

# Challenges Ahead of Leniency Programmes: The Brazilian Experience

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Over the last decade, the cartel enforcement landscape has significantly changed in Brazil: in 2000, new investigative tools were granted by Congress (dawn raids and leniency agreements), and since 2003 the Brazilian anti-trust authorities have promoted a hierarchy of antitrust enforcement that placed hard-core cartel prosecution as the top priority. Brazil now has an increasing number of cartel investigations, including alleged international cartels, record fines for cartel offences, individuals being held criminally accountable, and increasing cooperation among criminal and administrative enforcers, with the change in perception by criminal prosecutors and judges as to the seriousness of cartels.

This article focuses on the Brazilian experience regarding the implementation of its Leniency Program. Over 40 leniency agreements have been executed since 2003, most of them related to alleged international cartels. The effectiveness of the program is built mainly on three pillars: fear of detection (with increasing number of dawn raids and wiretaps, as a result of the cooperation with criminal authorities), threat of severe sanctions (with record fines and jail sentences), and efforts to promote transparency.

## I. Anti-cartel enforcement

At the administrative level, antitrust law and practice in Brazil is governed by the recently enacted Law No. 12,529/11, which entered into force on 29 May 2012 and

### Key Points

- Over the last decade, over 40 leniency proceedings have been successfully brought to an end in Brazil.
- Questions have been raised about the link with other procedures such as private enforcement and cartel settlements.
- Concerns have emerged with the length of some proceedings or the determination of the competent authority.

replaced Law No. 8,884/94.<sup>1</sup> Prosecution of cartels is a top priority in Brazil since 2003. Approximately 40 leniency agreements were signed since then, the majority with alleged members to international cartels, and more than 400 search warrants have been served over the last years. The authorities' interaction and cooperation with public prosecutors responsible for criminal anti-cartel enforcement<sup>2</sup> also gave CADE the ability to tap into the different investigation tools and resources available through the police and prosecutors—for instance, the use of wiretaps.

As a result of the use of more aggressive investigative tools, CADE has been imposing record fines on both companies and individuals found liable for hard-core cartel conduct. The record fine imposed by CADE in connection with a cartel case was roughly US\$1.3 billion,

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1 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat of Economic Monitoring of the Ministry of Finance ('SEAE'), the Secretariat of Economic Law of the Ministry of Justice ('SDE'), and the Administrative Council for Economic Defense ('CADE'). The SDE was the chief investigative body in matters related to anti-competitive practices, and issued non-binding opinions in connection with merger cases. The SEAE also issued non-binding opinions related to merger cases, and issued opinions in connection with anti-competitive investigations. The CADE was structured solely as an administrative tribunal, which made final rulings in connection with both merger reviews and anti-competitive practices.

2 Apart from being an administrative infringement, cartel is also a crime in Brazil, punishable by a criminal fine and imprisonment from 2 to 5 years. According to Brazil's Economic Crimes Law (Law No. 8,137/90), this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market essential to life or health. Also, Law No. 8,666/93 specifically targets fraudulent bidding practices, punishable by a criminal fine and imprisonment from 2 to 4 years. Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil, and act independently of the administrative authorities. Also, the Police (local or the Federal Police) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who may indict or not the reported individuals.

in 2014. The level of fines imposed is considerably higher when the case is supported by direct evidence (average of 15% of the annual gross revenues of the defendant in cases with direct evidence as opposed to average of 5% of the annual gross revenues of the defendant in cases without direct evidence). Table 1 provides a summary of the main cartel cases sanctioned or settled by CADE and the duration of the investigation.

In most of the cartel cases adjudicated in recent years, in addition to fines, CADE has been primarily ordering the publication of the decision in a major newspaper. In four cases, besides such penalty, CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for 5 years. In more recent cases, CADE has recommended the tax authorities to block the wrongdoer from obtaining tax benefits, and ordered the inclusion of the wrongdoer's name in the Brazilian Consumer Protection List. Finally, in a single case adjudicated in 2014 related to alleged cartel conduct, CADE took an even more aggressive approach, and adopted structural remedies to achieve optimal deterrence.

In addition to the cases described above, there are over 100 ongoing cartel investigations pending before CADE, including cases such as TFT-LCD, CRT, CRT glass, air freight forwarders, DRAM, ODD, underground cables, underwater cables, polymers, salt and silicate, most of them initiated through leniency applications.

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies in cartel cases. In February 2009, Brazil's administrative and criminal authorities launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the US Department of Justice and the European Commission. Brazil's antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, Argentina, Canada, Chile, China, Equator, France, Peru, Portugal, and Russia. The Brazilian authorities have in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of

dawn raids, foreign authorities and injured third parties have become interested in evidence seized in Brazil.

## II. The leniency program

Brazil's Leniency Program<sup>3</sup> was launched in 2000, and it was inspired by the US Leniency Program, adopting a winner-takes-all approach.<sup>4</sup> Article 86 of Law No. 12,529/11 authorises CADE's Directorate General (DG) to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or *all* of the administrative penalties for the illegal conduct under the law. Although the program is not restricted to cartel conduct, to date, all leniency agreements signed were related to alleged cartels.

Article 87 provides that successful fulfillment of a leniency agreement also protects cooperating parties from *criminal prosecution* under Brazil's Economic Crimes Law (Law No. 8,137/90) and related crimes. At its early stages, Brazil's Leniency Program received some criticism as some claimed that CADE, being an administrative agency, could not ensure criminal immunity. To attempt to minimise uncertainty, although it is not a legal requirement, the authority has regularly involved the Prosecutors' Office (state-level and/or federal-level, depending on the case) in the execution of the leniency letter. In practice, cooperation between criminal and administrative authorities has worked well in most leniency cases, with some exceptions.

Under Brazil's competition law, to benefit from the Leniency Program, the following requirements have to be fulfilled:

- (i) The applicant (a company<sup>5</sup> or an individual) is the first to come forward and confesses its participation in an antitrust violation;
- (ii) The applicant ceases its involvement in the antitrust violation;
- (iii) The applicant agrees to provide full, continuing, and complete cooperation to CADE throughout the investigation;

3 Cartels are often difficult to detect and investigate without the cooperation of the cartel members, as they require the elements of secrecy and deception. For that reason, a significant number of jurisdictions have adopted leniency programs in order to uncover such conduct. Brazil is no exception to that: Law No. 12,529/11 considers that it is in the interest of Brazilian consumers to reward cartel participants who are willing to confess, put an end to their participation in the cartel, and fully cooperate with the Brazilian antitrust authorities to ensure condemnation of the practice.

4 'Brazil has leniency and settlement programs that are similar in many ways to those in the United States.' (Thomas O. Barnett, former Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Perspectives on Cartel Enforcement in the United States and Brazil*, April 2008).

5 If a company qualifies for leniency, directors, officers, and current and former employees of the company who admit their involvement in the cartel as part of the corporate admission may receive leniency in the same form as the corporation. In order to benefit from the Leniency Program, individuals have to sign the agreement along with the company (not necessarily at the same time), and agree to cooperate with CADE throughout the investigation. If the corporation is unable to secure the full and truthful cooperation of one or more individuals, that would not necessarily prevent CADE from granting leniency to the corporation—in this case, both CADE and the criminal prosecutors would be free to prosecute such non-cooperating individuals.

Table 1 Summary of the main cartel cases

Case	Initiation of the investigation—adjudication	Fines (US\$) <sup>a</sup>	% of the total turnover <sup>b</sup>
Air cargo	2006–2013	124 million	Not available
Hydrogen peroxide	2004–2012	58 million	Not available
Industrial gases	2003–2010	1 billion	25% (50%) <sup>c</sup>
Steel bars	2000–2005	148 million	7%
Crushed rock	2002–2005	26 million	15–20%
Flat steel	1996–1999	23 million	1%
Security services	2003–2007	18 million	15–20%
Vitamins	1999–2007	7 million	20%
Sand extractors	2006–2008	1.3 million	10–22.5%

  

Case	Initiation of the investigation—settlement	Settlement (US\$) <sup>d</sup>
Underground/underwater cables	2010–2012	600,000
Air cargo	2006–2012	7 million
Marine hose	2009–2011/2012	10 million
IT services	2005–2011	20 million
Compressors	2009–2009	43 million
Plastic bags	2006–2008	10 million
Cement	2006–2007	19 million

<sup>a</sup>Exchange rate of 1 USD = 2.33 BRL.

<sup>b</sup>Under the previous competition law, fines for corporations for anticompetitive conduct ranged from 1 to 30% of a company's pre-tax revenues in the year preceding the initiation of the proceedings.

<sup>c</sup>One of the defendants had its fine doubled for recidivism.

<sup>d</sup>Exchange rate of 1 USD = 2.33 BRL.

- (iv) The cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the antitrust violation;
- (v) At the time the leniency applicant comes forward, CADE has not received sufficient information about the illegal activity to ensure the imposition of sanctions against the applicant.

Full or partial administrative immunity for companies and individuals depends on whether the DG was previously aware of the illegal activity being reported. If the DG was unaware, the party may be entitled to a waiver from any penalties. If the DG was previously aware, the applicable penalty can be reduced by one-third to two-thirds, depending on the effectiveness of the cooperation and the 'good faith' of the party in complying with the leniency letter. In the leniency letter, the DG generally states whether it was previously aware of the illegal activity being reported or not.

The new competition law eliminated the rule that leniency was not available to a 'leader' of the cartel. The elimination of the disqualification of the 'leader' as a

leniency applicant in the law does not necessarily mean that the authority will disregard the roles played by each cartel participant in determining whether to grant leniency or not—Article 86 of Law No. 12,529/2011 provides that the authority *may* grant leniency if the program requirements are fulfilled. In view of this, the authority is no longer required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party.

Brazil has a marker system that allows a company or individual to approach the authority without having all the information to file for leniency. For this purpose, the party needs to provide basic information on 'who, what, when and where' (the name of the company, and co-conspirators, affected product and geographic markets, and duration of the conduct) and the authority would have up to 3 days to provide the party with an answer on whether leniency is available or not. If yes and in case the authority considers the information to be sufficient, the party would have up to 30 days to perfect the marker.

The proposal for a leniency agreement can be made orally or in writing. Until the leniency agreement is executed, minutes of meetings remain in the possession of the applicant as documentary proof of the applicant's 'whistleblower' status. The proposal can also be made via written communication to the DG, which will be date- and time-stamped and considered strictly confidential by CADE. A proposal for leniency that is refused by the DG may not be construed as a confession as to matters of fact or as an acknowledgment of illegal antitrust activity, and such refusal may not be disclosed to third parties or other authorities.

Should the application be accepted, a leniency agreement is signed between the DG and the applicant. It is CADE's standard practice to invite criminal prosecutors to sign the leniency letter. This is viewed as a means to help maximise benefits for potential applicants and to ensure that administrative and criminal liabilities are addressed together. The following information is generally included in a leniency letter:

- (i) Complete identification of the applicant and its legal representatives, including contact information;
- (ii) Complete description of the illegal antitrust activity, including the identification of co-conspirators and their roles in the conspiracy;
- (iii) Admission of participation in the illegal antitrust activity by the leniency applicant;
- (iv) Statement by the leniency applicant that it has ceased its participation in the illegal antitrust activity;
- (v) List with all the documents provided or to be provided by the applicant in order to support the existence of the illegal antitrust activity;
- (vi) Obligation of the applicant to provide full, continuing, and complete cooperation to CADE throughout the investigation;
- (vii) Possibility to revoke an applicant's conditional leniency if cooperation obligations are not complied with or in case of misrepresentations.

The leniency letter is not subject to CADE's review or approval. CADE, however, must verify whether the applicant has fully complied with its obligations.<sup>6</sup>

As in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (either by being the second to come forward, or by presenting insufficient evidence), but discloses a second

cartel, and meets the other requirements for leniency, will receive full administrative and criminal immunity for the second offence and a one-third reduction in the administrative fine with respect to the first offence. The goal is to encourage subjects and targets of ongoing investigations to consider whether they may qualify for leniency in other markets where they are active. To receive such benefits, the applicant has to disclose the second cartel before the first case is sent by CADE's DG to CADE's Tribunal for final judgement.

The first leniency applicant came before the then SDE in 2003 after two dawn raids had taken place during that year, and the investigative authority had already amassed some positive reputation on its ability to uncover anti-competitive behaviour. At that point, in addition to search and seizure procedures, the agency had intensified the use of other means of proof, in cooperation with the criminal authorities (such as wire-tapping).

Since that year, the then SDE improved the leniency program in order to provide more transparency and certainty to the program. In 2008, the agency issued a '*Leniency Policy Interpretation Guidelines*' and a '*Model Annotated Leniency Agreement*'. Also, due to an increasing concern with discovery, CADE took additional precautionary measures to make sure that the identity and the documents presented by the leniency applicant would remain confidential throughout the investigation (the program was first revised in 2010 for this purpose and more recently in 2012 and 2014). Other concerns were also addressed—for example, additional individuals may join the leniency letter after its initial execution by the corporate applicant.

### III. Challenges ahead

Despite all the improvements achieved in recent years, there are major challenges to be addressed by the authorities in Brazil regarding the implementation of its Leniency Program, as discussed below.

#### A. Interplay of leniency and private claims

Private antitrust enforcement in Brazil has been on the rise over the past 5 years. This may be due to such reasons as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by CADE<sup>7</sup>; and the increasing general awareness of competition law in Brazil. In Brazil, cartel members, with no

<sup>6</sup> Other parties to cartel investigations usually challenge leniency in courts, which have never ruled against CADE's decisions on eligibility for immunity or compliance with the cooperation obligation.

<sup>7</sup> As it would be expected, follow-on litigation depends on the strength of CADE's case. CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued by the agency, all the evidence of the administrative investigation may be re-examined by the judicial courts,

exception to the leniency applicant, are jointly and severally liable for damages caused by their illegal antitrust activity, ie each cartel member may be held liable for the entire cartel-related damage.<sup>8</sup> Other jurisdictions provide for incentives for the leniency applicant regarding damage recovery for victims. For example, in the USA, the *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* (ACPERA) protects leniency applicants from treble damages and joint and several liability in private lawsuits in exchange for cooperation with plaintiffs. Other co-conspirators, however, remain jointly and severally liable for all damages, including treble damages. Another example is Hungary: the 2009 Competition Act states that a leniency applicant is not obliged to compensate injured parties unless they are unable to collect their claims from the other cartel members.

The fact that in Brazil a leniency applicant is jointly and severally liable with co-conspirators for damages caused by the illegal activity has not significantly deterred parties from applying for leniency till recent years. This has started to change in 2010, when CADE, for the first time, sent a copy of its decision finding a cartel violation in the market for industrial and hospital gases to potential injured parties for them to recover damages.<sup>9</sup> This decision was issued in the midst of the consolidation of Brazil's anti-cartel enforcement program, and at a time when the authorities were very committed to promoting consumers' and other stakeholders' awareness of the harm caused by price-fixing, bid-rigging, and other cartel-related practices. This ruling may have tipped the scale for private claims in Brazil, and we should expect an increasing number of claims being brought before courts. For example, in 2013, the State of São Paulo already filed a civil claim against a leniency applicant to recover overspent money due to the existence of an alleged bid-rigging in connection with the construction

and maintenance of São Paulo's subway ('Subway Cartel'). The judge in that case later required the government to amend the claim to also include the other co-conspirators.

If private claims continue to pick up in Brazil before certain amendments to the law are introduced, they would certainly have an adverse effect on the Leniency Program. Brazil's Congress needs, therefore, to pass new legislation excluding the leniency applicant from joint and several liability with its co-conspirators to preserve the incentives for companies to come forward and self-report antitrust offenses.

Another important aspect regarding the interplay between leniency and private claims is related to the level of protection offered by CADE to documents submitted by leniency applicants. The risk of premature disclosure of leniency documents, especially in view of cross-jurisdictional cases<sup>10</sup> and the rise of private antitrust enforcement, might deter a cartel member from applying for leniency in Brazil. Even though CADE has been adopting a number of measures to ensure that leniency documents and the identity of the leniency applicant remain confidential throughout the investigation, it is still unclear how it will treat leniency documents following the adjudication of the case. A 2013 incident involving the leakage of the identity of a leniency applicant at an early stage of the Subway Cartel investigation casted doubts over the ability of the involved authorities to comply with the confidentiality assurances given to the leniency applicant.

Also, if the leniency case involves a dawn raid, which requires judicial authorisation in Brazil, and/or a parallel criminal investigation, CADE will not have the last word regarding confidentiality of the files, and the courts may not grant confidential treatment to information and documents provided by the leniency applicant. If that is to happen, such documents and information would be

which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts. In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, concluded that there was no antitrust violation and therefore did not award any compensation to the plaintiffs. In any case, we should take the latter as an exception as, on average, judicial courts confirm over 70% of CADE's decisions.

8 Pursuant to Article 47 of Brazil's competition law, victims of anticompetitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazil Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damages, usually derived from losses related to its reputation in the market.

9 See Proceedings No. 08012.009888/2003-70 (industrial and hospital gases cartel case), adjudicated by CADE on 1 September 2010. Even before 2010,

few collective damage lawsuits have been spontaneously brought by local state prosecutors' offices representing alleged victims of cartels, most if not all in connection with regional fuel retail cartel cases that were initially investigated by the same prosecutors. Relevant case law includes two investigations by the state prosecutors' office in Rio Grande do Sul. Defendants in the Guaporé investigation were sentenced to two-and-a-half years of jail time for fixing fuel prices. After the conclusion of the criminal investigation, the State Prosecutors' Office filed for individual and collective damages and the parties were sentenced to compensate consumers that had been injured by the cartel, and pay collective moral damages for '*harming society, by having abused local consumers that were affected in their vulnerability*'. Likewise, in Santa Maria, after retailers were also sentenced to serve jail time, prosecutors filed for individual and collective redress, both granted by the courts.

10 Brazil's legal system allows defendants to have access to all the leniency documents since the very beginning of the investigation, which may interfere with the course of foreign investigations.

accessible by any third party, who could then file damage claims before courts.

## B. Interplay of leniency and cartel settlements

It is critical for competition authorities to achieve the right balance between leniency and settlements, as *'if settlement incentives are too high, cartel participants will choose to utilize available settlement systems rather than leniency programs, and settlements would result in a negative effect on the leniency program'*.<sup>11</sup>

Brazil's Settlement Program for cartel investigations was introduced in 2007, through an amendment to the previous competition law. Over 40 settlements have been executed by CADE since then, more than 20 of which in connection with cartel investigations. Parties to international cartel investigations, such as the marine hose, air cargo, compressors, and underground and underwater cables cases, have also settled with CADE.<sup>12</sup> Defendants can propose to settle at any stage of the investigation, regardless of whether the case is being handled by the DG or CADE's Tribunal. Defendants can only try to settle once ('one-shot game'). The negotiation process may be confidential at the discretion of CADE.

A scale of discounts apply to the settling sum that defendants that wish to settle are required to pay. Reductions may vary between (i) 30% and 50% for the first to propose to settle; (ii) 25%–40% for the second in; and (iii) for up to 25% to the other parties that come after. For settlement proposals submitted after the DG has concluded the investigation, reductions may be no greater than 15%. Those discounts are in theory based on the fine that would apply to the parties under investigation for cartel, and are supposed to vary according to (i) the order in which the parties come forward and (ii) the extent and usefulness of what the parties provide in cooperation with the authorities.<sup>13</sup>

Based on CADE's experience till March 2013, the benefits of settling over applying for leniency were as follows: (i) broad confessions accepted by CADE in settlements, which contrasted with the specific description the leniency applicant has to provide of its participation in the illegal activity being reported; (ii) no need to provide meaningful cooperation; (iii) immediate suspension of the investigation for settling parties during a specified period of time for the conditions set forth in the agree-

ment to be fulfilled, after which they would be excluded from the proceedings, while the leniency applicant has to take part in the investigation till its end; (iv) CADE's promise not to bring further charges against parties related to the settling defendant (eg current and former employees and other companies part of the same economic group), even if they have not been identified at the time the agreement was signed ('non-prosecution' promise, usually referred to 'umbrella' provision by CADE). As such general 'non-prosecution' promise is not available for the leniency applicant, it created an uneven playing field, reducing the incentives for leniency.

To deal with most of the issues identified above, in March 2013 CADE introduced new requirements for defendants in cartel investigations interested in settling. All cartel defendants must now acknowledge their involvement in the activity under investigation.<sup>14</sup> The provision does not refer to a 'confession' and the requirement 'to acknowledge participation' may allow for some flexibility with respect to its terms, compared with a strict 'confession' requirement. Still, this may also prevent individuals from settling with CADE, since 'acknowledging participation' in connection with the administrative investigation may compromise their respective defences in parallel criminal investigations, and may result in conflict of interest between the company and its employees should the company choose to settle the case with CADE even if the individuals decide otherwise. This situation is specific to Brazil, where it is possible to have parallel enforcement initiatives taken by administrative and criminal authorities against the same individuals for the same facts.

Also, the new regulation requires all cartel defendants that wish to settle to provide meaningful cooperation to CADE's DG. This means that both the leniency applicant and the settling cartel defendant are required to break ranks with the other cartel members and cooperate with the government. Cooperation may include submitting documents and information in the possession, custody, or control of the settling party; using the settling party's best efforts to secure the cooperation of current and former employees; and appearing for interviews, court appearances, and trials.

Finally, pursuant to the new regulation, the assessment on whether the parties have or not fulfilled the settlement conditions will take place only when CADE issues a final ruling on the case, and therefore, just like

11 See International Competition Network, *Cartel Settlements*, 2008, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>.

12 The 2007 Settlement Regulation also included rules on settlements for other types of anticompetitive conduct, which had been in place since 1994.

13 Since CADE is yet to issue sentencing guidelines, and case law for hard-core cartel cases is still limited, these standards may be of little help. In practice, CADE has been requiring defendants to pay amounts ranging from 5 to 15% of the revenues generated by the party in the year prior to the investigation in order to settle a case.

14 Until March 2013, such requirement only applied to cases initiated through a leniency agreement.

the leniency applicant, the settling defendant will be bound to cooperate with the authorities until the end of the investigation.

Despite the new regulation, the ‘umbrella’ provision, which shields from administrative liability of all employees and former employees of the settling cartel participant even if they are not a party to the settlement with CADE, is still only available for settlements and not for leniency agreements, which may act as a disincentive to file for leniency. On the other hand, there is still one major advantage of leniency over settlements for individuals: while the leniency applicant addresses together the administrative and criminal liabilities (being entitled to criminal immunity), the defendant interested in settling an ongoing case has to deal with the administrative and criminal investigations separately, and criminal immunity is no longer available.

### C. Length of the proceedings

The fact that Brazil’s competition law requires the corporate applicant to identify all the individuals, even low-level employees, for them to sign the leniency letter in order to be protected<sup>15</sup> and also identify individuals working for other cartel members to be included as defendants in the investigation, results in a very large number of defendants in one single case (there have been instances of 70 defendants in a single cartel case). This significantly extends the length of the administrative proceedings, and it also causes delay in joint international investigations. Also, the fact that there is an increasing number of foreign individuals being investigated in Brazil makes the situation more critical, as apart from translation requirements, CADE has to locate the individuals (who may not be working for the same company anymore) and serve process through a central authority (in Brazil, the *Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional* (DRCI)) or through consular and diplomatic channels; serving process in itself may take 1 to 3 years.

To deal with this challenge, CADE may have to limit through case law and under the limits allowed by the law the type of individuals that may be held administratively (as opposed to criminally) liable for cartel conduct. In 2007, for the occasion of the adjudication of the first leniency case in Brazil,<sup>16</sup> the majority of CADE’s Com-

missioners concluded that employees shall not be subject to CADE’s enforcement, and could only be held liable for criminal offenses; only officers and directors would be liable before CADE. However, CADE took a different approach in 2010, and concluded that any individual could be held administratively liable as long as there is enough evidence of its participation in the conduct. CADE needs to address this inconsistency as soon as practicable and adopt a strict approach regarding including individuals in the administrative investigation.

### D. Related criminal and administrative offenses

Article 87 of Brazil’s competition law provides that successful fulfillment of a leniency agreement insulates cooperating parties from criminal liability for cartel offenses under Brazil’s Economic Crimes Law (Law No. 8,137/90) and for other criminal offenses committed in connection with the antitrust violation, such as fraudulent bidding practices (Law No. 8,666/93) and conspiracy to commit crimes (Article 288 of Brazil’s Criminal Code).<sup>17</sup> Although the law generally refers to ‘*crimes directly related to the cartel activity, such as the ones listed in Law No. 8,666/93 and Article 288 of Brazil’s Civil Code*’, some prosecutors have already stated that a leniency letter signed with CADE may only protect leniency recipients from criminal conviction regarding those offenses explicitly mentioned by the law. This would mean, for example, that leniency applicants would not be shielded from liability for taking part in ‘organised crime’ directed to cartels, a crime introduced in Brazil by Law No. 12,850/13. Although this narrow interpretation of the law is not reasonable, it introduces legal uncertainty and decreases incentives for members to international cartels to apply for leniency in Brazil. In any case, to date, in cases where the additional offense has consisted of activity that is usually part to the commission of an antitrust violation, there have been no instances where a Prosecutor’s Office has elected to criminally prosecute such other conduct performed by a leniency applicant.<sup>18</sup>

The same concern applies to other administrative offenses committed in connection with the antitrust violation, with the difference that there is no provision in Brazil’s competition law on the possibility of obtaining immunity for those offenses as a result of a leniency letter executed with CADE. For example, if a cartel par-

15 This is opposite to what happens under the US system, for example, where all parties that are not carved out are granted conditional leniency.

16 See Proceedings No. 08012.001826/2003-10, adjudicated by CADE on 19 September 2007.

17 A grant of leniency under the previous antitrust law extended to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement.

The new competition law broadens the leniency grant to increase incentives for leniency.

18 In 2008, a criminal prosecutor of the State of São Paulo pressed criminal charges for related offenses against individuals who signed the leniency letter along with the corporation, but this decision was not confirmed by the head of the Prosecutor’s Office of the State of São Paulo.

ticipant bribes a public official to direct contracts to the designated winning bidders in connection with a bid-rigging arrangement, the company would also be subject to a fine of up to 20% of the company's gross revenues in the year prior to the initiation of the investigation under Brazil's Anti-bribery Law (Law No. 12,846/13), apart from other sanctions that may be imposed by CADE. A leniency applicant would have to engage into discussions with both CADE and the highest authority of the specific government entity (at the Executive, Legislative, or Judicial branches) where the alleged corruption practice took place, to try to ensure a more lenient treatment. Brazil's Anti-bribery law provides that self-disclosure of corrupt practices and illegal conduct in public tenders by corporations may result in a reduction of up to two-thirds of the applicable fine and immunity from other sanctions. Unlike CADE's leniency program, the anti-bribery law does not extend the benefits of its whistleblowers' program to the individuals involved, who may still be held liable under Brazil's Criminal Code and other statutes.

### E. Criminal jurisdiction over cartel conduct

Brazil's body of laws and case law is unclear about which judicial system (federal or state-level) has criminal jurisdiction over cartel conduct. While the Economic Crimes Law and the Public Procurement Law are federal statutes, state courts may have jurisdiction to enforce them. Pursuant to Brazil's Constitution, state courts have jurisdiction over all economic-related matters, unless otherwise provided by a federal law or in case the subject matter of the cartel directly affects the interest of the federal government. As both the Economic Crimes Law and the Public Procurement Law are silent regarding jurisdiction, some scholars and courts take the view that federal courts would only retain jurisdiction if the conduct under scrutiny directly affects the interests of the federal government. A 2002 law<sup>19</sup> allows the Federal Police to criminally investigate cartels when the conduct has interstate or international effects, and there are conflicting decisions of the Superior Court of Justice on

the sufficiency of such standard to establish jurisdiction of federal courts to review cases with interstate and/or international dimensions.<sup>20</sup> This situation creates legal uncertainty for the leniency applicant, and reduces the incentive for leniency. While this issue remains unresolved, CADE has been inviting both Federal and State-level prosecutors to sign the leniency letter but legal certainty will only be achieved with the passage of a law clearly establishing federal or state-level criminal jurisdiction over cartel conduct.

### III. Conclusion

As a policy matter, Brazilian antitrust enforcers are determined to impose stiffer sentences against harmful international cartels that target businesses and consumers in Brazil. In the coming years, more individuals are expected to be sentenced to serve jail time for engaging in cartel conduct, and CADE is expected to impose ever-higher fines against corporations and individuals, contributing to the attractiveness of Brazil's Leniency Program.

As Brazil's Leniency Program evolves, challenges facing international practitioners and enforcers alike tend to get more complex and intertwined. Issues related to discovery and confidentiality, especially in view of cross-jurisdictional cases, and the interplay between leniency and settlements, among other issues, are first and foremost symptoms of a system which is no longer in its infancy. Since 2010, CADE has continued to strive to broadcast its Leniency Program, but in the background there is now increasing concern that applicants may be exposed in ways that could impair their standing in relation to co-conspirators, other enforcement agencies, and injured third parties. The transition of Brazil's Leniency Program into a mature and tested set of rules and practices is a process that we are seeing now—and as in any such transition, it will not be without some turbulence.

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<sup>19</sup> Law No. 10,446/02.

<sup>20</sup> See Habeas Corpus No. 32.292 - RS (2003/0223642-5), adjudicated on 1 April 2004.