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Ref. Comments on the Peruvian Draft Guidelines on Trade Associations and Free Competition

Dear Sir,

We have pleasure in enclosing a submission that has been prepared by 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 INDECOPI.

Yours sincerely,

Marc Reysen
Co-Chair Antitrust Committee

Elizabeth Morony
Co-Chair Antitrust Committee

cc Leonor Cordovil and Mariana Tavares de Araujo



IBA CARTELS WORKING GROUP COMMENTS ON THE PUBLIC CONSULTATION VERSION OF THE DRAFT INDECOPI GUIDELINES TO TRADE ASSOCIATIONS AND FREE COMPETITION

I. 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 <http://www.ibanet.org>.

The Working Group commends INDECOPI for its efforts to provide clear and concise guidance on the interaction between trade associations and the competition rules on information exchanges and other potential cartel behavior; and welcomes INDECOPI's repeated willingness to engage with companies and to provide additional specific advice via the Technical Secretariat. We offer these Comments in the hope that they will assist INDECOPI in further refining the Draft Guidelines.

II. EXECUTIVE SUMMARY

This submission offers comments and suggestions to certain sections and topics of the draft Guidelines to Trade Associations and Free Competition (“Draft Guidelines”), taking into account approaches adopted by key jurisdictions on relevant aspects of the exchange of competitively sensitive information and potential cartel behavior. In particular, the IBA Cartels Working Group “Working Group” respectfully proposes that the Peruvian National Institute for the Defense of Free Competition (“INDECOPI”) considers the following amendments, with the purpose of enhancing transparency, predictability and legal certainty of its Draft Guidelines:

- i. Define the term “competitively sensitive information”, including examples and safe harbors;
- ii. Include an explanation of the circumstances in which the exchange of current information or very recent historic information can give insight into competitors’ operational strategies and can reduce uncertainty in the marketplace to the detriment of competition; and provide an indication of “other sensitive information” within the first text box of section 2.2 of the Draft Guidelines;
- iii. Provide examples of which type of conduct is expected to be problematic within the coordination category “current of projected marketing areas”;
- iv. Draw a distinction between lawful and unlawful decisions and recommendations for trade associations that are capable of decisively influencing the behavior of the members of an association; and note that there may be data protection concerns arising from the recommendation for trade associations regarding the recording of all meetings set under the Draft Guidelines;
- v. Further clarify how INDECOPI will consider specific situations regarding foreclosure issues (i.e., by setting out a cohesive framework on the matter);
- vi. Consider being less categorical and provide greater guidance regarding more nuanced situations in relation to the dissemination of competitively information to trade association members; and
- vii. Include in the Draft Guidelines a recommendation to unions and trade associations for the adoption of robust and effective compliance programs that

ensure the adherence to antitrust legislation by the associates and by the management of the unions/trade associations.

III. RESPONSE TO INDECOPI's DRAFT GUIDELINES

4. Introduction

4.1. Terms and definitions

An item dedicated to Terms and Definitions was a great approach adopted by INDECOPI. It provides more predictability and legal certainty in relation to the matters that will be further explored and presented in the Draft Guidelines.

Based on the wording presented in the Draft Guidelines, the Working Group's recommendations would be to consider adding a definition (and possibly some examples) of the term "Competitively Sensitive Information", considering that such expression is constantly used throughout the Draft Guidelines. For a better comprehension of the item, the inclusion of examples of information that may possibly pose greater risks would help to better illustrate the main core of the Draft Guidelines. If possible, it is also worth considering the inclusion/mention of possible safe harbors, in order to present a more robust counterpoint.

The challenge in this recommendation is the very definition of what would constitute competitively sensitive information is not always precise and definitely not permanent.¹ In this regard, as a way of reference, CADE, in its Guidelines for the Analysis of Previous Consummation of Merger Transactions ("Gun Jumping Guidelines")², defined that competitively sensitive information is specific (e.g., non-aggregated) and directly related to the performance of the economic agents core business. Additionally, the authority provided an exemplificative list of information that should be deemed sensitive, as

¹ The Antitrust Guidance for Human Resources Professionals ("HR Guidelines")¹, of October 2016, prepared by the US Department of Justice and the US Federal Trade Commission is a good example of this constant evolution. Such HR Guidelines establish that sharing information with competitors about terms and conditions of employment can run afoul of the antitrust laws. The HR Guidelines also state: "Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement". Therefore, one may conclude that employment terms and conditions, for instance, which in the past were certainly understood as safe harbors, currently may be seen as competitively sensitive information, depending on the dynamics and conditions that such information exchange is performed.

² Available at <http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf> (page 7).

below:

- a) Costs of the companies involved;
- b) Capacity level and plans for expansion;
- c) Marketing strategies;
- d) Product pricing (prices and deductions);
- e) Main customers and deductions ensured;
- f) Employees' wages;
- g) Main suppliers and the terms of contracts signed with them;
- h) On-public information on marks and patents and Research and Development (R&D);
- i) Plans for future acquisitions; and
- j) Competition strategies, etc.

5. Members: Activities that Might Constitute an Antitrust Violation

5.1. Exchange of Commercially Sensitive Information

The examples and approach in this part of the Draft Guidelines focus on the exchange of future information. Whilst the exchange of this type of information is the clearest breach of the competition rules, it would be helpful to include at the outset an explanation of the circumstances in which current information or very recent historic information can also give insight into competitors' operational strategies and can reduce uncertainty in the marketplace to the detriment of competition. It would also be helpful to provide an indication of "other sensitive information" within the first text box of this section.³

The examples provided are helpful, in particular as they explain why the information being shared is or is not likely to lead to coordination. To the extent that there are concrete examples arising from previous cases, it would be helpful to add those.

The Working Group has no comments on the recommendations in this section, other than

³ In this respect, the following list from the UK's guidance to trade associations is instructive: (i) Current or future pricing or matters affecting prices (price changes, profit margins, discounts, rebates, surcharges, credit lines offered); (ii) Company sales information (sales volume, sales revenues, stock levels, market share calculations, production volumes, production capacity, bid amounts and terms, including the decision whether to bid or not, limits on sales levels or sales of certain products to certain regions); (iii) Company cost information (cost accounting, distribution costs, production costs); (iv) Salaries and wages, or limitations on hiring a competitor's employees; (v) Commercial planning or strategy information including geographic growth and business expansion or contraction plans; and (vi) Any matters relating to specific suppliers or customers

to note that they appear clear and easy to follow. They also appear to address the principal concerns that could arise in relation to indirect information exchanges via a trade association.

5.1. Coordination

Section 2.1 of the Draft Guidelines provides that there is presumptively no valid reason or justification for a discussion of four categories of information; (i) current and future prices, (ii) current or potential clients; (iii) current or projected marketing areas; and (iv) conditions or variables for contract negotiations. Of the four areas, the category of “current or projected marketing areas” is less obviously problematic in all situations. For example, the UK competition authorities take the view that “promoting and protecting the interests of members in the media” can be a lawful purpose for a trade association. It is possible to see that a general marketing campaign to promote the health benefits of a particular food or to promote health and safety could be organized via a trade association. Therefore, it would be helpful for INDECOPI to provide some examples of which type of conduct within this category would be expected to be problematic.

The recommendations for trade associations are comprehensive and clear. The Working Group notes that some may be more difficult for smaller companies and trade associations to comply with. For example, ensuring that all meetings are recorded in audiovisual media or providing for all meeting documents to be duly registered. Further, there may be data protection concerns arising from these recommendations (particularly the recommendation to record all meetings).

With respect to this section of the Draft Guidelines, it would be helpful to draw a distinction between lawful and unlawful decisions/recommendations that are capable of decisively influencing the behavior of the members of an association. Whilst the examples provided are clearly situations that would be problematic, there are other types of decisions/recommendations that would not be problematic. For example, it is well established that technical standardization (which will, of necessity, influence companies’ production) is usually to the ultimate benefit of consumers and is acceptable under the competition rules. Under the UK guidance, for example, “industry standards that increase product interoperability, compatibility or safety” and “technical industry issues including standards and health and safety matters” are explicitly listed as being non-problematic. Although a similar position can be inferred from the examples listed in the text box, it would be helpful to make this more explicit in the Draft Guidelines.

6. Associations: Activities that Might Constitute an Antitrust Violation

6.1. Foreclosure Issues

The Working Group agrees with INDECOPI that members can use associations to foreclose competitors from entering or expanding in a market, thus shielding the members from competition. INDECOPI has identified three ways such foreclosure can occur: denying membership, denying services, and setting technical standards. The Working Group agrees, although it notes that denying membership and denying services are closely linked and may not need separate or unique treatment.

However, the Draft Guidelines are inconsistent and ambiguous in describing how INDECOPI will consider each of these three situations.

- i. The Draft Guidelines state that the association must have a “particularly important position” before it will review denials of membership or services, but it does not explain what constitutes a “particularly important position”. Presumably, the “important position” derives from the association’s ability to foreclose competition, although this is unclear. More concerning is that no such qualifier appears in the discussion with respect to technical standards.
- ii. The Draft Guidelines state that INDECOPI will review the promotion of technical standards to determine whether they “involve, introduce or promote significant restrictions on competition”, without describing what “significant” entails. In addition, this threshold for reviewing technical standards is much lower than the threshold for reviewing denials of membership or services. INDECOPI says that it will only review the denial of services when access to such services is “decisive for competition in the sector” and denial of membership when such denial “prevents specific competing agents from entering the affected market”. It does not explain why there are different standards depending on the conduct involved.
- iii. The Draft Guidelines state that the promotion of technical standards can be problematic, but it is unclear whether “promotion” includes lobbying government to set certain standards or creating certain standards for marketing purposes. Prohibiting the former may be an unjustified restriction on political speech and an intrusion into the political process, which permits advocating for results even where they benefit some competitors at the expense of others. Prohibiting the latter could be an unjustified intrusion into the marketplace and efforts by

competitors to differentiate themselves and their products, and ultimately to compete on the merits.

The Working Group believes that INDECOPI can resolve these issues by setting out a cohesive framework for how INDECOPI will consider foreclosure generally by an association. The beginnings of such a framework may exist in the final paragraph of the section on technical standards in which INDECOPI describes analyzing whether the conduct involves, introduces or promotes a significant restriction on competition and if so, whether the conduct creates efficiencies that offset the anticompetitive effects. In explaining how it analyzes a “significant” restriction on competition, INDECOPI could discuss the association’s ability itself or through its members to exercise market power, the necessary barriers to entry (total or partial), and the necessary magnitude and duration of the anti-competitive effects.

In considering such a framework, the Working Group commends to INDECOPI the recent analysis of Canada’s Competition Tribunal and Federal Court of Appeal in a foreclosure case involving the Toronto Real Estate Board, an association of real estate agents in the Greater Toronto Area. In lengthy and comprehensive reasons, the Tribunal analyzed TREB’s conduct as an abuse of dominance under Canada’s Competition Act.⁴

6.2. Information Issues

The Working Group agrees with INDECOPI that the dissemination of competitively sensitive information to trade association members can be problematic. Different jurisdictions treat such exchanges differently. In Canada and the United States, such exchanges may be powerful indicators of an underlying cartel agreement, but are not themselves criminal offences. In contrast, such exchanges in Europe are generally prohibited for reasons similar to those expressed in the Guidelines: they tend to eliminate “uncertainty” between competitors which can produce anti-competitive effects.

As noted earlier in these submissions, what constitutes competitively sensitive information is highly contextual and evolving⁵. The current Guidelines do not convey

⁴ Its reasons are available at: <https://www.canlii.org/en/ca/cact/doc/2016/2016cact7/2016cact7.html>. Those of the Federal Court of Appeal are available at: <https://www.canlii.org/en/ca/fca/doc/2017/2017fca236/2017fca236.html>.

⁵ The OECD published a report in 2010 concerning policy roundtables on the information exchanges between competitors under competition law. The report identified three key factors when it comes to assessing the legality of information exchange: (i) the structure of the affected market, (ii) the characteristics of the information exchanged and (iii) the modalities in which the information exchange takes place. Available at: <http://www.oecd.org/competition/cartels/48379006.pdf>.

that message, instead listing information that they suggest will always be competitively sensitive. This approach ignores that more and more information is already public and accessible in a digital age. Public companies in particular provide significant disclosure to investors and markets about their operations and future plans. The Working Group believes that the Guidelines would benefit from being less categorical and providing greater guidance regarding more nuanced situations.

7. Additional Comments

7.1. Compliance Programs

Based on all the above, the Working Group proposes that INDECOPI considers including in the Draft Guidelines a recommendation to unions and trade associations for the adoption of a robust and effective compliance program that ensures the adherence to antitrust legislation by the associates and by the management of the unions/trade associations themselves. This would be a good message for the market and would clearly demonstrate the support of the authority in relation to the legitimate activities of such entities.

An effective compliance program must summarize all the principles and recommendations established in the Draft Guidelines⁶⁷. For instance, this document would: (i) discourage the adoption of anticompetitive agreements and uniform behaviors among the associates as a result to the meetings of the unions and trade associations; (ii) discourage the competitively sensitive information exchange, either by the associates or by means of the management of the union and the trade association themselves; (iii) recommend that the union/association leaders should be independent and autonomous, unrelated to corporate management activities; and (iv) recommend that the associates representatives should not be in a position related to the Commercial/Sales Departments. It is worth noting that the items (iii) and (iv) are expressly established in the Brazilian

⁶ United States Sentencing Guidelines, §8B2.1. Effective Compliance and Ethics Program. The Sentencing Guidelines state that to have an effective compliance program, “an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” A company that “unreasonably delayed reporting the offense to the appropriate governmental authorities” will not be eligible to receive a reduction in culpability score based on the existence of a compliance program.

⁷ See *United States v. Kayaba Industry, Co. Ltd.*, Case: 1:15-cr-00098-MRB (N.D. Ohio, filed: 09/16/15) (Document #9, at 7-8) for a sentencing memorandum in which the Antitrust Division has mitigated a fine based on a compliance program and listed some elements as part of an effective compliance policy.

Guidelines as well.

Furthermore, the Working Group believes it would be helpful to cross-refer to the previous sections of the Draft Guidelines when discussing the risk that codes of conduct could help monitor compliance with anticompetitive objectives. This would reinforce the message that codes of conduct should not be a means for trade associations and their member companies to evade the previous rules on direct and indirect exchanges of information.

8. CONCLUDING CONSIDERATIONS

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