JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON PARAGUAY'S "IN DEFENSE OF COMPETITION BILL"

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The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

INTRODUCTION

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association appreciate the opportunity to provide comments to the Congress of the Paraguayan Nation ("Congress") regarding the "In Defense of Competition" bill ("Competition Bill" or "Bill"). The Competition Bill addresses a broad range of conduct, including agreements in restraint of trade, unilateral conduct by dominant firms, and mergers and acquisitions. The Bill would grant Paraguay's Ministry of Industry and Commerce the authority to enforce the proposed law, which would include the power to enjoin prohibited conduct, approve exempt conduct, impose fines, and order other remedies in the public interest.[1] In addition, the Ministry of Industry and Commerce would be responsible for developing and implementing regulations and procedures regarding the administration of the law.

The Sections recognize the substantial thought and effort of Congress that is reflected in the Competition Bill, and appreciate the opportunity to offer these comments. The Sections hope and intend that these comments will assist Paraguay in its consideration and implementation of the Bill. The Sections have worked together over the years to advance the level of analysis, debate, and competence in the competition law field, consistent with the larger ABA's objectives of promoting knowledge of and respect for the rule of law and legal processes. The Sections previously have prepared comments addressing a broad range of antitrust and competition law issues and submitted them to a

[1] Article 32(2) of the Competition Bill also appears to grant injured parties a private right of action.

number of countries and their enforcement authorities, including the European Union, China, India, Brazil, Australia, the United Kingdom, South Korea, and the United States.[2]

The memberships of the Sections include over 22,000 lawyers, economists, and other legal professionals from over 45 countries. The memberships include lawyers in the law departments of businesses, the faculties of law schools, as well as lawyers and economists in private practice and in government. Although most members are based in the United States, the Sections' international membership is growing. Members of the Sections have substantial expertise with competition law enforcement around the world, including Latin America. As a result, these comments reflect not only the Sections' members' perspectives and knowledge regarding U.S. antitrust law, but also their experience with and knowledge of best practices under the competition laws of many other jurisdictions.

The Sections appreciate and respect the authority of other nations to define and implement their own competition policy, but also believe there are benefits to understanding and learning from the experience of practitioners and enforcers in other jurisdictions with competition law regimes. To that end, these comments not only reflect the experience of the Sections' members, but also their knowledge of certain recommended practices and guidelines adopted by the International Competition Network ("ICN"). In the Sections' experience, many of the ICN's recommend practices have proven to be sound and sensible.

The ICN is an organization that is devoted exclusively to competition law enforcement. Its members are representatives of national and multinational competition authorities who engage in regular dialogues intended to "build consensus and convergence towards sound competition policy principles."[3] The ICN does not exercise any rule-making function, but instead develops consensus-based "best practices." Competition authorities then decide whether and how to implement the ICN's recommendations.

The ICN also has convened a Competition Policy Implementation working group that identifies the key elements that contribute to successful capacity building and

[2] Copies of previously submitted joint comments are available at http://www.abanet.org/antitrust/at-comments/comments.shtml.
[3] Available at http://www.internationalcompetitionnetwork.org/index.php/en/about-icn.

competition policy implementation in developing and transition economies. The group's activities are intended to benefit competition law regimes by promoting technical assistance efforts and encouraging dialogue with enforcement agencies in other jurisdictions. The Sections recommend that Congress consult the ICN and its best practices as Congress moves forward with its consideration and implementation of the Competition Bill. The ICN can serve as a helpful and valuable resource to Paraguay, including by serving as a mechanism by which Paraguay could consult with other competition law authorities.

In general, the Sections support the protection of vigorous competition in the marketplace, and have applauded the efforts of governments to implement comprehensive competition law regimes. However, it also is important that any competition law regime be well-conceived and carefully implemented, so as not to result in a law enforcement mechanism that improvidently intervenes in legitimate market functions or chills innovation and efficiency-enhancing conduct. As a result, the Sections offer these comments with the intention of assisting Paraguay in the further development of a well-conceived and well-drafted competition law regime.

COMMENTS

These comments address the Competition Bill's proposed legal standards governing 1) agreements in restraint of trade, 2) mergers and acquisitions, and 3) unilateral conduct by dominant firms.

I. Agreements in Restraint of Trade

Chapter II of the Competition Bill describes the types of agreements (both vertical and horizontal) that restrict competition in violation of the Bill; establishes market shared-based harbors that, if met, exempt conduct from the reach of Chapter II; and establishes a mechanism that gives the enforcement authority the power to authorize restrictive agreements if the conduct in question satisfies certain requirements. The Sections applaud Congress' efforts to describe clearly the kinds of conduct that would violate the law, but also offer several comments for consideration that are based upon the Sections' members' experience with the antitrust standards and practices of authorities in other jurisdictions.

A. Blanket Prohibitions and Obligation to Obtain Authorization to Engage in Conduct

Article 7 of the Bill establishes a presumption that a broad range of horizontal and vertical agreements restrain competition unless a) the parties do not exceed certain market share-based thresholds set forth in Article 8 or b) the enforcement authority affirmatively determines that the conduct satisfies a number of conditions set forth in Article 9. This approach is similar to the original model of evaluating agreements adopted by the European Community (EC). The original EC approach relied on broad prohibitions on conduct and a preclearance mechanism (parties could proceed without obtaining preclearance of an agreement but a subsequent European Commission finding of a violation would render the agreement void). Over time, the Commission observed that this approach was terribly burdensome and acted as a drain on limited enforcement resources. Enforcers were required to expend significant time and effort in the review and clearance of agreements, the bulk of which proved to be efficiency-enhancing, or at worst, competitively benign.

The European Community since has moved away from such broad prohibitions and it now has a system of exemptions in which some conduct is always permitted, some is permitted unless certain circumstances exist, and some conduct is almost always prohibited. The European Community's current approach is more similar to the U.S. model, which presumes that most commercial agreements are permissible under competition law unless they are shown to have an unreasonably restrictive effect on competition. While some agreements are viewed as so pernicious to be per se illegal (e.g., hard core price fixing and market allocation agreements), most activities are evaluated under a balancing test known as the rule of reason, which requires an assessment of whether a particular activity on balance is likely to lessen instead of promote competition.[4]

[4] In contrast to the U.S. approach, Article 7 of the Competition Bill appears to prohibit a broad range of agreements that have the purpose of reducing competition, regardless of whether the agreements in fact are likely to produce an anticompetitive effect.

Based on their experience both in the United States and European Community, the Sections counsel against introducing a formal system for the issuance of exemptions. Such an approach could have the unintended consequence of chilling procompetitive conduct and imposing significant burdens on both the enforcement authority and the companies that propose to engage in the conduct covered by the law. Instead, the Sections recommend that Congress adopt a standard that requires companies to assess the legality of their own conduct, and for the enforcement authority to provide additional guidance in the form of guidelines, block exemptions, and opportunities for parties to engage in informal consultation with the enforcement authority. An optional system that allows parties to conduct their own legal assessment of their proposed actions and seek advice voluntarily regarding the enforcement authority's interpretation of the law as applied to those actions would be preferable to a binding formal exemption system.

B. Safe Harbors Exempting Certain Agreements

Article 8 of the Competition Bill provides that agreements involving parties that do not exceed certain aggregate market share thresholds are exempted from the prohibitions of Article 7. These thresholds are:

- Combined 5 percent share where parties to an agreement compete with one another;
- Combined 10 percent share where parties to an agreement do not compete with one another; and
- Combined 5 percent share "when it is not possible to classify the agreement as horizontal or vertical."

The Sections recognize that the use of market share thresholds as an indication of safe harbor zones would provide parties to agreements and the enforcement authority with a better indication of the likelihood that the authority will take action against particular agreements. The Sections respect Congress' proposal to use market shares to determine the applicability of safe harbor zones, but note that reliance on market share

thresholds as the sole indicator of market power that actually may be exercised in a given circumstance could have aberrant effects.

The Sections also note that, with the exception of hard core agreements (e.g., price fixing, market allocation), most of the agreements that would be covered by Chapter II are unlikely to have anticompetitive effects unless one or more of the parties to the agreement has market power in some relevant market. The 5 and 10 percent thresholds set forth in the Competition Bill are well below the generally accepted levels at which firms are presumed to have market power,[5] and as a result the Sections recommend that Paraguay reconsider these thresholds.

C. Possible Per Se Treatment of All Vertical Price and Non-Price Constraints

Article 10(b) provides that all agreements "of a vertical nature that have the purpose of fixing resale prices, allocating distribution markets or supply sources according to territorial criteria, sales-and-purchase volume, or other criteria" are "absolutely prohibited regardless of their effect on the market." Such a standard would be inconsistent with the approach followed in the U.S. and other jurisdictions, where vertical agreements are evaluated on the basis of their likely competitive effects. Article 10(b), in contrast, appears to declare that all such agreements are per se illegal and does not allow for inquiry into the likely competitive effects of such agreements.[6]

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[5] For example, the U.S. antitrust enforcement agencies have issued guidelines for competitor collaborations that provide that:

> Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.

This "safety zone" does not apply to agreements that are "per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied." U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors (2000), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,161, available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[6] Moreover, Article 10(a), which addresses horizontal agreements, could be interpreted to prohibit many joint ventures, regardless of their competitive effects.

Many vertical agreements actually promote consumer welfare and are procompetitive.[7] For example, a manufacturer with a 10% share of a relevant product market might want to assign exclusive sales territories to its distributors so that the distributors can focus their sales efforts on building share at the expense of other manufacturer's products instead of on winning business at the expense of other distributors of the same brand. Judges, lawyers, and economists in many jurisdictions have recognized that limiting intrabrand competition to promote interbrand competition in this way can be efficiency-enhancing and improve consumer's competitive choices. However, under Article 10 such arrangements are illegal. The Sections recommend that Paraguay reconsider its proposal to declare all of these types of vertical agreements illegal.

The Sections note that the Article 12(1)(a) of the Competition Bill encourages the enforcement authority to issue "block exemptions" when "only two businesses participate and impose restrictions on the distribution or supply of determined products for sale or resale." The Sections commend Congress for proposing a mechanism that could be applied to exempt certain vertical agreements from Article 10's prohibitions, but encourages Congress to clarify how to interpret Article 12(1)(a) in light of Article 10(b)'s absolute prohibitions on such a broad range of vertical agreements. The Sections also suggest that Paraguay consider the experience of the European Community, whose approach to evaluating vertical restraints has moved from a system of block exemptions in which only narrowly specified conduct is permitted towards a model in which some conduct are always permitted, some are permitted unless certain circumstances are present, and some conduct are almost always prohibited.

II. Merger Notification System

The Sections welcome the provisions of the Competition Bill concerning merger notification, and recommend that Paraguay look to the recommended practices of the ICN's Merger Working Group as it considers the proposed legislation and its

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[7] See generally VIII Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ch. 16A-3 ("Procompetitive Potential of Distribution Restraints") ¶¶ 1611-1619 (2d ed. 2004).

implementation. The Merger Working Group of the ICN has developed *Recommended Practices for Merger Notification* ("*Recommended Practices*") that have been approved by all members of the ICN.[8] These practices are nonbinding, and reflect a consensus of the international competition enforcement community as to the best practices in this area. Numerous jurisdictions have adapted their merger review systems to the ICN *Recommended Practices*. In order to promote international convergence and to reduce unnecessary burdens on undertakings that operate globally and have to deal with multijurisdictional merger filings, the Sections recommend that Paraguay consult the ICN *Recommended Practices* and identify whether any of them can be appropriately incorporated into Paraguay's proposed competition law enforcement regime.

A. Notification Thresholds

According to the ICN's *Recommended Practices*, notification thresholds should be clear, understandable, and based on objectively quantifiable criteria, such as assets and sales (turnover), in order to promote certainty and efficiency in the merger review process.[9] The ICN also recommends that notification thresholds be based on information that is readily accessible to the merging parties.[10]

The Sections agree with the ICN's position on this issue and believe that Article 19(a)'s market share test is inconsistent with the ICN *Recommended Practices*. Article 19(a) requires notification of concentrations which "result in the acquisition or increase of a market share equal to or in excess of 30% of the national market for a given product or service, or of a geographic market defined within the same." These market share thresholds are not based on objectively quantifiable criteria, and reliance on these thresholds increases the uncertainty and unpredictability of the need to notify.

Additionally, market definition and market shares are often based on information that is not readily available to the merging parties. In order to determine their own market shares, parties to a given transaction must first define the relevant market(s) to the transaction, something that usually requires complex economic analysis, as well as commercial data not readily accessible, such as competitor sales, production, and capacity data. Consequently, parties may not be able to determine the scope and size of

[8] International Competition Network, Recommended Practices for Merger Notification, available at http://internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf .
[9] Id.
[10] Id.

the relevant markets and their market shares to verify in a timely manner whether an antitrust notification is mandatory. Such a subjective threshold also could serve as an incentive for merging parties to define and measure the affected markets in a fashion that is most likely to advance their substantive positions before the enforcement authority.

The ICN has indicated that market share-based tests may be appropriate for later stages of the merger control process, but such tests are not appropriate for use in making the initial assessment of whether a transaction must be notified. The Sections share that view, and accordingly recommend that Article 19(a) be replaced by a more objective measurement tool, such as one that relies upon asset values or sales volumes. When adopting an assets or sales threshold, the Sections recommend that Paraguay clearly define the scope of the geographic area to which such a tool is applied (national or worldwide), the relevant time period over which the measurement should be taken (e.g., a calendar year), whether it applies to one party and/or both, as well as what undertakings and affiliates must be included in the analysis.

B. Notification Thresholds for Foreign Corporations

The Competition Bill does not address what standards should apply to the notification of transactions between two or more foreign firms. When and if Congress or the enforcement authority decide upon what constitutes a sufficient local nexus for transactions that involve foreign firms, the Sections recommend that Paraguay take into consideration a number of best practices set forth in the ICN *Recommended Practices*.

The ICN's first recommendation relating to nexus is that authority should be asserted only over those transactions that have an appropriate nexus to the jurisdiction concerned. The ICN explains that requiring merger notification of transactions that are unlikely to result in appreciable competitive effects imposes unnecessary costs and excessive commitments of competition agency resources. The enforcement authority in Paraguay will have to determine how to allocate its resources in exercising its powers and complying with its obligations under the Competition Bill, and it would be in the authority's own self-interest not to be burdened with having to review transactions that have no domestic competitive effect.[11]

[11] For example, in 2005, the Brazilian antitrust authority ("CADE") issued a new interpretation of Brazil's merger notification thresholds. CADE announced that, consistent with the approach of many other jurisdictions, the Brazil notification threshold should be measured in terms of Brazilian domestic turnover

The Competition Bill appears consistent with the ICN's recommendations since it requires notification only where transactions involving foreign firms would produce effects on Paraguay. However, the Bill would benefit from clarification regarding when a transaction may be deemed to produce effects sufficient to establish a nexus to the jurisdiction.

The ICN recommends that the determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory (including, where appropriate, import activities) and/or by reference to the activities of the acquired business in the local territory. The ICN further explains that the notification should be required only when the transaction is likely to have a significant, direct, and immediate economic effect within the jurisdiction concerned. The ICN observes that requiring activity by at least two parties is appropriate because the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not justified.

The Sections agree with the ICN's recommendations and stress the importance of requiring activity within the jurisdiction by at least two of the parties to the transaction. Such a requirement avoids a situation where, for example, a large multinational firm based in Germany, would be required to notify the Ministry of Industry and Commerce of all mergers and acquisitions outside of Paraguay simply because it had a small sales office in Paraguay.

C. Transparency in Merger Review Procedures

Merger control laws should be applied in a transparent fashion, subject to the application of appropriate safeguards that protect against disclosure of confidential information. Merger control regimes should be transparent with respect to the jurisdictional scope of the merger control law, the principles and criteria the competition authoritry uses to apply the substantive review standard, and the competition authority's decision-making procedures.

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rather than worldwide turnover. This change in interpretation has significantly reduced the number of foreign merger notifications, which has helped CADE better focus its enforcement resources.

The Sections endorse the ICN's recommendation that a merger control regime have clear, understandable, readily identifiable merger review process standards and procedures, including those that address: (i) the identity and contact details of the competition agencies; (ii) filing deadlines, if any; (iii) notification procedures, including the information to be provided in an initial filing; (iv) filing fees, if any; (v) review periods; (vi) limits, if any, on implementing a transaction prior to clearance; (vii) investigative procedures; (viii) any deadlines with which merging parties, third parties, or the enforcement authority must comply during the review period; (ix) procedures and deadlines for appealing adverse decisions or for challenging a merger; (x) procedural rights of merging and third parties; (xi) enforcement procedures pertaining to violations of the merger control laws (*e.g.*, failure to notify) or merger review decisions (*e.g.*, breach of conditions or obligations); and (xii) measures for protecting confidential information. As currently drafted, the Competition Bill does not address most of these issues. The Sections do not have a view on whether these issues should be addressed in the Competition Bill or in subsequent implementing rules and regulations, but believe that either Congress or the enforcement authority should establish clear, transparent standards and procedures, in particular ones that address the timing of notification and the duration of any review periods.

1. Timing of Notification

The Competition Bill does not explain what events will trigger an obligation to notify a transaction, or the time frame within which parties must submit a notification. The ICN offers some helpful recommended practices on this topic. In general, the ICN has recommended that "parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction," and that they be permitted to notify "without undue delay."[12] However, the ICN recognizes that enforcement authorities should not be required to accept notifications of transactions that are merely speculative. Nor should merging parties be required to submit notifications with respect to such speculative transactions. The ICN *Recommended Practices* note that some jurisdictions permit filing on the basis of a letter of intent, agreement in principle or a public announcement of an intent to make a tender offer (with some jurisdictions also requiring an express certification by the notifying party or parties of a good faith

[12] Other jurisdictions have adopted timing procedures in accordance with ICN recommendations. The European Commission, for example, has brought its merger notification procedures in closer alignment with the ICN recommendation that parties not be required to have a definitive agreement to submit a merger notification.

intention to consummate the notified transaction), and that these jurisdictions have found that this practice has not resulted in a significant incidence of speculative notifications.

The appropriate timeframe for submitting merger notifications may depend in part upon whether Paraguay intends to prohibit closing while the enforcement authority reviews a transaction. If Paraguay plans to impose a suspensive period that lasts until its review is complete, the Sections recommend that, consistent with the ICN *Recommended Practices*, Paraguay not impose deadlines for premerger notification. As noted by the ICN, parties already will have an incentive to file promptly after reaching an agreement because they know they will be unable to close their transaction until it has been reviewed.

If, on the contrary, Paraguay does not intend to prohibit consummation pending the merger review, the Sections suggest the establishment of a reasonable time frame within which merging parties much submit their notification after the occurrence of a triggering event. The ICN has suggested that any "triggering event" should be "clearly defined" so that parties can determine with accuracy and certainty the date by which they will have to file their merger notification.

2. Review Periods

The Competition Bill also is silent as to the time period within which the enforcement authority must conduct a merger investigation. Although mergers may present complex legal and economic issues that require a reasonable amount of time to review, mergers also are often time-sensitive. Extended merger review periods could jeopardize the consummation of the transaction, adversely impact on the merging parties' individual ongoing business operations, and/or defer or risk the realization of any efficiencies arising from the transaction.

As a result, notwithstanding an enforcement authority's need for an adequate amount of time to review a transaction, merger reviews should be completed within a "reasonable" time frame, regardless of whether Paraguay intends to prohibit parties from consummating a transaction pending review by the enforcement authority. As the ICN notes, what constitutes a "reasonable" time period may depend upon a number of factors in a given transaction, including the complexity of the transaction, the possible

competition issues, the availability and difficulty of obtaining information, and the speed with which merging parties respond to information requests.

The Sections also recommend that Paraguay establish a mechanism that allows for the expedited review and clearance of transactions that do not raise material competition concerns. Because the vast majority of transactions are unlikely to cause any anticompetitive effects, the Sections suggest that Paraguay provide for a "fast track" or expedited review period that will allow the authorities to clear promptly nonproblematic transactions. In the United States, the enforcement agencies have the authority to clear a transaction by granting "early termination" the initial 30 day waiting period under the Hart-Scott-Rodino Act.

3. Confidential Treatment of Sensitive Business Information

The ICN *Recommended Practices* recognize that it is critical that business secrets and other sensitive information received from merging parties and third parties in connection with the merger review process be given appropriate confidentiality protections. The Sections applaud Article 25's recognition of the need for confidential treatment of documents and data.

However, the provisions relating to confidential treatment of business secrets, which may be granted by the Ministry of Industry and Trade, would benefit from greater clarification with respect to what information shall be deemed confidential, the process for obtaining confidential treatment of information, and the scope of any protections.

III. Abusive Practices by Dominant Firms

Chapter III of the Competition Bill prohibits abuses of a dominant position. Article 13(1) of the Bill sets forth the general principle of what constitutes an abusive practice, while Article 13(2) and Articles 14 through 16 delineate the specific kinds of activities that could constitute an abuse of a dominant position.

Given that abuse of dominance cases typically involve a single firm, the legal provisions that refer to them are generally known as unilateral conduct laws. The ICN's Unilateral Conduct Working Group has prepared several documents that address the concept of abuse of a dominant position and are relevant to Congress's consideration of

Chapter III. The most relevant ones are *Dominance/Market Power Analysis Pursuant to Unilateral Conduct Laws – Recommended Practices*,[13] *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies,*[14] and *Report on Predatory Pricing*[15] (individually or jointly, the "Reports"). While there are differences in how jurisdictions approach single firm conduct, the Sections recommend that Paraguay consult the ICN materials as it evaluates the Bill's proposed standards.

A. General Standards Governing Unilateral Conduct

The Sections applaud Congress for recognizing that unilateral conduct laws should address specific conduct and its anticompetitive effects, as opposed to concluding that the mere possession of dominance or substantial market power or its creation through competition on the merits violates the law. Article 1 of the Competition Bill makes clear that "the simple conquest of a market resulting from the natural process of increased efficiency" does not constitute a restraint of competition.

However, other provisions of the Bill appear to prohibit certain conduct without any showing that the activity in question is likely to have an adverse effect on competition. For example, Article 14 of the Bill prohibits "abusive exploitation" of competitors, customers, and suppliers that are dependent on a dominant firm, but the Bill does not indicate whether such conduct is illegal in every instance or only in those circumstances where the conduct is likely to harm the competitive process. Similarly, Paragraph 2(b) of Article 13 prohibits firms from "limiting production, distribution, or technological development to the unjustified prejudice of businesses or consumers," without defining the meaning of "unjustified prejudice" or whether there must be a likely showing that such conduct will harm competition.

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[13] International Competition Network, Dominance and Market Power Analysis Pursuant to Unilateral Conduct Laws – Recommended Practices , available at http://internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf.

[14] International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, available at http://internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf

[15] International Competition Network, Report on Predatory Pricing, available at http://internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf.

The Sections recommend that Paraguay revisit its proposed standards of unilateral conduct and its apparent focus on individual firms instead of the competitive process. If a primary objective of competition law is to enhance consumer welfare, in the Sections' experience that goal is best achieved by a legal regime that protects competition, not the interests of a single competitor or firm. Protecting and promoting the process of competition ensures that sellers will offer buyers products and services at competitive prices, and vice versa, and is more likely to promote welfare and economic efficiency. A legal regime that instead protects individual competitors without taking account of how or whether a particular course of conduct affects the level of competition could reduce firms' incentives to compete on the basis of price and quality. It also could result in more inefficient competitors remaining in the market.

Survey results of the ICN's Unilateral Conduct Working Group generally are consistent with the Sections' proposed approach to evaluating unilateral conduct by dominant firms. The Group surveyed a number of competition agencies regarding their purpose and objective of unilateral conduct laws. Virtually all of the agencies surveyed indicated that unilateral conduct laws should ensure an effective competitive process; they also indicated that unilateral conduct laws could advance other goals such as promoting welfare and economic efficiency.

B. Market Share Safe Harbor

Article 13(5) of the Bill establishes a presumption of dominance when any undertaking has a market share that exceeds 30 percent. Paraguay's proposed use of market share thresholds is consistent with the practice of many other jurisdictions that use a market power test as a first step in evaluating whether a particular course of unilateral conduct is anticompetitive. However, the Sections urge careful consideration of whether the proposed 30 percent threshold is appropriate, which, in the experience of members of the Sections appears to be far too low to support an inference of dominance.

The Sections also invite clarification of whether the burden of proof of carrying out a thorough market investigation of dominance and assessing whether a firm has market power remains with the enforcement authority or with the firm under investigation. Given the modest 30 percent threshold proposed by Congress, the Sections believe that the burden of proving market power should remain with the enforcement authority.

The ICN has issued a number of recommended practices regarding the use of market power analysis to assess dominance, and the Sections recommend that Paraguay take these practices into account as it considers the appropriate definition of "dominance" and abuses of a dominant position. The ICN has recommended that agencies use a sound analytical framework firmly grounded in economic principles in determining whether dominance/substantial market power exists. The ICN also has advised that market power tests should not be the sole determinant of whether a firm is dominant or possesses market power. The ICN has recommended that a firm should not be found to possess dominance/substantial market power without a comprehensive consideration of other factors that affect competitive conditions in the market under investigation, including entry conditions, buyer power, economies of scale and scope, network effects, access to upstream markets, and the amount of vertical integration in a relevant market.

C. Predatory Pricing

Article 15 of the Competition Bill defines the kinds of predatory pricing that are prohibited by law. This is a notable development, since none of the competition regimes surveyed by the ICN has attempted to define or provide the requirements of predatory pricing under their general competition laws. Typically, other jurisdictions set out predatory pricing standards in accompanying regulations or guidelines or have developed such standards through agency practice and/or court decisions.

1. Predatory Pricing Aimed at Protecting Competitors

Article 15 prohibits predatory pricing only when it causes severe damage to competitors. As discussed above, the Sections and many other jurisdictions believe that an effective antitrust law should protect competition, not individual competitors. Because price-cutting in many instances benefits consumers and does not harm competition absent some likelihood that the conduct will have an exclusionary effect and diminish competition, the Sections suggest that Congress consider more carefully whether to implement a standard that requires that the conduct harm competition instead of individual competitors.

In order to demonstrate injury to competition (as opposed to individual competitors), a number of jurisdictions require proof of one or more other factors other

than the existence of below-cost pricing. The Sections invite Paraguay to consider the approaches followed by other jurisdictions as it considers its proposed predation standard. For example, some jurisdictions (such as the United States) require proof that the party pricing below cost will be able to recoup its losses (i.e., eventually be able to increase prices and obtain additional profits that offset any short term losses). If recoupment is not likely, (such as because barriers of entry are low and new competitors would emerge should the predator attempt to raise prices above supra-competitive levels), then the consumer likely could have benefited from the price-cutting practice, irrespective of whether a certain competitor of the price cutter did not.

2. Average Total Cost Test

The Competition Bill appears to use an average total cost test to evaluate whether a pricing strategy is predatory in nature. There is no single cost measure used by all ICN participating agencies, and the Sections recommend that Paraguay evaluate whether an average total cost standard is the correct standard, in light of other jurisdictions' use of alternative benchmarks (e.g., average variable cost is the relevant measure used in the United States and the European Community).

CONCLUSION

The Sections welcome the efforts made by Paraguay's Congress to draft and implement a comprehensive competition law. In providing these comments, the Sections have sought ways in which Paraguay's draft legislation might become more consistent with international, consensus-based best practices. The Sections hope that Congress finds these comments useful as it evaluates the proposed Competition Bill.