JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, SECTION OF INTERNATIONAL LAW, AND SECTION OF CRIMINAL JUSTICE ON PUBLIC CONSULTATION NO. 16/2009 OF BRAZIL'S SECRETARIAT OF ECONOMIC LAW

September 2009

The views stated in this submission are presented jointly on behalf of these Sections only. 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.

The Section of Antitrust Law, the Section of International Law, and the Section of Criminal Justice (jointly, the "Sections") of the American Bar Association ("ABA") appreciate the opportunity to provide comments to the Secretariat of Economic Law of Brazil's Ministry of Justice (*Secretaria de Direito Econômico do Ministério da Justiça* – "SDE") with respect to the draft regulation submitted to public consultation no. 16, dated August 20, 2009 ("Draft Regulation").

The membership of the Sections includes over 33,000 lawyers, economists and other professionals from over 45 countries, although most are based in the United States. The Sections hope and intend that these comments will assist SDE in its consideration and final drafting of the regulation submitted to the referred public consultation. These comments were drafted from the perspective of the Sections and are grounded on the historical development of the U.S. antitrust law regarding similar issues. They also draw upon the experience of members of the Sections who practice competition law in Europe and other jurisdictions, including Brazil.

Executive Summary

The Sections have focused their comments on the rules governing SDE's leniency program. The Sections commend SDE for enhancing the key components of an effective leniency program: transparency, predictability, the provision of necessary incentives and inducements to self-report and cooperate, and the protection of confidentiality and privilege.

The Sections support SDE's acceptance of an oral leniency application process, which promotes full cooperation and avoids creation of unneeded and potentially incriminating materials that can impose extraneous risks and costs on applicants. However, once leniency is conferred, the applicant is required to execute an agreement to which SDE attaches the so-called "history of conduct statement". We suggest that SDE reconsider the need for such a statement, or at least limit the statement significantly since it may stand as a significant disincentive to cooperation by many amnesty applicants.

The Sections recommend several changes in the Draft Regulation to increase transparency and predictability. SDE should consider, for example, providing further information regarding the required content of and the procedures for drafting the history of conduct statement, and clarifying the timing and procedures under which public prosecutors may participate in the leniency process. We also recommend that SDE

clarify the kinds of cooperation that may be requested before and after execution of the leniency agreement, and the conditions for requesting waivers to exchange documents and information with the antitrust authorities of other jurisdictions.

The Sections submit specific comments on selected provisions of the Draft Regulation. For Article 60, Paragraph 1, as an example, the Sections suggest that SDE consider including a provision allowing additional individuals to be admitted as parties to the leniency agreement after its initial execution by the corporate applicant and before the conclusion of SDE's investigations.

The Sections suggest that, to the extent the Brazilian Law permits, SDE consider allowing so-called "consensual monitoring", which often involves participation of amnesty applicants in the gathering of evidence through electronic (audio or video) recording of discussions and/or agreements among the competitors involved in the ongoing illegal conduct.

In order to enhance the marker system contemplated under Article 62 of the Draft Regulation, the Sections recommend that SDE accept prior/anonymous consultation as a way of encouraging the reporting of illegal agreements, and consider revising Paragraph 2 of Article 62 to encourage parties to provide information about leniency applications in other jurisdictions on a voluntary basis.

The Sections urge SDE to acknowledge its preference for pre-existing evidence (as opposed to oral statement transcripts) under Article 64 of the Draft Regulation; confirm the agency's discretion to extend the leniency application period in appropriate cases; allow waiver of the one year time limitation for the execution of the leniency agreement; clarify the types of documents that must be submitted to SDE as evidence of illegal conduct and the timing allowed for submission (before, simultaneously with, or after the execution of the leniency agreement); establish the procedures that would apply in the event of breach of the leniency agreement by clarifying that parties in breach must promptly cure the breach or be subject to the potential revocation of conditional leniency; and make clear that while a company must use best efforts to secure the cooperation of its directors, officers and employees, a refusal by some of these individuals to cooperate should not adversely impact the company's application.

The Sections offer several recommendations regarding disclosure of documents aimed at clarifying the types of materials that must be disclosed consistent with due process, providing guidance regarding restrictions that may apply to the use by co-conspirators of any documents that they obtain from an applicant, including restricting such use to defending themselves in SDE's proceedings, strengthening the protection afforded to the applicant's documents and information found to be "commercially sensitive," and establishing a presumption against disclosure of leniency materials, as opposed to the current statement which seems to express a presumption in favor of disclosure.

Finally, the Sections recommend that SDE further clarify the criteria it will use in determining the level of discount that will be applied to fines in particular cases.

I. Introduction

The Sections commend SDE for reviewing regulation no. 4/2006 with a view toward improving SDE's administrative processes while at the same time providing useful clarifications to the application of SDE's existing administrative practices. These are important goals that will strengthen law enforcement effectiveness, provide greater transparency of law enforcement policy and practice, improve predictability for parties to such proceedings and their legal counsel, and ultimately enhance the welfare of Brazilian consumers.

The Sections have focused their comments on Chapter VII under Title II, which sets forth rules governing SDE's leniency program ("Leniency Program"). As leniency programs were first developed under U.S. antitrust law and the United States still has the most experience with them, the Sections believe that the experience of their members in this specific area of antitrust law enforcement may be useful to SDE in finalizing the Draft Regulation.

An effective leniency program is instrumental to successful efforts to detect, prosecute, and deter cartels. The opportunity to obtain a grant of leniency will often lead cartel members to disclose their conduct to authorities even before an investigation is opened, thereby greatly assisting the enforcement efforts of government authorities. In other cases, the availability of leniency will induce firms and individuals already under investigation to abandon their unlawful activities and provide evidence against other cartel members.[1] These comments take into account that key components of an effective immunity program are transparency, predictability, the provision of necessary incentives and inducements to self-report and cooperate, and the protection of confidentiality and privilege.[2]

The Sections first provide general comments on the Leniency Program as reflected in the Draft Regulation and then address selected provisions of the Draft Regulation itself.

II. General Comments

The Draft Regulation encompasses a number of improvements to the pre-existing enforcement regime embodied in regulation no. 4/2006. For example, Section II of the Leniency Program now acknowledges and clarifies the potential leniency applicant's opportunity to place a marker if it is considering filing an application but does not yet possess sufficient information and documents to secure conditional immunity. While the Sections understand that Brazil already has a "marker system" in place, establishing more specific rules and steps to be taken by parties seeking a marker provides useful and needed guidance. In fact, the Sections believe that the improved transparency of Brazil's marker system will serve to further destabilize cartels and

[1] Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, ICN Workshop on Leniency Programs, (Nov. 22, 2004) ("Cornerstones"), available at http://www.usdoj.gov/atr/public/speeches/206611.htm.

[2] *See Cornerstones, supra*. See also Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009, at 7, 28, available at http://www.abanet.org/antitrust/at-comments/2009/05-09/comments-saic.pdf.

provide additional incentives for corporations to act immediately upon the discovery of evidence indicating the existence of cartel conduct.

The Sections also commend SDE's initiative in detailing the mandatory provisions of leniency agreements under Article 73 of the Draft Regulation. The provisions promote greater transparency and predictability and will likely make the program more effective.

The Sections applaud Article 64, part V, which establishes that a written report by the Secretary of an oral leniency application will be prepared only upon request of the applicant. SDE's recognition of the sensitive issues that arise from written records of leniency applications reflects an understanding of the need to balance applicant incentives and enforcement objectives in order to benefit the overall effectiveness of the agency's program for detecting and pursuing cartels. However, the availability of an oral-only procedure is limited to the application process, because once leniency is conferred, the applicant is required to execute an agreement which, among other things, includes a statement detailing the history of the conduct. We suggest that SDE consider revising this requirement, as the creation of a written record is a highly sensitive issue for most amnesty applicants. A formal written record of incriminating information can impose significant added risks and costs upon the applicant in the event that such records may become discoverable in later civil litigation in any jurisdiction. The imposition of such added risks and costs may discourage potential leniency applicants from coming forward to cooperate with government prosecutors. Because the underlying rationale for any leniency program is to reduce or eliminate the risks and costs faced by one member of a cartel in order to promote reporting of the cartel so as to permit enforcement against the other cartelists, aspects of the leniency program that impose unnecessary or excessive risks and costs on potential leniency applicants are likely to be counter-productive and hinder the ultimate effectiveness of the leniency program.

Most jurisdictions have found that a written record of a leniency application is unnecessary for the effective prosecution of a cartel because the leniency process ensures that the agency will not prosecute the applicant making statements and the statements are not useful as direct evidence against other parties. The Sections would prefer to see the requirement of written statements eliminated entirely (that is, rendered optional), but if SDE believes that such statements are useful to the investigation, then we urge that thought should be given to minimizing the written statements required consistent with SDE's need for evidence.

Experience in other jurisdictions has shown that transparency and predictability are key to an effective leniency program. The Antitrust Division of the United States Department of Justice has already recognized that "[t]ransparency is not only critical to fostering confidence among the defense bar and the business community that the Division provides proportional and equitable treatment of antitrust offenders, but it is also essential to securing cooperation from culpable parties."[3] "To maximize the goals of transparency, authorities must not only provide explicitly stated standards and

[3] Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, Address before the OECD Competition Committee (Oct. 17, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/219332.htm.

policies, but also clear explanations of prosecutorial discretion in applying those standards and policies."[4] This is especially true in a jurisdiction such as Brazil, where the possibility of applying for leniency is a relatively new feature of the enforcement system. Designing clear and complete rules for the Leniency Program will help to facilitate this goal and will likely result in an increasing number of leniency applications leading to a greater incidence of successful cartel prosecutions. The International Competition Network ("ICN") agrees with this view, and has noted that "[a]n applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not."[5]

From this perspective, the Sections note several aspects of Brazil's leniency system that might benefit from further clarification in the Draft Regulation in order to give potential applicants greater confidence and assurance of predictability in the outcome should they apply and meet all the requirements of the Leniency Program. A firm applying for immunity must necessarily reveal very sensitive and damaging information about its prior business conduct to the enforcement authority. As noted above, in order to induce companies to disclose damaging information of this magnitude, a leniency policy—and the practices of the enforcement authority—must be as transparent and predictable as possible. Corporate entities will apply for immunity in direct proportion to their ability confidently to predict how they will be treated by the enforcement authority should they fulfill the conditions of the policy.[6]

In this context, SDE may wish to consider augmenting the Draft Regulation with respect to the so-called "history of conduct statement". The Sections understand that SDE typically drafts a history of conduct statement that summarizes the information provided by a leniency applicant regarding the anti-competitive conduct that is being revealed. The history of conduct statement is signed by the Secretary of Economic Law on the date of execution of the leniency agreement and constitutes one of its attachments. Given the importance of the history of conduct statement, and taking into consideration the concerns discussed above regarding the added risks and costs that written statements potentially impose on leniency applicants, the Sections suggest that SDE provide further information regarding the history of conduct's drafting procedures, required content, and handling and dissemination procedures.

The Sections understand that a leniency agreement in Brazil requires the signature of a public prosecutor in order for the individuals involved to gain immunity against criminal sanctions. The Draft Regulation would benefit from further explanation of the timing and procedures under which public prosecutors may participate in the leniency process. The Sections also suggest that SDE clarify its position regarding which of the prosecutors' offices in Brazil should be a party to the leniency agreement: the Federal Prosecutors' Office or the State Prosecutors' Office.

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[4] *Id*. at 6.

[5] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 3.

[6] *See*, *e.g.*, Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones*, *supra*, page 2: "Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program."

While the Draft Regulation clearly states that full cooperation during the entire procedure is expected from leniency applicants[7], it would be helpful if SDE could provide further explanation regarding the kinds of cooperation that may be requested before and after execution of the leniency agreement. This may be done by way of examples inserted in the Draft Regulation (e.g., provide evidence that the applicants may have on the effects of the conspiracy in the Brazilian territory, assist to the extent possible in identifying the current addresses of other conspiracy members, provide witnesses that SDE may interview in order to obtain additional information, etc.). While it should be noted that these are not exhaustive, by providing examples SDE would increase the transparency of the Leniency Program, thus making it more attractive for companies and individuals considering an application in Brazil. This is consistent with the recommendation of the ICN that a leniency applicant provide "full and frank disclosure of requisite information or evidence by the applicant to be eligible for, or sustain an application for leniency and lenient treatment."[8]

Finally, SDE should provide further guidance regarding requests for waivers to exchange documents and information with the antitrust authorities of other jurisdictions. The practice of the U.S. antitrust authorities generally has been to treat the identity of, and information provided by, leniency applicants as a confidential matter, and they normally will not disclose to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. This policy serves to maximize the incentives for companies to come forward and self-report antitrust offenses. Virtually every other jurisdiction that has considered the issue has adopted a similar policy.[9] We therefore suggest that SDE should: (1) clarify when and under what circumstances it may request prior consent of the applicants to promote such exchanges, making clear that no exchange will be made without such consent; (2) clarify that the granting of waivers is not a condition to obtaining conditional immunity (i.e., a pre-condition to the execution of the leniency agreement); (3) state that the documents or information exchanged with the authorities of other jurisdictions by virtue of a waiver will not be used against the applicant in the event that leniency is ultimately not obtained; and (4) indicate the circumstances, if any, in which it would consider accepting a limited waiver (e.g., a waiver strictly for the exchange of information regarding procedural issues).

III. Comments on Specific Provisions

Below the Sections respectfully submit specific comments on selected provisions of the Draft Regulation.

A. Section I, Article 60, Paragraph 1

This provision requires that current and former employees involved in the conspiracy who are joining with a company in seeking amnesty sign the leniency agreement jointly with the company and at the same time as the company executes the

[7] *See* Article 73, IX, sub-items (d), (e) and (f).
[8] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 4.
[9] *See* U.S. Department of Justice Antitrust Division, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 18, 2008)", Question 33, available at http://www.usdoj.gov/atr/public/criminal/239583.htm.

agreement in order to receive the same protection to which the company is entitled. This provision differs significantly from leniency programs of other jurisdictions in that there is no provision for additional cooperating employees to join in the leniency program after the leniency agreement is signed. The Sections recognize that the requirement that cooperating employees be included in the leniency agreement is embedded in the Brazilian antitrust law (Law no. 8,884, dated June 11, 1994). The Sections respectfully suggest that SDE consider whether the Draft Regulation could include a provision by which additional individuals could be admitted as parties to the leniency agreement after its initial execution by the corporate applicant (through an amendment to the initial leniency agreement or by separate agreement with the employees) and before the conclusion of SDE's investigations.

In the Sections' experience, the ability of a corporate applicant to discover all of its current and/or former employees who were involved in a conspiracy can require a significant amount of time, even when diligent efforts are made to investigate the underlying facts. This would typically extend beyond the initiation of the SDE's in-depth investigation of the conspiracy, which usually begins after the leniency agreement is signed. By cooperating with the investigation, it is possible or even likely that the corporate applicant will end up identifying additional individuals who were engaged in wrongdoing. These individuals would qualify for leniency in other jurisdictions, including the United States, if they agreed to cooperate with the investigation(s) in those other jurisdictions.

Under the Draft Regulation, however, it appears that individuals who may not be identified until a later stage would not have the ability to join the application. As a result, their incentive to cooperate with SDE would be greatly reduced, if not eliminated. If that were to happen, the Sections are concerned that SDE would be losing a valuable source of information and/or documents regarding the conspiracy. In addition, by requiring that all individuals either sign the agreement jointly with the corporate applicant or lose the opportunity of obtaining immunity, the Draft Regulation may cause corporate applicants to delay submitting their application, further hampering SDE's ability to effectively enforce against such illegal conduct.

Finally, Paragraph 1 of Article 60 states that SDE may refuse to accept employees and former employees of the corporate applicant as parties to the leniency agreement if it believes that their participation may "endanger the investigation." In the interest of transparency, SDE should clarify under what circumstances it may conclude that the participation of individuals puts the investigation at risk. The Sections note in this regard that under procedures utilized in the U.S., current employees receive leniency if they meet certain specified conditions, including their "full, continuing, and complete cooperation" and "an admission of knowledge of, or participation in, the anticompetitive activity." The specific cooperation obligations of individuals include the provision of documents, records and other materials and information; participation in interviews; and the provision of testimony. The U.S. Department of Justice reserves the right to revoke leniency with respect to any individual it "determines caused the corporate applicant to be ineligible for leniency, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the

anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter."[10]

B. Section I, Article 61, Sub-item III

The Sections endorse this provision requiring applicants to cease their participation in the conspiracy as a condition for entering into a leniency agreement with SDE, but suggest that, to the extent the Brazilian law allows, SDE consider a further provision to ensure the preservation of evidence and to deal with situations involving so-called "consensual monitoring." In the United States, an amnesty applicant that comes forward with an application involving ongoing conduct is often requested and encouraged – although clearly not required – to agree to consensual monitoring. This often involves the surreptitious gathering of evidence through electronic (audio or video) recording of discussions and/or agreements among the competitors involved in the ongoing illegal conduct. The U.S. Department of Justice often describes information obtained in this manner as among the most important evidence in prosecuting cartelists. Conflicts can arise, however, when foreign jurisdictions have inflexible requirements that the applicant immediately cease its participation in the illegal conduct.[11] Moreover, and perhaps more importantly, such immediate cessation can often lead other cartelists to become suspicious and can result in the destruction of important evidence and weaken enforcement cases that may need to be litigated.

For these reasons, SDE should consider adding a qualification such as "except as directed or permitted by SDE," or similar words, to ensure preservation of evidence and the opportunity for consensual monitoring in those jurisdictions that rely on such activity.

C. Section II, Article 62

As mentioned, the Sections applaud the fact that the Leniency Program clearly acknowledges the existence of a marker system in Brazil. A clear and effective marker system has proven to be a critical element of the leniency programs in the United States and other jurisdictions. There are several ways to potentially enhance the marker system contemplated under Article 62 of the Draft Regulation.

First, Article 62 does not indicate whether a prospective leniency applicant may inquire on an anonymous basis whether it would be the first to self-report to SDE. As the ICN has noted, prior/anonymous consultation is accepted by various jurisdictions as a means of allowing companies and individuals to engage in an initial dialogue that often can lead to an amnesty application.[12] SDE should consider adopting such an approach as it would encourage the reporting of illegal agreements in Brazil.

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[10] *See* U.S. Department of Justice Antitrust Division, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 18, 2008)", Question 30, available at http://www.usdoj.gov/atr/public/criminal/239583.htm.

[11] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 10.

[12] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 5.

Paragraph 2 of Article 62 requires the party seeking a marker to disclose the other jurisdictions where it has applied or is considering applying for leniency. The Sections are not aware of this requirement in other jurisdictions. Marker applicants may often be asked whether they have approached other jurisdictions to seek leniency, but are not required to provide this information as a condition of receiving a marker. Cartels can often be complicated, and illegal conduct in multiple jurisdictions may be related or wholly unrelated. Many factors can influence when and whether an applicant approaches a particular jurisdiction. Moreover, some jurisdictions such as the EC prohibit a leniency applicant, without express consent, from disclosing the fact that it is the leniency applicant.[13] Thus, if a leniency application was first made to the EC and such consent could not be obtained, this theoretically could put the applicant in the position of being unable to seek leniency in Brazil or of doing so only at risk of losing leniency in the EC. For all these reasons, SDE should consider whether to revise Paragraph 2 to provide that parties are encouraged to provide information about leniency applications in other jurisdictions on a voluntary basis, rather than required to do so as a precondition to receiving a marker.

Paragraph 3 of Article 62 provides that SDE may grant up to 30 days to the leniency applicant to perfect the marker, i.e., to submit a leniency agreement proposal to SDE. The Sections view this time frame as a sensible initial goal but also believe that a 30-day period very often will be insufficient for the applicant to gather the information and documents that may be necessary to submit the proposal. SDE should consider adding a provision in the Draft Regulation allowing the agency to grant the applicant an extension at the agency's discretion under circumstances showing good cause.

D. Section III, Articles 63 and 64

The Sections support SDE's acceptance of an oral leniency application process, as set forth under Articles 63 and 64 of the Draft Regulation. A "paperless" process allows the corporate leniency applicant to fully cooperate with SDE's investigation without creating additional, unneeded incriminating materials that can impose extraneous risks and costs on applicants, as discussed above. In this sense, it avoids placing the applicant in a worse position than its non-cooperating co-cartelists (e.g., with regard to civil liability) by virtue of its cooperation with SDE.

For these reasons, the Sections encourage SDE to consider alternative means of obtaining "on the record" evidence from the leniency applicant, including pre-existing documents or other similar documentary evidence obtained as a result of the leniency applicant's assistance, and to forbear using an applicant's oral statement transcript as evidence. SDE could acknowledge its preference for pre-existing evidence (as opposed to oral statement transcripts) under Article 64 of the Draft Regulation. This would further increase the attractiveness of the Leniency Program to prospective applicants, which in turn would likely enhance the effectiveness of SDE's enforcement program.

E. Section III, Article 65, heading

[13] See Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), Section 12, item (a).

The Sections suggest that SDE insert the word "written" before the word "proposal" in order to specify that this Article refers exclusively to written applications, as opposed to oral applications addressed by Article 64.

F. Section III, Article 67

This Article provides a period of up to six months for completing the leniency application. It appears that this period is counted from the submission of the leniency agreement proposal (as established by Articles 64 and 65), not from the marker (Article 62). For the sake of clarity, the Sections believe that it would be appropriate to include a reference to Articles 64 and 65 under Article 67. In addition, SDE may wish to consider including a provision recognizing the agency's discretion to extend this period to allow itself additional flexibility in appropriate cases. For similar reasons, SDE should consider including a provision that would contemplate a potential waiver of the one year time limitation for the execution of the leniency agreement, as set forth under Article 67. In both cases, it would be appropriate for SDE to clarify that the 6-month and 1-year time frames should be adhered to and that exceptions should not be expected by parties except in exceptional cases.

Likewise, SDE should consider clarifying that under Article 67 an applicant may amend the scope of its application until the time that the leniency agreement is executed. This would address the situation of related conduct that may be discovered by the applicant following the submission of its proposal pursuant to Article 64 or 65. This would also encourage the ongoing investigation of facts that could benefit SDE's efforts to detect and enforce against additional illegal conduct such as a cartel in another product line or industry.

G. Article 73

Article 73 outlines the provisions that every leniency agreement is expected to contain.[14] Consistent with the suggestion submitted under the above "general comments" section to the effect that written statements be eliminated or at least minimized, the Sections suggest that the word "detailed" be removed from Article 73, Sub-items IV and X, (a). In addition, SDE may consider specifying that the conduct description be circumscribed to its nexus with the Brazilian territory. This would limit the impact of Brazilian leniency applications in other jurisdictions, thereby encouraging prospective applicants to come forward with their applications in Brazil.

Article 73, Sub-item IX, (b) requires that the applicant submit to SDE any and all documents in its possession that may evidence the illegal conduct. The Sections suggest that SDE provide examples of documents that it may wish to receive (e.g., emails, meeting notes), as well as guidance with respect to when they should be submitted (before, simultaneously with, or after the execution of the leniency agreement).

[14] Article 73 appears under Section III – The Leniency Agreement. It seems that this Section should be numbered "IV," not III as the previous Section which addresses the leniency agreement proposal is already identified as Section III. Likewise, the current Section IV, which outlines the benefits deriving from the leniency agreement, should be renumbered as Section V.

Further, SDE should consider establishing the procedures that would apply in the event of breach of the leniency agreement by clarifying that parties in breach of the leniency agreement must promptly cure the breach or be subject to the potential revocation of conditional leniency. SDE may also want to specify under Article 73 that a company must use best efforts to secure the cooperation of its directors, officers, and employees, but a refusal by some of these individuals to cooperate should not adversely impact the company's application. Such a provision has allowed the U.S. Department of Justice flexibility in maintaining leniency status for cooperating companies, while at the same time permitting the potential prosecution of non-cooperating current or former employees.

Finally, Article 73, Sub-item IX, (f) refers to other authorities in addition to SDE that may be parties to the leniency agreement. For the sake of transparency, the Sections believe SDE should provide further guidance on which other authorities may sign the leniency agreement and the circumstances in which such other authorities may become involved.

H. Article 74

Article 74 provides that the identity of the leniency applicant shall be kept confidential until the Administrative Council of Economic Defense (*Conselho Administrativo de Defesa Econômica* – "CADE") issues a final ruling with respect to the matter under investigation. This provision is consistent with rules on confidentiality adopted by other jurisdictions. It is also consistent with ICN's recommended practices.[15] The Sections appreciate SDE's clear statement in this regard.

The Sections note, however, that Article 74 Paragraph 1 includes broad provisions for the disclosure of materials to defendants in administrative proceedings, i.e., alleged co-conspirators. Paragraph 1 provides that the co-conspirators shall be given access to relevant documents related to the violation under investigation if such access is deemed to be necessary to ensure due process and protect the rights of defense of such co-conspirators.

Although the Sections acknowledge that due process may require that defendants have access to documents provided by the leniency applicant in order to properly exercise their rights of defense, the specific wording of Paragraph 1 is overly broad and does not appear to distinguish among the types of materials that may be necessary to be disclosed and those materials which may not need to be disclosed for the purposes of due process. The Sections believe that it would be useful to provide further description of the factors that may apply in determining which documents may or may not be disclosed, as well as the factual circumstances that may lead SDE to allow access to them. One suggestion is that the defendants would be allowed to inspect documents, but they would not be allowed to take and retain copies. Circumscribing the dissemination of copies of inculpating documents in this manner may limit their potential availability in civil litigation, thereby encouraging applicants to seek leniency.

Further, the Draft Regulation does not appear to address which restrictions may apply, if any, to the use by co-conspirators of any documents that they obtain pursuant

[15] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 8.

to Paragraph 1. An applicant would likely have significant concerns if such documents were permitted to be disclosed by a co-conspirator to third parties or used in foreign proceedings, thus increasing the potential risks and costs to the leniency applicant (e.g., in civil litigation or with a government agency in another jurisdiction).

In order to minimize such risks and costs, SDE may consider at least adding a provision under Article 74 requiring defendants to refrain from using the documents that they obtain pursuant to Paragraph 1 for purposes other than defending themselves in SDE's proceedings, and shall not be used for other purposes including but not limited to in connection with investigations or proceedings in other jurisdictions.

The Sections likewise note that Paragraph 2 of Article 74, which provides that SDE shall grant confidential treatment to the applicant's documents and information that may be "commercially sensitive", does not provide significant guidance as to restrictions on the use of such information. Under the Draft Regulation, the list of "commercially sensitive" documents and information is fairly limited.[16]

The Sections believe that placing reasonable limits on the disclosure of incriminating and commercially sensitive materials will reduce the likelihood that potential leniency candidates will be deterred by the fear of being forced to bear excessive risks and costs in other fora (i.e., in other jurisdictions or in civil actions) as a result of seeking leniency in Brazil, thereby encouraging the reporting of illegal activity under the leniency program. The Sections are concerned that the disclosure and confidentiality provisions of Article 74, as drafted, may not provide the most effective balancing of the incentives and risks of leniency to the potential applicant, and they therefore urge SDE to reevaluate this article in light of these issues.

The ICN endorses an approach which favors a presumption against disclosure of information provided by a leniency applicant. ICN guidance emphasize that "it is good practice to keep any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the agency is required by law to disclose the information."[17] The ICN recognizes that confidentiality is necessary to allay the fear that information may be used in private damage litigation or shared with other government agencies, foreign or domestic, which may use that information against the applicant. The ICN also recognizes that one of the main concerns that may inhibit potential applicants from self-reporting is the risk that information and documents produced in the jurisdiction where leniency is granted may become discoverable in other jurisdictions.[18]

In view of the foregoing, the Sections suggest that SDE consider revising its disclosure and confidentiality provisions to make clear that there is a presumption against disclosure of leniency materials (as opposed to the current statement which seems to express a presumption in favor of disclosure) except as necessary for the proper administration of justice, including defendants' right of defense, and an

[16] *See*, for instance, Articles 26 and 28.
[17] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 8.
[18] *See* International Competition Network, "Anti-Cartel Enforcement Manual", Drafting and Implementing an Effective Leniency Program, April 2006, chapter 2, page 5.

expansion of the protection afforded to information and documents submitted by leniency applicants.

I. Article 75

Article 75, Sub-item II provides that CADE shall reduce by one third to two thirds the fines that would otherwise apply to the leniency applicant. This provision is applicable only in cases where SDE had previous knowledge of the conduct reported by the applicant.

SDE should consider describing the criteria it will use in recommending to CADE the level of discount that should be applied in particular cases. These criteria will presumably include, *inter alia*, the importance of the information and evidence provided by the applicant and the level of cooperation shown during the proceedings. By articulating criteria, SDE will enhance the transparency and predictability of the Leniency Program and thus the frequency with which it is pursued by potential applicants.

IV. Conclusion

The Sections hope that these comments are useful. We would be pleased to respond to any questions that SDE may have and to offer any further assistance that may be helpful as SDE finalizes the Draft Regulation.