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April 12, 2018

Via Email: firrazabal@fne.gob.cl

Felipe Irarrázabal Philippi
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Huerfanos 670, Pisa 9
Santiago, Chile

**Re: COMMENTS ON CHILE'S INTERNAL GUIDELINES FOR THE
SUBMISSION OF CRIMINAL CLAIMS FOR CARTEL OFFENCES**

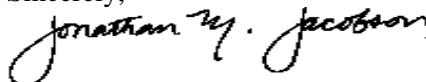
Dear Mr. Philippi:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments on Chilean competition agency ("FNE") Internal Guidelines for the Submission of Criminal Claims for Cartel Offences.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

We appreciate your consideration of the Sections' comments on this important initiative. If you have any comments or questions after reviewing our comments, we would be happy to discuss them.

Sincerely,



Jonathan M. Jacobson
Chair, Section of Antitrust Law



Steven M. Richman
Chair, Section of International Law

Attachment

COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE INTERNAL GUIDELINES FOR THE SUBMISSION OF CRIMINAL CLAIMS FOR CARTEL OFFENCES

April 12, 2018

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

The Sections of Antitrust Law and International Law of the American Bar Association (“Sections”) respectfully submit these Comments to the Internal Guidelines for the Submission of Criminal Claims for Cartel Offences (“Guidelines”).¹ The Sections offer these Comments in the hope that they will assist the National Economic Prosecutor’s Office (*Fiscalía Nacional Económica* or “FNE”) in further refining the Guidelines. The Sections are available to provide additional comments or to participate in consultation with the FNE as it may deem appropriate.

Executive Summary

The Sections appreciate the FNE’s initiative to submit the Guidelines for comment. Overall, the Sections believe that the Guidelines incorporate the proper criteria for the FNE to analyze when considering the prosecution of criminal cartels in Chile, and commend the FNE for the initiative. The Sections respectfully make the following recommendations, which aim to further clarify certain aspects of the Guidelines:

- Any overlapping criteria that apply to both the duty to file a criminal claim and the power to lodge a criminal claim may be harmonized and described consistently;
- Some of the criteria related to the power to lodge a criminal claim may be clarified and/or expanded to include objective criteria; and
- The Guidelines may provide further guidance on how the FNE will determine against which individuals – especially foreign individuals – to lodge a criminal claim.

Criteria Regarding Both the Duty to File a Criminal Claim And the Power to Lodge a Criminal Claim

There appears to be substantial overlap between the necessary criteria to impose a duty to file a criminal claim in paragraph 22 (the “mandatory criteria”) and the criteria that the FNE will consider in applying its discretion to file a criminal claim in paragraphs 26 to 34 (the “discretionary criteria”). For example, paragraph 22 requires, among other things, consideration of whether “[t]he economic effects of the conduct are of a significant magnitude and capable of causing a systemic impact upon the markets.” At the same time, paragraph 26 permits consideration of the

¹ The Sections’ Comments are based on an English translation of the Guidelines (copy appended).

“[m]agnitude of the effects produced by the collusive agreement.” The Sections respectfully suggest that it would be helpful to clarify to what extent the discretionary criteria are in fact identical to the mandatory criteria. Where the criteria are identical, the Sections recommend that their descriptions be harmonized throughout the Guidelines. Where they are substantially different, it would be desirable to note and explain the differences.

Criteria Regarding the Power to Lodge a Criminal Claim

The Sections note that paragraphs 26 to 34 identify “a series of guiding criteria that the FNE shall take into account according to its own opinion at the moment of deciding whether or not to exercise its power to bring criminal charges.” In most instances, it is clearly delineated how these criteria are relevant and the FNE will be apply them. However, it is not clear how some criteria will influence the FNE’s discretionary decision. For example, paragraph 30 states that “the FNE will also analyze whether the cartel was organized, coordinated, entered into, carried out, or monitored with the participation of an association or entity that gathers competitors.” The Guidelines do not state whether the involvement of an association is more or less likely to lead to criminal prosecution, and the answer is not intuitively obvious. Accordingly, the Sections respectfully recommend that the FNE consider revising the Guidelines to make clear whether the existence of a particular criterion favors or disfavors criminal prosecution.

Further, the Sections respectfully suggest that some of the discretionary criteria are overly subjective. For example, in applying its discretion, “[t]he FNE may take into account those cases in which it has been demonstrated that the anticompetitive agreement extended during a significant period of time, considering the nature of the conduct and the affected market.” The Guidelines provide no further guidance about what will be considered a “significant period of time,” rendering this criterion overly subjective. The Sections are mindful of the fact that criminal antitrust enforcement in Chile is at an early stage, and so the FNE is presumably (and understandably) acting with caution and willing to preserve some discretion in this area. Notwithstanding this, Sections respectfully recommend that the FNE establish more objective time criteria in order to increase transparency and predictability.

Another criterion that the FNE will consider when determining whether to bring criminal claims is the “likelihood of success of the criminal action.” For this, the FNE will consider “whether a criminal claim is necessary, proportional and compatible with the integral fulfillment of [its] objectives.” However, the Guidelines do not provide objective criteria for such an analysis to be carried out on a case-by-case basis, rendering this criterion overly subjective as well. The Sections believe that providing further information on how the FNE will apply its analysis with regard to this criterion may further enhance the transparency and predictability of the FNE’s decisions.

Finally, the Guidelines state that the FNE may consider whether “the offenders held a high market share in the relevant market that the offense affected or tended to affect.” The Sections respectfully suggest that the FNE consider whether this criterion should refer to the offenders’ market power rather than their market share, since high market shares do not necessarily result in an ability to raise prices.

Imposing Criminal Liability on Individuals

The Sections note that the Guidelines provide that in determining whether to file charges against an individual, “the FNE may take into account the seriousness of the individual involvement and the functions performed by the individuals” in executing the collusive agreement. The Sections recognize the importance of maintaining a balance between providing individuals with clear notice of what conduct may be charged criminally and providing the FNE with appropriate discretion to charge only those individuals who are duly culpable. In this respect, the Sections respectfully suggest that the Guidelines do not provide clear criteria for selecting individuals within an organization as targets of a criminal claim, and could be expanded to do so.

The Sections also note that the Guidelines do not discuss the possibility of the FNE bringing criminal claims against foreign individuals. There are substantial difficulties involved with the prosecution of foreign individuals for violations of domestic antitrust laws, including due process concerns, issues with extradition, and foreign policy implications. Accordingly, the Sections respectfully recommend that the Guidelines provide additional guidance as to when foreign individuals may be prosecuted. As mentioned, the Sections are mindful of the fact that criminal antitrust enforcement in Chile is at an early stage, which makes it difficult to create a detailed regulatory framework. Nevertheless, the Sections respectfully recommend that the FNE try to provide additional guidance in this respect in order to increase transparency and predictability.

Conclusion

The Sections appreciate the opportunity to comment on the Guidelines, and commend the FNE for its work. The Sections remain available to clarify any of the recommendations made herein.