



19 January 2025

To: The Administrative Council for Economic Defense (“CADE”)

Sub: Comments on the new version of CADE’s Leniency Guide

Dear Sir/Ma’am,

We have great pleasure in enclosing comments on the draft Antitrust Leniency Guide on behalf of the Antitrust Section of the International Bar Association (“IBA”). The Co-chairs and representatives of the Antitrust Section of the IBA would be delighted to discuss the enclosed submission in more detail with CADE if that would be useful.

Yours sincerely,

Janet Hui & Samantha Mobley,
Co-Chairs of the International Bar Association's
Antitrust Section



INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

**COMMENTS ON CADE'S
LENIENCY GUIDE**

19 JANUARY 2025

1. INTRODUCTION

- 1.1 The International Bar Association's ("IBA") Antitrust Section ("Section") would like to thank the Administrative Council for Economic Defense ("CADE") for the opportunity to provide comments on the new version for the Antitrust Leniency Guide ("Draft Leniency Guide"). Such an inclusive process will ensure a robust, effective, and workable framework that benefits all stakeholders.
- 1.2 The Section congratulates CADE on the comprehensive nature of the Draft Leniency Guide and the clarity it provides on several key aspects. The Section offers these submissions for CADE's consideration as it finalizes the Draft Leniency Guide.

2. ABOUT THE IBA

- 2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Argentina, and it has considerable expertise in assisting the global legal community.
- 2.2 The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including with international cartel matters and leniency regimes. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.

3. SUBMISSIONS OVERVIEW

- 3.1 Leniency regimes around the world rest on several key pillars. Some of the most important are transparency, predictability, and certainty. A leniency program will not achieve its potential (i) if the agency is not transparent about the benefits available and how it will make decisions under the program, (ii) if the process for obtaining the promised benefits is ambiguous or uncertain, or (iii) if a cooperating party that meets the requisite requirements cannot be certain that it will obtain the promised benefits. Leniency programs that lack these features risk failure because potential cooperating parties will not seek leniency if the process is too uncertain, too cumbersome, or too arbitrary. Put simply, leniency applicants do not want to find themselves worse off having sought leniency than if they had not disclosed the conduct.
- 3.2 The Draft Leniency Guide provides much transparency, predictability, and certainty. It is a very good foundation for the continuous successful antitrust leniency program currently available in Brazil. These comments focus on a few areas where the Section believes that the Draft Leniency Guide could be more precise or provide more information to increase

transparency, predictability, and certainty for potential cooperating parties. The Section's proposed suggestions for the Draft Leniency Guide are highlighted in yellow.

4. REQUIREMENTS FOR FILING AND ANTITRUST LENIENCY AGREEMENT (SECTION 5)

- 4.1 While collaboration and cooperation by leniency applicants is a standard worldwide, the level of continuous collaboration should be reasonable and not excessive. It is often critical to provide predictability for leniency applicants so as not to put leniency applicants in a worse position than other defendants. The Section would like to suggest the following changes to Item 5 of the draft Guide:

5. Requirements for filing an Antitrust Leniency Agreement

Articles 86 of Law No. 12,529/2011 and 198 of RiCade list the requirements for signing a leniency agreement in Brazil. According to their terms, it is necessary that:

- I. the company is the first to qualify with respect to the reported or investigated violation;*
 - II. the company and/or individual ceases its participation in the reported or investigated violation;*
 - III. at the time of proposing the agreement, the General Superintendence does not have sufficient evidence to ensure the conviction of the company and/or individual;*
 - IV. the company and/or individual confesses their participation in the crime;*
 - V. the company and/or individual cooperates fully and permanently with the investigation and the Administrative Proceeding, appearing, at their own expense, whenever requested, at all procedural acts, until the final decision on the reported violation is issued by CADE; and*
 - VI. cooperation results in the identification of others involved in the violation and the obtaining of information and documents that prove the violation reported or under investigation.*
- (...)*

To the extent that this does not undermine its obligation to cooperate with the investigation, the administrative and procedural expenses set forth in item V should preferably directly relate to the leniency company and/or leniency individual. These expenses should be based on principles such as reasonableness and an overall consideration that leniency applicants should not face undue disincentives (in that they may end up being worse off) compared to other parties in the investigation such as non-cooperating parties or settling (non-leniency) parties. In this respect we note that this overall consideration would encourage greater willingness among parties to cooperate with Brazilian antitrust authorities at an earlier stage. This approach particularly benefits those who engage with CADE for cooperation early on, primarily the leniency and partial leniency applicants, in contrast to the settling parties.

5. REQUIREMENTS FOR FILLING AN ANTITRUST LENIENCY AGREEMENT (SECTION 6)

5.1 It is often critical to provide predictability for leniency applicants. The Section would like to suggest the following changes to Item 6. b. of the draft Guide:

b. Total or partial benefits of the Leniency Agreement

The termination of the punitive action of the public administration – total leniency – or the reduction of one to two thirds of the applicable penalties – partial leniency (art. 86, §4 of Law No. 12,529/2011) -, depends on the “prior knowledge” of the General Superintendence of Cade regarding the conduct (art. 209, I and II of RiCade):

- i. if the SG/CADE had no prior knowledge of the violation, the company and/or individual will receive, with the declaration of compliance with the leniency agreement by the Plenary of the CADE Tribunal, the benefit of the termination of the punitive action of the public administration in relation to the reported violation;*
- ii. if the SG/CADE already had prior knowledge of the conduct, but did not have evidence to ensure the conviction of those involved, the company and/or individual may enter into a leniency agreement with partial benefits (Partial Leniency) and will receive, with the declaration of compliance with the leniency agreement by the Plenary of the CADE Tribunal, the benefit of a reduction of one to two thirds of the applicable penalty, depending on the effectiveness of the collaboration provided and the good faith of the offender in complying with the leniency agreement.*

(...)

In the case of partial leniency, the gross revenue of the company in the line of business affected by the cartel in the last fiscal year prior to the initiation of the Administrative Proceedings must be considered for the calculation basis of the base fine (art. 37, I of Law No. 12,529/2011), and alternative parameters may be applied, according to the specificities of the specific case, in accordance with the case law of the CADE Tribunal (see Guide to Dosing Cartel Fines). The reference revenue will be updated by SELIC until the partial leniency agreement is signed.

The rate and calculation basis for the fine associated with partial leniency agreements should adhere to principles such as reasonableness and an overall consideration that leniency applicants should not face undue disincentives (in that they may end up being worse off) compared to other parties in the investigation such as non-cooperating parties or settling parties.

Preferably, SG/CADE will determine the calculation basis during the negotiation of the Partial Leniency Agreement. This should serve as a parameter for the calculation basis for potential TCCs, ensuring the necessary predictability, legal certainty, and equality among the agreements. This approach will guarantee that the signatories of a Partial Leniency Agreement are not at a disadvantage compared to those who entered into TCCs.

The lowest rate applied to the TCC contract holder must be adopted as the maximum rate, if applicable (art. 86, §5, of Law No. 12,529/2011). This rate will be the base rate, on which the individualization of sanctions and application of mitigating and aggravating factors will be

applied. Finally, the legal reduction of one to two thirds of the applicable penalty will be applied (art. 86, §4, II, of Law No. 12,529/2011, combined with art. 209, II, RiCade). The benefit granted to the signatory of the partial leniency must not be less than the largest discount granted to a compromise party in the context of a TCC in the same proceeding.

- 5.2 As the national competition statute is silent in this respect, the suggested language aims to provide legal predictability and certainty regarding the negotiation and payment of fines associated with Partial Leniency Agreements. CADE's Partial Leniency could be seen as lacking clarity and placing signatories of partial leniency agreements at a considerable disadvantage compared to those who enter into settlement agreements, as the signatories only discover the calculation basis and the fine amount at the very end of the administrative proceeding, during the final hearing.
- 5.3 To address this issue, it is essential to establish a clear and predictable framework for negotiating and paying fines under Partial Leniency Agreements. The suggested language aims to provide legal predictability and certainty by ensuring that the fines for Partial Leniency Agreements are negotiated at the time the agreement is signed and subsequently submitted to CADE's Tribunal for validation. This approach aligns with the principles applied to settlement agreements and ensures that the signatories of Partial Leniency Agreements are not disadvantaged compared to those who enter into settlement agreements.
- 5.4 By establishing the calculation basis and fine amount upfront, CADE ensures a fair and transparent process that upholds legal certainty and fairness. This clear framework for Partial Leniency Agreements allows all parties to be treated equitably, providing the necessary predictability for companies to make informed decisions and plan effectively. Aligning the principles applied to Partial Leniency Agreements with those applied to settlements further enhances the effectiveness and credibility of the leniency program in Brazil, encouraging more companies to come forward and cooperate with CADE earlier in the process.

6. LEVEL OF PUBLICITY OF THE INFORMATION AND DOCUMENTS OF THE LENIENCY AGREEMENT (SECTION 41)

- 6.1 It is critical to protect the confidentiality within the Leniency Program and give this assurance to leniency applicants. The Section would like to suggest the following changes to Item 41. of the draft Leniency Guide, based on a twofold rationale:
- (a) The limitation to the Brazilian jurisdiction underscores the jurisdictional boundaries within which the leniency agreement operates, providing clarity and legal certainty to the parties involved.
 - (b) This also asserts CADE's sovereignty in relation to agreements it is a signatory to and prevents the misuse of information in jurisdictions outside of Brazil without

CADE's agreement. By maintaining control over the dissemination of information, CADE protects the integrity of the Leniency Program in Brazil and ensures that the cooperation of leniency applicants is not exploited by defendants in foreign jurisdictions (this is important in light of the fact that have been a number of attempts in this respect in the past).

41. Level of publicity of the information and documents of the Leniency Agreement

Cade may grant access to those documents in an exceptional manner, in the event of:

*I – express legal determination **by a Brazilian Authority**;*

*II – specific judicial decision **by a Brazilian Court**;*

III – authorization from the signatory of the Leniency Agreement or the promisor of the TCC, with the consent of CADE, provided that there is no prejudice to the investigation; or

IV – international legal cooperation, provided for in articles 26 and 27 of the CPC, subject to authorization from CADE and authorization from the signatory of the Leniency Agreement or the compromiser of the TCC, provided that there is no prejudice to the investigation.

*In the event of a court decision, the information and documents additionally made available must be restricted to the beneficiary parties of the order, within the scope of that specific action and cannot be made available to third parties (including abroad), and PFCade will intervene in the legal process to ensure the maintenance of the Leniency Program. **Items I and II are limited to Brazilian court decisions and / or legal determinations from national authorities.***

7. CONCLUSION

- 7.1 The Antitrust Section would like to take this opportunity to thank CADE in advance for considering these submissions. The Section would like to commend CADE on consulting on the draft and hopes that the submissions will enable CADE to improve the draft further as it continues to refine its antitrust leniency program.
- 7.2 If CADE would like to discuss the points raised in this submission, please contact the Section Officer identified in the cover letter.