



INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

**COMMENTS ON THE GUIDE ON COOPERATION AGREEMENTS BETWEEN
COMPETITORS**

17 NOVEMBER 2025

1. INTRODUCTION

- 1.1. The International Bar Association's ("IBA") Antitrust Section ("Section") would like to thank Peru's National Institute for the Defense of Competition and the Protection of Intellectual Property ("INDECOPI") for the opportunity to provide comments on the Guide on Cooperation Agreements Between Competitors ("Draft Guide"). Such an inclusive process will ensure a robust, effective, and workable framework that benefits all.
- 1.2. The Section congratulates the INDECOPI efforts to provide guidance that fosters pro-competitive collaborations while preserving effective rivalry. The Section offers these submissions for the INDECOPI's consideration as it finalizes the Draft Guide.

2. ABOUT THE IBA

- 2.1. The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Peru, and it has considerable expertise in assisting the global legal community.
- 2.2. The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including with international cartel matters and leniency regimes. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.

3. SUBMISSIONS OVERVIEW

- 3.1. The Draft Guide is a valuable and timely initiative. We respectfully suggest: (i) strengthening the express alignment with international standards through a clearer articulation of the two-step effects-based assessment and the indispensability test for ancillary restraints; (ii) sharpening the delineation among cartels, horizontal collaborations (including joint ventures without a change of control), and concentrations subject to prior merger control; (iii) enhancing the Guide's didactic value through "borderline" examples and operational examples at each critical step of the analysis; (iv) clarifying the (non-)existence of an ex ante authorization channel for collaboration agreements and, correlatively, confirming that lawful collaborations are not subject to prior control by the competition authority; (v) consolidating the efficiencies-and-consumer-benefit analysis to ensure clear and operable sequencing; (vi) ensuring terminological consistency among "restriction," "negative effects," and "anticompetitive effects" (the latter as the category relevant to the relative prohibition under Article 9 of the TUO of the LRCA); and (vii) harmonizing analytical factors across chapters to avoid internal dissonance (e.g., introducing in the general section

the references to “market power” and “impact on effective competition” that appear later).

4. SPECIFIC OBSERVATIONS

(A) Alignment with international standards

- 4.1. The Draft Guide’s structure—first excluding conduct subject to absolute prohibition and then applying an effects-based assessment focused on efficiencies and consumer welfare—accords with international practice. It appropriately emphasizes that, within lawful collaborations, only ancillary, necessary, and proportionate restrictions should be tolerated, and it organizes the second-level analysis around competitive effects, verifiable efficiencies, and an equitable pass-on to consumers. This two-step, effects-based framework is consistent with U.S. competitor collaboration guidance and the EU Horizontal Cooperation Guidelines¹.
- 4.2. We propose the following adjustments to cement convergence and improve usability:
 - Specify that the indispensability test requires parties to demonstrate why reasonably available, less restrictive alternatives would not allow achievement of the collaboration’s legitimate aims within comparable timeframes and costs. This formulation facilitates ex ante self-assessment and enhances predictability in enforcement.
 - Make explicit that the assessment is comparative and forward looking: the relevant benchmark is competition with and without collaboration, considering market dynamics and likely entry or expansion in both scenarios.
 - Indicate that qualitative evidence may suffice where quantification is impracticable, provided it is robust, reasoned, and supported by objective materials. This is especially relevant for sustainability collaborations and innovation outcomes.

(B) Terminological clarity and internal consistency

- 4.3. Use “restriction” to refer to clauses or conduct that dampen rivalry; “negative effects” for risks identified in the second level analysis (Sections 3.2.2 A and B); and “anticompetitive effects” only to describe those effects that, after the overall balancing, amount to an infringement under the relative prohibition (Article 9 TUO LRCA). This distinction should be reflected throughout the text. The differentiated

¹ Federal Trade Commission & U.S. Department of Justice. (2000). Antitrust guidelines for collaborations among competitors. Washington, DC; European Commission. (2023). Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements. Official Journal of the European Union, C 259, 1–159.

use of “negative effects” for preliminary risk identification and “anticompetitive effects” for the final infringement finding reflects the approach adopted in leading international guidance, which distinguishes between initial concerns and effects amounting to a violation².

- 4.4. In Section 3.2.2(B), focus “measures” on minimizing negative effects, not on mitigating “risks of anticompetitive effects.” This differentiation is already recognized in the last paragraph of p. 21 of the Draft Guide and should be consistently maintained.
- 4.5. In Section 3.2.2(C), within the general part, include the clarification that in many cases it will not be possible to quantify precisely the benefits and possible negative effects, and that rigorous qualitative assessments are acceptable when quantification is impracticable.
- 4.6. Harmonize factors across chapters: the “elements of analysis” in Section 4.1(D) (including “market power of the parties” and “impact on effective competition”) should be incorporated or expressly cross referenced in Section 3.2.2(A) to ensure consistency.

(C) Clear differentiation among cartels, joint ventures, and concentrations

- 4.7. The Draft Guide defines cartels and acknowledges the need to exclude concentrations from its scope. We recommend strengthening the interface with Peru’s competition statute and merger control regime to provide firms a clear roadmap from the outset.
- 4.8. First, embed in Step One a categorical reminder that if the object of the agreement falls within absolute prohibitions, the conduct is a cartel. In practical terms: Where the coordination has as its object price or terms fixing, output limitation (including quotas), market/customer allocation, or bid rigging, it is a hard-core cartel. In such cases, the Guide should state expressly that no effects, efficiencies, or pass on analysis are available.
- 4.9. Second, sharpen the JV versus concentration boundary using material criteria already recognized under Peru’s merger control rules:
 - Where a “joint venture” establishes joint control and, on a lasting basis, performs the functions of an autonomous economic entity, it is a concentration and must be assessed under the merger control framework—not under this Guide.
 - Where cooperation falls short of a change in control or the creation of a functionally autonomous undertaking (e.g., production pooling, shared R&D,

² European Commission. (2023). Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements. Official Journal of the European Union, C 259, 1–159.

participation in standard setting, joint purchasing), it remains a horizontal collaboration within the Guide's scope, provided no absolute prohibitions are implicated.

- Consider additional criteria based on international practice, such as those established by the FTC in its Guide which treats a competitor collaboration as a horizontal merger in the relevant market where: (i) the participants are competitors in that market; (ii) formation involves an efficiency-enhancing integration of economic activity; (iii) the integration eliminates all competition among the participants in that market; and (iv) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms³.

4.10. Third, add an “intake” checklist to guide initial self-classification, for example:

- Does the arrangement create or transfer control (sole or joint) over an undertaking or productive assets? If yes, consider merger control.
- Does the agreement have any hard-core restriction as its object? If yes, it is a cartel.
- Are the restraints strictly necessary and proportionate to implement a legitimate collaboration? If yes, proceed to effects and efficiencies analysis under the relative prohibition.

4.11. Terminology and conceptual clarity: consistently use “negative effects” to refer to the initial risk diagnosis at the second level (Sections 3.2.2 A and B) and “anticompetitive effects” only where, once balanced, those effects constitute a relative prohibition under Article 9 TUO LRCA. This avoids confusion with the general term “restriction. This clarity reduces classification errors, prevents forum shopping, and aligns with concepts already embedded in Peru’s merger control regime.

(D) Use of cases: need for “borderline” illustrations and material criteria

4.12. The Draft Guide references common categories of collaboration and identifies risk vectors; this is helpful. To maximize legal certainty, we suggest including short, anonymized case vignettes that distill material criteria where the line between cartel, collaboration, and integration is not obvious. In addition, we recommend examples at each critical step of the analysis, especially in Section 3.1.2(A) (ancillary restraints), illustrating which types of clauses are typically considered directly related and functionally subordinate to a lawful agreement (e.g., strictly necessary information-use limits, narrowly tailored exclusivity obligations in time, scope, and product, and non-solicitation clauses tied to the joint project). For example:

³ Federal Trade Commission & U.S. Department of Justice. (2000). Antitrust guidelines for collaborations among competitors. Washington, DC.

- Capacity sharing in a concentrated market with synchronized planned outages: factors distinguishing operational efficiency from coordinated output limitation.
 - An R&D platform among the few firms with significant innovation capabilities: how to safeguard rivalry in adjacent pipelines and avoid foreclosure of non-participants through governance, IP, and information flow design.
 - Standard setting with essential IP: how open participation, FRAND licensing, and transparency mitigate exclusion risk; when exclusive certification windows may be justified and when they become unnecessary restrictions.
 - Joint purchasing with downstream overlaps: the boundary between legitimate buyer power synergies and monopsony risks affecting output and innovation.
- 4.13. Each vignette should set out the decisive facts, the ancillary restraints deemed necessary (or not), and the mitigations that were dispositive. This approach translates abstract tests into operational guidance and advances the Guide’s objective of legal certainty.

(E) Ex ante authorization or “comfort” for agreements; confirmation of no prior control for lawful collaborations

- 4.14. The Draft Guide does not describe a specific ex ante authorization mechanism for collaboration agreements. Within Peru’s current framework, and absent a general authorization channel, the Guide should:
- Confirm expressly that collaboration agreements are not subject to any authorization or prior control by the competition authority.
 - Encourage early compliance design: risk matrices, information firewalls, governance protocols, and, where appropriate, external compliance monitoring for higher risk collaborations. Taking into account Article 17 of Law No. 31112 of Peru.
- 4.15. If, in future, Peru contemplates introducing informal comfort routes or limited scope guidance for novel sustainability collaborations or complex innovation platforms, the Guide could be updated to reflect such developments. In any event, it should be clear that collaborations qualifying as concentrations remain subject to merger control where thresholds are met, including standstill obligations, and are not reviewable under this instrument.

(F) Efficiencies and consumer benefits

- 4.16. The Draft Guide appropriately centers the second-level analysis on efficiencies and equitable pass-on to consumers. To improve consistency and predictability, we propose:

- Sequencing. Make the sequence explicit: identify potential restrictive effects; identify and substantiate efficiencies that are (i) verifiable, (ii) inherent to the collaboration, and (iii) unattainable through materially less restrictive means; then demonstrate the mechanism and timing for pass-through that reserves a fair share to consumers; finally, conduct an overall balancing using a with/without comparison.
 - Evidentiary standards. Clarify that efficiencies must be supported by objective evidence and reasonable implementation plans. Qualitative assessments are admissible where quantification is impracticable, and this clarification should be included in the general part (Section 3.2.2(C)) to ensure coherence with specific sections (e.g., sustainability).
 - Sustainability benefits. Recognize that benefits may include individual use value, individual non-use value, and, where appropriate, collective benefits, provided there is substantial overlap with the relevant consumers and the benefits accrue to them appreciably. The Guide should also stress that sustainability is not a shield for unnecessary restraints or coordination on competitively sensitive parameters.
 - Proportionality. Reiterate that the greater the potential restrictive impact, the stronger and more clearly evidenced the efficiencies and pass-on must be to justify the collaboration.
- 4.17. Additionally, to reinforce conceptual clarity, it is important to distinguish clearly between: (i) the necessity and proportionality test for ancillary restraints at the first level (Section 3.1.2), which is not satisfied by mere convenience, operational difficulty, or lower profitability; and (ii) the identification of efficiencies at the second level (Section 3.2.2), where the sharing of technical or financial risks may be relevant as an efficiency if verifiable and inherent to the agreement, but does not, on its own, render a restraint “necessary.” We recommend reassessing the general reference to “sharing of financial risks” (p. 23) considering the necessity and proportionality standard in Section 3.1.2(B), clarifying scenarios and limits.

5. CONCLUSION

- 5.1. Thank you for considering these submissions. The Antitrust Section commends INDECOPI for advancing clear, practical guidance to facilitate pro-competitive collaboration while safeguarding effective rivalry. We are encouraged by the Draft Guide’s effects-based architecture and its focus on verifiable efficiencies and consumer benefit, and we welcome the continued refinement of the interface between collaboration guidance and Peru’s merger control framework.
- 5.2. Should INDECOPI wish to discuss any of the points raised in this submission, please contact the Section Officer identified in the cover letter. The Antitrust Section stands ready to engage constructively as INDECOPI finalizes a transparent, predictable, and

administrable Guide that promotes lawful, innovation-enhancing, and sustainable collaboration in Peru.