveys, etc. In all cases, however, the procedure used must be based on sound economic principles, be adaptable to market circumstances, and be consistent with the available qualitative evidence.

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, so that there exists an effective competitive pressure. 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.

[20] 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.[21] 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 mostly 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, among others, could 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 type of competition existing between the removed competitor and the undertakings involved in the merger;[22]

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

iv) 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;

v) 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;

vi) 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.

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

[21] This section has been included as a factor related to possible unilateral effects of a merger. However, the removal of a vigorous and effective competitor may also induce coordinated effects, whenever it facilitates tacit or explicit collusion among existing firms in a specific market.

[22] For example, in markets where competition results from bidding procedures and auctions, the removal of a vigorous and effective competitor may have a greater impact than in markets where competition depends on other variables, like quality and advertising.

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, the homogeneity of the product supplied by them, and the existence of monitoring and punishment systems for those that deviate from a collusive agreement.

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 change the scale of some firms operating in that market, making them more or less similar to each other.[23] Finally, another element to consider when evaluating the probability of collusive behavior in a market is the history of the analyzed industry, as well as the record of previous collusion cases that have arisen in that industry.

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.

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

[23] The first situation happens, for example, when a 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 between that firm' scale and the ones of the remaining competitors.

production levels, innovation, 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. For instance, this may be the case if an economic group, already holding a minority position in a firm, takes control over a different undertaking that operates in the same market as the first one.

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 firms are completely independent).

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.[24] The threat imposed by the entry of new competitors

[24] Similarly, the absence of barriers to entry may also help existing firms in a market to expand their supply of the relevant product, and/or to boost competition by introducing new products into the relevant market.

constrains the ability of the existing firms to raise their prices. However, for the threat to be credible, it is necessary that entry be timely, likely and sufficient.

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, to the ones used in the relevant market.

Once these undertakings have been identified, entry barrier 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 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, switching costs that customers have to incur to change from one supplier to another, and investments that are necessary to overcome advantages 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.[25]

V. FURTHER CONSIDERATIONS

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 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 changes 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

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

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 occasionally 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 can 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.

d) The ability of customers to bargain jointly (i.e., as a single unit) with the supplier;

e) The method used by the customers to buy the relevant products (for example, auctions, bidding procedures, contests).

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, the firms that take part in a merger (e.g., the buying and the selling firm) 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 these firms (for instance, non-compete and/or non-solicitation clauses). 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 variable unit costs, the pre-merger price of a product is higher than the expected post-merger price.[26] In a case like this, if a merger were prohibited, this would prevent consumers from enjoying lower prices (assuming that this price-reduction scenario is sufficiently likely).

As a consequence of all this, the existence of efficiency gains, and the impact that those gains may have on consumers living in the Argentine Republic, 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, like internal growth or collaboration among competitors.

b) It must be proven that efficiency gains are likely and rapidly obtained, and that their

[26] 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.

realization does not depend on factors beyond control of the merging firms.

c) Additionally, it must also be proven that efficiency gains will benefit costumers, through lower prices, larger supply, or greater quality or variety of the relevant product.

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

e) Cost reductions that imply transfers between two or more economic agents will not 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.

f) 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 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, in a context where its tangible and intangible assets will also disappear; (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 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 specific 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.[27] 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, or vice versa).

Another element that may reduce 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.

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[27] Similarly, vertical mergers may generate some pro-competitive benefits, which are also specific to this kind of transactions. Among them, it can be mentioned lower transaction costs between merging firms, removal of "double marginalization" effects, and solutions to problems derived from certain services offered by a firm, that may help other undertakings operating in the same production and distribution chain.

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 those 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.[28]

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 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.

[28] 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 other 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 to it. Such behavior is specifically stated as an example of anticompetitive conduct in Section 2, Sub-Section i) of Act 25,156.