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The Use of Structural Presumptions in Antitrust – Note by Argentina

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1. Structural presumptions are a tool in competition law whereby authorities or courts use information about market conditions or its structure to make inferences as part of their legal analysis. These presumptions are employed to reach decisions in specific cases. Common applications of structural presumptions include assessing an increase in economic concentration in a market resulting from a merger as an indicator of potential harm to competition, and using market shares as an indicator of the presence (or reinforcement) or absence of dominance or market power. This can be done independently or alongside other signs of such power, particularly in the analysis of merger control and in investigations of abuse of dominant position.

2. To examine the structural presumptions that the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) has incorporated into its guidelines, manuals, and regulations for evaluating mergers and cases of abuse of dominant position, it is necessary to delve into the quantitative and qualitative criteria underpinning them. These structural presumptions aim to increase predictability in the application of competition policy, providing a clearer framework for companies and market agents. Indeed, these guidelines are employed by the CNDC to make its decisions more predictable for the parties involved, while still allowing for a case-by-case analysis and the possible inclusion of complementary methods that may be developed in the future.

3. This note will address the various types of structural presumptions used by the CNDC and their relevance in each case, including merger reviews and the identification of dominance or market power, and will examine the theoretical and empirical evidence related to structural presumptions and the appropriate thresholds for their application. Throughout the contribution, the use of structural presumptions for the analysis of economic concentrations and cases of exclusionary abuse of dominant position is described, based on the guidelines and regulations developed and published by the CNDC, which outline the evaluation criteria for these cases. Finally, some conclusions are presented, discussing the potential challenges of using structural presumptions and their future implications.

1. Structural Presumptions in the Guidelines and Regulations of the CNDC

4. The CNDC uses a combination of quantitative and qualitative measures to assess the competitive impact and potential harm of economic concentrations and potentially anti-competitive behaviours. For concentration assessments, there are two key documents: the *Regulation for the Notification of Economic Concentrations*, published in 2023, and the *Guidelines for the Control of Economic Concentrations*, released in 2018. Additionally, the *Guidelines for the Analysis of Exclusionary Abuse of Dominant Position Cases*, published in 2019, details the methodology for determining the existence of a dominant position, as well as outlining different types of abuse of dominance as defined by Act No. 27.442 on the Defence of Competition (LDC, for its acronym in Spanish).

1.1. Regulation for the Notification of Economic Concentrations

5. On 28 August 2023, the CNDC approved the new *Regulation for the Notification of Economic Concentrations*, applicable to all notifiable concentration acts requiring authorisation under Chapter III of the LDC. This regulation replaced the one established in

2001 and introduced a primary innovation: a “summary procedure” (PROSUM) for transactions with a low probability of significant adverse effects on competition.

6. Additionally, through Provision 62/2023, the CNDC established inclusion criteria for economic concentrations eligible for the PROSUM. Among these criteria, some of them are linked to quantitative structural presumptions:

- Horizontal concentrations where the combined market share in each relevant market affected by the transaction is below 20%.
- Horizontal concentrations where the combined market share in each relevant market is under 35%, and the increase in the Herfindahl-Hirschman Index (HHI) is less than 150 points.[1]
- Vertical concentrations where individual shares in each vertically linked market are below 30%.

7. The same Provision describes the cases in which an economic concentration, even when meeting the criteria for inclusion in PROSUM, is not eligible for the abbreviated procedure and must follow the ordinary proceedings. Exclusion criteria include the structural presumption that any concentration where the post-operation HHI in the relevant market exceeds 2,500 points must follow the ordinary procedure, even if it meets PROSUM inclusion criteria.

8. In sum, the 2023 update to the merger review regulation introduced several criteria for classifying the type of procedure a notifiable economic concentration should follow, some of them based on structural presumptions tied to market shares and HHI concentration levels. These updates help distinguish between potentially complex operations likely to harm competition and those with lower risk, making them candidates for a fast-track procedure. This change significantly accelerates CNDC's merger analysis and allows for a more efficient allocation of resources by the authority.

1.2. Guidelines for the Control of Economic Concentrations

9. In April 2018, the *Guidelines for the Control of Economic Concentrations* were approved.[2] To develop these, the CNDC referenced guidelines from various foreign competition agencies, international organisations’ recommendations, and the insights of academic and professional experts. These guidelines aim to enhance transparency and efficiency in merger review analysis, adapting them to the characteristics of the Argentine market.

10. Among other aspects, these guidelines outline the methodology for defining the relevant market in both its product and geographic dimensions, calculating companies' shares, and assessing theories of potential harm due to increased market concentration. They also include additional elements for consideration in the analysis of economic concentrations, such as barriers to entry, countervailing buyer power, and potential efficiency gains.

[1] This index is defined as the sum of the squares of market shares, with the advantage of giving greater relative weight to the shares of larger companies. The values of the HHI can range from 0 (a fully atomised market) to 10,000 (a monopolistic market).

[2] Available at: https://servicios.infoleg.gob.ar/infolegInternet/anexos/305000-309999/308818/res208.pdf.

11. Regarding elements most closely related to structural presumptions, the guidelines set out the methodology for defining the relevant market, measuring concentration levels, and determining companies' market shares. The CNDC also establishes concentration thresholds to assess whether an economic concentration operation could raise competition concerns.

12. The relevant product market is defined as the smallest group of products in which a hypothetical monopolist could profitably implement a small but significant and non-transitory price increase, known as the SSNIP Test. Although the concept of a "small but significant and non-transitory price increase" may vary by market, it generally represents an actual increase of between 5% and 10%, maintained for at least one year.

13. The relevant product market definition must be tailored to each specific case, meaning that two concentration operations within the same economic sector may be analysed under different product market definitions. One particular case requiring special attention are "multi-sided markets". In these markets, participants on different "sides" interact indirectly through an intermediary, which facilitates the value generated by such cross-side interactions. There are two alternative approaches to capture their specific structure: defining separate markets for each customer group or defining a single market encompassing all customer groups. This scenario, accounted for in the guidelines, has become increasingly important in recent years with the rise in multi-sided market transactions in digital environments.

14. After defining the relevant product market, it is necessary to delineate the relevant geographic market, understood as the smallest region where a single supplier could profitably impose a small but significant and sustained price increase for the product in question. In this process, analysing demand-side substitution is especially important, as it allows assessment of the extent to which consumers would be willing to switch to alternative goods or services located outside that region in response to price changes.

15. According to the guidelines, the market shares of the active companies in the relevant market at the time of the transaction, along with those of immediate potential competitors, can be calculated based on sales, production, or productive capacity intended for that market. These shares may be expressed in monetary terms (considering sales revenue), in physical units or volume, or through production capacity or reserves, the latter being particularly applicable for natural resources. The choice of calculation metric will depend on which best reflects the competitive capacity of the companies, considering the specific characteristics of the market being analysed.

16. The monetary value of sales is typically used in markets where firms stand out primarily for product differentiation. This evaluation approach is often applied in consumer goods markets, which may contain segments defined by price, quality, and brand. For instance, when analysing Anheuser-Busch InBev's acquisition of SabMiller in the Argentine beer market in 2018, the sales value was used alongside volume of beer sold due to the degree of product differentiation.[3] Another relevant case in 2018 was the acquisition by Molinos Río de la Plata S.A. of four brands and two dry pasta manufacturing plants from Mondelez Argentina S.A. In assessing the dry pasta market, the CNDC also relied on sales value to calculate shares, given the segmentation by "low," "medium," and "high" price levels observed in the market.[4] However, the analysis was supplemented with volume and installed capacity indicators, which made it possible to conclude that under any

[3] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_1375.pdf

[4] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_1173.pdf

available metrics, there was a significant asymmetry between the acquiring companies and their competitors.

17. Physical units sold or produced are typically used in homogeneous product markets, where companies are distinguished by the buyers or buyer groups they serve. The CNDC has used this metric in various cases, such as passenger air transport, to assess the British Airways and Iberia merger in 2014,[5] considering the number of passengers transported by origin-destination route. The same metric was applied in the analysis of a cooperation agreement between Aerolíneas Argentinas and Alitalia in 2020,[6] for the joint management of passenger transport services between Italy and Argentina. Similarly, in 2017 in the mobile telecommunications services market, shares were calculated on the base of the number of subscribers,[7] while a cinema complex merger analysis in 2015 measured market share based on audience numbers and gross revenue.[8]

18. Installed production capacity, for its part, is often used as complementary data in markets with idle capacity, as this indicator can more accurately reflect companies' relative positions in the relevant market. An example of this analysis is found in the decision evaluating the transfer of Cargill's wheat milling business unit to Molino Cañuelas in 2019, where this metric was used alongside market share by sales volume. According to the CNDC analysis, the wheat milling sector exhibited significant idle capacity, close to 40%, affecting all flour mills, albeit unevenly. Thus, the effects of the transaction were assessed from both the installed capacity and the sales volume perspectives, without significantly altering the final conclusions of the analysis.[9]

19. Similarly, alternative methods can be used to measure market share in certain markets, depending on how accurately they reflect companies' competitive capacities, considering the specific characteristics of the analysed market. An example is the pay TV signal transmission sector, where market share is typically measured based on ratings, an indicator of the average number of people watching a programme or channel during a given time. This approach was applied in mergers such as Disney/Fox in 2021 and Discovery/Warner in 2022, where horizontal effects were observed in the same signal segments.[10] [11]

20. As for the thresholds at which a transaction could raise competition concerns, the guidelines establish that a transaction between companies with a combined market share of less than 20% should not raise concerns about reducing competition. This is because another set of companies, covering more than 80% of the market, is not involved in the transaction under analysis.

21. Likewise, the guidelines indicate that the HHI is a useful tool for measuring market concentration, establishing a criterion that a post-merger HHI below 2000 points suggests a low likelihood of competitive constraints, as it reflects a concentration level similar to

[5] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_840.pdf

[6] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_1644_-_2020.pdf

[7] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_1300.pdf

[8] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_938.pdf

[9] Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/conc_1358_-_2020.pdf.

[10] Available at: https://www.argentina.gob.ar/sites/default/files/2022/01/conc-1692-dictamen-reso.pdf

[11] Available at: https://www.argentina.gob.ar/sites/default/files/2022/09/att_-_discovery.pdf

that of a market with five equally sized companies. Another factor that can rule out potential anti-competitive effects is a small increase in the HHI value, especially when the combined market share of the merging companies is relatively low. Specifically, if the increase in HHI is less than 150 points and the combined share of the companies is below 50%, this is considered an indicator that the concentration operation does not raise competition concerns. This is because such a transaction has an effect similar to a merger between two companies with shares of 8.7% each, resulting in a new entity with a total share not exceeding 18% of the market.

22. Regarding vertical concentrations, an integration between a supplier and a customer, both with market shares below 30% (as supplier and buyer of the relevant product, respectively), should not raise concerns regarding a reduction in competition. Such concerns should also not arise if the HHI values are below 3000 points on both the supply and demand sides, or when both conditions are met in combination (i.e., a market share below 30% on the demand side and an HHI below 3000 points on the supply side, and vice versa).

23. Additionally, the guidelines include an assessment of theories of harm, focusing on the potential negative effects of a concentration operation, specifically on unilateral and coordinated effects. One of the main unilateral effects of an economic concentration operation is the creation or strengthening of a dominant position in the market.

24. The existence of a dominant position can be approximately evaluated through quantitative criteria based on companies' market shares. These criteria make it possible, for example, to rule out cases of creation or strengthening of a dominant position in situations where the undertakings involved have a combined market share smaller than that of another undertaking operating in the same market. One of these criteria is proposed by Melnik, Shy & Stenbacka (2008), who define a "dominance threshold" based on the calculation of the shares of the two companies with the highest market share.[12] Below this threshold, it is unlikely that a company has a dominant position in the market.

25. This threshold is defined as $S^D = ½ [1 – \Upsilon(S_1^2 + S_2^2)]$, where S_1 is the share of the largest company and S_2 that of the second largest (both expressed as values between 0 and 1). The parameter Υ is calculated according to specific market characteristics, such as potential competition, entry barriers, and pro-competitive regulation. Low values of Υ reflect low entry barriers, while high values indicate significant barriers and limited potential competition. Given the difficulty of calculating Υ, regulatory and competition agencies often adopt a value of 1 as a reference, in line with the proposed parameters of the authors.

26. In this regard, in the previously mentioned transaction in the wheat milling market between Cargill and Molino Cañuelas, the CNDC calculated the dominance threshold assuming a value of 1 for the parameter Υ, both for the scenarios before and after the transaction, obtaining values of 49% and 46%, respectively. Since the companies' combined share was approximately 28%, this indicator helped strengthen the conclusion that the transaction would not have the potential to affect competition in a way that could harm general economic interest.

27. This indicator was also calculated in other transactions, particularly in 2016, in mergers between companies with global-scale production impacting the Argentine market. In the acquisition of Hellermanntyton Group by Delphi Automotive, the target company held a 44.5% share in the Argentine market for automotive industry fasteners, which

[12] "Assessing Market Dominance"; Journal of Economic Behavior and Organization, vol 68, pp 63-72, 2008.

increased by 1.06% following the merger with Delphi (the acquiring company).[13] In Sanofi's acquisition of a Boehringer Ingelheim business unit, the acquirer held a 6.63% share in the Argentine market for over-the-counter expectorants, while the acquired company had a 34.45% share.[14] In the merger between Westport Innovations and Ta Gas Technology, the market shares were 5.6% and 26.4%, respectively, in the Argentine market for compressed natural gas conversion kits.[15] In all three cases, the dominance threshold was above the combined share resulting from the transaction, indicating that none of the transactions had the potential to create a dominant position.

28. Finally, an economic concentration operation may produce coordinated effects. According to the Guidelines, the likelihood of collusive conduct tends to increase when certain conditions are present which not only facilitate agreements between competitors, but also favour their continuation over time. These conditions include a reduced number of companies in the market, similarity in scale, homogeneity in the products they offer, and the existence of monitoring and sanction mechanisms for those who deviate from a collusive behaviour.

29. An economic concentration transaction can alter these conditions, either facilitating or hampering collusion. In particular, a horizontal concentration can reduce the number of companies in the market, thereby facilitating collusion. It can also influence the scale of the remaining companies, making them more or less similar to each other. Finally, to assess the likelihood of collusive behaviour, it is essential to analyse the history of the industry under examination and consider whether there is any precedent of collusion.

30. In July 2023, as a result of the analysis of the Linde/Praxair merger, two of the leading suppliers of medical and industrial gases at both national and global level, the competition authority conditioned the operation upon compliance with a commitment that included a divestiture in the oxygen market, as well as behavioural measures.

31. The CNDC arrived at this commitment after conducting an analysis based on market shares, HHI variation, entry barriers, the analysis of potential coordinated effects, and the history of coordination between the parties and their competitors in the supply of medical oxygen, as well as other medical and industrial gases.[16]

32. It was concluded that the transaction would eliminate a relevant competitor in the supply of medical, industrial, and special gases, as well as in the retail helium market. In most of the markets analysed, competition would be reduced from four to three key players due to the consolidation of Linde and Praxair into a single economic entity. The substantial increase in concentration as a result of the transaction would lead to a significant rise in the market and bargaining power of the notifying companies in the oxygen market, where unilateral effects were identified. Additionally, the CNDC noted that it would reinforce a market structure that could facilitate coordinated practices in the oxygen market, in which coordinated behavior has been detected and sanctioned in the past by the CNDC.

33. In this regard, the analysis of the merger between Brink's and Maco Caudales, two companies specialising in the security of cash transportation, is also noteworthy. In 2021,

[13] Available at: https://cndc.produccion.gob.ar/sites/default/files/cndcfiles/1383.pdf.

[14] Available at: https://cndc.produccion.gob.ar/sites/default/files/cndcfiles/1380.pdf

[15] Available at: https://cndc.produccion.gob.ar/sites/default/files/cndcfiles/1373.pdf

[16] In 2005, the CNDC sanctioned four companies that produced and marketed medical oxygen for engaging in concerted actions to divide customers and set prices, including Praxair. Available at: https://www.argentina.gob.ar/sites/default/files/2017/02/cond_697.pdf

the approval of this transaction was conditioned to the compliance with a commitment that included structural and behavioural measures, as the CNDC found that, although the companies involved were consolidating as the country's second-largest cash transportation company, with a market share not exceeding 35%, the presence of a market leader with a share greater than 55% at the national level and in many of the local markets considered (the firm Prosegur) created a scenario with two competitors holding over 90% of the market share, which favoured the emergence of collusive behaviour.

1.3. Guidelines for the Analysis of Exclusionary Abuse of Dominant Position Cases

34. In May 2019, the CNDC published the *Guidelines for the Analysis of Exclusionary Abuse of Dominant Position Cases*.[17] The objective of the document is to provide guidelines for analysing behaviours that are considered infringements to the LDC and that represent an abuse of a dominant position in a given market. Like the guidelines for merger control, these contribute to making decisions more predictable, without prejudice to case-by-case application and the incorporation of complementary criteria that may be developed in the future.

35. Section 5 of the LDC defines that a company holds a dominant position when it is the sole supplier or buyer in a market or when, even if it is not the only one, it is not exposed to substantial competition. Section 6 of the law, in turn, establishes several criteria for determining the existence of a dominant position, including the low substitutability of a product by others, the existence of regulatory restrictions limiting other products' access to the market, and the limited ability of competing companies to counter the dominant company's power.

36. Dominant position may also be understood as a situation of economic power that enables a company to act with a significant degree of independence from its competitors, suppliers, or customers. This concept of independence is linked to the level of competitive pressure exerted on the company in question. Having a dominant position implies that such pressure is not sufficiently effective, allowing the company to enjoy substantial market power.

37. Dominant position is always defined in relation to a specific market. To do this, it is necessary to delineate the market in question in terms of its product, geographic scope, and temporal dimensions, following the general criteria established in the *Guidelines for the Control of Economic Concentrations* outlined in the previous subsection. However, in certain cases, the analysis of certain behaviours may require specific criteria. For example, the extent of the geographic market may vary depending on whether it involves a merger, in which case the analysis is fundamentally forward-looking, or past behaviour, as in investigations of alleged anticompetitive conducts. Likewise, the existence of a dominant position may be evaluated according to the same measurement criteria described in the aforementioned merger review guidelines.

38. According to the *Guidelines for the Analysis of Exclusionary Abuse of Dominant Position Cases*, and considering criteria that include structural presumptions for evaluating this type of conduct, it is noted that in situations where the investigated company holds a share of less than 40% of the relevant market, it is unlikely to hold a dominant position, even if it has the highest share in that market. Furthermore, a high market share sustained over a long period is a necessary but not sufficient condition to identify the existence of a dominant position. Similarly, the smaller the difference between the market share of the company in question and that of its closest competitor, the less likely it is that the former

[17] https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante.pdf.

holds a dominant position in the analysed market. However, exceptions may exist depending on the specific characteristics of the market.

2. Final Remarks

39. Throughout this note, we have presented three CNDC documents outlining various analysis criteria based on certain structural presumptions. These documents aim to increase predictability in the application of competition policy, providing a clearer framework for companies and market agents. A challenge in developing these presumptions is ensuring they are precise enough to enhance efficiency and predictability in applying competition policy, while also maintaining a level of generality that allows agencies the flexibility to analyse the particularities of each case.

40. In this regard, structural presumptions play a fundamental role in balancing efficiency and predictability in applying the competition law. At the same time, their design must acknowledge that each market has specific characteristics, making it necessary to maintain a flexible approach open to new methodologies. In this way, the presumptions not only guide the CNDC's decisions, but also allow the criteria used to evolve as additional tools are developed and new dynamics emerge in the markets. In conclusion, structural presumptions form a key pillar of antitrust analysis, providing a balance between regulatory clarity and the adaptability needed to address the complexity and diversity of today's markets.