



3 May, 2018

Felipe Irrazabal Philippi
National Economic Prosecutor
Fiscalía Nacional Económica
Huérfanos N° 670 Pisos 8, 9 y 10
Santiago de Chile

Email: firrazabal@fne.gob.cl

**Ref. Comments to the Internal Guidelines for the Submission of Criminal Claims
for Cartel Offences**

Dear Mr. Irrazabal,

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 the Fiscalía Nacional Económica.

Yours sincerely,

Marc Reysen
Co-Chair
Antitrust Committee

Elizabeth Morroni
Co-Chair
Antitrust Committee

cc Mariana Tavares de Araujo



**IBA CARTELS WORKING GROUP COMMENTS ON THE PUBLIC
CONSULTATION VERSION OF THE INTERNAL GUIDELINES FOR THE
SUBMISSION OF CRIMINAL CLAIMS FOR CARTEL OFFENCES ISSUED
BY THE NATIONAL ECONOMIC PROSECUTOR'S OFFICE - CHILE**

1. INTRODUCTION

This submission is made to the National Economic Prosecutor's Office ("*Fiscalía Nacional Económica*" or "**FNE**") on behalf of the Cartels Working Group ("**Working Group**") of the Antitrust Committee of the International Bar Association ("**IBA**") in relation to the Internal Guidelines for the Submission of Criminal Claims for Cartel Offences ("**Internal Guidelines**"), regarding the FNE's public consultation version of its Internal Guidelines.

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 help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and 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 the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at <http://www.ibanet.org>.

The Working Group hopes to contribute constructively to the FNE's Internal Guidelines.

2. RESPONSE TO FNE'S PUBLIC CONSULTATION

The Working Group commends the FNE for the issuance of the Internal Guidelines in order to provide transparency to the factors that the FNE will weigh when determining whether to file a criminal case. The Working Group recognizes the challenges associated with prescribing, and thereby potentially limiting, the exercise of prosecutorial discretion by issuing public guidance.

The issuance of the Internal Guidelines builds on the FNE's fine tradition of seeking public consultation of its cartel enforcement policies and ensuring transparency to the greatest extent possible in its decision-making. Under the leadership of Chief Economic Prosecutor Felipe Irrázabal, the FNE previously sought public consultation for its Guidelines on Leniency in Cartel Cases ("Leniency Guidelines").¹ The FNE's Leniency Guidelines have greatly enhanced transparency and legal certainty regarding the application of the Chilean Leniency Program and have served as a model for competition enforcers in Latin American and around the world. The Working Group greatly appreciates the opportunity to share the following comments and proposed amendments to the Internal Guidelines.

2.1 Rationale for the Internal Guidelines

The FNE's introductory note to the Internal Guidelines explains that criminal investigations for cartel offence will begin through a criminal claim filed by the FNE. Such claim may only be filed after the Competition Court ("***Tribunal de Defensa de la Libre Competencia***" or "***TDLC***") has issued a final ruling in the investigation carried out by the FNE, and has found the defendants guilty of cartel conduct.

According to the FNE, the Internal Guidelines have the aim to "*make explicit the criteria under which the FNE will exercise its authority to file criminal claims for cartel offences*". The FNE further notes "*Our objective is to disclose the reasons that will guide the FNE's activity in this matter, thereby restricting the margin for discretion that the law grants to the agency.*"²

¹ See IBA Cartels Working Group response to the FNE's public consultation regarding guidelines on leniency in cartel cases available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=2FBB0ED8-CB09-4916-BBA5-96324ED9A144>

² See FNE's Internal Guidelines, page 1 (English translation).

2.2 Consistency between the agreement established by the TDLC’s judgment and the cartel offence

With respect to the consistency analysis required as the first step for the FNE’s decision to bring a criminal claim, paragraph 19 of the Internal Guidelines provides a list of the circumstances in which Article 3 and Article 62 will not be met. This includes concerted practice, collusive agreements amounting to bid rigging in tenders launched by private suppliers which do not offer public utilities, or agreements the object of which is to fix marketing conditions or the exclusion of actual or potential competitors.

The IBA welcomes the FNE’s efforts to clarify the conduct that can (or cannot) give rise to a potential criminal claim. As with other jurisdictions, the FNE has restricted criminal claim possibilities to the most serious of collusive conduct. In the UK, for example, there is a similar possibility for the prosecution of cartel conduct as an offence and that offence is also limited to conduct involving namely price fixing, market sharing, bid-rigging, and limiting output.

Canada’s Competition Act criminalizes conduct that is extremely likely to have anticompetitive effects and extremely unlikely to produce procompetitive societal benefits. Thus, decisions to prosecute criminally do not typically rest on an assessment of the conduct’s likely effects, which can be very subjective, but on the essential nature of the conduct. The Competitor Collaboration Guidelines issued by the Canadian Competition Bureau (“CCB”) discuss how the CCB distinguishes between conduct that it considers criminal under the Competition Act and that which is not criminal but may substantially lessen or prevent competition such that the Competition Tribunal should prohibit it after a civil proceeding.

In Canada, the factors that the FNE considers when making its decisions to prosecute (*e.g.*, magnitude of harm, magnitude of benefit to the accused, duration of the conduct) would be considered at the sentencing stage, not the assessment of whether the conduct is a criminal offence rather than a civil one. Having said that, given scarce prosecutorial resources, Canadian prosecutors no doubt consider issues regarding the severity of the conduct when deciding whether to file charges, but the law does not require such severity before an accused can be criminally charged or convicted.

With respect to the list of exclusions, it is unclear to which types of conduct the exclusion of “agreements the object of which is to fix marketing conditions or the exclusion of actual or potential competitors” will apply in practice. This is particularly the case, given the list of conduct in Article 62, which includes “*an agreement involving*

two or more competitors, to fix sale or purchase prices for goods or services in one or more markets; restrict output or supply; divide, assign or distribute market zones or quotas”. It would be helpful if the FNE could provide some practical scenarios in which it expects the exclusions to apply.

2.3 The duty to file a criminal claim

Paragraph 13 of the Internal Guidelines provides for the FNE to be obliged to file a criminal claim if the existence of a collusive agreement is determined, and if this agreement constitutes a criminal offence within the meaning of article 62, whenever competition in the markets is considerably hindered as a result of the infringement.

Thus, in the above circumstances, the FNE has no discretion whether or not to prosecute. However, the question whether competition in the markets is considerably hindered appears to provide the possibility for the FNE to exercise some discretion as to whether it considers the case serious enough to warrant criminal prosecution. This is similar to the UK, where the Competition and Markets Authority (CMA) will bring a criminal prosecution if it determines that (i) the evidential tests are met and (ii) prosecution would be in the public interest. Thus, there is a similar discretionary element under the UK regime. In the UK, the CMA has issued detailed Internal Guidelines as to the circumstances in which it is likely to bring a prosecution under the criminal cartel offence, including practical examples. The FNE’s Internal Guidelines at paragraph 22 is welcome, as it provides an overview of the considerations that the FNE will take into account. It would be helpful if the FNE could expand on the Internal Guidelines at paragraph 22, particularly with respect to the final condition, namely that *“the economic effects of the conduct are of a significant magnitude and capable of causing a systemic impact upon the markets”*. In particular, it would be helpful to know what factors will be taken into account in determining the magnitude and systemic impact of the conduct.

2.4 The power to lodge a criminal claim

The Internal Guidelines also sets out the criteria that the FNE will take into account when it has discretion whether to lodge a claim (*i.e.*, when the conditions discussed above are not all met). The classification of the criteria into factors pertaining to the conduct, those pertaining to the liability of the individual involved, and those pertaining to the likelihood of success is similar to the criteria adopted in the UK, discussed above.

To provide further guidance to companies and individuals, it would be helpful if the FNE could provide additional consideration of the weight that different factors may be given. For example, while it appears likely that the magnitude of the effects will be a

central factor in the FNE's decision-making, it is less clear whether the involvement of a trade association be a significant factor.

We note, in this respect, that the magnitude of economic benefits that individual companies or individuals obtained from cartel conduct is generally difficult to ascertain. In the UK, for example, the CMA will not attempt to quantify the gains that an individual may have made, but will instead "*look at the extent to which the individual's purpose was to preserve or increase the profits of their organisation or to profit personally*". The FNE may therefore find that it is relatively difficult to apply this criteria in practice.

Having said so, the Working Group recognizes that at the early stages of prosecution of cartel conduct in Chile, it may be important that the FNE retains some discretion regarding the cases where it may decide whether or not file a criminal claim. Therefore, the FNE could, in addition to the comments above, consider revisiting the Internal Guidelines within a reasonable timeframe so as to reflect the enforcement practice and any lesson learned; and then possibly set forth clearer criteria for this second category of cases.

3. CONCLUDING CONSIDERATIONS

The Working Group supports the FNE's initiative to provide transparency and legal certainty regarding the criteria under which the FNE will exercise its authority to file criminal claims for cartel offences and commends its openness to consider the comments above and the proposed amendments to the Internal Guidelines.

The Working Group believes that the comments and suggestions provided above could enhance the proposed document and would better serve to fulfill the FNE's honorable objective.

The Working Group would be pleased to respond to any questions the FNE may have regarding these comments and/or to provide any additional comments or information that may assist the FNE in finalizing the Internal Guidelines.