ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION WORKING GROUPS

SUBMISSION OF COMMENTS IN RESPONSE TO THE SPANISH NATIONAL COMMISSION FOR MARKETS AND COMPETITION "PROPOSED GUIDELINES FOR COMPLIANCE PROGRAMS IN RELATION TO THE DEFENSE OF COMPETITION"

1 Introduction and Purpose of Submission

1.1 Introduction

The International Bar Association's Antitrust Committee sets out below a submission in response to the consultation of the National Commission for Markets and Competition (the "CNMC") on Proposed Guidelines for Compliance Programs in relation to the Defense of Competition (the "Draft Guidelines"). Specifically, the submission has been prepared by members of the Cartel Working Group and Unilateral Conduct and Behavioral Issues Working Group.

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

Bringing together antitrust practitioners and experts among the 80,000 individual lawyers from across the world who are members, 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 perspective. Further information on the IBA is available at www.ibanet.org.

1.2 Purpose of Submission

The IBA welcomes the opportunity to respond to the public consultation by the CNMC on its Draft Guidelines and is supportive of the initiative to provide guidance on the criteria that the CNMC deems relevant when considering whether a compliance program is effective.

The central focus of the IBA Antitrust Committee is to provide an international forum for thought leadership with respect to competition/antitrust law developments. The IBA is neither an undertaking that can provide its own experience nor an association that has consolidated such experiences. Nevertheless, the IBA comprises lawyers with significant knowledge in a number of jurisdictions and brings together experience from advising a large number of clients in matters related to the Draft Guidelines. As such, the IBA has sought to share its perspective on certain points raised in the Draft Guidelines.

2 Issues raised by the Draft Guidelines

2.1 CNMC practice regarding compliance programs

The Draft Guidelines helpfully set out the existing practice of the CNMC in relation to compliance programs, noting that the mere existence of a compliance program, whether *ex ante* – implemented before an infringement takes place- or *ex post* – adopted after an infringement is committed, does not in itself justify the consideration of the program as a mitigating circumstance when calculating the amount of the fine.

The Draft Guidelines point out that the CNMC considers compliance programs on a case by case basis, has found in several cases that *ex post* compliance programs reflecting a company's commitment to compliance with competition law have been taken into account as a mitigating factor but that none of the *ex ante* compliance programs submitted to the CNMC within an investigation have been considered sufficient to mitigate liability. In this regard, the CNMC appears to equate an effective ex ante compliance program with either no infringement or a successful leniency application.

While that approach is orthodox and shared by a number of authorities around the world, the Working Groups note that it may not give full value to compliance efforts and that it may be preferable to give an additional incentive to companies in their implementation of compliance programs by recognizing

that where all reasonable steps are taken a company should not receive any fine at all.

This approach would be fully in accordance with Spanish law. Article 63 of Law 15/2007, of July 3, for the Defense of Competition (the "LDC") enables the authority to impose fines on undertakings that "deliberately or through negligence" infringe the provisions of the law. Undertakings that take all reasonable steps to prevent infringements through the implementation of an effective compliance program should not be found to have acted negligently and, as such, should not be the subject of fines merely due to the unauthorized acts of their employees or other agents.

A similar criterion should apply in relation to parent company responsibility. Where the evidence demonstrates that a parent company or group have put in place all reasonable measures to prevent infringements, they should not be considered responsible for the unauthorized behaviour of subsidiary entities.

Recognizing the possibility of infringement decisions that do not impose fines on undertakings due to their compliance efforts would bring CNMC practice into line with its own national legislation and would provide a key incentive to companies to take all reasonable steps.

2.2 Assessment criteria

A. Involvement of the company's governing bodies and/or top management

The Working Groups fully agree that the involvement of governing bodies and top management is an important element of any compliance program.

However, the CNMC suggests that the involvement of a single member of the governing bodies or top management in a competition law infringement is sufficient to demonstrate that a compliance program was ineffective.

The Working Groups respectfully submit that the mere involvement of a single officer or manager should not be sufficient to deprive a company of all benefit in cases where all other officers and management have demonstrated commitment to compliance and all reasonable steps have been taken. Accordingly, the Working Groups would urge the CNMC to carry out a case by case assessment of management buy in as a whole.

B. Effective training

The Working Groups strongly agree that training sessions adapted to each working unit according to the specific risks to which they are exposed are essential for a compliance program to be fully effective. As the CNMC correctly suggests without proper training the rest of elements of the compliance program may not be effective, as, for instance, the reporting channel will not serve its purpose.

Nevertheless, the Working Groups would urge the CNMC to continue to give weight to those other elements. Moreover, the Working Groups believe it would be very useful to have objective guidance on the minimum characteristics of such training for undertakings of different sizes in terms of whether it should be in person, with which frequency, for example. The idea would be to identify minimum standards to both encourage companies at all levels to take additional measures where necessary and to facilitate the assessment of compliance programmes in general.

C. Existence of an anonymous reporting channel

The Working Groups also believe that anonymous reporting channels are essential for the effectiveness of a compliance program as they enable the detection of infringements and represent a dissuasive measure for employees.

In this regard, the CNMC correctly points out that the future transposition of the Whistleblowing Directive will entail that companies with over 50 employees will need to implement an anonymous whistleblowing channel. However, it would be useful to clarify the situation for companies (or Spanish subsidiaries of multinational corporations) of less than 50 employees that are not obliged to implement an anonymous whistleblowing channel under the Whistleblowing Directive.

D. Identification of risks and design of control protocols or mechanisms

The Working Groups agree with the importance of identifying a risk map within a given compliance program that will allow for employees to easily visualize and become aware of the risks they are exposed to according to their area of business and/or role within the company.

Again, however, the Working Groups would urge the CNMC to provide additional guidance as to the minimum ideal content and frequency of revisions of the risk map (and the protocols associated with it). For instance, a

two-yearly review for big corporations, and every three to five years for smaller companies, or upon the occasion of an event which entails new risks for the company or organization (as stated in the Draft Guidelines, the acquisition of a new company or business, a change in shareholder structure or corporate control, the development of a new line of business or a new market or significant changes in relevant caselaw, among others).

Additionally, the Working Groups believe it would be useful if the Draft Guidelines provided for more examples regarding different protocols or mechanisms considered appropriate.

E. A transparent and effective disciplinary system

The Draft Guidelines point out that a given compliance program should have effective disciplinary sanctions, that need to be visible and identifiable for all employees of the undertaking.

The Working Groups fully agree that disciplinary sanctions are a necessary element of any effective compliance programme in general. Nevertheless, the Working Groups would also point out that there are a number of sectors in Spain in which relations with employees are governed by collective bargaining agreements that do not provide margin for additional disciplinary sanctions. In such cases, the Working Groups would urge the CNMC to take those limitations into account in their assessment of the compliance programme in question.

In addition, and given the importance of employee collaboration in the detection and analysis of possible infringements, the Working Groups would also urge the CNMC to indicate that disciplinary provisions should provide flexibility for employees that collaborate in such internal investigations.

2.3. Consequences deriving from the implementation of an effective compliance program in the proceedings opened by the CNMC

In relation to section 4 of the Draft Guidelines, the Working Groups would once again point out that, as explained in Section 2.1 above, it would be both legally coherent and possibly advantageous to take full account of any compliance programme in which all reasonable measures are taken, regardless of the outcome in a specific case. As to the analysis of specific situations set out in the Draft Guidelines, the Working Groups believe that the following considerations are relevant.

First, the Working Groups believe it is unreasonable to expect undertakings to apply for leniency in every case in which it discovers the existence of a possible cartel infringement. Undertakings may be constrained from doing so given the associated implications of submitting a leniency application (for instance, the additional exposure to damages claims). Moreover, there is a risk that by equating an effective compliance programme with the existence of a leniency application, undertakings may be forced to apply for leniency and denounce as cartels grey-area cases that would be better investigated in a procedure outside the leniency program.

Accordingly, the Working Groups believe that credit should also be given in any event where the company has taken clear steps to bring the anticompetitive conduct to an end, including disciplinary measures and organizational changes.

The same point applies, even more strongly, where an undertaking has participated in a non-cartel infringement for which leniency is not available.

Finally, we believe that the CNMC should also address in its Guidelines the importance given to the existence of a compliance program when the company offers commitments in order to terminate proceedings ("terminación convencional").

3. Summary of Key Points

The Working Groups are grateful for the opportunity to share its views on the Draft Guidelines and believe that the transparency and clarity of the Draft Guidelines, the encouragement to firms to create compliance programs and the guidance as to the criteria and elements identified as necessary for an effective compliance program are most welcome.

In this regard, the Working Groups respectfully submit that due consideration of the comments above will enable the CNMC to fine tune that guidance in such a way as to maximize the implementation of compliance efforts by undertakings of all sizes.

March 30, 2020