COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE DRAFT INTERNAL GUIDELINES ON FINE REQUESTS MADE BY THE NATIONAL ECONOMIC PROSECUTOR – FISCALÍA NACIONAL ECONÓMICA

February 28, 2019

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

The Sections of Antitrust Law and of International Law (“Sections”) of the American Bar Association (“ABA”) appreciate the opportunity to submit their views to Chile’s antitrust authority, Fiscalía Nacional Economica (“FNE”), concerning the “Internal Guidelines on Fine Requests made by the National Economic Prosecutor” (“Draft Guidelines”), which were issued for public consultation in November 2018.

I. EXECUTIVE SUMMARY

The Sections commend FNE for its efforts to provide transparency and predictability regarding the calculation of antitrust fines. The Sections offer these comments to assist the FNE in further refining the Draft Guidelines, especially in regards to the methodology used to set the base amount of the fine, the circumstances that give rise to adjustments to the base amount, and the predictability and proportionality of the fines imposed. In particular, the Sections recommend that the FNE establish a quantitative methodology that provides a more objective estimate of the fine to be recommended, and further specify the weight to be assigned to each criterion used to determine the fine. The Sections further recommend that the FNE consider clarifying in both sections of the Draft Guidelines the distinct criteria to be applied in imposing sanctions in cartel cases and in abuse of dominant position cases. The comments reflect the expertise and experience of the Sections’ members with antitrust laws and enforcement practices around the world. In particular, the Sections’ members are familiar with issues regarding the calculation of antitrust fines to be imposed on companies and individuals for antitrust violations. The Sections are available to provide additional comments, or otherwise to assist the FNE as it may deem appropriate.
II. INTRODUCTION

1. The Scope and the Goals of the Draft Guidelines

After receiving contributions from academics and professionals on a comparative analysis of optimal fines for competition violations, on August 30, 2016, Law No. 20,945 was published with the aim of improving the Chilean legal framework for the protection of competition. The above-mentioned law resulted in important amendments to Decreto Ley No. 211 (“DL No. 211”), the act that governs competition defense in Chile. Among other aspects, DL No. 211 was reformed to allow authorities to press charges for antitrust violations and request the imposition of higher fines. The process of assessing the amount of the fines to be imposed and the criteria that should be considered in calculating fines were amended as well.

The FNE is legally authorized to appear as a party before the Tribunal for the Defense of Free Competition (“TDLC”) to represent the general public interest of the community in economic affairs, and to propose a sanction in the form of a fine by means of a legal action or complaint. The determination of any fine that is ultimately imposed is the responsibility of the TDLC, subject to review by the Supreme Court.

The methodology used to calculate antitrust sanctions is an extremely important issue given the significant effects that such sanctions may have on the incentives of market participants to comply with the law. The Sections therefore support the FNE’s initiative to adopt Guidelines that will disclose the steps that it will take to determine the amount of proposed fines in various scenarios, based on the facts and circumstances of specific cases. Such guidelines will provide legal practitioners and market participants with further clarity and predictability. In principle, such guidelines will enhance compliance with the law while reducing the costs and other burdens of enforcement. The Draft Guidelines may also be a useful reference for the TDLC and the Supreme Court regarding the justifications underlying fines proposed by the FNE.

2. General Comments

The Draft Guidelines comprise two sections: (i) a first stage to determine the base amount of the fine, consisting of three sub-parts: (a) two different methods for basing the calculation (sales of the offender and the financial benefit derived from the violation), or (b) the possibility for fines to be imposed disregarding the sales or the financial benefit
(based on Chilean annual tax units—“UTA”) and (c) provisions applicable to the criteria established above; and (ii) a second stage prescribing certain adjustments to the base amount (higher or lower) depending on the circumstances of the case.

With respect to the first section, the Sections respectfully suggest that the FNE may wish to address and clarify some aspects, such as: (i) how the duration of the offense may affect the calculation of the base amount; (ii) which products and services shall be encompassed in the “line of products or services associated with the offense” and what “association” is required between the violation and the products or services encompassed; (iii) whether and how exchange rates will affect the base amount; (iv) the methodology of fine calculation related to individuals; (v) the definition of financial benefit; and (vi) on which grounds the data for estimating the economic benefit could be considered “unsuitable, insufficient or unreliable.”

In the second section, there appear to be some practical issues that may be encountered in defining: (i) which of the offenders is the leader of the conduct; (ii) market power vis-à-vis market shares; (iii) the essentiality of goods and services; and (iv) which markets are more susceptible to innovation and technology development. The FNE could also consider further clarifying the weight it will assign to each criterion to determine the fine.

Finally, the Sections propose that the FNE consider further clarifying in both sections of the Draft Guidelines the different criteria it will adopt in imposing sanctions to cartel and abuse of dominant position cases. Because there are important differences between these types of conduct, the Sections recommend that the Draft Guidelines provide additional detail, in distinct provisions, on how it will determine the fine for each type of conduct.

III. COMMENTS ON SPECIFIC PROVISIONS

1. First Stage: Determination of the Base Amount

Paragraphs 12-13 provide that the base amount of the fine will cover the entire period during which the violation took place and will be equivalent to a percentage of the offender’s sales corresponding to the line of products or services associated with the violation. This provision may give rise to several questions that the Sections submit should be addressed: (i) which products and services are encompassed by a “line of products or services” (some authorities have released a list of field activities/products to
be considered when setting the fines\(^1\); (ii) in international cartel cases and/or cases concerning worldwide companies, confirmation that only domestic sales will be covered, guidance on what sales constitute domestic sales and clarification on which exchange rates will apply; and (iii) the methodology used to determine the percentage of sales that is applied to calculate the base amount of the fine.

The scope of the “line of products or services” to which the percentage applies obviously plays a crucial role in determining the base amount of the fine. It is therefore necessary to ensure that the criteria are neither excessive nor insufficient to achieve an appropriate level of deterrence. It may also be advisable to include in these paragraphs a more specific definition of the relationship required between the violation and the products or services—e.g., where the cartel directly affected the price of an intermediate product or component, will the fine be calculated based on that intermediate product or component or on the finished product incorporating it? (This has been a common question raised in international cartel investigations, such as in cases involving products such as dynamic random access memory, cathode ray tubes, and optical disk drives.) One option would be for the FNE to provide illustrative examples demonstrating how particular situations are analyzed.

The Sections also encourage the FNE to consider using this opportunity to provide guidance regarding the exchange rate to be used in the fine calculation.\(^2\)

As to the percentage used to calculate the base amount, paragraph 13 further provides that the base amount of the fine will be equivalent to a percentage of the offender’s sales, which may not exceed 20 percent without additional justification (\textit{i.e.}, court precedents or law). Paragraph 14 provides that in cases in which the financial benefit obtained as a result of the violation is chosen as the basis for calculating the fine, the FNE “may use the methodology deemed most adequate for the particular case.” The Draft Guidelines would benefit from illustrative examples of the application of the methodology. Pursuant to paragraph 15, “the base amount calculated applying such criterion shall not exceed the sum equivalent to the financial benefit resulting from the


\(^2\) \textit{There are cases in which the Brazilian Competition Authority considered: (i) the exchange rate of the last year of the conduct, (ii) an average exchange rate of the last year of the conduct, (iii) an average of the last three years of the conduct, (iv) the exchange rate of the last day in the year in which the offender obtained the highest sales, or (v) the exchange rate of the last day of the year preceding the opening of the investigation.}
offense, increased by 35%.” The Sections respectfully suggest that the FNE explain the basis for the 35 percent increase.

The Sections further recommend that the FNE consider defining in the Draft Guidelines the term “financial benefit,” and specifying grounds for determining that the existing data for the estimate of financial benefit could be considered “unsuitable, insufficient or unreliable for such purpose.”

2. **Second Stage: Adjustments to the Base Amount Depending on Additional Circumstances**

Paragraph 24 states that a “recidivist shall be deemed to be any person or economic operator that has been previously convicted for anticompetitive offenses of any nature, during the last ten years.” For the sake of completeness and to avoid any doubt, it is advisable to clarify whether recidivism will be found to have occurred only in cases where the party engages in the same conduct again (e.g., whether a company found to have engaged in abuse of dominant position for imposing exclusivity clauses would be considered as recidivist for later engaging in price discrimination or for participating in a cartel agreement). In the United States, the EU, and UK, recidivism is based on the commission of the same or a similar offense. Section 8C2.5 of the United States Sentencing Commission’s Sentencing Guidelines provides: “(i) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 1 point; or (ii) if the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 2 points.”

Paragraph 25 lists circumstances that may potentially increase the base amount of the fine: (a) whether the offender was the organizer or instigator of the conduct; (b) the degree of market power of the party involved in the conduct; (c) whether the conduct affects goods or services that are particularly sensitive to the population, or of massive

---

3 See U.S. Sentencing Comm’n, Guidelines Manual 2018, Sentencing of Organizations (Nov. 1, 2018), available at https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN. The Competition and Markets Authority (“CMA”) determines that if the CMA, concurrent regulators, or the European Commission have previously issued a decision relating to the same or similar infringements in the preceding 15 years, the fine may be increased up to 100 percent. The prior infringements are taken into account only if they had an impact in the United Kingdom. See also European Comm’n, Fines for Breaking EU Competition Law (Nov. 2011), available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf.
consumption or first necessity; (d) the participation of a trade association or entity that includes competitors; (e) the involvement of board members, managers, or relevant executives in the conduct; (f) secret or surreptitious actions of the offender to avoid detection by authorities; (g) records showing that the offender was aware of the unlawfulness of its actions; (h) restrictions to innovation in markets in which the consumer welfare fundamentally depends upon it; and (i) refusal to supply evidence or information during the course of the investigation, as well as failures to comply with timeframes and deadlines; etc.

The Sections share the FNE’s view that some of such circumstances may aggravate the seriousness of the conduct, but encourage the FNE to take into account the practical difficulties of assessing some of them and/or to provide more explanation of how each of these elements will be assessed, as discussed below:

a) Role as organizer or instigator: It can be difficult to definitively ascertain the specific roles of each participant in an antitrust violation, especially in cartel cases. In long-lasting cartels, the participants’ roles may change over time, new players may join the cartel, and some members may exit. While the organizer or instigator deserves the greatest punishment, this may be impracticable to implement. Additionally, the parties under investigation will have more incentive to dispute the findings of the authorities on the role of each participant, which may complicate and delay proceedings.

4 The former Brazilian investigative body in matters related to anticompetitive practices, Secretary of Economic Monitoring at the Ministry of Finance (“SDE”), for example, has recognized that many cartels have no clear ring-leader. The SDE noted that the mere fact that one party has arranged a meeting or maintained records will not necessarily exclude the party from the possibility of leniency. Furthermore, there will be no clear leader if two or more parties play equivalent roles in the cartel. For example, if in a two-firm conspiracy each firm played an equal role in the operation of the cartel, both firms are potentially eligible for leniency. Finally, the fact that an undertaking is a market leader does not necessarily mean that it is the ring-leader. See Secretariat of Economic Law, Antitrust Division, Council of Economic Defense, FIGHTING CARTELS: BRAZIL’S LENIENCY PROGRAM (3d ed. 2009), available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/brazil_leniencia_program_brochure.pdf/@@download/file/Brazil_Leniencia_Program_Brochure.pdf. See also Anna Rita Bennato et al., OFT: Consultation on Leniency and Penalties: Consultation Response from the ESRC Centre for Competition Policy, ECONOMIC AND SOCIAL RESEARCH COUNCIL (Dec. 2011), available at http://competitionpolicy.ac.uk/documents/8158338/8262284/2.+Leniency+and+Penalties.pdf/2aab3d47-2902-4c75-bcb7-0d7e1324a484
(ringleaders’ roles within cartels are diverse, and there are cases where there is more than one ringleader over the duration of a cartel. It is unclear whether one firm can generally be said to have instigated an antitrust violation, since the inception of collusive practices is often more complicated).

5 The U.S. Department of Justice (“DOJ”) requires that the applicant not be “the” leader or originator of the illegal activity in order to be eligible for full immunity. As it is very difficult to judge the entities’ or individual’s role in the conduct, the DOJ has sought to promote transparency by issuing written guidance making clear that the language disqualifying “the leader or originator” will be interpreted very narrowly, and an applicant’s eligibility will not be jeopardized unless it actually coerced other members of the cartel.
b) Offender’s market power: Market power and market shares are two different economic concepts. The Sections suggest that the Draft Guidelines differentiate them and establish objective criteria for the assessment of the degree of market power. A market share of 30-40 percent does not necessarily imply that the holder of such a position has the power to increase prices and/or exclude competitors. Furthermore, measurement of market power is more appropriate to assess whether a firm has engaged in monopolization, rather than in determining fines for a violation.

c) Essentiality of goods or services: It may be advisable to define essential goods and services rather than leave this as open-ended. Brazilian Law No. 7,783/1989 provides the following examples: water treatment and supply; electricity, gas and fuels production and distribution; medical services; food and medicine supply; funeral services; public transportation; sanitary/sewage treatment and disposal; telecommunications; nuclear and radioactive products’ control, use and storage; data related to essential services’ processing; air navigation services and air traffic control; and bank clearing/settlement services.

d) Restriction of innovation: Since the importance of innovation may vary significantly depending on the market involved, it may be difficult to ascertain to what extent anticompetitive conduct would impair the development of new technologies or the enhancement of products or services.

__________________________

6 See European Comm’n, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases), available at http://ec.europa.eu/competition/antitrust/procedures_102_en.html# (“Market shares are a useful first indication of the importance of each firm on the market in comparison to the others[, but] . . . [t]he Commission also takes other factors into account in its assessment of dominance, including the ease with which other companies can enter the market – whether there are any barriers to this; the existence of countervailing buyer power; the overall size and strength of the company and its resources and the extent to which it is present at several levels of the supply chain (vertical integration).”).

e) Procedural misconduct of the defendant: The Sections respectfully suggest that procedural misconduct should be assessed as a stand-alone violation, and not as a “circumstance that will be considered to increase the base amount.” An offender that, for example, provides misleading information, fails to comply with deadlines, or omits relevant information in the statements should be subject to specific fines for procedural misconduct and bad faith, which would deter such conduct and provide incentives for cooperation. The Sections realize that fines for such procedural offenses could require amendments to the statute rather than by regulations.

Paragraphs 27-28 refer to the economic capacity of the offender as a criterion for decreasing the base amount of the fine. The Draft Guidelines do not address the risk of insolvency or lack of financial means to pay the fines imposed even after the adjustment, nor do they provide alternative methods to help the offender pay the fine considering its economic capacity. The European Commission and the U.S. Department of Justice have agreed to allow the offender to pay fines in installments in appropriate cases and the FNE could consider doing the same.

Paragraph 29 refers to the following additional mitigating circumstances that can lead to reductions in the fine: (i) the secondary role of the offender, to the extent of its participation in the conduct; (ii) if the conduct was not fully implemented or if it failed to produce noticeable effects in the market; (iii) if it is proven that the conduct was acknowledged and explicitly authorized by a public authority or by sector-specific regulation; and (iv) if it is certified that the offender disclosed the conduct to the public before any investigation was initiated by the Prosecutor. The Sections offer the following comments on some of these criteria:

i) Secondary role of the offender: For the same reasons indicated above, it is often difficult to ascertain the exact role and importance of each member

---

8 Pursuant to the International Competition Network’s Setting of Fines for Cartels in ICN Jurisdictions report, non-compliance with procedural obligations such as late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc., can be subject to independent sanctions whether or not a final decision on a substantive infringement is reached. If a decision on a substantive violation is eventually reached, the procedural misbehavior can still be considered as an aggravating factor, whether or not it resulted in separate procedural sanctions. See International Competition Network, Setting of Fines for Cartels in ICN Jurisdictions (Apr. 2008), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_SettingFines.pdf.

of a cartel. Investigation into this mitigating element may also complicate and lengthen investigations, as investigated parties may challenge the arguments and defenses submitted by the other defendants, envisaging a higher antitrust exposure for competitors (and lower exposure for themselves). Procedural delays caused by disputes between private parties under investigation may complicate enforcement and render it less effective.

ii) The conduct was limited to an unsuccessful attempt: Deterrence considerations suggest that punishment should depend on the character of the defendant’s conduct, rather than its success. It may also be difficult for the authority to obtain economic evidence sufficient to establish “noticeable effects,” and the issue may invite extended debate and challenge by offenders. Again, this may result in complexity and delay of proceedings, with attendant complications for enforcement.

iii) Government authorization or sectoral regulation: The Sections submit that the role of government in mandating or authorizing conduct that violates competition law is among the most complex of all the issues that arise in ascertaining the antitrust liability of private parties due to its political implications and the potential for impacting international relations. The issue is handled differently by different jurisdictions and depending on the nature of the authorization or sectoral regulation, but typically as a complete defense or an immunity at the liability stage. Canada, for example, has a “regulated conduct” defense, while the United States employs a variety of doctrines including “express immunity” and “implied immunity” where federal regulation is involved, and the “state action doctrine” where the conduct is protected by state or in some circumstances, local law. In addition, addressing government involvement at the fining stage may give rise to extended disputes about complex issues of government structure, operation of regulatory systems, assignment of responsibility for certain conduct as between regulators and regulated parties, and other related questions. The Sections accordingly recommend that the FNE address these issues in assessing whether the conduct constitutes a violation at all, rather than as a mitigating factor in assessing the level of the fine.
IV. ADDITIONAL RECOMMENDATIONS

Optimal deterrence and efficient enforcement are facilitated when the fining regime is based on clear and predictable criteria. At the same time, fines should be proportional to the violation in severity and duration. As the Organization for Economic Cooperation and Development (“OECD”) has pointed out, it is important to provide a clear explanation of why a fine has been set at a particular level. If the law itself does not provide sufficient criteria, clarity and predictability can also be achieved by issuing explanatory guidelines.

Accordingly, the Sections recommend that the FNE address the principle of proportionality, establish a quantitative methodology that provides a more objective estimate of the fine to be recommended, and further specify the weight to be assigned to each criterion used to determine the fine.

The Sections further recommend that the FNE consider clarifying in both sections of the Draft Guidelines the distinct criteria to be applied in imposing sanctions in cartel cases and in abuse of dominant position cases. Typically, fines imposed for cartel violations reflect a higher percentage of revenue, recognizing, among other things, that the probability of detecting cartels, which are secret, is lower than the probability of detecting abuse of dominance. Furthermore cartels are considered the most egregious type of antitrust violation because they do not involve any offsetting competitive benefits. Failing to recognize these distinctions may result in disproportionate penalties on non-cartel cases and chilling potentially procompetitive conduct.

11 Id. at 20.
12 See id. at 7.
13 For instance, the Sections have pointed out the need to distinguish abuse of dominance from monopoly agreements in their comments to China on the draft guidelines of the Anti-Monopoly Commission of the State Council on Determining the Illegal Gains Generated from Monopoly Conduct and on Setting Fines. See Comments of the American Bar Association Sections of Antitrust Law and International Law on the Draft Guidelines of the Anti-Monopoly Commission of the State Council on Determining the Illegal Gains Generated from Monopoly Conduct and on Setting Fines (July 21, 2016), available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160721.pdf.
V. CONCLUSION

The Sections appreciate the opportunity provided by the FNE to comment on the Draft Guidelines.