JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON COMISIÓN NACIONAL DE COMPETENCIA’S DRAFT REVISION OF THE NOTICE ON LENIENCY

June 3, 2013

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law (the “Sections”) of the American Bar Association (ABA) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (collectively, the “Sections”) of the American Bar Association welcome the opportunity to respond to the public consultation of the Comisión Nacional de Competencia (“CNC”) regarding its draft Notice on Leniency (“Draft Leniency Notice”). The Sections are aware of the great success of the Leniency Program in Spain since its introduction in 2008, appreciate the substantial thought and effort of the CNC reflected in the Draft Leniency Notice, and offer these comments in the hope that they may further assist in the completion of the final Notice of the CNC. The Sections are available to provide additional comments or to participate in consultations with the CNC, as appropriate. The Sections’ Comments reflect their expertise and experience with competition law in the U.S. as well as many other countries.

Introduction

The Sections welcome the CNC’s initiative to update its Notice on Leniency. First, the Sections sincerely apologize for the late submission of their comments, which is due to the short time frame of the consultation process. However, the Sections hope that the CNC will still be in a position to review our comments and take them into consideration in drafting the final Notice on Leniency. Second, the comments are not meant to be exhaustive but rather to highlight certain points that the Sections believe are important.

Scope of the definition of a cartel

The delineation of what constitutes cartel behavior in paragraph 9 of the Draft Notice is on the whole helpful and sound. The Sections note, however, that paragraph 9 of the Draft Leniency Notice cites “information exchanges concerning prices or projected quantities” and that footnote 4 in the same paragraph 9 also mentions “information exchanges concerning forecasts of prices and other competitive parameters” as falling within the definition of cartel conduct. These references to information exchanges go beyond the...
definition found in the Fourth Additional Provision of the 2007 Spanish Competition Act,\(^1\) which states in pertinent part that a “cartel is taken to be any secret agreement between two or more competitors which has as its object prices fixing, production or sales quotas, market sharing, including bid rigging, or import or export restrictions.”\(^2\)

**Leniency for individuals**

Given the potential exposure of natural persons to fines under the Spanish Competition Act,\(^3\) the Sections agree with the CNC that it is appropriate and beneficial to the Spanish leniency program to include leniency for individuals.

However, the Draft Leniency Notice states (at paragraph 17) that the company that has submitted the corresponding application may extend its application to the legal representatives or the persons that comprise the management bodies, as long as they have collaborated with the CNC. As a result, the Sections read the Draft Leniency Notice to provide leniency to a company’s legal representatives and members of management bodies on a discretionary, as opposed to a mandatory, basis. If this is unintended, the Sections suggest clarifying this paragraph to provide for automatic protection for, at least, all current legal representatives and management body members of a company receiving immunity or a reduced fine. Providing immunity or a reduction of fines for all legal representatives and management body members of a company that receives leniency increases predictability in the application of the leniency program, and increases the likelihood that a company’s management will approve the participation of the company in the leniency process, and participate fully in it. Moreover, providing automatic leniency from fines for legal representatives and management body members of a successful immunity or reduction applicant is consistent with the Spanish Competition Act articles 65.3 and 66.4, which automatically extend the exemption or reduction from payment of the fine to legal

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\(^1\) Competition Act 15/2007 of 3\(^{\text{rd}}\) July (Official State Gazette No. 159, of 4\(^{\text{th}}\) July 2007)

\(^2\) The International Competition Network has cited favorably the 1998 OECD Recommendation that states a “‘hard core cartel’ is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce . . . .” International Competition Network, *Building Blocks for Effective Anti-Cartel Regimes* 12 (citing OECD, *Recommendation Concerning Effective Action Against Hard Core Cartels* (1998)) (2005), available at [http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf). This definition does not refer to information exchanges. We also note the statement by Professor Hovenkamp, the leading United States antitrust scholar, that “[a]greements to exchange price information or to standardize products . . . may facilitate the maintenance of prices at supra-competitive levels. But in and of themselves such agreements are not price-fixing and may be quite pro-competitive.” Herbert Hovenkamp, *FEDERAL ANTITRUST POLICY* §4.6b, at 193 (4\(^{\text{th}}\) ed. 2011).

\(^3\) See article 63.2, Spanish Competition Act (“[B]esides the sanction set out in the previous section, when the offender is a legal person, a fine of up to 60,000 euros may be imposed on each of its legal representatives or on the persons that comprise the management bodies that have participated in the agreement or decision.”).
representatives and management body members of the successful applicant.\textsuperscript{4} Discretionary immunity/reduction therefore presents inconsistency within the Spanish competition enforcement regime, which the Sections suggest should be avoided.

Automatically exempting or reducing the fine of the former legal representatives and management body members of the leniency applicant would also increase predictability in the application of the leniency program and would encourage leniency applications, but the Sections recognize the countervailing policy considerations that may favor discretionary leniency for former legal representatives and management body members.

**Informal assistance in the process**

According to paragraph 18 of the Draft Leniency Notice, the leniency applicant can receive informal assistance from the CNC in relation to a potential leniency application. Paragraph 18 states that if the information provided about the cartel given is sufficient (indicating, for example, “the affected sector or the product or service involved”), the CNC can indicate whether the conditional exemption is still available. The Sections regard this as the same as exploratory and informal conversations practiced in many other jurisdictions, for instance in the U.S. (and has nothing to do with a hypothetical submission possible with the European Commission). The Sections believe it would be helpful to future applicants for the Guidelines to make clear that the CNC does not consider this informal assistance to be a hypothetical leniency application.

**Date of leniency application regarding oral statements**

According to paragraph 20 of the Draft Leniency Notice, similar to the EU Leniency Notice, the CNC may, upon the applicant’s request, accept corporate statements orally. An oral corporate statement will be recorded at the CNC’s premises and, after it has been transcribed, will be registered in the CNC’s registry. The Draft Leniency Notice indicates, however, that the information will be deemed to have been submitted when the transcript is registered. The Sections submit that it would be reasonable that the relevant submission date and time instead be the day of the meeting with the CNC when the corporate statement is provided orally. In addition, there is no indication in the Draft Leniency Notice that the applicant will be provided with the opportunity to check the technical accuracy of the

\textsuperscript{4} See, e.g., article 65.3, Spanish Competition Act (“The exemption from payment of the fine granted to an undertaking shall also benefit its legal representatives, or the persons comprising the management bodies and who have taken part in the agreement or decision, providing they have collaborated with the National Competition Commission”). See also article 66.4 (“The reduction of the amount of the fine corresponding to an undertaking shall be applicable, in the same percentage, to the fine that may be imposed on its representatives or on the persons that comprise the management bodies that have taken part in the agreement or decision, providing they have collaborated with the National Competition Commission”).
recording or to correct the substance of the statements or the accuracy of the transcript. Therefore the Sections suggest to include such opportunity.

**Submission of information and marker system**

Besides specifying the content of the corporate statement in paragraph 21, paragraph 22 of the Draft Leniency Notice states that “the applicant must submit information and evidence related to the cartel, including all contemporaneous evidence available to it enabling the CNC to verify the existence of the cartel,” and it provides a list of the type of evidence required (which goes beyond article 46 of the Royal Decree 261/2008).

The Sections commend the CNC’s desire to provide guidance and clarity as to what must be submitted to qualify for the exemption. The Sections also recognize that paragraph 29 in Section 2.3 of the Draft Leniency Notice indicates that upon the applicants’ reasoned request, the CNC may grant an additional period to submit the evidence unavailable at the time of the submission. However, the possibility that the CNC may grant this additional period in exceptional circumstances and/or the fact that it seems that the applicant “must submit” the detailed list of evidence provided under paragraph 22 could have the unintended consequence of discouraging leniency applicants. In addition, article 46 of the Royal Decree 261/2008 did not provide such detail but followed the EU Notice in relation to this issue. The Sections therefore respectfully suggest that the CNC replace the current wording with the following: “the applicant must submit information and evidence related to the cartel, including all contemporaneous evidence reasonably available to it at the time of the application that will enable the CNC to verify the existence of the cartel.”

It also would be helpful to clarify that the possibility for the CNC to grant additional time for submitting evidence as laid out in paragraph 29 of the Draft Leniency Notice refers to the type of evidence requested in paragraph 22 of the Draft Leniency Notice, which will be also consistent with article 46.5 of Royal Decree 261/2008. It would also be useful to refer to this provision of Royal Decree 261/2008 in paragraph 29.

The Sections encourage the CNC to state its intention to make generous use of this discretion to grant an additional period to submit evidence. The purpose of this procedure is to encourage the race among cartel members to report cartels. By signaling that it will give extensions to leniency applicants who have a clear indication of cartel activity but have not yet completed the collection of all available evidence of that cartel, leniency candidates will be motivated to make disclosures at the earliest opportunity. Any rule or practice suggesting that the applicant’s first contact with the CNC must await further

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5 See article 46.3 of Royal Decree which states that “The applicant for an exemption from payment of the fine under article 65.1 of Act 15/2007 of 3 July 2007 must provide the Directorate for Investigation with the following information and evidence (…) d) Evidence relating to the cartel in the possession of the applicant or available to it in a reasonable time period, in particular, contemporaneous evidence of the cartel that allows its existence to be verified”.

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investigation threatens to confuse and delay CNC discovery of the cartel, which should be
the critical consideration.

Many jurisdictions refer to the provision of such additional time to complete
of the leniency application as a “marker system.” In order to harmonize terminology and
concepts applied to cartel enforcement in various jurisdictions, the Sections suggest that the
CNC also refer to this provision as a “marker system”.

**Coercion**

According to paragraphs 40 and 41 of the Draft Leniency Notice the first
leniency applicant is not eligible for exemption (but can still qualify for a reduction) if it took
steps to coerce other companies to join the cartel or to remain in it. The draft leniency notice
seems to adopt a strict interpretation of this concept and indicates that this would not apply if
the conduct of the leniency applicant responds to the enforcement of the mechanisms
established in the cartel, such as an invitation to form part of it, participate in the adoption or
execution of coordinated retaliatory measures or controlling the agreements adopted. The
Sections suggest that the CNC clarify this point by providing additional detail regarding the
specific circumstances that would disqualify the first leniency applicant from eligibility for
exemption (perhaps by describing several hypothetical cases and indicating how the CNC
would apply these provisions of the Notice in each case).

**Rejection of the first leniency applicant**

The Sections read paragraphs 42 and 43 of the Draft Leniency Notice to state
that if the first immunity applicant is rejected because it took steps to coerce it can still obtain
a fine reduction, but the first reduction applicant will not move up to take the first immunity
applicant’s place. In addition, this would not alter the determination of the level of reduction
applicable to the other leniency applicants.

The Sections respectfully submit that the CNC should not rule out excluding a
priori access to immunity for the second applicant in such a situation. The availability of
immunity or higher reduction band for leniency may even serve as a further incentive for the
second applicant to cooperate more fully and provide even more information. However, the
second applicant could receive immunity only if the information either “enables” the
Commission to carry out an inspection or to verify an infringement in connection with the
cartel. It would be hard to imagine that the second applicant could satisfy the conditions of
article 65.1 a) of the Spanish Competition Act, but it might still satisfy conditions of article
65.1 b) and might enable the CNC to verify the existence of an infringement. In addition, the
immunity applicant might also decide to withdraw its information from the Commission’s
file (see paragraph 46 of the Draft Leniency Notice). Thus, the Sections do not see any
reason that would militate against the second applicant “moving up.”
Reevaluation of Leniency applications

Paragraph 45 of the Draft Leniency Notice provides that if immunity is unavailable or the undertaking failed to meet the specified conditions, the CNC will adopt a resolution rejecting the immunity application. However, paragraph 46 of the Draft Leniency Notice indicates that the CNC can change its conclusions if there are new facts or if the applicant submits new information. In that case, the CNC will examine the information and new evidence, confirm if the conditions for immunity are fulfilled, and adopt a decision. It is unclear if this would be deemed a new application or a part of the original application, such that the date and time to be considered will still be the date of the original. Unless the CNC has provided the leniency applicant with a marker, the Sections suggest that such additional evidence should be considered as submitted on the actual day of the submission. This approach allows room for additional leniency applications, which would need to provide added value. Otherwise, it might be difficult to assess such added value during the process of receiving and evaluating various leniency applications.

Cooperation by leniency applicant

Paragraph 66 of the Draft Leniency Notice indicates that the applicant must cooperate fully, diligently, and continuously throughout the procedure (as it is stated in article 65.2 of the Spanish Competition Act and article 52 of Royal Decree 261/2008).

However, the Draft Leniency Notice adds that the applicant “must show a genuine spirit of cooperation and those leniency applicants that hinder the investigation or the process through behavior contrary to this spirit will not have access to the leniency,” This wording introduces new and ambiguous concepts that could reduce predictability and increase uncertainty and discretion, contrary to the goals of the Draft Leniency Notice.

In addition, in the same paragraph, the Draft Leniency Notice states that the cooperation obligation includes, among others, the conducts contained in subparagraphs a) to e). The words “among others” implies that additional conduct might be needed to comply with the cooperation obligation, thus increasing the effective burden associated with obtaining immunity. This language contrasts with that contained in article 65.2 of the Spanish Competition Act and article 52 of Royal Decree 261/2008, which would seem to consider the requirements in paragraphs a) to e) to be exhaustive.

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6 Article 65.2 of the Spanish Competition Act states: “For the National Competition Commission to grant the exemption set out in the previous section, the undertaking or, as the case may be, the natural person that has submitted the corresponding application must meet the following requirements …[a) to e)]” (emphasis supplied).

7 Article 52 of Royal Decree 261/2008 states: “For the purposes provided for in articles 65.2.a) and 66.1.b) of Act 15/2007 of 3 July 2007, the fine exemption or reduction applicant will be deemed to cooperate fully, continuously and diligently with the National Competition Commission when, over the course of the proceeding, the applicant complies with the following requirements…. [a) to e)].”
Last, the Sections observe that the language used for requirement e) of the Draft Leniency Notice seems to differ from the one employed in the same requirement e) contained in article 52 of Royal Decree 261/2008. While the latter states that the leniency applicant must “c) Facilitate interviews by the Directorate for Investigation with the employees and current executives of the company and, if applicable, with former executives,” the Draft Leniency Notice requires the applicant “c) To guarantee the availability of employees and current executives and, if applicable, of former executives of the company applying for leniency.” The latter is of course far more severe. The requirement of a “guarantee” may not be achievable for undertakings because such availability can be beyond their control, given that the employees or executives (current or former) could be exposed to other types of sanction and would be taking their own measures to avoid legal exposure. The Sections believe that the new wording might discourage undertakings from applying for immunity, given that if they do not comply with that guarantee, they would lose the benefits of the leniency despite all good faith and diligent attempts to cooperate.

**Protection of leniency application**

Paragraph 77 of the Draft Leniency Notice commits that the CNC will not to provide copies of the corporate leniency statements in the context of damage claims resulting from infringement procedures in which immunity or leniency applications have been made. In this context, the Draft Leniency Notice refers to Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 (“the Resolution”)\(^8\) regarding the protection of leniency material in the context of civil damages actions. While the statement of the CNC is most welcome, it seems that the CNC would limit that protection only to corporate statements made by the leniency applicant. However, the Resolution extends this protection to all “leniency material,” which would refer not only to “statements by leniency applicants submitted under the leniency program” but also at least to “witness statements made by employees and directors of undertakings cooperating under the leniency programme (whether oral or written).” In addition, the Resolution recognizes that other information submitted by a leniency applicant (including, for instance, pre-existing documents) could also qualify for protection as “leniency material” in the different jurisdictions.

The Sections encourage the CNC to grant the same level of protection to corporate statements made by the leniency applicant as well as to all the other documents closely related to the leniency statements, such as supporting documents and evidence submitted voluntarily by the applicant with that leniency application. Otherwise, the effectiveness of the leniency program and the incentives to cooperate could be seriously diminished. On the other hand, the extension of that protection to all “leniency materials” seems to have been contemplated in paragraph 76 of the Draft Leniency Notice, which states

that the CNC will not be able to provide “data and documents” submitted by the leniency applicant when it intervenes in judicial procedures in relation to competition issues.

CONCLUSION

The Sections appreciate the opportunity provided by the CNC’s public consultation to comment on the Draft Leniency Notice. The Sections would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the CNC in finalizing the Draft Leniency Notice.