COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW IN RESPONSE TO THE ITALIAN COMPETITION AUTHORITY'S REQUEST FOR PUBLIC COMMENTS REGARDING ITS DRAFT GUIDELINES ON COMPLIANCE PROGRAMS

June 7, 2018

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

The Sections of Antitrust Law and International Law of the American Bar Association ("the Sections") welcome the opportunity to participate in the Italian Competition Authority (the "ICA") public consultation process on the ICA's Draft Guidelines on Compliance Programs (the "Draft Guidelines") issued on April 20, 2018.

Executive Summary

The Sections commend the ICA's efforts to consult with stakeholders on the Draft Guidelines. The ICA's leadership in this area demonstrates an understanding that compliance programs incentivize the establishment and maintenance of a culture of competition and compliance. We also applaud the ICA for providing transparency and predictability concerning the possible mitigation of fines. The recognition that compliance efforts can be credited, even if there is a violation, encourages all undertakings to commit resources to prevent violations and, if one occurs, promptly detect and report them.

Another commendable feature of the Draft Guidelines is that they direct the undertaking to focus on the risk of antitrust infringements based on the particular characteristics of the undertaking and the markets in which it participates. No compliance program can cost-effectively eliminate every conceivable risk, however, a good faith, prospective attempt to reduce material risks is a laudable goal. The Draft Guidelines very helpfully set out: (1) the content expected in an effective compliance program; (2) the procedure for requesting an assessment of the compliance program when seeking a mitigation of fine, and (3) the criteria the ICA will apply when determining if, and to what degree, mitigation should be awarded based on the undertaking's compliance program.

Based on the broad experience of the Section members as counsel to companies and as government enforcers addressing issues involving compliance training and corporate oversight, the Sections wish to comment on a few areas of the Draft Guidelines and suggest that the ICA may wish to consider some refinements.

Draft Guidelines Section 2 **Requirements of an Effective Compliance Program**

The Sections commend 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. As the Draft Guidelines note, an effective compliance program can facilitate the discovery and investigation of possible antitrust violations. It can also prevent future violations. As discussed herein, the ICA's guidelines comport with generally recognized international standards for effective competition compliance programs. Notably, the ICA wisely recognizes that the effectiveness of a compliance program should be assessed considering the undertaking's size, the nature of the business, the organization's structure, and any regulatory context. The Draft Guidelines' risk assessment approach recognizes that small and medium undertakings may have fewer resources to devote to compliance. For example, these undertakings may be able to implement standard compliance programs more easily than customized "gold standard" compliance programs. Incentivizing the adoption of compliance programs even if they are not "gold standard" would help create awareness and a culture of compliance which may be otherwise be lacking among smaller and medium-sized businesses.

The Draft Compliance Guidelines state that the undertaking's risk assessment is a fundamental element in the assessment of the effectiveness of the compliance program. The Sections would add that when making an application for the reduction of the fine as a result of the implementation of a compliance program, the risk assessment may include formal and informal compliance audits and assessments. For example, an undertaking may devote additional compliance efforts to reviewing its activities in a geographic location or a product where its market share or limited number of competitors potentially increase the risk of an infringement.

The Antitrust Division of the United States Department of Justice does not have antitrust compliance guidelines like the ICA's Draft Compliance Guidelines. The Antitrust Division, however, in practice has begun to recognize compliance programs as a mitigating 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. In the view of the Antitrust Division, if a violation has occurred, this alone is evidence that the existing compliance program was inadequate and ineffective. 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. The United States Sentencing Guidelines also allow companies to receive lower culpability scores, and thus lower fines, if they have "effective" compliance programs. Eligibility for this credit, however, requires discovery and self-reporting before the offense is discovered or likely to be discovered outside of the company.[1]

In practice, therefore, in the United States today no credit is given for an existing compliance program if an antitrust violation has occurred. The Sections commend the Draft Guidelines for

[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.

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

The Antitrust Division is rethinking its views on compliance programs in a way that would bring them more in line with the ICA Draft Guidelines by considering allowing some credit for existing compliance guidelines, even if they fail to prevent the violation in question. On April 9, 2018, the Antitrust Division held a public roundtable discussion to explore the issue of corporate antitrust compliance and its implications for criminal antitrust enforcement policy. On May 31, 2018, Principal Deputy Assistant Attorney General Andrew Finch stated:

> Just last month, enforcers from three different continents joined us at the Division as part of a public roundtable on corporate antitrust compliance, representing a range of views and experiences in encouraging effective corporate compliance programs. In light of the discussions and feedback from the roundtable, we are re-evaluating our policy regarding corporate compliance efforts. That includes carefully examining our policy regarding pre-existing corporate compliance efforts, and what role they should have in our decision-making.[2]

The Antitrust Division has recently given credit in determining the level of the fine for implementing or enhancing a compliance program *after* an investigation has begun if a company can demonstrate that it has established a serious compliance program designed to change the culture of the company on a prospective basis. In a 2015 sentencing memorandum[3] in which the Antitrust Division advocated the mitigation of a fine based on the company's actions to establish a comprehensive compliance program, the government commended the following non-exhaustive elements as part of a comprehensive and genuine compliance program:

- "Training of senior management and all sales personnel. In addition to classroom training, it provided one-on-one training for personnel with jobs, such as sales people, where there is a high risk of antitrust crimes";
- Testing the effectiveness of the training by examining the "employees' awareness of antitrust issues before and after the training";
- "Prior approval, where possible, of all contacts with competitors and reporting of all contacts with competitors." The reports are to be audited by in-house counsel;
- A requirement that sales personnel certify that all the company's prices were independently set, and that they had not exchanged pricing information or agreed with any competitors on a price;

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[2] Andrew Finch, Principal Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, Remarks at the ABA Antitrust in Asia Conference in Seoul, May 31, 2018, available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-aba-antitrust.

[3] *United States v. Kayaba Industry, Co. Ltd.,* Case: 1:15-cr-00098-MRB (N.D. Ohio, filed: 09/16/15) (Document #9, at 7-8).

- Establishment of an anonymous hotline to report violations;
- Disciplining of violators, including high level executives.

The Antitrust Division has emphasized the need for the compliance program to effect genuine change in corporate culture, not just one that looks good on paper: "The Antitrust Division is willing to consider compliance efforts in reaching a fine recommendation in cases where a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense to occur."[4]

The Sections note that the Draft Guidelines discuss the importance of a system whereby antitrust violations may be reported anonymously to management. The Sections commend 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. Anonymity encourages the use of the reporting system by protecting the employee from retaliation. These types of hotline 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 the compliance program by making available to every employee a means for reporting concerns.

Because of the importance of encouraging lower-level employees to anonymously report violations, the Sections agree that such reporting programs and hotlines should remain entirely anonymous and confidential. However, the Sections respectfully suggest that to encourage use of these reporting programs, the ICA also should recommend that corporations consider appropriate non-retaliation protections, particularly for lower-level and non-culpable 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 fear of retaliation, a hotline or other reporting mechanism may not be as effective as intended.

The Guidelines provide overall guidance on the elements of 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).[5] CADE's Guidelines on Compliance Programs ("CADE's Guidelines"), however, do provide detailed descriptions of the elements it sees as critical to a robust program, as follows:

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[4] Brent Snyder, Former Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, United States Department of Justice, *Compliance is a Culture, Not Just a Policy*, September 9, 2014, available at https://www.justice.gov/atr/file/517796/download.

[5] 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.

- "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)."[6]

- "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 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"[7]

- "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.…"[8]

- "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:

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  - 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."[9]

  - "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

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[6] 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.
[7] *Id.* at 16-18.
[8] *Id.* at 18-20.
[9] *Id.* at 21-23.

(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."[10]

- "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."[11]

- "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."[12]

The ICA also may wish to emphasize that a compliance program has to be designed to create not just a paper program but a culture of competition and compliance from "the top down." As former Antitrust Division Deputy Assistant Attorney General Brent Snyder has remarked, "[e]mployees pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don't, the employees won't."[13] The Draft Guidelines should also emphasize that an effective antitrust compliance program is not a one-time event but requires a process for continuous monitoring and updating.

The International Chamber of Commerce ("ICC") has published an Antitrust Compliance Toolkit, which may be a useful resource for the ICA to cite in its Guidelines.[14] The ICC states that "The elements in the ICC Antitrust Compliance Toolkit are not intended to represent a comprehensive or prescriptive list of what an antitrust compliance programme 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 programme has to be designed to meet the specific antitrust risks faced by the company in question."

The Sections recommend that the ICA consider some further description of the elements that it considers key for an effective compliance program, along the lines described above.

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[10] *Id.* at 24-25.
[11] *Id.* at 26-27.
[12] *Id. at* 27.
[13] *Compliance is a Culture, Not Just a Policy*, *supra* n. 3.
[14] The Antitrust Compliance Toolkit, available at https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/.

Draft Guidelines Section 3 **Application for Reduction of Fine Based on a Compliance Program**

The Draft Guidelines state that the undertaking seeking the benefit of mitigation should submit a memorandum with accompanying documents describing how the compliance program was adequate and demonstrating material improvements in the program. The Sections agree that the undertaking seeking the mitigation based on its compliance efforts should bear the burden of demonstrating the adequacy and effectiveness of its program.

To meet its burden, an undertaking will submit an explanatory memorandum with all documents demonstrating the implementation of the program. The Sections recommend that the memorandum and any supplementation or other documentary evidence offered in support be submitted and treated confidentially. A complete application may contain information, such as discipline of employees for certain behavior that would be harmful to the undertaking and individuals concerned if made public. Confidential calls to a hotline, for example, should remain confidential.

Draft Guidelines Section 4 **Level of Mitigation for Compliance Program Implemented After Start of Proceedings**

If an undertaking implements an antitrust compliance program for the first time after the start of proceedings, it is still eligible for a reduction in fine up to 5%. The Draft Guidelines indicate that to receive possible mitigation, the new and effective compliance program should be implemented before the Statement of Objections in order to be evaluated by the ICA. The Sections would add that the ICA should consider that even if has not been possible to implement every aspect of the program before the Statement of Objections, if the undertaking has demonstrated good faith and a commitment to completing implementation of the program (e.g., by allocating resources to do so), the fact that implementation is not complete before the statement of objections should not preclude mitigation. Some aspects of the program, such as in person training for every employee, simply may require more time.

Draft Guidelines Section 5 **Level of Mitigation for Compliance Programs Implemented Before the Start of the Proceedings**

When an undertaking has a compliance program in place before the start of the proceeding the possible mitigation in fines will range from zero to 15% depending upon the ICA's assessment of the effectiveness of the program

1) **Mitigation reduction of up to 15%**

This is the highest possible mitigation designed to reward companies that have implemented a strong compliance program before the initiation of proceedings. The ICA recognizes that a compliance program can still be deemed effective in some circumstances even if there has been an infringement. The existing compliance program will be deemed effective if the violation is detected and reported to the ICA before the initiation of proceedings.

The Sections believe this is a key provision of the Draft Guidelines. This transparency gives undertakings the assurance that a compliance program can still be credited even if there is an infringement. Without this certainty, companies may believe it is more efficient to wait until the start of an investigation to implement an effective, or even any, compliance program.

2) Mitigation reduction of up to 10%

A mitigation reduction of up to 10% also is available even though the compliance program did not stop the infringement from happening and did not result in the detection and reporting of the violation by the undertaking before the investigation. To qualify for this reduction, the undertaking must demonstrate in its application that while the existing compliance program did not prevent or detect the violation, the program did contain the characteristics of an effective compliance program and was carried out in a serious and consistent manner. In addition, the undertaking must demonstrate that it has updated and strengthened the compliance program in light of the discovery of the infringement and the failure of the previous program to prevent it.

The Sections commend the ICA for setting forth specific ranges of mitigation for compliance programs based on the characteristics of the program. The Sections also commend the ICA for providing possible mitigation for programs implemented before the start of the proceeding even though an infringement may still have occurred.

The Draft Guidelines state that if the violation happened over a prolonged period of time, this would clearly demonstrate that the compliance program was inadequate because it was unable to detect violations. The Sections believe that while this is an important factor the ICA should consider in determining whether a compliance program was effective despite a violation, it should be viewed in the context of the compliance program as a whole and the nature of the violation.

3) Mitigation reduction of up to 5%

A mitigation reduction of up to 5% is available even if the compliance program in effect at the time of the violation was inadequate (for example, if high-level executives were involved in the violation) if a substantial upgrade in the compliance program to address all inadequacies and conform with the characteristics of an effective compliance program is adopted and implemented after the initiation of proceedings but before the issuance of the Statement of Objections.

The involvement of the undertakings' top management is given as an example of a compliance program that was manifestly inadequate. The Sections recommend that it be clear, that while this will be considered an important factor in assessing the adequacy of the compliance program at the time of the infringement, the compliance program will be viewed as a whole in assessing its adequacy.

Draft Guidelines Section 6 **Recidivism**

The Draft Guidelines provide that a 5% mitigation is possible for an undertaking that is a recidivist but adopts and implements an effective compliance program after the start of the proceedings. Mitigation will not be granted, however, to an undertaking that has previously benefitted from a mitigation based on a compliance program in a previous matter.

The Sections recommend that the Draft Guidelines provide some clarification on the scope and meaning of recidivism. For example, an infringement in one product line or geographic location should not necessarily count as recidivism for an entire undertaking (i.e., for the parent and subsidiaries in multiple geographic locations and various product lines).

Draft Guidelines Section 8 **Compliance Programs within Groups of Undertakings**

The Draft Guidelines contain a provision regarding the parent's liability for the violation by a subsidiary, stating that the adoption of a compliance program by the parent company does not in itself suffice to eliminate the parent's responsibility for the subsidiary's conduct. In order for the compliance program of the parent company to be considered effective, the subsidiary must implement a compliance program that is tailored to the risk assessment and circumstances applicable to the subsidiary's operation. In other words, one uniform compliance program for an entire group of undertakings may not be considered effective.

The Sections recommend, however, that when assessing the parent's compliance program, if the parent has adopted and implemented a specific program for the subsidiary and audited its implementation and compliance, the program still may be considered effective even if does not prevent an infringement. This evaluation will incentivize parent undertakings to implement an effective program for its subsidiaries by providing credit even if the subsidiary engages in an infringement.

Conclusion

The Sections appreciate the opportunity provided by the ICA's public consultation process to comment on the Draft Guidelines. The Sections 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.