

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by  
Brazil****5 June 2018**

This document reproduces a written contribution from Brazil submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm](http://www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm)

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## *Brazil<sup>1</sup>*

1. CADE implemented its Leniency Programme in 2000 and signed the first leniency agreement in 2003. Since then, 83 agreements have been signed (64% national cartels, 18% international cartels with global dynamics, 18% cartels with national and international effects). Despite the increasing intelligence efforts and independent proceedings, the leniency programme is still the main tool for detecting cartels in the country.

2. Between 2003 and 2011, the majority of agreements signed (70%) referred to international cartel cases. After this period, the prosecution of bid rigging cartels was improved, and the number of national cartel processes resulting from leniency agreements grew significantly (77% of the agreements signed were domestic cartel cases). Changes implemented in the leniency programme by law No. 12.529/2011<sup>2</sup> may have helped to induce a greater number of cartelists to report national cartels. Reliability, predictability, transparency and legal certainty in the programme rules can be seen as a good explanation for this new trend<sup>3</sup>. The Car Wash operation also played an important role in this tendency, by incentivising a lot of large Brazilian contractors to report their participation in national bid-rigging cartels to CADE.

3. Although nowadays the Brazilian Antitrust Leniency Programme is capable of attracting national and international cartel participants, a lower-than-hoped for number of leniency applications by small and medium sized companies is still a reality. This could be due to an information gap: small and medium sized companies do not usually have compliance units and often are not aware or worried about antitrust infringements. In this sense, CADE would need to find more effective ways of promoting its leniency programme among these companies. But there is also a cost component involved: companies with this profile are inclined to postpone their expenditures, choosing the litigation process instead of an agreement, hoping for acquittal. Another cost that seems to be considered is related to the company's reputation. Reporting to the authority implies

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<sup>2</sup> The main changes promoted by Law No. 12.529/2011 were: (i) alteration of the competent authority to enter into Leniency Agreements from SDE/MJ to CADE, through its General Superintendence; (ii) repealing the rule stating that the cartel leader could not propose a leniency agreement; and (iii) specification of the benefits of the Leniency Agreement in the criminal sphere: Law No. 12.529/2011 provides that execution of a Leniency Agreement leads to suspension of the limitation period and prevents the criminal prosecution of the leniency recipient regarding the offenses set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to cartel activity, such as those set forth in the General Procurement Act (Law No. 8.666/1993), and on article 288 of the Criminal Code (criminal conspiracy). Once the Leniency Agreement has been fulfilled, the ability to sanction the above crimes is automatically extinguished, according to article 87 of Law No. 12.529/2011.

<sup>3</sup> On May 2016, CADE published the first version of the Guidelines on CADE's Antitrust Leniency Programme, last updated on September 2017. Available at: <http://en.CADE.gov.br/topics/publications/guidelines/guidelines-CADEs-antitrust-leniency-programme-final.pdf>

recognizing participation in an illicit activity that may not be discovered and it can have serious consequences on the present. To improve the programme and dispel the fears of small and medium-sized companies the specialised leniency unit at CADE is able to provide a friendly approach and strictly observe the confidentiality guarantees.

4. Another challenge faced by the Brazilian Leniency Programme is *market diversification in leniency applications*. Today the applications received are concentrated mainly on construction services, automotive and electronic components markets. It is known that some markets are more prone to collusion than others, but the possibility of cartelisation exists in almost every market. In order to promote this diversification, CADE should enhance its detecting capability in diverse markets through screening and other intelligence tools.

5. A big concern nowadays is the *balance between public and private enforcement of cartel conducts*. Although civil actions for damages are still incipient in Brazil, leniency applicants are concerned about the consequences of signing an agreement with CADE, as they are likely to be the first (and easier) target for follow-on civil damages actions.<sup>4</sup> The disadvantage of being sued first and being held liable for the full amount of the cartel can of course be a major disincentive for a leniency application. To ensure that the leniency recipient does not suffer worse consequences from damages actions than its co-cartelists, CADE is now working on a resolution to regulate the access to documents by third parties<sup>5</sup>. There is also the Senate legislative bill No. 283/2016 that recommends that a leniency recipient and the ones who have signed Cease and Desist Agreements (TCC in its acronym in Portuguese) should be exempted from paying double restitution in case of civil damages claims and should not be held jointly liable for the damages caused by the cartel.

6. A challenge that has arisen in leniencies involving public bids is the concern with criminal prosecution of corruption crimes. Some individuals and/or companies may even be interested in antitrust leniency, but hesitate to apply for it because of the exposure to corruption crimes, which are not subject to immunity. Thus, an important agenda, recently brought about by the Car Wash Operation, is the *necessity of a more effective coordination with other governmental agencies responsible for prosecuting crimes that are frequently related to cartel conduct*, e.g. corruption. The Federal Prosecution Service (“MPF” in its acronym in Portuguese) and the Office of the Comptroller General (“CGU” in its acronym in Portuguese) also sign agreements that give immunity and/or penalty/fine reductions<sup>6</sup>.

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<sup>4</sup> In international cartel cases, leniency applicants in Brazil fear the exposure to follow-on civil damages actions, especially in the United States, as the Brazilian antitrust law confers criminal immunity.

<sup>5</sup> The proposal of Resolution under analysis sets up the confidentiality of the History of Conduct and presented evidences. However, after the condemnation, the documents and excerpts explicitly used to fundament the decision can be discovered.

<sup>6</sup> Ruled by Law n° 12.529/2011, CADE’s antitrust leniency programme is available to legal entities and individuals, who benefit from administrative and criminal immunity. The anticorruption leniency agreement, signed by CGU, was established by Law No.12.846/2013 and is available to legal entities only, that benefit from administrative fine reduction and immunity from the penalty of prohibition of receiving incentives, subsidies, grants, donations or loans from the government. The collaboration agreements (Law n° 12.850/2013) are signed by the MPF and

7. The interaction between CADE and the MPF is well established: in antitrust leniency agreements, for instance, a public prosecutor co-signs the agreement as a consenting party, which gives legal certainty to the criminal immunity for the cartel conduct. This co-signing, however, does not mean that the MPF is not going to prosecute crimes that are not related to the cartel conduct, but establishes an open line to negotiate collaboration agreements with that prosecution body.

8. Due to the recent implementation of law No. 12.846/2013 (“Anticorruption Law”), which gave CGU the authority to sign administrative leniency agreements on corruption matters, CADE is also seeking to establish greater cooperation with that governmental body. Especially when it comes to bid-rigging cases since one of the leniency programme’s main goals is to avoid overlaps or grey zones with other public bodies. The cooperation can also involve information sharing if the applicant signs a protocol waiver, in which case CGU has to abide by confidentiality stipulations.

9. In order to claim jurisdiction to start a leniency agreement negotiation in multijurisdictional cartel cases, CADE needs to verify the existence of substantial effects of the cartel conduct in the Brazilian market. In case the conduct had overt main effects on another jurisdiction, it is possible to have prosecutorial deference in favour of the authority where there is enough evidence of prosecution efforts<sup>7</sup>.

10. In this sense, the *confidentiality request can hinder the co-ordination with other agencies when there is no waiver granted by the applicants*. When CADE receives confidentiality waivers from applicants, it can cooperate with foreign antitrust authorities to negotiate when the Agreement is going to be publicised, or even when the administrative proceeding is going to be initiated, aiming to preserve investigations in other jurisdictions and/or not to harm any negotiation of agreements by the applicants in other countries<sup>8</sup>.

11. In terms of convergence and harmonisation of national leniency programmes, CADE considers that the principles of the leniency programme – confidentiality of the negotiation, transparency of rules and the more privileged position of the leniency recipient regarding its co-cartelists - should be preserved by all the authorities in order to protect this important institute for cartel sanction and deterrence. Hereupon, international organisations and networks, such as OECD and ICN, play a relevant role in the effort to develop international standards and guidelines that encourage the adoption of the fundamentals of effective leniency programmes.

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are available to individuals only. In this case, individuals benefit from full criminal immunity or reduction in imprisonment time.

<sup>7</sup> The Nishikawa case was an important high-level precedent of coordination between international jurisdictions. Nishikawa Rubber Co., Ltd. is a transnational producer of body sealing products (BSP). The BSPs were sold to carmakers in the US and for Toyota and Honda to use in the cars manufactured in Canada and then sent to the US for sale. Under the Agreement for the application of positive comity principles to the enforcement of competition laws signed by the two countries, the Competition Bureau recognized that the effects of the conduct were concentrated in the United States market. For this reason, it was agreed that the Antitrust Division of the Department of Justice would address the matter.

<sup>8</sup> The internationally coordinated dawn raid carried out to provide evidence to the hermetic compressor proceeding, in 2009, was a landmark to CADE in the cooperation with foreign antitrust authorities.