COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE’S DRAFT GUIDELINES FOR ITS ANTITRUST LENIENCY PROGRAM

February 1, 2016

The views stated in this submission are presented jointly on behalf of the Sections of Antitrust Law and International Law 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 Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (the “ABA”) appreciate the opportunity to submit their views to the Administrative Council for Economic Defense (“CADE”) concerning its draft guidelines on CADE’s Antitrust Leniency Program (the “Draft Guidelines”), and CADE’s proposed changes to the Leniency Regulations, as set forth in CADE’s Internal Regulations (the “Leniency Regulations”), published for public consultation on November 11, 2015. The Sections applaud CADE’s efforts to consolidate the best practices and procedures of negotiating leniency agreements, which will enhance the transparency, certainty and, ultimately, the credibility of CADE’s Leniency Program.

Comments

The Sections commend CADE for its efforts “to provide an institutional framework for future negotiations and to serve as a reference for public-sector employees, attorneys, and society as a whole . . . in proceedings involving this important activity in connection with the Brazilian competition law and policy for dismantling cartels, and prosecuting antitrust conspiracy” through the Draft Guidelines. Since executing its first leniency agreement in October 2003, CADE has emerged as an active and highly regarded cartel enforcement agency. The Sections believe that the Draft Guidelines make the path to obtaining leniency clearer to potential applicants and, in doing so, reinforce CADE’s commitment to prosecuting cartel misconduct.

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2 See id. at 8.
The proposed changes to the Leniency Regulations, through amendments to CADE’s Internal Regulation, also represent a more accurate reflection of CADE’s current enforcement practice by, e.g., (i) stating that CADE’s General Superintendence (the “GS/CADE”) cannot use documents provided by an applicant if CADE denies leniency; (ii) establishing clear rules for the discounting available through leniency plus agreements; and (iii) defining the procedure for parties that approach CADE after a marker has been awarded to facilitate the order of settlement agreements or the possibility of obtaining the marker should it become available. To a large extent, the proposed changes to the Leniency Regulations reflect the emphasis on transparency and certainty set forth in the Draft Guidelines.

1. Paperless Leniency Application Process

The Draft Guidelines state that the GS/CADE—rather than the leniency applicant or the applicant’s attorneys—prepares and signs the History of Conduct, and CADE’s Internal Regulation similarly provides that an application may be oral or written. In practice, however, the leniency applicant is required to prepare and submit detailed written accounts of possible misconduct that is the underpinning of CADE’s infringement report and History of Conduct. The Sections are concerned about the disincentives to self-report in Brazil created by this requirement, particularly where the leniency applicant anticipates private damage litigation in the United States or other jurisdictions. For example, the written confession that CADE currently expects may be subject to mandatory disclosure in follow-on U.S. private damage lawsuits as an admission against the company’s interests, and would therefore expose the leniency applicant to significant and unfair litigation risks that do not exist for companies electing not to self-report or cooperate with CADE’s investigation. Therefore, the Sections urge CADE to follow the example of the United States, Canada, the European Union, Japan, Australia and many other jurisdictions by adopting a paperless leniency application process.

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5 See CADE, “Proposed Amendments to CADE’s Internal Regulation on Leniency,” Nov. 11, 2015, at 1, available at [citation to be added].
7 See id. at 2.
8 See id.
9 See id.
10 See Draft Guidelines, supra note 1, at 36.
11 See CADE’s Internal Regulation, supra note 6, Art. 200.
12 At the same time, the Sections recognize CADE’s efforts to safeguard the confidentiality of evidence and documents submitted during the investigation. Although these efforts may not succeed in eliminating the risk of disclosure in Brazil and other jurisdictions, CADE’s stringent procedures are an exemplary template for other enforcement agencies.
14 Public records would be admissible, if relevant, in the United States. See Fed. R. Evid. 401 (governing relevance); id. 803(8) (providing a hearsay exception for public records). Indeed, foreign public documents are self-authenticating under Federal Rule of Evidence 902(3) and can be proven under Federal Rule of Civil Procedure 44(a)(2). In addition, admissions of a party opponent would be permissible under the hearsay exceptions for prior witness statements and party opponent admissions in Federal Rule of Evidence 801(d).
2. Leniency for Corporate Directors, Officers and Employees: Express Ratification

The Draft Guidelines provide that “the benefits of [a corporate leniency agreement] can be extended to its current and former directors, managers, and employees, and to companies of the same economic group . . . involved in the violation, as long as they cooperate with the investigations and sign the instrument together with the company.” \(^{15}\) The Sections commend CADE for extending protection to the employees of leniency applicants. However, the Sections are concerned that requiring all potentially relevant employees to ratify their participation in or knowledge of the misconduct prior to executing the leniency agreement delays the investigation, jeopardizes confidentiality, and unnecessarily taxes CADE’s resources. Moreover, this prerequisite may discourage cooperation. The executives and employees who participated in or have knowledge of the misconduct may not support a company’s application for leniency lest they expose themselves to criminal prosecution. Additionally, similar to the concerns set forth above with respect to corporate confessions, an individual’s ratification may be viewed as a statement against interest with adverse repercussions in other jurisdictions. In this context, the Sections believe that eliminating the ratification process would streamline leniency negotiations and increase efficiency.

The Sections believe that this requirement also limits CADE’s ability to determine which individuals will prove most valuable to its investigation. A corporate leniency applicant may err on the side of caution and seek ratification from individuals who had no role in the misconduct. Ratification limited to the key players in the conspiracy would ease the burden on both the leniency applicant and CADE’s resources by flagging the most important witnesses early in the investigation.

The Sections believe that limiting the scope of ratification would not compromise CADE’s ability to elicit full and continuing cooperation from the relevant individuals. The Sections have observed that in the United States and other jurisdictions, the mere threat of personal consequences such as fines and imprisonment usually provides ample incentive for individuals to cooperate. If these repercussions are not enough to secure cooperation, CADE retains the power to exclude employees from the leniency agreement.

**Conclusion**

The Sections appreciate the opportunity to comment on CADE’s Draft Guidelines and proposed changes on the Leniency Regulation, and hope that this submission is helpful. The Sections would be pleased to respond to any questions CADE may have regarding these comments or to provide any additional comments or information that may be of assistance.

\(^{15}\) See Draft Guidelines, supra note 1, at 16 (emphasis added) (citations omitted).