



March 29, 2019

Comisión Nacional de Defensa de la Competencia – CNDC

E-mail: cndc@produccion.gob.ar

Dear Sirs,

Proyecto notificación concentraciones – Draft Guidelines for Merger Notification

Please find attached a submission prepared by the Merger Working Group of the Antitrust Committee of the International Bar Association on the above draft guidelines. We welcome CNDC's initiative in developing guidelines to assist in the application and interpretation of the Act for the Defense of Competition.

The Co-chairs of the Merger Working Groups and Officers of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail, should that be of the interest to CNDC.

Your sincerely

Marc Reysen
Co-Chair Antitrust Committee

Elizabeth Morony
Co-Chair Antitrust Committee

cc Leonor Cordovil

**INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE
COMMENTS ON THE DRAFT GUIDE FOR
MERGER NOTIFICATION IN ARGENTINA**

1. INTRODUCTION

- 1.1 In February 2019, the *Comisión Nacional de Defensa de la Competencia* (“**CNDC**”) the Argentinian antitrust authority, made available for comments its draft Guide for Merger Notification (the “**Draft Guide**”) in Argentina. These comments have been prepared by the Antitrust Committee (“**Committee**”) of the International Bar Association (“**IBA**”) with the assistance of its Merger Working Group (“**MWG**”). the comments aim to provide certain suggestions regarding merger notification, grounded on similar guidelines enacted worldwide and best competition law practices.
- 1.2 The IBA is the world’s leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shaping the future of the legal profession across the globe. It is the global voice of the legal profession.¹
- 1.3 The IBA has over 55,000 individual lawyer members from around the world, including many from Argentina. The IBA’s Antitrust Committee includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, which places it in a unique position to provide international and comparative analysis in the development of competition laws and enforcement practices.²
- 1.4 The Committee maintains working groups, which provide input on the development of competition laws around the world, including the MWG. Having regard to its interest in important international legal developments in significant jurisdictions such as Argentina, the Committee respectfully submits its comments and suggestions on the Draft Guide.

¹ Further information about the IBA is available at <http://www.ibanet.org/>.

² Further information about the IBA Antitrust Committee can be found at <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx>

- 1.5 The Committee appreciates CNDC's decision to consult with interested stakeholders regarding the important issues related to merger notification. Such guidance will be beneficial both to CNDC's staff as well as to parties to M&A transactions and their advisors (local and international).
- 1.6 The Committee considers that the Draft Guide provides sophisticated and substantial guidance and would like to assist CNDC in providing even more precise and practical guidance. The Committee offers these comments in the spirit of constructive input and hopes that CNDC will find this contribution to be helpful in the development of sound competition policies and administrative practices for merger control.

2. COMMENTS

- 2.1 The Committee recognizes the important similarities between the Argentinian and the European merger control regimes. Although there are some differences between these Argentinean guidelines and the European merger control guidelines,³ no major conflicts were identified. However, in some areas of the Argentinean guidelines more clarity and detail would be desirable. These areas include joint ventures, the calculation of the business turnover threshold and the statements on the involved undertakings whose turnover is to be taken into account.
- 2.2 The Committee's comments, including suggested additions and revisions to the (English translation⁴ of the) Draft Guide are set out in the chart below.

³ Available at http://ec.europa.eu/competition/mergers/legislation/draft_jn.html

⁴ The comments have been prepared taking into consideration the English version of the Draft Guide made available by CNDC at https://www.argentina.gob.ar/sites/default/files/traduccion_ingles_guia_notificacion_1.pdf.

IBA Antitrust Committee Comments on the Argentinian Draft Guide for Merger Notifications		
Original Draft	Suggested Draft	Comments / Justification
References to “economic group” (Sections V.4 and VI.2)		Considering the references made by the Draft Guide to the “economic groups” involved in a given transaction, such as to calculate the turnover thresholds, the MWG suggests including the general concept considered by the CNDC in this regard, or a cross-reference with the applicable regulation (i.e. section 9 of Antitrust Law No. 27,442 and its regulatory decree No. 480/2018).
Chapter II - The Principle of Economic Reality “(...) to consider that those imports are not substantial, several factors must be evaluated, such as their importance, regularity and predictability. When local purchases from a company turn out to be insignificant, it will be considered that the merger does not produce effects in Argentina. A tool that can be used to evaluate the relative significance of imports is to measure its amount, as well as its relative weight, within the tariff position to which they belong”.	“(...) to consider that those imports are not substantial, several factors that assess their importance, regularity and predictability must be evaluated, such as their importance, regularity and predictability . When local purchases from a company turn out to be insignificant, it will be considered that the merger does not produce effects in Argentina. A tool that can be used to evaluate the relative significance of imports is to measure its amount, as well as its relative weight, within the tariff position to which they belong”. (Include additional paragraph detailing the adequate parameters according to CNDC).	The inclusion of an additional paragraph indicating the specific parameters related to the amount/weight of imports considered adequate for CNDC could be useful to guide the agents in assessing whether a filing would be mandatory. Objective criteria on the concepts of “importance”, “regularity” and “predictability” would be important to provide clarity and guarantee a well-functioning system. ⁵
Chapter III – The Concept of Merger “Therefore, a merger occurs when it simultaneously holds that: (1) At least two undertakings, previously independent, combine or merge with each other; and (2) There is a takeover (i.e., a non-transitory shift in the control of an undertaking, or a change in the	“Therefore, a merger an acquisition of control occurs when it simultaneously holds that: (1) At least two undertakings, previously independent, combine or merge with each other; and (2) There is a takeover change of control (i.e., a non-transitory shift in the	This paragraph of the Draft Guide corresponds to the European regulation on merger between previously independent undertakings, which is only one out of three possible categories of concentration under European law: a concentration may also arise from the acquisition of control as well as in the form of a joint venture. It would be useful to include cross-references to situations in which the concentration occurs because of an acquisition of control or a joint venture,

⁵ The importance of objectively determinable criteria is highlighted in the International Competition Network, Recommended Practices for Merger Notification Procedures, Recommended Practice #II.B.

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way that the will of that undertaking is determined)”. 	control of an undertaking, or a change in the way that the will of that undertaking is determined). Concentrations may also occur through acquisitions of control over existing undertakings or in the form of a joint venture, as further detailed in Chapter V”.	which are dealt with later in the Guide.
Chapter IV - The concept of control “(…) rights, contracts and any other instrument that grants the possibility of having a substantial influence over the abovementioned undertaking (...)”	N/A	<p>Notwithstanding the fact that the definition of control in general corresponds to the one of the European Union, the Draft provides an enumeration of rights that could give control over an undertaking. Such an enumeration cannot be found in the European Guidelines. Since it might be too restrictive, the list should be reconsidered.</p> <p>Very little detail is provided on the following important points: Control on a contractual basis; Control by other instruments; Person or undertaking acquiring control; Interrelated transactions; Detailed explanations regarding minority shareholders and veto rights.</p> <p>Further explanation or clarification of these concepts would be very useful. Additionally, section 7 of the Antitrust Law No. 27,442 refers to several – potentially overlapping- concepts, such as “acquisition of control”, “acquisition of decisive influence” and “acquisition of determinant influence”. The MWG suggests the Draft Guides providing clarification as to the precise extent of these terms.</p>
Chapter V – Acts subject to mandatory notification: V.1. Section 7, Sub-Section a): “Proper mergers” “Section 82 of Act No. 19,550 (the so-called “Company Act” of Argentina) provides two categories of “proper mergers”: (i) Mergers “through consolidation”, which occur when two or more companies are dissolved, without being liquidated, in order to constitute	N/A	For reference purposes, in addition to the two options for a merger described in the draft (1) Mergers “through consolidation” and (2) Mergers “through absorption”, the European Guidelines also include the creation of a single economic unit by combining the activities of previously independent undertakings as a possible merger.

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a new company; and (ii) Mergers “through absorption”, which occur when an existing company absorbs one or more companies, which are dissolved without being liquidated. Both cases may constitute a notifiable merger under the terms of Chapter III of the ADC”.		
<p>Chapter V – Acts subject to mandatory notification: ongoing business establishments</p> <p>“According to Section 1 of Act No. 11,867 (the so-called “Business Goodwill Act” of Argentina), the elements of an ongoing “business establishment” or “business goodwill”, for the purposes of its transfer by any title, are: facilities, merchandise stocks, business names, clientele, right to premises, innovation patents, trademarks, industrial designs, honorific distinctions, and all the other rights derived from commercial, industrial or intellectual property. The change of control in the business goodwill of a firm, through the acquisition of any of the elements previously mentioned, whether total or partial, may therefore constitute a notifiable merger under the terms of Chapter III of the ADC”.</p>	N/A	<p>The Draft lists several elements of a “business establishment” such as “facilities, merchandise stocks, business names, clientele, right to premises, innovation patents, trademarks, industrial designs [...] other rights derived from commercial, industrial or intellectual property” and states that the transfer of one of these elements in whole or in part may constitute a notifiable merger. Under European law, the acquisition of such elements constitutes a concentration only if the conditions for the acquisition of assets are met.</p> <p>Accordingly, under European Law the acquisition of control over (intangible) assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, (i.e. a business with a market presence, to which a market turnover can be clearly attributed). The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. Furthermore, exemptions and special cases are addressed, such as outsourcing.</p> <p>This section does not provide adequate guidance as to possible notifiable events. The European approach of focusing primarily on a business undertaking would be useful to adopt.</p> <p>More details about specific circumstances in which the acquisition of assets (either tangible or intangible) would represent a concentration would be very useful.</p>

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Chapter V – Acts subject to mandatory notification: V.3. Section 7, Sub-Sections c) and e): acquisitions of shares (page 6 - 7)	N/A	The explanations about acquisition of control on a factual basis do not provide sufficient practical guidance. Incorporating further explanations and examples about factual control acquisition would assist economic agents to determine when an acquisition implies a control acquisition on a factual basis and therefore the obligation to notify the transaction is triggered.
Chapter V – Acts subject to mandatory notification: V.4.2. Creation of joint ventures with full functions (page 10)	N/A	<p>It seems that the Draft confines the joint venture business model to the incorporation of a new entity. However, it is not only through a legal entity that a joint venture may take place. There are several examples of joint venture agreements that do not include the incorporation of new legal entities.</p> <p>The Draft Guide generally follows the same approach as European Law with the key element being the concept of full-functionality. The Draft, however, only deals with the creation and acquisition of an already existing joint venture and does not consider the option of an acquisition of another undertaking by several undertakings, which will then be jointly controlled.</p>
Chapter VII – The Exemptions to mandatory notification	N/A	The MWG suggests reinforcing that exemptions should be narrowly interpreted and on a case-by-case basis. Thus, the parties should substantiate these. Otherwise, in case of doubt concerning the mandatory nature of the filing of a given transaction, filing an advisory opinion within the CNDC to obtain a formal decision on this matter is advisable.
Chapter VII – The Exemptions to mandatory notification VII.1. Section 11, Sub-Section a): Acquisitions in which the buyer already owns more than 50% of the target company's shares	(...) VII.1. Section 11, Sub-Section a): Acquisitions of undertakings in which the buyer already owns more than 50% of the target company's shares	The exemption should be further clarified to indicate that it applies to acquisitions of undertakings in which the buyer already owns more than 50% of the shares, (provided that it does not entail a change in the nature of control, either from sole to joint or vice versa).
Chapter VII – The Exemptions to mandatory notification VII.3. Section 11, Sub-Section	(...)	The MWG suggests adding the remainder of the legal provision for clarity purposes.

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c): Acquisitions of a single undertaking in Argentina by a single foreign economic agent	VII.3. Section 11, Sub-Section c): Acquisitions of a single undertaking in Argentina by a single foreign economic agent, which owns no assets in Argentina (excluding those held for residential purposes) or shares in other Argentine companies, and had no significant, regular and periodic exports to Argentina during the preceding 36 months.	
Chapter VII – The Exemptions to mandatory notification VII.3. Section 11, Sub-Section c): Acquisitions of a single undertaking in Argentina by a single foreign economic agent What will be relevant to determine if those companies are a single unit is the fact that, previous to the merger, they carry on their activities in a coordinated fashion and under common control. (...) Note, however, that if the buyer is a foreign company which is already present in the Argentine markets through significant, habitual and frequent exports, then the first landing exemption is not applicable.	(...) What will be relevant to determine if those companies are a single economic unit is the fact that, previous to the merger, they carry on their activities in a coordinated fashion and under common control. (...) Note, however, that if the buyer is a foreign company which is already present in the Argentine markets through significant, habitual and frequent exports during the 36 months prior to the transaction , then the first landing exemption is not applicable.	In addition to the reference of a single “economic unit”, for clarity purposes, the MWG suggests including a precise term to the concept of “habitual and frequent exports”, using as a cross-reference the timing provided by item 2 of the cumulative monetary thresholds (Chapter VI).
VII.4. Section 11, Sub-Section d): Acquisitions of inactive firms Section 11 of the ADC has an additional provision concerning the exemption to notify the acquisition of firms that are inactive or without economic activity for at least one year.	(...) Section 11 of the ADC has an additional provision concerning the exemption to notify the acquisition of firms that are inactive or without economic activity for at least one year during the previous year.	The wording of the Draft Guide does not indicate the exact year that should be considered for this purpose. The law refers to the inactivity of the target during the last year (understood as the year prior to the transaction), and it would be useful to clarify that this would be based on the company’s fiscal year.
VIII. State-owned enterprises When a transaction involves the combination of two or more state-owned enterprises that are	N/A	Similar to Argentinian law, European law provides for the possibility of a merger or an acquisition of control between two State-owned undertakings, if the

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independent concerning their business behaviour (although they may be owned by the same State), then that transaction will be considered a merger, and will be subject to mandatory notification provided that it exceeds the monetary thresholds established by the ADC.		undertakings were formerly part of different economic units having an independent power of decision.