IBA CARTELS WORKING GROUP'S COMMENTS IN RESPONSE TO THE ITALIAN COMPETITION AUTHORIY'S PUBLIC CONSULTATION VERSION OF THE DRAFT GUIDELINES ON COMPLIANCE PROGRAMS

1. INTRODUCTION

This submission is made to the Italian Competition Authority ("**ICA**") on behalf of the Cartels Working Group (**"Working Group"**) of the Antitrust Committee of the International Bar Association (**"IBA"**) in relation to ICA's public consultation version of its draft Guidelines on Compliance Program (**"Draft Guidelines"**) issued on April 20, 2018.

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 ICA's public consultation on the Draft Guidelines.

2. EXECUTIVE SUMMARY

The Working Group commends the ICA's initiative to promote the culture of competition and compliance, and its efforts to enhance transparency and predictability concerning the possible mitigation of fines.

With the purpose to further improve the proposed rules, this submission offers comments to the following sections of the Draft Guidelines:

i. **Section 2**: Requirements of antitrust programs;

ii. **Section 4**: The application of the mitigating circumstance as a result of antitrust compliance programs implemented after the start of the proceedings;

iii. **Section 5**: The application of the mitigating circumstance as a result of antitrust compliance programs implemented before the start of the proceedings;

iv. **Section 6**: Recidivism;

v. **Section 8**: Compliance programs with group of undertakings.

3. RESPONSE TO ICA'S PUBLIC CONSULTATION

3.1 Section 2. Requirements of antitrust programs

The Working Group commends the ICA for encouraging the development of a culture of compliance by mitigating penalties when a company can show the existence of a robust compliance program.

The Antitrust Division of the United States Department of Justice (**"The Antitrust Division"**) does not have antitrust compliance guidelines such as the ICA's Draft Compliance Guidelines but has, in practice, begun to recognize effective guidelines as a mitigation factor in negotiating fines. Unlike the ICA's proposed guidelines, however, the Antitrust Division does not give credit for a preexisting compliance program if a violation has occurred. The Antitrust Division notes that compliance programs can be rewarded if they lead to the detection and reporting of a violation that can qualify an undertaking for leniency. But, leniency is the only possibility of mitigation.

The United States Sentencing Guidelines gives credit to companies if they have effective compliance programs. Eligibility for such credit requires discovery and self-reporting before the offense is discovered or is likely to be discovered outside of the company.[1]

The Working Group commends the Draft Guidelines for recognizing that in certain instances a mitigation of a fine may be appropriate for a compliance program even if a violation still occurs. The Working Group believes that this approach recognizes that no compliance program can guarantee 100% effectiveness, but also that providing possible mitigation will incentivize undertakings to commit the resources to establish, audit, and maintain serious compliance programs.

The Working Group notes that the Draft Guidelines discuss the importance of a system whereby antitrust violations may be reported anonymously to management. The Working Group commends the ICA for recommending the implementation of an anonymous compliance hotline or other mode of communication through which employees can register complaints or report on compliance issues or illicit behavior. These types of programs not only encourage employees to take ownership of the compliance program by self-monitoring and reporting, but also incentivize the company leadership to abide by

[1] United States Sentencing Guidelines, §8B2.1. Effective Compliance and Ethics Program. The Sentencing Guidelines state that to have an effective compliance program, "an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." A company that "unreasonably delayed reporting the offense to the appropriate governmental authorities" will not be eligible to receive a reduction in culpability score based on the existence of a compliance program.

the compliance program by making available to every employee a means for reporting concerns.

Because of the importance of the ability of lower-level employees to anonymously report violations, The Working Group agrees that such reporting programs and hotlines should remain entirely anonymous and confidential. However, the Working Group respectfully suggests that internal reporting models and/or whistle-blowing systems pursuant to paragraph. 22 of the Guidelines on Compliance ensure the anonymity of the reporter, in order to better incentivize employees to their use. We believe that the use of reporting systems better encourages employees to report issues, as they are protected from retaliation by other employees.

While anonymity and confidentiality should encourage employees to report illicit behavior, in smaller organizations or organizations without the means to implement an anonymous hotline-type program, anonymity of reporting may not be practical. In addition, unless corporations create an environment in which employees feel comfortable reporting misconduct without retaliation, a hotline or other reporting mechanism may not be as effective as intended.

The Guidelines provide overall guidance on an effective program but do not set forth detailed rules on what such programs should address. This is similar to the practice of Brazil's competition authority, the Administrative Council for Economic Defense (**"*Conselho Administrativo de Defesa Econômica* – CADE"**).[2] CADE's Guidelines on Compliance Programs ("CADE's Guidelines"), however, do provide detailed descriptions with respect to the elements it sees as critical for a robust program, as follows:

- "Commitment: An organization's genuine commitment is the basis for any successful program…. [C]ommitment is substantiated through the following: tone from the top, adequate resources, and autonomy/independence for the Compliance Leader (CL)."[3]

- "Tone from the top: [C]ompliance is a fundamental value in the corporate culture, which is safeguarded by its inclusion on the agenda of the company's governing

[2] An English translation of CADE's Guidelines for Competition Compliance Programs is available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf.

[3] CADE Guidelines for Competition Compliance Programs at 16, available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf.

bodies or of the highest-level person responsible for steering the business of the company and approving its financial statements.

- Appropriate Resources: The resources designated for competition compliance programs should have as parameters (i) the organizations' particularities (size, market where it runs its business, etc.) and (ii) how compliance represents avoided costs in potential investigations and convictions.…

- Autonomy and Independence: It is fundamental to nominate an individual or team of individuals to lead the compliance activities"[4]

- "Risk Analysis: Well-structured compliance programs are usually preceded and followed by a profound risk analysis. Among other factors, risks generally vary owing to a company's size, economic sectors in which it runs its businesses, position occupied in the market, the reach of its activities, the number of employees and the level of training such employees have received.…"[5]

- "Risk Mitigation: Once the potentially problematic areas have been identified in each particular case, the following initiatives are alternatives aimed at mitigating the risks associated with anticompetitive practices:

- Training and Internal Communication: The training offered to employees is a proper way to transmit the rules and objectives of the compliance program.… In addition to training, it is also important to provide constant communication about the compliance rules through different forms of communication between the organization and its employees, so these rules effectively become a part of the corporate culture. In drafting written materials, be it a Code of Conduct, guidelines or specific orientations for compliance, a company should take into consideration the reality of its business."[6]

- "Monitoring: The success of the compliance program is also highly dependent on an organization's capacity to monitor implementation. In general, monitoring activities can be directed at two areas: (i) adequate functioning of processes and controls; and (ii) evaluation of effectiveness… Communication channels between the company and its employees, as well as between the company and third parties involved in its business, also play an important role in monitoring compliance."[7]

[4] *Id.* at 16-18.
[5] *Id.* at 18-20.
[6] *Id.* at 21-23.
[7] *Id.* at 24-25.

- "Documentation: Each of the initiatives related to competition compliance must be properly documented by the organization. Proper documentation allows for continued evolution of the program, based on improvement on the commitments previously made and shared among the areas."[8]

- "Internal discipline and incentives: Part of monitoring consists of applying penalties to employees that violate competition compliance rules.… The penalties should be applied to all employees, regardless of hierarchical position. It is also important that they are clearly outlined, public and in line with the legislation (not only competition, but also labor law) … [T]he ideal is for the company to take into consideration the degree of involvement in the conduct, its severity, the employee's previous participation in compliance training, [their] cooperation with the investigative proceedings and also [their] good faith, hence it can determine which factors mitigate or aggravate the punishment."[9]

The Working Group recommends that the ICA consider some further description of the elements that it considers key for an effective compliance program, along the lines described above. [10]

Specifically with the goal to further enhance autonomy and independence, the Working Group respectfully proposes that Appointed Compliance Officer reports only to the independent control committee of each undertaking or, in case of lack thereof, to the shareholder. The connection with the high-level management could undermine the effectiveness of the compliance system, because of legitimate issues of hierarchical relationships between managers and because control systems should be extended to the upper management. The Appointed Compliance Officer should also have a central position in the assessment of antitrust risks, appointed with functions of monitoring and supervision of the internal processes implemented by the compliance program, modelled as far as possible on the Supervisory Committee set forth under Legislative Decree no. 231/2001. Finally, the Appointed Compliance Officer should not be subject to disciplinary measures if antitrust infringements have been fraudulently carried out by employees in violation of control systems correctly implemented.

---

[8] *Id.* at 26-27.
[9] *Id. at* 27.
[10] The International Chamber of Commerce ("ICC") has published an Antitrust Compliance Toolkit, which provides as follows: "The elements in the ICC Antitrust Compliance Toolkit are not intended to represent a comprehensive or prescriptive list of what an antitrust compliance program must include, but seek to reflect what is commonly regarded as good practice in the field. Indeed, antitrust agencies themselves recognize that there can be no 'one-size-fits-all' approach, and that each compliance program has to be designed to meet the specific antitrust risks faced by the company in question." Available at https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/.

The entire process of antitrust compliance cannot be implemented through a one-off action, but it requires a continuous monitoring and update. The Working Group therefore proposes that the ICA considers giving monitoring activities greater emphasis in the Draft Guidelines, as the effectiveness of a compliance program cannot ignore the ability of a firm to conduct a continuous monitoring on its effective implementation within the internal business processes. This activity should be carried out at least on a yearly basis through the support of external counsels and it will be aimed at determining whether: (i) the risk identification is aligned with the business of the undertaking, also by taking into account the guidelines set forth by the competent national competition authority, (ii) employees have correctly mastered and implemented the concepts that have been provided during the program during their activity; this task should also be completed by a thorough and specific analysis of the corporate documentation (i.e. strategic planning, marketing, sales), (iii) there are additional business activities require an intervention based on the recent legal developments. The Working Group takes the view that detailing such essential activity in the Guidelines on Compliance would foster the adaptation of the undertakings to the implementation of compliance programs.

3.2 Section 4. The application of the mitigating circumstance as a result of antitrust compliance programs implemented after the start of the proceedings

In general, the mitigating circumstance granted to undertakings as a result of the implementation of antitrust compliance programs should be applied to the final amount of the fine rather than to the base amount, as set forth under the Guidelines on Fines. The current method of calculation carries a dire sequence: the reduction of the fine entailed by the compliance program shall most likely be negligible. Conversely, should the reduction of the fine be applied on the final amount, it may become a real incentive for undertakings, including smaller ones, which by thinking along the lines of the business rather than from a legal perspective, would come to the conclusion that the cost for the development and implementation of a program, leading to a reduction of the fine, offsets the risk to face the fine.

3.3 Section 5. The application of the mitigating circumstance as a result of antitrust compliance programs implemented before the start of the proceedings

This Working Group also respectively proposes that the ICA considers providing for the applicability of the mitigating circumstance in all cases in which the undertakings have implemented an adequate and effective compliance program before the start of the

proceedings, without requiring undertakings to apply for leniency in relation to the violations in which they know they are involved.

In fact, while the justification of the ICA's sceptical position vis-à-vis compliance programs which have not brought to leniency is fully understandable, the practicality of this case may induce the ICA to rethink its proposal. Considering that firms granted leniency treatment see normally a full abatement of their fine and in any event a reduction of it which goes much beyond even 15%, there is virtually no incentive for a firm to implement a full-fledged compliance program. The firm may on the contrary be induced to skip such program altogether and in case apply for leniency and obtain the full mitigation provided for by law. This induces us to thing that lenience and compliance programs benefit should run independent of each other.

3.4 Section 6. Recidivism

The Working Group proposes that the ICA considers providing further clarity regarding the provision on recidivism with the following proposed changes:

1. Making clear that the definition of "undertaking which has repeated an infringement" is the same as stated in the Guidelines on Fines;
2. Specifying whether the undertaking requesting the application of the mitigating circumstance will be considered as "undertaking which has repeated an infringement", although it has not committed an infringement of competition law in the five years preceding the start of the violation being investigated, but it is nevertheless part of a group of undertakings and one of them can be considered as an "undertaking which has repeated an infringement" according to the Guidelines on Fines;
3. If the ICA should opt for the definition of "undertaking" as a "single economic entity", the ICA could consider stating whether the undertaking requesting the reduction of the fine can be considered as an "undertaking which has repeated an infringement" if it belongs to a group of undertakings in which another affiliate has infringed the competition law in a market other than the one under investigation.

3.5 Section 8. Compliance programs with group of undertakings

The Working Group respectively proposes that the Draft Guidelines sets forth that the provision relating to groups of undertakings will only be applicable in the cases in which the parent company is party to the proceedings and that - for the purposes of applying the mitigating circumstance - the ICA will only assess the compliance programs implemented (i) by the subsidiary that committed the violation and (ii) by the parent company involved in the infringement or that is held responsible pursuant to the so-called parental liability principle.

Furthermore, the ICA could consider regulating the following hypotheses: (i) only one, between the parent company or the subsidiary that committed the infringement, has a compliance program (or has implemented a program after the start of the proceedings) according to the Draft Guidelines; (ii) the parent company and the subsidiary that has committed the infringement have (or have implemented after the start of the proceedings) compliance programs deserving different reductions of fine.

The criteria for the quantification of the mitigating circumstance should also be clarified, considering that in the cases of parental liability the fine is jointly and severally imposed.

Finally, the Working Group takes the view that ICA should specify that the adoption of a compliance program at the group level will not be considered an indicator of the so-called "decisive influence" and therefore of the responsibility of the parent company for the infringement committed by its subsidiary. Otherwise, the provision would act as a disincentive for the adoption of compliance programs within groups of undertaking.

4. CONCLUSION

The Working Group appreciates the opportunity provided by the ICA's public consultation process to comment on the Draft Guidelines and commend its openness to consider the comments above.

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