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Ref. Comments on Chilean Draft Guidelines on Fines

Dear Sir,

We have pleasure in enclosing a submission that has been prepared by the following members of the Cartels Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of FNE.

Yours sincerely,

Marc Reysen
Co-Chair Antitrust Committee

Elizabeth Morony
Co-Chair Antitrust Committee

cc Leonor Cordovil, Mariana Tavares de Araujo, and Andrew Ward

**ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION
SUBMISSION TO THE NATIONAL ECONOMIC PROSECUTOR – FISCALÍA
NACIONAL ECONÓMICA**

1 Introduction and Purpose of Submission

1.1 Introduction

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at <https://www.ibanet.org>.

1.2 Purpose of Submission

The Antitrust Committee of the IBA (*Antitrust Committee*) sets out below its submission on the “Internal Guidelines on Fine Requests made by the National Economic Prosecutor” (the “Draft Guidelines”), which were put under public consultation by the antitrust authority of Chile – Fiscalía Nacional Económica (“FNE”).

The IBA's Antitrust Committee comprises international antitrust practitioners from multiple jurisdictions around the world. The Antitrust Committee wishes to address only specific issues based on the Antitrust Committee's international experience in a manner that the FNE will hopefully find constructive and helpful.

2.1. 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 abovementioned law resulted in important amendments to Decreto Ley No. 211 (“DL No. 211”), the act which sets forth relevant regulation for 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 quantum of the fines to be imposed and the criteria that should be considered for their calculation were amended as well.

In accordance with the Draft Guidelines, the FNE is legally authorized to appear as a party before the Honorable Competition Court (“TDLC”) representing the general public interest of the community in economic affairs, with all the duties and attributions attached to that authority, to propose a sanction in the form of a fine through a legal action or complaint. The determination of the fine that is ultimately imposed falls under the respective scopes of jurisdiction of the TDLC and the Supreme Court.

The Antitrust Committee therefore acknowledges the importance that the FNE discloses and regulates the steps that it will take to determine the quantum of the fine it will propose when facing various prospective scenarios, based on the particularities of the concrete case, and with that providing legal practitioners and market participants with further clarity, predictability, and transparency. The Draft Guidelines may also be a useful reference to the TDLC and the Supreme Court regarding the justifications underlying fines proposed by the FNE.

2.2. General comments

First of all, the Antitrust Committee commends the FNE for inviting comments on the Draft Guidelines and for endeavoring to improve transparency and enhance legal certainty with respect to its fine recommendations. The Antitrust

Committee appreciates the substantial efforts of the FNE reflected in the Draft Guidelines and offer these Comments in the hope that they will assist the FNE to refine the Draft Guidelines to enhance their contribution to the just and efficient antitrust enforcement in Chile.

In general terms, the Draft Guidelines comprise two sections, which cover: (i) a first stage of determining the base amount of the fine – this part contains (a) two different methods for the setting of the calculation basis (sales of the offender and the financial benefit derived from the violation), (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 that are applicable to the criteria established above; and (ii) a second stage prescribing certain adjustments to the base amount, which may lead to decreases or increases, depending on the circumstances of the case.

With respect to the first section, the Antitrust Committee considers appropriate to address and clarify some aspects, such as: (i) how the duration of the offense may impact on 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 which relation is required between the violation and the products or services; (iii) whether and how exchange rates will be factored in setting the base amount; (iv) the wording of the methodology of fine calculation related to individuals; (v) the definition of financial benefit; and (vi) on which grounds the existing data for estimating the economic benefit could be considered “unsuitable, insufficient or unreliable”.

As to the second section, the Antitrust Committee sees some practical obstacles in defining: (i) which of the offenders is the leader of the conduct; (ii) market power vis a vis market shares; (iii) the essentiality of good and services according to the Draft Guidelines, and not to a law; and (iv) which markets are more susceptible to innovation and technology development. Furthermore, the FNE could consider further clarifying in the second section the weight it will give to each criterion to determine the fine.

On a separate point, the Antitrust Committee proposes that the FNE considers further clarifying in the both Antitrust Committee of the Draft Guidelines the different criteria it will adopt in imposing sanctions to cartel abuse of dominant position/monopolization cases. Because the nature of such conducts is substantially different, the Antitrust Committee recommends that the Draft Guidelines detail in different provisions how it will set forth the fine that will

apply to each conduct. It is also recommended to consider more in detail how compliance programs adopted by an offender (either before the start of the antitrust proceedings or as a result of such proceedings) could play a role in the extent of the fine to be imposed.

2.3. Comments on the specific provisions

2.3.1. First stage: determination of the base amount

Paragraphs 12-13 prescribe 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 excerpt will give rise to two to questions that need to be addressed: (i) which products and services may be encompassed by a "line of products or services" – some authorities released a list of field activities/products to be considered when setting the fines; and (ii) in international cartel cases and/or cases concerning worldwide companies, what would be the applicable exchange rates?

The definition of a narrower or broader "line of products or services" plays a crucial role in determining the base amount, it is therefore necessary to balance excluding/including too many items, in order to obtain an optimum level of deterrence. Such paragraphs could also establish which kind of relation (direct or indirect) is required between the violation and the products or services for determining the basis fine according to the sales criteria.

The Draft Guidelines should also determine which sales would be considered as "associated with the violation" in international cartel cases, i.e., it should be specified that the base amount of the fine is limited only to sales on the Chilean market, for territorial competence and *ne bis in idem* considerations.

On the second point, in spite of the fact that many jurisdictions lack clear regulations on exchange rates, the Antitrust Committee encourages the Chilean authority to consider this opportunity to provide guidance to the market regarding this element of the fine calculation.

It is also worth addressing the specific situation of bid-rigging, where not all cartel members may directly realize sales from the infringement: in such cases,

the net tender value could be a useful benchmark. 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% without providing a justification for setting such limit (i.e. court precedents or law).

Paragraph 14 determines that in cases in which the financial benefit obtained as a result of the violation is chosen for the purpose of calculating the fine, FNE "may use the methodology deemed most adequate for the particular case" when determining the financial benefit arising from the violation. Nonetheless, the Draft Guidelines do not provide examples of the methodology that could be deemed appropriate, as well as in which situations this methodology would apply – e.g. when more beneficial to the defendant. It is important to make clear the situations considered appropriate to use such methodology to avoid the lack of legal certainty. In Brazil, for example, such methodology is mentioned in the Competition Law without further definition and it results in lack of legal certainty as far as currently only one Commissioner at the Tribunal defends the methodology and also applies its own methodology not approved by the other commissioners.

Pursuant to paragraph 15, "the base amount calculated applying such criterion shall not exceed the sum equivalent to the financial benefit resulting from the offense, increased by 35%". The Antitrust Committee believes that the grounds for the 35% increase should be specified.

Furthermore, the FNE could consider defining in the Draft Guidelines the term "financial benefit" (e.g., whether it includes overcharge, if it is related to damages); and specifying on which grounds the existing data for the estimate of financial benefit could be considered as "unsuitable, insufficient or unreliable for such purpose".

Finally, the Antitrust Committee considers that paragraphs 21 and 22 should specify that the base amount of the fine can only be determined based on the sales of economic entities that were prosecuted by the FNE. In Chile, there is no partnership liability, so every company affected by a potential fine should be prosecuted in order to exercise their right of defense in the corresponding judicial procedure.

2.3.2. Second stage: adjustments to the base amount depending on additional circumstances

As a general comment, the Antitrust Committee considers that it would be helpful to establish clear parameters for the quantification of each of these additional circumstances to ensure legal certainty (e.g. using a model that increases or decreases the base amount in a fixed or variable percentage for each circumstance).

Paragraph 24 sets forth that “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 case the party engages in the same conduct again (e.g., would a company punished by abuse of dominant position for having imposed exclusivity clauses be considered as recidivist for later engaging in price discrimination or for participating in a cartel agreement?). Pursuant to § 8C2.5. of the United States Sentencing Commission’s Sentencing Guidelines, if more than one of the below mentioned situations applies, use the greater: “(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.” It should also be considered whether the notion of a “party” entails only the given legal entity or all entities within an entire company group.

Paragraph 25 lists circumstances that may potentially increase the base amount of the fine: (i) whether the offender was the organizer or instigator of the conduct; (ii) the degree of market power of party involved in the conduct; (iii) whether the conduct affects goods or services that are particularly sensitive to the population, or of massive consumption or first necessity; (iv) the participation of a trade association or entity that gathers competitors (v) the involvement of board members, managers, or relevant executives in the conduct; (vi) secret or surreptitious actions of the offender to avoid detection by authorities; (vii) records showing that the offender was aware of the

unlawfulness of its actions; (viii) restrictions to innovation in markets in which the consumer welfare fundamentally depends upon it; and (ix) refusal to supply evidence or information during the course of the investigation, as well as failures to comply with timeframes and deadlines; etc.

The Antitrust Committee shares the view that some of such circumstances may potentially aggravate the seriousness of the conduct, but would encourage the FNE to take into account the practical difficulties of assessing some and/or to provide further details on how each of these elements will be assessed regarding the topics below:

- i) Leadership of the practice: it is burdensome to ascertain properly the specific roles of each participant in an antitrust violation, especially in cartel cases. In long-lasting cartels, there are time windows for the participants to change the roles among themselves, the possibility for new players to join the illegal organization or for current players to cease the practice. Even though the organizer or instigator of the conduct deserve the most rigorous treatment, in the real world this provision may be unpractical. Additionally, the parties under investigation will have more incentives to dispute the findings of the authorities on the role of each participant, which may result in delays in the conducting of antitrust probes;
- ii) Market power degree of the participants: market power and market shares are two different economic concepts. The Draft Guidelines should differentiate them and establish objective criteria for the assessment of market power degree. There are cases in which a market share of 30-40% does not necessarily give rise to market power to increase prices and/or create obstacles to competitors. Additionally, this seems more applicable to fines in cases of monopolization – for cartel cases, a reduced market share should not be taken into consideration to mitigate responsibility, once this may undermine deterrence;
- iii) Essential goods and services: it is advisable to define the sensitiveness of goods and services by law for legal certainty purposes. By way of example, Brazil has Law No. 7,783/1989, which prescribes that water supply and distribution, medical services, food supply, public transportation, sanitary/sewage treatment, telecommunications, nuclear products, air navigation services, bank clearing/settlement services, etc., are essential for the population;

iv) Restriction to innovation: since the importance of innovation may vary significantly depending on the market involved, it may be quite difficult to ascertain to what extent an antitrust practice would impair the development of new technologies or the enhancement of products or services; and

v) Procedural misbehavior of the defendant: the Antitrust Committee takes the view that it is more appropriate to define, through law, specific fines and injunctions to address such procedural violations (i.e., misleading information, failure to comply with deadlines, omissions in the statements). In addition, if the same procedural violations entail a procedural sanction and subsequently also a higher fine on the merits, this could be contrary to the internationally recognized *ne bis in idem* principle (in Europe, see e.g. Article 4 of Protocol No. 7 of the European Convention on Human Rights).

Paragraph 26 refers to the offender's collaboration with the FNE before or during the investigation as a criterion for decreasing the base amount of the fine. The Antitrust Committee believes that the conditions for the implementation of this mitigating circumstance should be strictly objective, for legal certainty purposes. Therefore, it would be advisable to include a list of the specific actions that the offender must implement in order to obtain the base amount reduction. Otherwise, it is difficult to draw a clear distinction between collaboration and self-incrimination.

Paragraphs 27-28 also 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. In this sense, the Antitrust Committee believes FNE could consider providing alternative sanctions in order to achieve the deterrence goal in these circumstances. 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.¹

Paragraph 29 refers to additional mitigating circumstances, which will lead to reductions in the amount of the fine. They are described as follows: (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

¹ See, e.g., European Comm'n, Antitrust Manual of Procedures (Mar. 2012), available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

and explicitly authorized by a public authority or by the sector-specific regulation, and; (iv) if it is certified that the offender disclosed the conduct to the public before and investigation was instructed by the Prosecutor.

Please find below our considerations on some of them:

i) Secondary role of the offender: for the same reasons indicated above, it is burdensome to ascertain the exact role and the order of importance of each member of a cartel. In addition to that, if the authority grants discounts for companies engaged in collusion based on their level of cooperation with the illicit agreement, it may create incentives for them to assume passive positions and only react to invitations to collude. This mitigating element may also cause the investigations to last longer, once the offenders will challenge the arguments and defenses submitted by the others, envisaging a higher antitrust exposure for competitors and a lower for itself. Delays to antitrust enforcement caused by disputes between private parties under investigation may result in underdeterrence;

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.; and

iii) Conducts previously authorized by public authorities or by sector-specific regulation: Government involvement or public regulation on the antitrust liability of private parties has been handled differently by various jurisdictions. 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. The Antitrust Committee submits that because of the complexity involved, incorporating into fine calculations considerations of public governmental action 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. Accordingly, the Antitrust Committee recommends that the FNE address these issues in assessing whether the

conduct constitutes a violation rather than as a mitigating factor in assessing the level of the fine.

The Antitrust Committee also recommends considering the use of a compliance program as a mitigating circumstance, in line with the recommendations in other jurisdictions and the FNE's most recent practice (2012). The burden of proof would of course lie with the accused firm.

2.3.4. Additional Comments

In order to achieve optimal deterrence it is important that the fining regime is based on clear, predictable and transparent criteria. At the same time, the principle of proportionality needs to be respected to ensure that the fine is proportional to the violation in question, both in terms of its gravity and duration. As the Organization for Economic Cooperation and Development ("OECD") has pointed out, it is important to provide a clear explanation as to why a certain fine has been set at a particular level. If the law itself does not provide sufficiently clear criteria, the required transparency and predictability can also be achieved by issuing explanatory Guidelines.

In this sense, the Antitrust Committee recommends the FNE addresses the principle of proportionality; establishes a quantitative methodology that provides a more objective estimate of the fine that shall be imposed; and determines the influence of each criterion set under the Draft Guidelines on the final amount imposed.

Furthermore, the FNE could consider further clarifying in the both Sections of the Draft Guidelines the different criteria it will respectively adopt in imposing sanctions to cartel and to abuse of dominant position/monopolization cases. Typically, fines imposed for cartel violations are calculated considering a higher percentage of revenue. One of the main reasons for imposing higher fines in relation to cartel violations is Heimler and Mehta's (2012) argument that the probability of detecting cartels is lower than the probability of detecting abuse of dominance violations. Furthermore, among all anticompetitive conducts, cartel is the most egregious violation. OECD estimates that prices in cartelized industries are 10 to 20 per cent higher than they would be if the market were competitive; and has even suggested that, according to Heimler and Mehta's (2012) modeling, cartel violations with

arguably larger price effects such as bid rigging would need higher levels of fines to achieve deterrence that other forms of cartel violation (i.e. soft cartels). Not doing so may result in disproportionate penalties on abuse of dominance cases, and result in overdeterrence.

3 Conclusion

The Antitrust Committee appreciates the opportunity provided by the FNE to comment on the Draft Guidelines. We would be pleased to respond to any questions the FNE may have regarding these comments, or to provide additional comments or information that may be of assistance to the FNE.