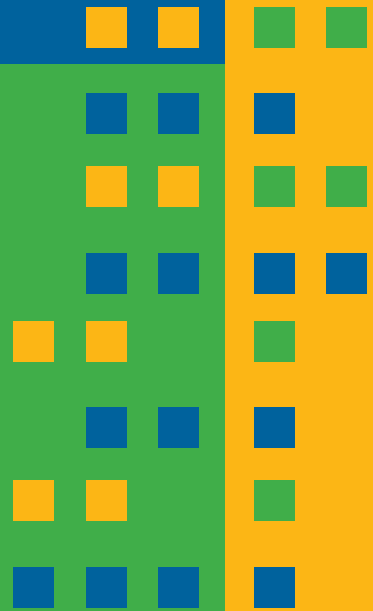


# OVERVIEW OF COMPETITION LAW IN BRAZIL



**IBRAC**

Desde 1992

Instituto Brasileiro de Estudos de Concorrência,  
Consumo e Comércio Internacional

## Dados Internacionais de Catalogação na Publicação (CIP)

O967 Overview of competition law in Brazil. / São Paulo : IBRAC/Editora Singular, 2015.

448 p.

ISBN: 978-85-86626-74-6

Edited by: Cristianne Zarzur, Krisztian Katona and Mariana Villela.

Contributors: Ana Paula Martinez, Aurélio Santos, Barbara Rosenberg, Bruno de Luca Drago, Caio Mario da Silva Pereira Neto, Carlos Francisco de Magalhães, Cristiano Rodrigo Del Debbio, Daniel Andreoli, Eduardo Caminati Anders, Eduardo Frade Rodrigues, Erika Vieira Sang, Fabíola Cammarota de Abreu, Fabricio Antonio Cardim de Almeida, Filippo Maria Lancieri, Francisco Niclós Negrão, Gabriel Nogueira Dias, Guilherme Morgulis, João Marcelo Lima, Joyce Midori Honda, Leonardo Maniglia Duarte, Luís Henrique Perroni Fernandes, Marcela Abras Lorenzetti, Marcelo Calliari, Marcio Bueno, Marcio Dias Soares, Marcos Exposto, Marcos Paulo Verissimo, Maria Eugênia Novis, Mariana Tavares de Araujo, Mauro Grinberg, Paulo Eduardo Lilla, Paulo Leonardo Casagrande, Pedro Paulo Salles Cristofaro, Priscila Brolio Gonçalves, Renata Fonseca Zuccolo, Renê Guilherme S. Medrado, Ricardo Botelho, Rodrigo Alves dos Santos, Sandra Terepins, Vinicius Marques de Carvalho.

1. Direito da concorrência, Brasil. 2. Concorrência, Brasil. 3. Direito econômico. 4. Direito econômico internacional. I. Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional – IBRAC (Ed.). II. Editora Singular (Ed.).

CDD: 341.3787

CDU: 339.137:34(81)

CDU: 929

Revisora: Christina Rostworowski da Costa

Diagramação: Microart Design Editorial

Capa: Aeroestudio

© desta edição [2015]

**IBRAC**

Rua Cardoso de Almeida, 788, cj 121

05013-001 – São Paulo-SP

Tel. (11) 3872-2609

[www.ibrac.org.br](http://www.ibrac.org.br)

[ibrac@ibrac.org.br](mailto:ibrac@ibrac.org.br)

**Editora Singular**

[www.editorasingular.com.br](http://www.editorasingular.com.br)

[singular@editorasingular.com.br](mailto:singular@editorasingular.com.br)

## Chapter IX

# ANTI-CARTEL ENFORCEMENT IN BRAZIL: STATUS QUO & TRENDS

ANA PAULA MARTINEZ

MARIANA TAVARES DE ARAUJO

Hardcore cartel prosecution has quickly evolved in Brazil over the past decades. From 1994 to 2003, Brazil's antitrust authorities focused primarily on merger reviews, and substantial resources were devoted to the review of competitively innocuous mergers. In 2003, the antitrust authorities established a hierarchy of antitrust enforcement that placed anti-cartel enforcement as top priority. From 2003 to 2008, Brazil's antitrust authorities implemented the leniency program and built a network with criminal prosecutors that allowed them to tap into sophisticated investigative techniques and secure criminal sanctions, including jail sentences for cartelists. Following that, CADE concluded the first high profile cartel cases and spent significant resources on public outreach on harmful effects of cartels. A more recent phase began in May 2012, when the current antitrust law entered into force and introduced key legal changes, including revised administrative and criminal sanctions to cartel conduct.

This article provides an overview of anti-cartel enforcement in Brazil and discusses current trends.

## I. Overview of the Anti-cartel Enforcement

### A. Administrative Enforcement

At the administrative level, antitrust law and practice in Brazil is governed by the recently enacted Law 12,529/11, which entered into force on May 29, 2012 and replaced Law 8,884/94.<sup>1</sup> The new antitrust law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Brazilian Antitrust Authority – CADE. CADE's structure includes a Court comprised of six Commissioners and a Chairman; a Directorate-General for Competition – DG; and an Economics Department. The DG is the chief investigative body in matters related to anticompetitive practices. CADE's Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review. There are also two independent offices within CADE: CADE's Legal Services, which represents CADE in court and may render opinions in all cases pending before CADE; and the Federal Prosecution Office, which may also render legal opinions in connection with cases pending before CADE.

In Brazil, the Anglo-American concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent, which means that CADE's Commissioners are under no obligation to follow past decisions in future cases. Under CADE's internal regulations, legal certainty is only achieved if CADE rules in the same way at least ten times, after which they codify a given statement via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one.<sup>2</sup>

<sup>1</sup> Prior to Law 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. SDE was the chief investigative body in matters related to anticompetitive practices, and issued non-binding opinions in connection with merger cases. SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anticompetitive investigations. CADE was structured solely as an administrative court, which made final rulings in connection with both merger reviews and anticompetitive practices.

<sup>2</sup> Binding Statement No. 7, whereby it is an antitrust violation for a physicians' cooperative with monopoly power to prevent affiliated physicians from being affiliated with other physicians' cooperatives and medical insurance plans.

Article 36 of Law 12,529/11 sets forth the basic framework for anticompetitive conduct in Brazil. Article 36 addresses all types of anticompetitive conduct other than mergers. The law did not change the definition or the types of anticompetitive conduct that could be prosecuted in Brazil under the previous law. The law prohibits acts ‘*whose object or effect is to*’ (i) limit, restrain or, in any way, adversely affect open competition or free enterprise; (ii) control a relevant market of a certain good or service; (iii) increase profits on a discretionary basis; or (iv) engage in abuse of monopoly power. However, Article 36 specifically excludes the achievement of market control by means of ‘*competitive efficiency*’ from potential violations. Under Article 2 of the law, practices that take place outside the Brazilian territory are subject to CADE’s jurisdiction, provided they produce actual or potential effects in Brazil.

The law was broadly drafted to apply to all forms of agreements and exchange of sensitive commercial information, formal and informal, tacit or implied. Cartels, as an administrative offense, may be sanctioned by CADE – fines<sup>3</sup> against the companies may range from 0.1 to 20 % of the company’s or group of companies’ pre-tax turnover in the economic sector affected by the conduct, in the year prior to the beginning of the investigation. To date, CADE has not issued secondary legislation clarifying in which cases the agency will resort to the group’s sales instead of taking into account only the turnover of the defendant. CADE’s Resolution No. 3/2012 lists 144 ‘fields of activities’ to be considered for the purposes of calculating the fine under the new law. CADE may resort to the total turnover, whenever information on sales derived from the relevant ‘sector of activity’ is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. CADE has seldom resorted to this provision when determining fines and, when it has, the fine imposed was less than the equivalent to the maximum percentage of the defendant’s turnover allowed by the law.

Officers and directors<sup>4</sup> liable for unlawful corporate conduct may be fined an amount ranging from 1 to 20% of corporate fines; unlike the

<sup>3</sup> Individuals and companies may also be fined (a) for refusing or delaying the provision of information, or for providing misleading information; (b) for obstructing an on-site inspection; or (c) for failing to appear or failing to cooperate when summoned to provide oral clarification.

<sup>4</sup> Under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices perpetrated by the company. Con-

previous law, CADE must currently determine fault or negligence by the directors and officers in order to find a violation. Other individuals, business associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50,000.00 to BRL 2 billion.<sup>5</sup>

According to Article 45 of Brazil's antitrust law, the following shall be taken into account by CADE when setting fines: (i) level of seriousness of the infringement; (ii) good faith of the defendant; (iii) gain obtained or aimed by the defendant; (iv) whether the conduct has been consummated or not; (v) level of actual or potential harm to competition, Brazilian economy, consumers or third parties in general; (vi) detrimental economic effects caused by the conduct in the market; (vii) economic situation of the defendant; and (viii) recidivism. Finally, fines must be doubled if the defendant was already sanctioned by CADE for antitrust offenses in the last five years,.

Apart from fines, CADE may also: (i) order the publication of the decision in a major newspaper, at the wrongdoer's expense; (ii) debar wrongdoers from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years; (iii) include the wrongdoer's name in the Brazilian Consumer Protection List; (iv) recommend tax authorities to block the wrongdoer from obtaining tax benefits; (v) recommend the intellectual property authorities to grant compulsory licences on patents held by the wrongdoer; and (vi) prohibit individuals from exercising market activities on his/her behalf or representing companies for five years.<sup>6</sup> As for structural remedies, under the law, CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects associated with the wrongful conduct.

---

sidering the strict sanctions that have been imposed to legal entities by CADE to date, this provision has nearly been forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

<sup>5</sup> Approximately USD 17,482.00 to USD 699,300,000.00 (exchange rate of USD 1.00 = BRL 2.86).

<sup>6</sup> The idea behind this provision was to deal with situations in which CADE debarred wrongdoers from participating in public procurement procedures and from obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision.

The law also includes a broad provision allowing CADE to impose any ‘*sanctions necessary to terminate harmful anticompetitive effects*’, whereby CADE may prohibit or require a specific conduct from the wrongdoer. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE’s wide-ranging enforcement of such provision may prompt judicial appeals.

As for law enforcement, the prosecution of cartels has been a top priority in Brazil since 2003. Approximately fifty leniency agreements have since been signed, the majority with alleged members of international cartels, and more than 400 search warrants have been served since 2003.

As a result of the use of more aggressive investigative tools, CADE has been imposing extremely high fines on both companies and individuals found liable for hardcore cartel conduct. The record fine imposed by CADE in connection with a cartel case was of roughly USD 1 billion, 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 sales of the defendant in cases with direct evidence, as opposed to an average of 1% of the annual gross sales of the defendant in cases without direct evidence). The table below provides a summary of the main cartel cases sanctioned by CADE and the duration of the investigation:

Case	Filing of the Investigation – Adjudication	Fines (USD) <sup>7</sup>	% of the Total Turnover <sup>8</sup>
Marine Hose	2007-2015	5 million	Not available
Hospitals	2000-2015	3,8 million	Not available
Metal Detector Security Doors	2008-2014	4,4 million	Not available
Cement	2006-2014	1,08 billion	15-20% (30-40%) <sup>9</sup>
LPG Distribution	1997-2014	3,7 million	Not available

<sup>7</sup> Exchange rate of USD 1.00 = BRL 2.86.

<sup>8</sup> Under the previous antitrust law, fines for corporations for anticompetitive conduct ranged from 1 to 30% of a company’s pre-tax sales in the year preceding the filing of the proceedings.

<sup>9</sup> The fine of one of the defendants was doubled for recidivism.

Case	Filing of the Investigation – Adjudication	Fines (USD) <sup>7</sup>	% of the Total Turnover <sup>8</sup>
Air Freight	2007-2014	29 million	Not available
Copyright Collection	2010-2013	12.6 million	Not available
Air Cargo	2006-2013	100 million	Not available
Hydrogen Peroxide	2004-2012	47 million	Not available
Industrial Gases	2003-2010	800 million	25% (50%) <sup>10</sup>
Steel Bars	2000-2005	120 million	7%
Crushed Rock	2002-2005	21 million	15-20%
Flat Steel	1996-1999	19 million	1%
Security Services	2003-2007	15 million	15-20%
Vitamins	1999-2007	5,7 million	20%
Sand Extractors	2006-2008	1,0 million	10-22.5%

In addition to the cases described above, there are over one hundred ongoing cartel investigations pending before CADE, including cases involving markets such as TFT-LCD, CDT, CPT, air freight forwarders, DRAM, ODD, underground cables, underwater cables, polymers, salt and silicate, capacitors, several auto-parts cases, most of them initiated through leniency filings.

Brazil's Settlement Program for cartel investigations was introduced in 2007, through an amendment to the previous antitrust law.<sup>11</sup> In March 2013, CADE introduced revised requirements for settlements, according to which all defendants in cartel cases must now acknowledge their

<sup>10</sup> The fine of one of the defendants was doubled for recidivism.

<sup>11</sup> The 2007 Settlement Regulation also included rules on settlements for other types of anticompetitive conduct, which had been in place since 1994.



involvement in the activity under investigation.<sup>12</sup> The provision does not refer to a ‘confession’ and the requirement ‘to acknowledge participation’ may allow for certain flexibility with respect to its terms, compared to a strict ‘confession’ requirement.<sup>13</sup> Also, under the current rules, meaningful cooperation is mandatory in all cartel cases; and the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE issues a final ruling on the case.<sup>14</sup>

Settlement proposals may be accepted at any stage of the investigation, even after DG has concluded its investigation and while CADE’s Court reviews the case. Defendants may only try to settle once (“one-shot game”). The negotiation process may be confidential at CADE’s discretion. A scale of discounts is applicable to the settling sum defendants that wishing to settle must pay.<sup>15</sup>

<sup>12</sup> Until March 2013, such requirement only applied to cases initiated through a leniency agreement.

<sup>13</sup> This may also prevent individuals from settling with CADE, since ‘acknowledging participation’ in connection with the administrative investigation may compromise their respective defense 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 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.

<sup>14</sup> 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.

<sup>15</sup> Reductions may vary between (i) 30% and 50% for the first party to propose the settlement; (ii) 25% to 40% for the second in; and (iii) up to 25% to the other parties that follow. For settlement proposals submitted after the DG has concluded the investigation, reductions are limited to 15%. Theoretically based on the fine that would apply to the parties under investigation for cartel, such discounts 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. Since CADE is yet to issue sentencing guidelines, and case law for hardcore cartel cases is still limited, these standards may be of little help. In practice, CADE has required defendants to pay amounts ranging from 5 to 15% of the sales generated by the party in the year prior to the investigation, in order to settle a case.

The table below provides a summary of the main cartel cases settled by CADE and the duration of the investigation:

<b>Case</b>	<b>Filing of the Investigation –Settlement</b>	<b>Settlement (USD)<sup>16</sup></b>
CRT (CPT and CDT)	2009-2015	14.4 million
Medical and Hospital Services	2000-2015	1.4 million
DRAM	2010-2014/2015	945,000
Air and Maritime Freight	2009-2014/2015	8.5 million
IT Services	2012-2014	400,000
Coatings and Composites Resins	2014	12.4 million
LCD	2008-2014	15 million
LPG Distribution	2005-2013/2014	9.7 million
Laundry Services	2008-2014	1 million
Ambulances	2005-2014	12.5 million
Underground/ Underwater Cables	2010-2013	480,000
Air Cargo	2006-2013	5.7 million
Marine Hose	2007-2008/2013	10 million
IT Services	2005-2011	16 million
Compressors	2009-2009	35 million
Plastic Bags	2006-2008	8 million
Cement	2006-2007	15,5 million

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies in cartel cases. Brazil's antitrust authorities have

<sup>16</sup> Exchange rate of USD 1.00 = BRL 2.86.

executed cooperation agreements with the U.S. Department of Justice, the European Commission, Argentina, Canada, Chile, China, Equator, France, Peru, Portugal and Russia.<sup>17</sup> The Brazilian authorities have requested the assistance of foreign authorities in several occasions 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.

### B. *Criminal Enforcement*

Apart from being an administrative offense, cartel is also a crime in Brazil, punishable by criminal fine and imprisonment from two to five years. According to Brazil's Economic Crimes Law (Law 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 8,666/93 specifically targets fraudulent bidding practices, punishable by criminal fine and imprisonment from two to four years.

Brazilian Federal and State Prosecutors are in charge of criminal enforcement in Brazil, and act independently from 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 or may not file criminal charges against the reported individuals.

The administrative authorities (former SDE and current DG) have set a framework for the relationship with the criminal authorities, which reduces legal uncertainty and creates a healthy competition among the different criminal enforcement authorities. Each one of the 26 Brazilian States has a State Prosecution Office. Early in its efforts to increase cooperation, SDE established a relationship with prosecutors in São Paulo and encouraged the creation of a special unit within the Prosecution Office of the State of São Paulo – named *GEDEC* – to investigate cartels and cooperate with the competition agencies in joint criminal and administrative investigations. The cooperation experience with São Paulo was used as a reference point

<sup>16</sup> 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 U.S. Department of Justice and the European Commission.

to foster relationships with other prosecutors. In December 2007, the Federal Police established an “*Intelligence Center for Cartel Investigations*” to advance cooperation efforts in joint criminal and administrative investigations of cartels. Along the same line, the Prosecution Offices of the States of Paraíba, Rio de Janeiro, Santa Catarina, Amazonas, Minas Gerais, Rio Grande do Norte and Piauí have organized special anti-cartel units, with the support of the Brazilian Ministry of Justice. In October 2009, the Ministry of Justice launched the National Anti-Cartel Strategy, a permanent forum comprised of both criminal and administrative antitrust authorities to discuss the implementation of the country’s criminal anti-cartel laws. In November 2013, CADE executed a cooperation agreement with the Federal Police setting the framework for cooperation under the new antitrust law.

## II. Trends

### C. *Increased Criminal Prosecution*

More than 350 executives are facing criminal proceedings in Brazil for alleged cartel offenses and there is a final criminal decision sentencing 19 executives to pay a criminal fine for cartel offenses.<sup>18</sup> In 2014, a criminal court sentenced one defendant in an international cartel case to serve 10 years and 3 months in prison, and also determined the payment of damages in the amount of approximately USD 130 million.<sup>19</sup> Even though the maximum statutory prison term for cartel offenses is of 5 years, the judge found the defendant guilty on multiple counts (collusion and criminal conspiracy). Another 21 executives were sentenced to serve jail terms of two and a half to five years and three months for cartel offenses.

Though there are appeals pending review against such judicial decisions, the decisions indicate that an earlier trend of settling criminal cases under specific conditions<sup>20</sup> (e.g., payment of a criminal fine and

<sup>18</sup> Foreign executives may also be subject to Brazil’s criminal system.

<sup>19</sup> Exchange rate of USD 1.00 = BRL 2.86.

<sup>20</sup> The ability to settle a criminal investigation for cartel conduct is disputable following the introduction of changes to Brazil’s Economic Crimes Law, which became effective in May 2012. The new antitrust law modified the criminal sanctions applicable to anticompetitive conduct. The previous provision of the Economic Crimes Law sets forth jail terms of two to five years *or* the payment

appearance every other month before a judge to state that the person is not involved in cartel conduct) seem to have been overturned. These decisions also reveal that criminal courts now regard cartel conduct as a serious violation that justifies the imposition of jail sentences.

#### *D. Imposition of Non-pecuniary Sanctions.*

In most cartel cases adjudicated in recent years, in addition to fines, CADE had been primarily ordering companies to publish the guilty verdicts in a major newspaper. More recently, CADE has also recommended that tax authorities prohibit wrongdoers from obtaining tax benefits and determined the inclusion of the companies' names in the Brazilian Consumer Protection List.

In 2014, CADE's Court delivered a final ruling on the cement cartel investigation, which had been in progress since 2006. In January, the Reporting Commissioner had recommended that the six companies, six individuals and three industry associations be found guilty of collusion. The judgment came to an end in May and sanctions included a record fine of over USD 1 billion, plus other ancillary sanctions, such as the divestiture of assets and a ban on carrying out transactions in the cement and concrete industry for five years, subject to certain conditions. It was the first time that CADE resorted to structural sanctions, which is relatively unusual in cartel cases. The judgment reasoning and the Commissioners' further public declarations suggest that this case may not have been an outlier and that CADE would consider adopting structural remedies and M&A bans in cartel investigations, particularly in markets in which the alleged conspiracy reportedly went on for a long period of time.

Furthermore, during its last adjudication session in 2014, CADE issued guilty verdicts in connection with three bid-rigging cartel investigations in the markets for metal detector security doors; orthopedic orthotics and prosthesis products; and painting and plumbing materials. In all such cases, apart from the imposition of fines, defendants were also

---

of a criminal fine. The new law determines that anticompetitive behavior may be punished with a jail term of two to five years *plus* the payment of a criminal fine. Since the minimum criminal sanction is now a two-year jail sentence (and not a fine), some prosecutors understand that individuals are no longer allowed to settle criminal investigations. Such provisions only apply to acts perpetrated on or after May 29, 2012.

debarred from public procurement for a five-year period. CADE had previously imposed this sanction on very few occasions (e.g., cartel on security services adjudicated in 2007).

CADE's rulings in these cases indicate that high fines against companies and decisions in newspapers are no longer the only tool it will resort to in order to severely punish cartel conduct.

### *E. Increased Number of Settlements and Interface With Leniency*

Notwithstanding the pros and cons of settling, the fact is that since 2013, CADE has executed approximately sixty settlements, mostly in connection to cartel investigations. From December 2014 to February 2015 alone, the Court approved thirteen settlements with defendants in domestic and international cartel cases.<sup>21</sup>

The current enforcement practice shows that CADE has been open to negotiate settlements at all stages of the proceedings. Accordingly, three of the aforementioned settlements were entered into only a few months after dawn raids had been conducted in connection with the case.<sup>22</sup> Conversely, in 2014, CADE also settled a cartel investigation after it had already been reviewed by all advisory bodies (the DG, CADE's Legal Services and the Federal Prosecution Office), which had recommended the defendants to be found guilty.

On the interface of settlements with leniency, even after the 2013 regulation, the "umbrella" provision, which shields all employees and former employees of the settling cartel participant from administrative liability, 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 discourage filings for leniency. On the other hand, there is still one major advantage of leniency over settlements for individuals: while leniency applicants address administrative and criminal liabilities together (therefore being entitled to criminal immunity), defendants interested in settling an

<sup>21</sup> International cartel cases include DRAM, products for the transmission and distribution of electric energy, and air and maritime cargo freight CDT, and CPT.

<sup>22</sup> Settlements in the coatings and composites resins investigation in December 2014 (See Cases No. 08700.004496/2014-19, 08700.004627/2014-68 and 08700.005159/2014-49).

ongoing case must deal with the administrative and criminal investigations separately, and criminal immunity is no longer available.

#### F. *Increased Private Damage Claims*

Private antitrust enforcement in Brazil has been on the rise over the past five 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>23</sup> and the increasing general awareness of antitrust law in Brazil. In Brazil, cartel members, with no exception to the leniency applicant, are jointly and severally liable for damages caused by their illegal antitrust activity, *i.e.*, each cartel member may be held liable for the entire cartel-related damage.<sup>24</sup> Such joint and severally liability has not significantly deterred parties from applying for leniency till recent years. Said scenario began changing in 2010, when CADE sent a copy of its decision finding a cartel violation in the market for industrial and hospital gases to potentially injured parties for the first time, so that such parties could seek damages from the relevant wrongdoers.<sup>25</sup> Said ruling may have tipped the scale for private claims in

<sup>23</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, 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, one should take the latter as an exception as, in average, judicial courts confirm over 70% of CADE's decisions.

<sup>24</sup> Pursuant to Article 47 of Brazil's antitrust 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 who causes losses to third parties must indemnify those that suffer damages (Article 927). Plaintiffs may seek compensation for pecuniary damages (actual damages and lost earnings) and pain and suffering. Under recent case law, companies are also entitled to pain and suffering, usually derived from reputation losses in the market.

<sup>25</sup> See CADE, *Industrial and Hospital Gases Cartel Case*. (Case No. 08012.009888/2003-70) (September 1, 2010). Even before 2010, the local State Prosecution Offices representing alleged victims of cartels spontaneously filed few collective damages

Brazil, with a potential adverse effect for leniency. For example, in 2013, the state of São Paulo had 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 (the judge later required the government to amend the claim to also include the other co-conspirators). Brazil's Congress must therefore 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 cartel investigations 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>26</sup> and the rise of private antitrust enforcement, may 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 an investigation on an alleged bid rigging in connection with the construction and maintenance of São Paulo's subway cast doubts on the ability of the authorities involved to comply with the confidentiality assurances given to the leniency applicant.

---

lawsuits, most of which – 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 Prosecution 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 Prosecution Office filed for individual and collective damages and the parties were sentenced to compensate consumers that had been injured by the cartel and to pay collective pain and suffering 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.

<sup>26</sup> 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.



### G. *Recurrent Use of Borrowed Evidence*

The reforms that extended CADE's investigative tools have not eliminated the antitrust authority's need to use borrowed evidence when conducting some of its investigations. Indeed, Brazilian courts have consistently allowed administrative authorities to borrow evidence gathered in criminal proceedings, as long as the original diligence was authorized by a judge and due process of law are respected. According to the case law of Brazilian higher courts, the evidence may be shared with other authorities even if the original proceeding – in which the evidence was gathered – has different defendants.

In the end of 2014, CADE convicted a fuel distributor for influencing its retailers to standardize their commercial practices in two cities of the State of São Paulo, and did so relying on borrowed evidence from labor proceedings.<sup>27</sup> More cases where the authority uses evidence gathered on other instances are likely, including the major investigation of alleged bid rigging in the construction industry, which included dawn raids that did not count on CADE's active participation.

However, relying on other authorities for evidence also exposes CADE to occasional flaws in wiretappings and dawn raids. For instance, the defense of individuals under investigation in criminal proceedings related to the alleged bid rigging in the construction industry has focused on attempting to have the evidence declared illegal. If that happens to be the outcome, part of the borrowed material will not be available to the antitrust authority. In this sense, in May 2014, a federal judge nullified the fines of over half a billion reais CADE had imposed on an industrial gas manufacturer (Air Products) in 2010 sustaining that the supporting evidence, which had been borrowed by the criminal authorities, was illegally obtained.

<sup>27</sup> CADE, *Shell Brasil Ltda. (currently Raízen Combustíveis S/A)*. (Case No. 08012.011042/2005-61) (November 12, 2014). Earlier in that year, the authority imposed sanctions against pharmaceutical laboratory Merck S/A for having met with the country's largest pharmaceutical companies to prevent distributors from working with generic products. In such case, CADE decided for the admissibility of evidence borrowed from other of its proceedings, in which Merck was not the defendant, reversing the Reporting Commissioner's decision on the issue. CADE, *Merck S/A*. (Case No. 08012.005928/2013-12) (August 6, 2014).

#### H. *Need for Increased Cooperation with Anticorruption Authorities*

The fight against corruption has been on the rise in Brazil, specially following the enactment of Brazil's Clean Companies Law in 2013 (Law 12,846/13) and the recent so-called Car Wash investigation.<sup>28</sup> Given that some cartel cases, in particular those involving bid rigging, also encompass corrupt practices, it is crucial for CADE and the anticorruption authorities to closely cooperate to ensure consistency and preserve the incentives for the leniency program. Article 87 of Brazil's antitrust law determines that successful fulfillment of a leniency agreement insulates cooperating parties from criminal liability for cartel offenses under Brazil's Economic Crimes Law (Law 8,137/90) and for other criminal offenses perpetrated in connection with the antitrust violation, such as fraudulent bidding practices (Law 8,666/93) and conspiracy to commit crimes (Article 288 of Brazil's Criminal Code).<sup>29</sup> Although the law generally refers to "*crimes directly related to the cartel activity, such as the ones listed in Law 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 the offenses explicitly mentioned by the law. It is therefore necessary for the criminal authorities to align with CADE on what should be the approach for a given corruption case in order to preserve the incentives for leniency and reduce legal uncertainty.

The same concern applies to other corrupt practices that could potentially amount to an administrative offense perpetrated in connection with the antitrust violation. The only difference being that there is no provision in Brazil's antitrust law on the possibility of obtaining immunity for such offenses as a result of a leniency letter executed with CADE. For example, if a cartel participant 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 sales in the year prior to the initiation of the investigation

<sup>28</sup> The so-called investigation is directed to uncover alleged corrupt practices and cartel affecting the state-owned oil company Petrobras. More than 13 whistleblowers have already signed leniency agreements with the criminal authorities.

<sup>29</sup> 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 antitrust law broadens the leniency grant to increase incentives for leniency.

under Brazil's Clean Companies Law (Law 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 under whose jurisdiction the alleged corruption practice took place (at the Executive, Legislative or Judicial Branches), to try to ensure a more lenient treatment. According to Brazil's Clean Companies Law, 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 against other sanctions. Unlike CADE's leniency program, the Clean Companies 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 laws.

## **Conclusion**

Administrative and criminal prosecution against hardcore cartels have been on the rise since 2003, when the first dawn raids were conducted and the first leniency agreement was executed. Since then, Brazilian antitrust authorities have lived up to their promise to increase enforcement and step up sanctions against cartels. 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 and other severe ancillary sanctions against corporations and individuals, contributing to the attractiveness of Brazil's leniency program.

The accomplishments of Brazil's anti-cartel enforcement program show that Brazil's antitrust authorities have scored more hits than misses in this process. Nevertheless, it is still a work in progress and in order to ensure continuous development, CADE needs to be ready to deal with many complex issues, some of which may depend on additional changes to relevant laws and current policies.

\* \* \*