COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW IN RESPONSE TO THE ARGENTINIAN NATIONAL COMMISSION FOR THE DEFENSE OF COMPETITION’S DRAFT REGULATION FOR THE IMPLEMENTATION OF THE LENIENCY PROGRAMME

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

August 20, 2018

Introduction

The American Bar Association Sections of Antitrust Law and Section of International Law (the “Sections”) are pleased to offer the following comments on the draft Regulation for the Implementation of the Leniency Program (“Draft Leniency Regulation” or the “Regulation”) published by the Commission for the Defense of Competition of Argentina (“Commission”) on July 6, 2018. These comments are submitted in response to the Commission’s request for public comment.

The Sections commend the Commission for issuing draft regulations under the Leniency Program that bring more transparency and certainty to the 27,442 Act that recently entered into force. The adoption of the Guidelines and Specific Regulation is in itself a best practice, which provides needed certainty to the Leniency Program.

Comments on the Draft Leniency Regulation

The comments below correspond to the indicated paragraph number of the Draft Leniency Regulation and are organized by topic.

1. Request for a marker

The Regulation states that to apply for the Benefit of Immunity or Reduction of Sanctions, the applicant must submit a request to the Commission for a marker. The timing of the marker will inform the priority given to the Request for Leniency in relation to other submitted requests.

The Sections agree with the Regulation’s proposed restriction on the possibility of “joint applications.” Nonetheless, the Sections suggest that the Commission consider following the example of jurisdictions such as Brazil or Mexico, by making clear in the Regulation that this restriction does not apply to multiple legal entities that are part of the same economic group and are acting as a single economic agent (i.e., under common
control). Thus, it would be helpful to state expressly that leniency may be granted to all entities within a single economic group that fulfill the program’s requirements.¹

I.i. Enquiries: The Regulation provides for the possibility of informal and anonymous consultations regarding the availability of a marker in a specific market, prior to submitting the formal request for a marker. This policy is consistent with international best practice. The Sections recommend identifying the officer or officers at the Commission that can be contacted for this type of enquiry.

I.ii.a and b. Marker Request: The Regulation states that the marker must be requested in person before the Commission, and that the applicant must sign every page of the formal documentation. The Sections recommend, following the example of other jurisdictions, considering the possibility of accepting email or oral/telephonic marker requests, which can be confirmed in writing later, if needed.

Since the goal of the Leniency Program is to enable participants to report possible cartel activities to the Commission as soon as practicable, it is important that the request for a marker can be sought quickly and without undue burden. Accepting telephonic or email marker requests also ensures that foreign-based applicants are not disadvantaged as compared to domestic applicants. The Sections also recommend that the marker process clearly identify the exact time a marker was requested, which would make the system more predictable and transparent.

Regarding signatures and written applications, the Sections suggest making clear that the Commission may issue a request for information or clarification to rectify an inadvertent omission in the Marker Request (e.g., not providing supporting documents demonstrating capacity of individuals, not signing every page of the documents, etc.) before deeming the Marker Request as invalid.

I.ii.c. Marker Request: The Regulation states that applicants must address certain questions in their application for a marker, including among others iv) approximate duration of the infringement. The Sections recommend that the Regulation should clarify that the


Item 15 provides: “Does it make a difference if the leniency applicant is a company or an individual? Yes. If the leniency applicant is a company, the benefits of the agreement can be extended to its current and former directors, managers, and employees, and to companies of the same economic group, de facto and de jure, involved in the violation, as long as they cooperate with the investigations and sign the instrument together with the company (art. 86, paragraph 6, of Law No. 12.529/2011 combined with art. 198, paragraph 1, RICADE). 17 The individuals and companies of the same economic group can enter into the agreement together with the applicant company or in an addendum to the original Leniency Agreement when authorized by Cade, according to its discretion (art. 198, paragraph 2, RICADE). Companies and their directors, managers, and employees may be represented by the same or different legal representatives or attorneys. However, if the leniency applicant is an individual and the agreement is signed without the participation its legal entity, the benefits will not be extended to the company with which the individual is or was associated (art. 86, paragraph 6, Law No. 12.529/2011 combined with art. 198, paragraph 3, RICADE). The justification for this is to increase the instability of the cartel, so that all participants involved, whether they are companies or individuals, still have a strong incentive to report the anticompetitive practice to CADE as soon as possible.”
applicant should state the approximate duration of the infringement to the extent of its knowledge, recognizing that the applicant may not have exhaustive information for all participants.

Section I.iii.a. Issuance of the Marker Certificate: Section I.iii.a states there will be a National Registry of Markers created by Decree 480/2018, indicating the name or corporate name of the applicant, DNI number or CUIT as appropriate, date and time the request was submitted, and precedence given to the application. Given the need to protect the confidentiality of leniency applicants and the integrity of the investigative process, the Sections recommend clarifying that the registry is confidential and is not accessible to third parties. In the absence of clear and strict confidentiality protection, the Sections are concerned that a registry will be a significant deterrent to leniency applications.

Section I.iii.c. Issuance of the Marker Certificate: Section I.iii.c provides that the applicant will be notified of the approval or rejection of the Marker Request. The Sections recommend providing for the possibility of the applicant being notified orally given that written notifications may be discoverable in private litigation.

2. Leniency Plus and similar incentives

The Regulation states the Commission shall not grant an extension of the application to cover separate infringements and/or different markets. In these cases, the applicant shall submit a new application, which will be processed according to its time of presentation and the fulfilment of the applicable requirements.

Leniency Plus provides an incentive for subsequent applicants to report additional infringements even if they do not qualify for leniency for the first infringement. The Sections suggest that the Commission consider explaining in greater detail the procedures that will apply to leniency plus applications. Brazil’s Leniency Guidelines detail such procedures, and specifically provide, for example, that Brazil’s antitrust agency, Conselho Administrativo de Defesa Econômica (“CADE”), will issue a certification of leniency plus eligibility together with a marker for the leniency application.² Such a provision would

² See note 1, supra. CADE Leniency Guidelines, item 87 provide: “87. How does the request for a marker relates to Leniency Plus? The request for a marker in reference to Leniency Plus is made in the same manner as indicated above (“Part II.1 Request for a marker”), the leniency applicant states that, in addition to a marker for the New Leniency Agreement in a new market, the leniency applicant also intends to receive the benefits of Leniency Plus for the market in which the leniency applicant is already being investigated — indicating the respective administrative proceeding (proceeding with the Original Leniency Agreement). A CADE’s General Superintendence will certify that the company is potentially eligible for the benefit of Leniency Plus if it meets the legal requirements (art. 86, paragraphs 7 and 8, of Law No. 12.529/2011), so that SG/CADE can make a timely decision on the information submitted, in observance of the guarantees of confidentiality set forth in article 86, paragraph 10, of Law No. 12.529/2011. Note that, if the leniency applicant seeks the benefit of Leniency Plus, the request for a marker must be submitted to the SG/CADE before the administrative proceeding in relation to the market already under investigation (proceeding with Original Leniency Agreement) is sent to CADE’s Tribunal for judgment. Note that, if the leniency applicant seeks the benefit of Leniency Plus, the request for a marker must be submitted to the SG/CADE before the administrative proceeding in relation to the market already under investigation (proceeding with Original Leniency Agreement) is sent to CADE’s Tribunal for judgment (art. 209, RICADE).”
enhance legal certainty and transparency regarding the operation of the Commission’s leniency plus program.

3. **Request for leniency**

The Regulation states that the Request for Leniency shall be formalized during the Coordination Hearing, which shall be held within ten days from the issuance of the Marker Certificate.

The Sections note that this time frame is very short, and may be impossible to meet if the applicant has not completed its internal investigation. Providing for such a brief period to fulfill the leniency requests risks reducing incentives to report and to obtain comprehensive leniency submissions.

The Sections encourage the Commission to consider adopting a more flexible approach, particularly with respect to the periods provided for leniency applicants to comply with its requests. Investigations can vary in complexity, depending on a variety of factors. For example, where the conduct occurred in multiple jurisdictions, and documents and individuals are located in different jurisdictions, evidence will take longer to gather and may require translation. Having flexible timelines would allow the Commission to adjust the timing as required to permit the applicant to carry out a robust internal investigation and provide a comprehensive report to the Commission.

The Commission could consider establishing flexibility on a case by case basis. This is the approach followed in Brazil. CADE’s Leniency Guidelines provide: 44. *How long does the marker request remain in effect? In the first Marker Declaration, CADE’s General Superintendence will indicate a deadline for the leniency applicant to submit the Leniency Agreement proposal. Deadline extensions will be defined case by case, according to the interim deadlines defined by SG/CADE (art. 199, paragraph 3, c/c art. 204, RICADE).*

This approach is also followed by the Mexican Economic Competition Commission (Comisión Federal de Competencia Económica, “COFECE”), which provides that the meeting in which the applicant will provide COFECE with the information and documents to evidence the existence of the cartel and its participation will be scheduled on a case-by-case basis. In general, it may be scheduled up to 60 business days following the date on which a Marker was assigned to the applicant. In practice, the meeting is typically scheduled within 30 days.

---

3 See note 1 supra.

Section D.e. provides: “The date for the scheduling of the Meeting will be determined on a case-by-case basis by the Investigating Authority and may, in general, be up to sixty business days from the date the Marker and the Key were granted. The purpose of the Meeting is for the Applicant to provide the information and documents to support the recognition and participation in a … monopolistic practice.”
Accordingly, the Sections recommend extending the deadline for the Coordination Hearing or leaving it flexible to adjust on a case by case basis.

Section II.ii.b. Formal Request for Leniency: The Regulation states that the Request for Leniency shall contain, among other information, the identification of the other participants in the infringement, including a detailed description of its own participation as well as each of the other participants involved.

The Sections note that it may not always be possible for an applicant to provide comprehensive information on the activities of other cartel members. A cartel member may participate in a conspiracy for a limited period or may have information limited to a particular time or place but may lack information regarding other participants. The Sections believe the Regulation should not put a leniency application in question if the applicant does not have complete information about the rest of the conspiracy or acts of other parties.

The Sections therefore recommend making clear that the applicant must provide full disclosure of its own activities and to the extent of its knowledge of the activities of other participants.

Section II.iii. Applicant sworn statement: The Sections believe it is important to clarify that the sworn statement may be given orally to avoid risk of discovery in civil litigation. Moreover, the Regulation requires a declaration stating that the information provided is “accurate, truthful and verifiable.” The Sections recommend excluding the term “verifiable” because leniency applicants may not always have documentation to verify the conduct and replacing it with “complete to the best of its knowledge.”

Section II.iii.c. Applicant sworn statement: This Section provides that the applicant shall refrain from disclosing any information related to the Request for Leniency until the Enforcement Authority decides otherwise or has resolved or filed the proceedings under which the request is processed. The Sections note that this obligation may be in tension with other reporting obligations that a company may have to other competition agencies or sectoral regulators and can even become an impediment to participating in the Leniency Program. The Sections therefore would recommend reframing the prohibition on disclosure as a requirement that the applicant notify the Commission when it is required to disclose any information related to the Request for Leniency to other competition agencies or regulators.

Section II.iii.d. Obligation to cooperate: The Sections commend the explanation of the continuing obligation to cooperate, as this has been an area of uncertainty in the experience of some jurisdictions. However, the Sections believe that terms such as “without delay” and “disclosing indirectly” are somewhat vague and could cause confusion. The Sections would recommend eliminating the concept of “disclosing indirectly”.

Section II.iv.e. Data and information supporting the request for Leniency: Section II.iv.e of the draft Regulation advises the leniency application to submit “[r]ecords and/or evidence of any nature, in possession of third parties, that may lead to the clarification of the facts concerned.” The Sections submit that it may not be practicable to ask or require leniency applicants to provide information that is in the possession of third parties.
4. Preliminary evaluation of the application and signing of the Conditional Agreement

The Regulation contemplates a 60 day evaluation and review procedure that may be extended for an additional 30 days in appropriate cases. The Sections recommend adding flexibility to this procedure as some cases may require more time to gather evidence and analyze the facts. Furthermore, as long as the leniency applicant is providing full cooperation, strict deadlines may not be necessary. The applicant will be incentivized to provide complete cooperation as required to obtain a Conditional Agreement and imposing a short deadline could undermine the satisfaction of the leniency conditions.

The Sections submit that the Regulation should also be clear if the terms of cooperation require the creation of documents that will need to be provided. The Sections recommend that the Commission only require production of pre-existing documents and evidence and not require the creation of new documents.

5. Granting definitive benefit of immunity or reduction of sanctions

Section IV of the draft Regulation states, “With the prior opinion of the NATIONAL COMMISSION FOR THE DEFENSE OF COMPETITION, having obtained an effective outcome during the administrative sanction procedures, by issuing a resolution determining the existence of an infringement and sanctioning the responsible parties, the Enforcement Authority shall sign the Definitive Agreement of Exoneration or Reduction of Sanction.”

The Sections believe this section would benefit from additional information about what constitutes an “effective outcome” that triggers the Enforcement Authority’s obligation to sign the Definitive Agreement.

6. Cooperation duty

Section V.ix of the Regulation requires the leniency applicant “[t]o make arrangements that are reasonably within their reach to ensure the full cooperation of any other persons who could provide records or evidence for the proceedings.” The Sections believe this should be clarified to make clear that the applicant is required to take steps to encourage the cooperation of employees and to obtain records or evidence that are within its possession, custody or control. While it may be appropriate for applicants to seek and encourage cooperation from third parties, they should not be required to guarantee it.

7. Withdrawal

The Sections believe it is important to clarify at what point during a proceeding an application can be withdrawn and what would justify withdrawal. Applicants should not be able to withdraw the application late in the day without cause, as this could undermine an investigation and a potential prosecution. The Sections would recommend making clear that the applicant should not be able to withdraw an application without a valid reason.
There appears to be some inconsistency between Section III and Section VII. Section III states that “once the Conditional Agreement has been subscribed, without prejudice to the applicant’s right to withdraw the Request for Leniency, any documentation and other evidence provided by the applicant described in item II iv), may and will be used and taken into account during the investigation procedures.” This appears to give the Commission authorization to use “documentation and other evidence” provided by the leniency applicant even after the leniency applicant withdraws the application.

Section VII, on the other hand, seems to state the opposite: “withdrawal of the application implies that the Enforcement Authority cannot keep nor use copy of the documentation provided by the applicant in its investigation or eventual administrative sanctioning procedure.” The Sections therefore suggest that these sections be clarified and harmonized.

As noted in Section 7 above, the Sections believe that the applicant should not be able to withdraw an application without a valid reason. If there is a valid withdrawal of an application, the Commission should not be able to maintain or use a copy of the documentation provided for by the applicant.

8. Template for Leniency Agreement

Finally, the Sections propose that the Commission consider making available a template leniency agreement with standard provisions that would address critical issues, such as: (i) the entities and individual applicants that will sign the agreement; (ii) a limited description of the admission; (iii) the obligations of the applicants; (iv) certifications and warranties of the Commission; and (v) other provisions as necessary. Making such a template available online would ensure that the applicant knows the terms of the agreement from the outset, which should expedite the investigation and negotiation process.

CADE’s Leniency Guidelines provides a link to a model agreement: “73. Is there a Model Leniency Agreement? Yes. A Model Leniency Agreement can be accessed here. Note that, as a rule, the standard wording of the Leniency Agreement should be used to expedite the negotiations and maintain equal treatment regarding agreements. Requests for amendments by the leniency applicant should be exceptional and duly grounded in light of circumstances of the case at hand. The SG/CADE also reserves the right to make changes and update the standard model when specific circumstances of the case at hand so require.”

The Sections would welcome the opportunity to provide comments on such a template.

9. International cooperation

The Sections recommend including provisions regarding the possibility of cooperation in the investigation and sanctioning of international cartels, especially regarding waiver requests.

See note 1 supra.
Enforcement agencies have long recognized the benefits of using waivers to coordinate enforcement and to protect cartel leniency applicants. However, it is also a best practice not to require the applicant to give waivers as a condition of cooperation under leniency programs. Accordingly, additional clarity on waiver requests would provide potential applicants with greater transparency on this issue.

**Conclusion**

The Sections commend the Commission for incorporating many international best practices into the Draft Leniency Regulation and respectfully request that the Commission to consider adopting the refinements and clarifications recommended in these comments. We would be glad to answer any questions or provide any additional input that the Commission may desire.