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Presidente del Consejo Directivo
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**Ref. INDECOPI's Draft Guidelines on Actions for Damages on Behalf of Consumers as a
Consequence of Anticompetitive Conduct**

Dear Madam,

We have pleasure in enclosing a submission on behalf of the Antitrust Litigation Working Group
of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Committee would be delighted to discuss the
enclosed submission in more detail with the representatives of INDECOPI.

Yours sincerely,

Daniel G. Swanson

Co-Chair Antitrust Committee

Thomas Janssens

Co-Chair Antitrust Committee



IBA ANTITRUST COMMITTEE COMMENTS ON INDECOPI'S DRAFT GUIDELINES ON ACTIONS FOR DAMAGES ON BEHALF OF CONSUMERS AS A CONSEQUENCE OF ANTICOMPETITIVE CONDUCT

I. INTRODUCTION

The International Bar Association (“IBA”) is the world's leading international organization of legal practitioners, bar associations and law societies. As the “global voice of the legal profession”, the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at <http://ibanet.org>.

The IBA’s Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Litigation Working Group of the IBA’s Antitrust Section (Antitrust Litigation Working Group or “ALWG”) and draw on that combined experience.

The ALWG understands that, to date, there has been no collective capability to address the

damages that a consumer may suffer as a consequence of anticompetitive conduct in Peru. Accordingly, the ALWG commends the Peruvian National Institute for the Defense of Competition and Protection of Intellectual Property (“INDECOPI”) for its efforts to provide guidance concerning actions for damages to be taken on behalf of consumers as a consequence of anticompetitive conduct in Peru (the “Draft Guidelines”), which will permit the Commission for the Defense of Free Competition (“Commission”), its Technical Secretariat and certain consumer associations to bring such actions. The ALWG welcomes the opportunity to provide these comments to assist INDECOPI in further refining the Draft Guidelines for this new regime.

The ALWG notes, for completeness, that the following comments have been based on a review of the English translation of the Draft Guidelines.

II. EXECUTIVE SUMMARY

This submission offers comments and suggestions regarding certain sections of the Draft Guidelines, considering approaches adopted by key jurisdictions regarding such practices. In particular, the ALWG respectfully proposes that INDECOPI considers the following aspects of the Draft Guidelines:

1. Providing guidance as to how non-economic damages (including moral damages) might be quantified in cases such as those contemplated by the Draft Guidelines (Section 2 of the Draft Guidelines);
2. Whether the definition of, and requirement for, a “final decision” prior to damages claims being commenced could disproportionately impact leniency applicants (Section 2 of the Draft Guidelines);
3. The use of documents provided in the context of INDECOPI’s leniency program, in cases such as those contemplated by the Draft Guidelines (Section 3 of the Draft Guidelines);
4. Whether a distinction in the treatment of Type A and Type B leniency applicants is warranted in the context of damages claims (Section 3 of the Draft Guidelines);
5. Including in the Draft Guidelines some more precise criteria to be applied when determining a “class” of consumers (Section 4 of the Draft Guidelines);
6. The timing of the period within which class members can opt-out, and the evidence that class members could be required to adduce in order to make a claim (Section 7 of the Draft Guidelines); and
7. Certain aspects regarding the Commission’s delegation of its authority to bring a damages action to a consumer association (Section 9 of the Draft Guidelines).

These aspects are addressed in turn below.

III. RESPONSE TO THE DRAFT GUIDELINES

With the purpose of contributing to the improvement of the Draft Guidelines, this submission offers the following comments regarding specific sections, and other important considerations that reflect the experiences of other jurisdictions.

Draft Guidelines, Section 2: Damages - Economic and Moral

There are no guidelines concerning the quantification or formulation of damages included in the Draft Guidelines. Despite that, the Explanatory Memorandum is clear that any actions brought by the Commission must substantiate the causal relationship between the anticompetitive conduct and the damage caused. There is also clear recognition that concerning quantification of damages including that *"damages caused by anticompetitive conducts have generally an economic nature"* and that *"economic studies support that action loss and the loss of profit are compensable damages"*.¹

The Explanatory Memorandum also appears, however, to go beyond these principles and notes that the fact that there is emphasis on damages of an economic type in international jurisdictions *"does not mean that it is impossible to compensate other types of damages through these actions, such as the moral damages that are recognized by section 1984 of the Civil Code and are not of an economic nature since section 52 of the Competition Act does not establish any restriction within the list of compensable damages"*.²

The ALWG notes the Explanatory Memorandum's comment that, *"an exact quantification of damages derived from anticompetitive conduct cannot be required"*. Notwithstanding this, the ALWG respectfully suggests that it may be helpful if the Draft Guidelines were to provide guidance as to how non-economic damages (including moral damages) might be quantified in these cases.

Draft Guidelines, Section 2: Requirement for a Final Decision

The Draft Guidelines state at section 2.1 that once the administrative decision concerning the existence of an infringement of competition law is final, and as long as there is a favorable report

¹ Para 2.3 of the Explanatory Memorandum.

² Para 2.3 of the Explanatory Memorandum.

from the Technical Secretariat, the Commission is entitled to bring an action for damages caused by the anticompetitive conduct that has been proven.³

The term "final decision" is defined at 2.2 of the Draft Guidelines, as meaning "*a decision that cannot be challenged through administrative or judicial appeal. In the case of several individuals held liable for the anticompetitive conduct it will sufficient to have a final decision regarding one or some of them to be able to bring an action for damages against them*".⁴

The Explanatory Memorandum is also express that the purpose of the rule concerning actions against only one of a group of cartel members is to ensure that there is no delay in the effective compensation of consumers, which is a laudable purpose.

The ALWG notes that an unintended consequence of the current drafting is that a leniency applicant, against whom there will be a final decision and who is unlikely to appeal any decision or exercise any available avenues of judicial appeal, may also be the party who is the subject of any damages action taken by the Commission. The unintended consequence of the current drafting is that a Type B leniency applicant in particular may have limited incentives to come forward under the leniency program where:

- (a) they are liable to have an action for damages commenced against them by the Commission in addition to the payment of a penalty;
- (b) documents provided by them to the Commission are likely to be used against them in the damages action; and
- (c) under the current Draft Guidelines, they are likely to be the first party to be proceeded against for the whole of the damages claimed, with the consequence that it will be necessary for them to take a further and separate action in due course to recoup any damages payable from other cartel participants.

On the other hand, requiring plaintiffs to await the outcome of judicial appeals against findings of infringements of competition law could result in disproportionately long delays, thereby undermining the Draft Guidelines' aim of promoting damages claims: justice delayed is justice denied. This could be seen as particularly unfair if plaintiffs are unable to bring proceedings against immunity beneficiaries (who do not appeal against the infringement finding) simply because other infringing entities have chosen to appeal.

³ Section 2.1 of the Draft Guidelines.

⁴ Para 2.2 of Explanatory Memorandum.

On this basis, the ALWG would propose that INDECOPI contemplates the possibility that concept of the “final decision” be reconsidered to ensure that leniency applicants do not bear a disproportionate burden of any damages action which may be commenced by the Commission, whilst enabling claims to be commenced against entities who do not appeal the infringement finding.

Draft Guidelines, Section 3: Leniency Program - Use of Leniency Program Documents

Any leniency program is intended to be an investigative tool for detecting cartel activity by incentivizing corporations and individuals to report on cartel activity. That incentive comes in the form of permitting applicants for leniency to avoid regulatory liability if they meet the requirements of the program.

The ALWG understands that, in Peru, liability for civil damages co-exists alongside the leniency program and that a reduction in fine does not reduce or limit that liability.⁵ However, consequences flow from the drafting of the Draft Guidelines which have the capacity to undermine the efficacy and efficiency of INDECOPI's leniency program.

The first is that the relevant leniency program guidelines state that *"the information provided by the beneficiary contained in the confidential file as a result of an application for benefits shall not, under any circumstances, be transferred by the Technical Secretariat and the Commission to be used against the beneficiary in a possible claim for damages. This limitation does not apply to the information contained in the Case File in which the administrative procedure is processed, nor to information that may have been made public by the Collaborator himself"*.⁶

This limitation is not reflected in the Draft Guidelines which are silent as to the use to which documents provided by the leniency applicant, and in the possession of the Commission, may be put. Assuming that the leniency program guidelines are an adjunct to the Draft Guidelines, the ALWG would encourage INDECOPI to consider clarifying in the Draft Guidelines the scope of the “information” provided by immunity beneficiaries that is protected from use in damages claims.

The ALWG notes that different jurisdictions seek to strike this balance in different ways. For example, the EU protects *leniency statements* themselves from passing into the hands of plaintiffs

⁵ Para 3.4 of the Explanatory Memorandum to the Draft Guidelines.

⁶ Para 3.4 of the Explanatory Memorandum to the Draft Guidelines.

in damages claims (including class actions),⁷ but does not prevent *contemporaneous documents* provided by the immunity applicant from being provided to plaintiffs. In Australia, leniency statements (proffers) tend to be provided orally and thus cannot in practice be 'disclosed', but contemporaneous documents provided by the leniency applicant to the regulator may be subject to a subpoena from class action litigants in relation to those documents. In Brazil, on the other hand, although the regulator will not tend to disclose leniency statements, documents delivered by leniency applicants as evidence could be made public;⁸ however, the courts are not bound by this practice and have ordered disclosure of leniency statements to plaintiffs.

While therefore not uniform across jurisdictions, the tendency is nevertheless to provide a greater degree of protection from disclosure (albeit not necessarily absolute protection) to leniency statements/proffers, while allowing disclosure of contemporaneous/supporting documents provided by leniency applicants. Against this backdrop, the ALWG respectfully proposes that INDECOPI considers adopting a similar approach in the Draft Guidelines in order to balance the interests of leniency beneficiaries (and the attractiveness of the leniency program) with the interests of plaintiffs in damages claims (and the private enforcement of competition law that the Draft Guidelines seek to achieve). This will resolve what appears to be a disconformity between the leniency program guidelines and the Draft Guidelines and provide greater certainty for leniency applicants.

Draft Guidelines, Section 3: Leniency Program - Distinction between Types of Leniency Applicant

The second issue concerning the operation of the leniency programs is the distinction between damages actions against "Type A" leniency applicants and any other type of leniency applicant. This distinction is drawn at paragraph 3.4 of the Draft Guidelines, which states: "*the Commission shall not exercise the power referred to in Section 2.1 of these Guidelines [being the power to bring an action for damages] against individuals who, under the Leniency Program Guide, qualify as applicants for Type A Leniency, without prejudice to the right of the affected persons, as well as the consumer associations that comply with section 9 of the Guidelines, to bring actions for damages themselves against those individuals*".⁹

Accordingly, despite the distinction which is drawn between Type A and other types of applicant so far as damages actions taken by the Commission are concerned, any applicant may be the subject of a damages action separately brought under Peruvian law, including by a consumer

⁷ Article 6(6)(a) of Directive 2014/104/EU – the EU's "Damages Directive", 26 November 2014.

⁸ CADE's Resolution n. 21/2018.

⁹ Para 3.4 of the Draft Guidelines.

association under its delegated powers from the Commission.

To the extent that a Type A applicant and a Type B applicant both may cooperate in any regulatory investigation and qualify for a 100% reduction in penalty it seems there is no principled reason for a distinction in treatment for the purposes of any damages action. To treat applicants differentially, particularly where both may be liable to a damages action as a consequence of the regulatory action, could potentially provide a further disincentive for potential Type B applicants for leniency beyond the issue concerning the use of documents outlined earlier, thereby further undermining the efficacy of the program.

To avoid this unintended consequence, the ALWG respectfully suggests that further consideration be given by INDECOPI to whether a distinction in the treatment of leniency applicants is warranted in light of the clear benefits of a leniency program that detects consumer harm.

Further, to the extent that a consumer association is permitted to take an action against a Type A applicant under its delegated power from the Commission in circumstances where the Commission may not itself take a damages action being barred from doing so, the ALWG would encourage INDECOPI to consider addressing what appears to be an inconsistency in the Draft Guidelines. As consumer associations take their delegated powers from the Commission under section 9 of the Draft Guidelines, they should not be permitted under the Draft Guidelines to do what the Commission may not.

Draft Guidelines, Section 4: Discretion of Commission - Determination of "Class"

Section 4 of the Draft Guidelines establishes that a report from the Technical Secretariat of the Commission shall identify the class of consumers that is affected and that, for this purpose, a "*duly motivated and reasonable estimation*" only, will be sufficient.

The Explanatory Memorandum goes on to say that, for the purpose of the Draft Guidelines, a "class" refers to the group of people that will be represented in the action for damages and that, by way of example, it may be sufficient to note that the class includes consumers who have purchased the cartel's product during the relevant period and to estimate the number of members who belong to that class on a reasonable and duly motivated basis but without the need to bring strong evidence or exact calculations.¹⁰

¹⁰ Para 4 of the Explanatory Memorandum.

The ALWG notes that the Draft Guidelines appear to leave the Commission with a broad discretion to define the class and who falls within or outside it. The ALWG considers that it may be helpful – for the courts and the parties – for the Draft Guidelines to identify some more precise criteria to be applied when determining the “class”. To that end, the ALWG notes that other jurisdictions in which class actions can be brought have a range of criteria to define the “class”, including considerations as to (i) a minimum number required to constitute a class in case of collective interests (for example, seven in Australia), (ii) a clear indication of all groups of consumers whose rights will be defended, in cases of diffuse interests, (iii) the need for the claims to have an element of commonality or the same/similar circumstances or applicants to have the same interest, (iv) the need for there to be common issues of fact and/or law, and (finalv) criteria concerning the financial standing of the plaintiff/representative.

Draft Guidelines, Section 7: Opt-out Provisions

Section 7.1(ii) of the Draft Guidelines states that those wishing to opt-out must do so within 10 days of the Commission declaring that it will take action. This seems to be a very short period. In practice, it is unlikely to be practicable to publicize the class action sufficiently widely to enable those wishing to opt out to even learn of the claim within that timeframe. As a result, many parties may be bound by the outcome of the litigation in circumstances where they do not wish to be, but were unable to learn of, or opt-out from, the claim in time.

The ALWG would therefore encourage INDECOPI to further consider the timing of the opt-out period. One alternative may be the Australian model whereby the court sets the date by which notice must be given to opt out;¹¹ a similar court-ordered notice-based period also operates in the UK.¹² The court, on the application of a group member, may also fix another date so as to extend the time period by which group members may opt out.¹³ This means that there is sufficient time to advertise the existence of the damages action and for group members to make a rational and deliberate choice about whether they wish to remain a group member or opt out.

Section 7.1(iii) of the Draft Guidelines also appears to give the Technical Secretariat broad discretion as to when class members should be required to “*provide payment receipts or other documents as evidence of their membership to the class*”, and provides that such evidence would need

¹¹ Section 33J(1) and (2) Federal Court of Australia Act 1976 (Cth).

¹² Section 47B(11)(b)(2) Competition Act 1998 as amended by Consumer Rights Act 2015, Schedule 8; and Competition Appeal Tribunal Rules 2015, rules 80(1)(h) and 82(1).

¹³ Section 33J(3) Federal Court of Australia Act 1976 (Cth).

to be adduced “*within 30 business days*” of INDECOPI’s public communication announcing the claim. Whilst it is true that, as the Explanatory Memorandum notes, “*in some cases it will be reasonable to infer that consumers would have kept payment receipts or other documents as evidence of their membership to the protected class*”,¹⁴ careful consideration may be warranted as to when, and within what timeframe, it will be reasonable or realistic to require such evidence to be produced.

The ALWG would respectfully recommend in particular that INDECOPI considers the risk that this requirement acts as a barrier to effective compensation reaching class members. In particular, the ALWG would argue that it may be beneficial that the 30-day period for providing such evidence be reconsidered: in many cases, the relevant receipts/purchase records may not be readily available to class members, or they may not hear about the claim in sufficient time to locate relevant records. In addition, although the Explanatory Memorandum notes that “*the Technical Secretariat will give preference to the submission of documents through virtual means that allow automated processing of information*”,¹⁵ in practice such an online portal/database to which documents can be uploaded will take time to set up (especially if a third-party claims administrator is appointed to operate the portal/database) and class members may have difficulties accessing it, making the submission of evidence within a 30-day timeframe practically difficult.

Draft Guidelines, Section 9: Consumer Associations

Section 9 of the Draft Guidelines provides that the Commission may, so long as there is a favorable report from the Technical Secretariat, delegate its authority to bring a damages action to a consumer association. Such delegation appears to only be permissible where the Commission has decided not to bring an action for damages itself and considers that such associations may effectively represent those interests.

While the Draft Guidelines also stipulate that consumer organizations are those constituted in accordance with section 153 of the Consumer Protection and Defense Code¹⁶ (“Code”) it appears that the relevant associations are defined by reference to their purpose: “*to protect, defend, inform and represent consumers and users*”. Further section 153.2 of the Code as stated in the Explanatory Memorandum, suggests that INDECOPI has the discretion to recognize consumer associations, and on the basis of such recognition, the association is permitted to take relevant actions.¹⁷

¹⁴ Para 7.3 of the Explanatory Memorandum.

¹⁵ Para 7.3 of the Explanatory Memorandum.

¹⁶ Para 9 of the Explanatory Memorandum.

¹⁷ See fn 84 of the Explanatory Memorandum.

The choice of consumer association to which the Commission may delegate its powers appears to be at the discretion of the Commission. There are no criteria included in the Draft Guidelines by which the Commission may nominate or determine, in case of a conflict, which association may best protect, defend, inform or represent consumers in any damages action and direct to whom its powers should be delegated. Nor do the Draft Guidelines state whether more than one consumer association may litigate in the same case (e.g. to pool expertise or resources), and if so, how applications submitted by multiple (potentially competing) consumer associations would be dealt with.

Given that any consumer association will be an organization that receives delegated powers from the Commission and will, in effect, act in the role of the Commission in taking the action, the ALWG would encourage INDECOPI to consider including in the Draft Guidelines the criteria by which such associations will be selected, and clarifying whether more than one may be selected in any given case. Such criteria should be sufficiently objective to permit the Commission to choose between organizations where more than one applies under section 9.2 of the Draft Guidelines.

Also in this regard, the ALWG notes that such delegation of powers would allow a consumer association to bring a damages action on behalf of all affected consumers, including both the diffuse interests and collective interests of consumers. The ALWG appreciates the purpose of setting forth an alternative for the redress of a broad group of affected consumers, while noting that such broad delegation of powers could, eventually, reduce the interest of associations to apply for selection by the Commission. Associations may not be willing to face the responsibility and costs associated with filing claims, or may not even be allowed to do this, given the powers set in its bylaws – in Brazil, for instance, associations only have standing for collective actions on behalf of their associates. An alternative option to be considered would be the possibility of delegating powers in regards to specific groups of consumers, or also in regards to the associates of each association that apply to be granted with a delegation of powers by the Commission.

There is a further issue concerning the timing by which a consumer association must apply for selection by the Commission. While the Commission has two years to decide whether to bring a damages action (see section 5.1 of the Draft Guidelines) during which time its powers may be delegated, a consumer association must submit an application to the Commission seeking standing to bring an action within one year of the final decision declaring the existence of anticompetitive conduct (section 9.2 of the Draft Guidelines). Accordingly, a consumer association, which will be affected by information asymmetry by comparison with the Commission, has less time to decide whether to bring an action and take steps, than the

Commission.

The ALWG would propose that, so as to ensure that a consumer association that meets relevant criteria is not discounted from bringing an action by reason that it fails to apply within one year, INDECOPI considers that it be permitted to apply for delegated powers at any time following the final decision, although any damages action commenced by it must be within the two year limitation period.

IV. CONCLUDING CONSIDERATIONS

The ALWG appreciates the opportunity provided by INDECOPI to comment on the Draft Guidelines. We welcome any further opportunity to provide any additional comments or clarification, or answer any questions, that INDECOPI may have following review of these comments.