Immunity, Sanctions & Settlements 2018

Brazil

Ana Paula Martinez, Mariana Tavares de Araujo
and Alexandre Ditzel Faraco
Levy & Salomão Advogados

GCR Know-how

Immunity, Sanctions & Settlements 2018

Brazil

Ana Paula Martinez, Mariana Tavares de Araujo and Alexandre Ditzel Faraco
Levy & Salomão Advogados

Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

Article 86 of Brazil's Antitrust Law (Law No. 12,529/11) authorises the Director General (DG) of Brazil's antitrust authority (CADE) 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. Such benefits are confirmed at the time the case is adjudicated by CADE's Tribunal (article 86, paragraph 4, of Law No. 12,529/2011).

Brazil's Leniency Programme provides for a winner-takes-all approach: the first applicant to qualify will be entitled to full or partial administrative immunity depending 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 to two-thirds, depending on the effectiveness of the cooperation and 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 leniency letter is not subject to CADE's Tribunal review or approval, which, however, must verify whether the applicant fully complied with its obligations when it issues the final ruling on the case.

A successful fulfilment of a leniency agreement also protects cooperating individuals from criminal prosecution under Brazil's Economic Crimes Law (Law No. 8,137/90) and related crimes. Pursuant to Law No. 12,529/11, by signing the leniency agreement, the statute of limitations is suspended and the Public Prosecutor's Office will be prevented from filing a criminal suit against the individuals that are party to the leniency agreement. Once CADE verifies that the leniency applicant has fulfilled with its obligations, criminal immunity is also confirmed and the ability to sanction the abovementioned crimes is automatically extinguished (article 87 of Law No. 12,529/2011).

2 Do the protections extend to current and former officers, directors and employees?

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. To benefit from the Leniency Programme, individuals have to sign the agreement along with the company (not necessarily at the same time), and agree to cooperate with the authorities throughout the investigation.

Protection may also be extended to other companies pertaining to the same economic group, as long as they cooperate with the investigation and sign the leniency letter.

Employees and former employees may also apply for leniency on its own, in which case protection is not extended to the company.

3 Is immunity available after an investigation begins?

Yes. If the DG was previously aware of the illegal activity being reported, partial immunity for administrative liability may be available – the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and good faith of the party in complying with the leniency letter. Criminal immunity would still be available in those cases.

According to CADE's Guidelines for Leniency Agreements, it can be considered that the DG was previously aware of the illegal activity if there is an ongoing administrative proceeding with reasonable evidence of the anticompetitive conduct at the time that the marker is requested by the leniency applicant.

4 What are the eligibility requirements before an investigation begins?

The requirements are:

- The applicant is the first to come forward and confesses its participation in an antitrust violation;
- the applicant ceases its involvement in the antitrust violation;
- the applicant agrees to provide full, continuing and complete cooperation to the authorities throughout the investigation;
- the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the antitrust violation; and
- 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.

5 What are the eligibility requirements after an investigation begins?

The requirements are the same as for when the investigation has not yet begun.

6 Will the applicant have to admit to a violation of law?

Yes.

7 Are ringleaders or initiators of the conduct eligible?

Law No. 12,529/11 eliminated the rule that leniency was not available to a leader of the cartel. This change will not necessarily result in the authority disregarding the roles played by each cartel participant when deciding whether to grant leniency or not – article 86 of Law No. 12,529/11 provides that CADE may grant leniency if the programme requirements are fulfilled. Therefore, while the authority is no longer required to address arguments

that an applicant must be disqualified for having been a leader in a conspiracy, this most likely will not be followed by policy changes resulting in immunity from sanctions being available regardless of the role played by each participant.

8 When must the applicant terminate its involvement in the conduct?

The applicant must terminate its involvement in the conduct as a condition to apply for leniency (article 86, paragraph 1, II, of Law No. 12,529/11).

9 What constitutes termination of the conduct?

This is not explicitly provided for in the law. As a matter of practice, if a cartel is ongoing, CADE encourages leniency applicants to approach it before making it known to its co-conspirators that it has ceased its involvement in the conduct. Upon celebration of a leniency agreement, the agency usually asks the leniency applicant not to disclose its awareness of the cartel to the other participants until the investigation is made public.

10 Will the applicant be required to make restitution to victims?

Not in the leniency letter. However, pursuant to article 47 of Law No. 12,529/11, victims of anticompetitive conduct may recover losses sustained as a result of a violation. A general provision in the Brazil Civil Code also establishes that one that causes losses to third parties shall indemnify the injuries suffered (article 927). Plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings) and moral damages.

11 Can more than one applicant qualify for immunity?

No. Brazil adopts a winner-takes-all approach and only the first to qualify may be entitled to benefits. However, in the case of a company, directors, officers, and current and former employees of the company applying to the leniency, they may sign the agreement along with the company (not necessarily at the same time), as well as other companies that are part of the same economic group.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

No. Please refer to question 2.

13 Does the afforded protection extend to any non-antitrust infringements?

Article 87 of Law No. 12,529/11 provides that successful fulfilment of a leniency agreement insulates cooperating parties from criminal liability for cartel offences 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). The previous antitrust law extended to criminal liability under the Economic Crimes Law but not to crimes under other statutes, such as fraud in public procurement. Still, in cases where the additional offence has consisted of activity that is also an antitrust violation, there have been no instances where a Prosecutor's Office has finally elected to criminally prosecute the conduct performed by a leniency applicant under a different statute.

With respect to other administrative offences committed in connection with the antitrust violation, for which leniency is not available under Law No. 12,529/11 (eg, bribery in a bid-rigging case), the leniency applicant would have to engage in discussions with both CADE and the specific government entity where the alleged corruption practice took place, to attempt to secure a more lenient treatment. Brazil's Anticorruption 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 Programme, the Anticorruption Law does not extend the benefits of its whistle-blowers' programme to the individuals involved, who may still be held liable under Brazil's Criminal Code and other statutes.

14 What confidentiality assurances are given to the first applicant to report?

As a general rule, CADE will treat the identity of the applicant as confidential until it issues the final ruling on the case. Yet, after an administrative proceeding is initiated the defendants in the investigation will have access to the leniency agreement and to the documents submitted by the applicant, to prepare their respective defences and exercise their due process rights.

In the case of a dawn raid, which requires judicial authorisation in Brazil, and/or of 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.

15 Does the authority publish guidance regarding the application of the programme?

On 4 September 2017, CADE launched Leniency Guidelines consolidating its practice regarding the application, negotiation and execution of leniency agreements. CADE's Internal Rules (Resolution No. 20/2017) set forth the general rules and procedure that apply to the Leniency Programme. The Guidelines serve as guidance to the general public, companies, private practitioners, as well as other authorities, such as the Public Prosecutors' Office, on how CADE enforces its Leniency Programme.

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Generally, no. But potential conflict would arise in situations where the leniency applicant is directed by the authority to actively participate in meetings or hold conversations with cartel members to assist the authority in obtaining further evidence of the conduct. The acceptance of such evidence is controversial under Brazil's legal system. Furthermore, the fact that each individual is required to sign the leniency agreement also delays the negotiation process and introduces challenges to the timing of joint initiatives with foreign competition authorities (eg, a joint dawn raid).

Immunity application and marker process

17 What is the initial process for making an application?

Brazil has a marker system that allows a company or individual to approach the authority without having all the information to file for leniency. Under the revised article 239, paragraph 2, of CADE's Internal Rules CADE is now required to issue a marker within five business days after having received all the necessary information (and no longer three days, as provided previously), and at that time it will set the deadline for the applicant to submit the first draft of the so called "History of Conduct". In any case, CADE typically responds on the same day or on the day after the applicant puts down the marker. The revised rules eliminated the maximum 30-day deadline from the issuance of the marker to present the "History of the Conduct", and such deadline will be now set on a case by case basis.

CADE's revised Internal Rules set forth under the new article 240 establishes that if a marker is not available, the applicant may request that CADE certifies in writing the date and time it appeared before the agency (but not the order in line). CADE will then organise a waiting list and in case the first to come forward does not successfully perfect the marker, the second-in and eventually others will be invited to the negotiation. Such certificate may also protect place in line for the second-in, third-in and others, in a settlement negotiation, where the order in line is one of the factors to determine the level of discount available. In this case, once CADE signs the leniency agreement with the first applicant that meets the requirements, it would then invite the other parties in line to check their willingness to settle the case through the Settlement Programme.

18 What information is required to secure a marker?

CADE requires preliminary information on "who, what, when and where" (the name of the company, and co-conspirators, affected product and geo-

graphic markets, and duration of the conduct). The level of information required to obtain a marker may vary from case to case, since there will be circumstances where CADE will need more information to confirm whether the marker is available for the reported conduct.

19 How much time will an applicant have to perfect its marker?
Please refer to question 17.

20 Can the deadline for perfecting the marker be extended?
There is no statutory or policy rule on this issue. In practice, it may be.

21 What is required to perfect the marker?
There is no statutory or policy rule on this issue. In practice, CADE expects the applicant to show that it is conducting a thorough internal investigation and at that time to produce preliminary results of its evidence gathering. Please refer to question 17 for further information.

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?
There is no statutory or policy rule on what the applicant must submit when it perfects the marker. In practice, CADE expects the information provided by the applicant when it puts down a marker to be preliminary and superficial and is relatively flexible on the information and other evidence to be submitted at the time it is perfected.

23 Can an applicant lose its marker if a second applicant comes forward with better information?
No. Provided that the applicant complies with the deadline set forth by CADE to perfect the marker, it will not lose its position to a second applicant with better information.

24 What if the applicant's investigation reveals that no violation exists?
The application process is terminated and all documents returned to the applicant, without any copies being kept by the DG.

25 What if the authority decides not to investigate?
Under article 246 of CADE's Internal Rules, should it decide the information provided is not enough for it to open a formal investigation against the other parties involved (or if the applicant chooses not to execute the agreement for any reason), CADE would not be allowed to use any of what has been discussed with the applicant in the future. However, that would not prevent CADE from investigating the same conduct if it learns about it through other sources.

In practice for that to work CADE adopts a Chinese Wall and limits the number of people at the agency who have access to any information provided by the applicant during the pre-execution phase of the agreement. These people would be conflicted in working in any future investigation not initiated through that leniency agreement.

Immunity cooperation obligations

26 What is the applicant required to produce?
There are no public rules or policy on the scope of the cooperation expected from the applicants as a condition to execute the leniency letter. The applicants are required to conduct a thorough internal investigation and to submit all evidence and information in their possession or at their disposal that is connected to the anticompetitive conduct. In practice, at that stage, CADE expects the applicants to produce enough evidence/information to allow it to file for a search and seizure warrant in court or to issue a recommendation to CADE's Tribunal to impose sanctions against all co-conspirators. It also asks the applicants to submit an electronic certification report in which the applicant describes the respective the sources from where the electronic evidence shared with CADE was collected, and the chain of custody from the moment each document was collected up to the point it is delivered to CADE. The electronic report has the purpose of certifying the documents' integrity.

27 Will the applicant be required to make a written confession?
The corporate confession can be made orally, however, the leniency agreement itself is in writing and includes the applicant's admission of participation in the anticompetitive practice.

28 Can third parties obtain access to the materials provided by the applicant?
In case of 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 were to happen, such documents and information would be accessible by any third party, who could then file damage claims before courts. Moreover, defendants that are searched may have access to the files immediately after the raid. Furthermore, owing to the fact that to date few investigations started through leniency have been finally adjudicated by CADE, it is not yet clear what treatment CADE will give to such documents following the adjudication of the case.

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?
No. Even if the company is unable to secure the full and truthful cooperation by one or more individuals, it 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.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?
No. Pursuant to article 251, paragraph 1, of CADE's Internal Rules the assessment of the fulfilment of the agreement's obligations will take into account the cooperation of each applicant separately.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?
No provisions in the law or in secondary legislation set forth the rules on privilege or make public if/when CADE would request access to in-house counsel and compliance personnel material. A few recent decisions issued by the courts in the lawsuits that follow the dawn raids in cartel cases have set forth that the general rule on privilege applicable to emails and other documents created by or directed to counsel also covers communication with in-house counsel. The decisions are pending appeal.

Granting immunity

32 How does the authority announce its promise not to charge or sanction?
Through a written leniency letter executed between CADE and the applicants. It is CADE's standard practice to invite criminal prosecutors to sign the letter as well. This is viewed as a means of helping to maximise benefits for potential applicants and to ensure that administrative and criminal liabilities are addressed together.

33 Does the authority put its commitment in writing?
Yes.

34 Who is given access to the document?
Before the administrative proceeding is initiated, only CADE, the applicants and the criminal prosecutors. After that, defendants will be given access to the document to prepare their respective defences and exercise their due

process rights, and are put on notice of the prohibition to use it for any other purposes. If a dawn raid is conducted, defendants who are searched may have access to the files immediately after the raid.

35 Does the authority publish a model letter for conferring immunity?

Yes. A model letter of the Leniency Agreement can be accessed at CADE's website (www.cade.gov.br). Under CADE's Leniency Guidelines, amendments to the model letter proposed by the leniency applicant will only be accepted in exceptional circumstances and where there are strong grounds supporting such changes.

Individual immunity or leniency

36 Is there an individual immunity programme?

Brazil's Leniency Programme applies to both corporations and individuals.

37 What is the process for applying?

Please refer to questions 17 and 36.

38 What are the criteria for qualifying?

Please refer to questions 4 and 36. P

Revocation of immunity

39 On what basis can corporate immunity be revoked?

There is no express provision on the possibility of revoking immunity. When adjudicating the case, CADE's Tribunal will assess whether the applicant complied with the cooperation requirement or not, based on a report prepared by the DG, and there is limited room for discretion on that point.

Other defendants usually challenge leniency in the courts, which have never issued a decision against CADE's decisions on eligibility for immunity or compliance with cooperation requirement.

To date, a corporate immunity has never been revoked in Brazil.

40 When can it be revoked?

Please refer to question 39.

41 What notice is required to revoke?

Please refer to question 39.

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes. Brazil's Constitution ensures judicial review to any decision issued by an administrative authority by a party that has been directed affected by it.

Reduction in sanctions

43 Does the leniency programme allow for reductions in sanctions?

The Leniency Program allows for reduction in sanctions when the DG's has previous knowledge of the illegal conduct reported by the applicant. Article 247, paragraph 3 of CADE's Internal Rules provides that the DG is considered to have had previous knowledge of the illegal conduct reported if, by the time of the proposal, it was being investigated through any of the proceedings provided by Law No. 12,529/11 (the applicant would be aware of it before the leniency letter is executed).

44 What is the process for seeking a reduction in sanctions?

The leniency agreement for reduction in sanctions will follow the same process established for the full immunity request.

45 Is there a marker process similar to immunity applications?

Yes, the marker process is the same. Please refer to question 17.

46 Are the reductions in sanctions fixed or discretionary?

The applicant will benefit from a reduction of one to two-thirds in the applicable sanctions, according to article 86, paragraph 4, II of Law No. 12,529/11.

47 How are the reductions in sanctions calculated?

In determining the amount of the reduction of sanctions, CADE's Tribunal shall consider the specific parameters set forth in article 86, paragraph 4, II, of Law No. 12,529/11 and in article 251, paragraph 2, of CADE's Internal Rules:

- effectiveness of the cooperation during investigations; and
- relevance of the information, documents and evidence produced.

48 Are there sentencing guidelines?

No.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

There are no statutory or policy rules or public case law on this issue.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

Brazil's Leniency Programme adopts a winner-takes-all approach, thus, only the first applicant will receive benefits – full immunity if the DG was not aware of the reported conduct or partial immunity if the DG was previously aware. The second-in can only receive benefits under Leniency-Plus, which provides for a fixed discount (see questions 53–54), or cooperate under the settlement framework and be entitled to discounts (see questions 62–72).

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

Not applicable.

52 Does the competition authority publish guidance regarding sentencing reductions?

No.

53 Does the authority provide for "Amnesty Plus" benefits?

Yes. As in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (by being the second to come forward), but discloses a second cartel, and meets the other Leniency Programme requirements, will receive full administrative and criminal immunity for the second offence and a one-third reduction in fine with respect to the first offence. To receive such benefits, the applicant has to disclose the second cartel before the first case is sent by the DG to CADE's Tribunal for final judgment. Section IV of CADE's Leniency Guidelines details the rules that apply to Leniency Plus.

54 How is the Amnesty Plus discount calculated?

There is no detailed rule or case law on Amnesty Plus. Under CADE's stated enforcement practice, an amnesty plus applicant would be eligible to receive the statutory discount for amnesty plus (see question 53) or to combine the discount available for the first party to settle the case (see question 63) with the statutory discount for amnesty plus, depending on the scope of the cooperation it agrees to. In this case, the leniency plus applicant would be eligible to discounts ranging from 50 to 66.67 per cent of the fine that would otherwise be imposed, depending on the order a party presented itself before CADE and on the level of cooperation offered.

Cooperation obligations for sentencing reductions

55 Are the cooperation obligations similar to those for immunity applicants?

Yes.

56 Will the applicant be required to make a written confession?
Please refer to question 27 and 66.

57 Can third parties obtain access to the materials provided by the applicant?
Please refer to question 34.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?
Yes. Liability is established under Brazil's Antitrust Law separately for individuals and corporations.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?
Please refer to question 30.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?
Please refer to question 31.

61 Can an applicant challenge the amount of the reduction of sanctions?
While in theory it is possible, in practice it has not happened.

Settlements

62 How is the settlement process initiated?
According to CADE's Internal Rules and the revised Settlement Guidelines issued by CADE in 2017, the settlement process may be initiated through a proposal submitted by the defendant, which must be addressed to the Reporting Commissioner if the case is already at the Tribunal, or to the DG if it is still at the DG. Alternatively, if the case is still at the DG, the DG may also initiate the settlement process by proactively approaching the defendant to negotiate a settlement.

Under the Settlement Guidelines, the party interested in settling with CADE is required to put down a marker and five days after CADE certifies the party's place in line, the party is expected to file the settlement requirement.

Once the settlement requirement is filed, the DG or the Reporting Commissioner nominates a Negotiation Committee of normally three to four CADE's officials to assist the settlement negotiation.

As a rule, the negotiation period is 60 days, and can be renewed for other periods depending on the circumstances of the individual case. In case the settlement is filed at the Tribunal, the negotiation period is of 30 days, which can be renewed by the Reporting Commissioner for other equivalent periods.

Differently from the Leniency Agreement, its execution does not automatically grant criminal immunity. However, CADE may facilitate the negotiation of a plea bargain agreement with the Prosecutor's Office and/or the Federal Police, in parallel with the settlement of the charges at the administrative level.

63 Is the amount of the sanction always fixed in the settlement agreement?
CADE's Settlement Guidelines set forth a scale of discounts that will apply to the settling sum that defendants that wish to settle are required to pay. Reductions may vary between:

- 30 per cent to 50 per cent of discount on the expected fine for the first to propose to settle;
- 25 per cent to 40 per cent of discount on the expected fine for the second-in; and
- up to 25 per cent to the parties that come after.

For settlement proposals submitted after the DG has concluded the investigation the reductions may be no greater than 15 per cent. Those discounts are in theory based on the fine that would apply to parties under investigations for cartel and are supposed to vary according to:

- the order in which the parties come forward; and
- the extent and usefulness of what the parties provide in cooperation with the authorities.

64 What role, if any, do the courts play in the settlement process?
CADE's decision to settle is final at the administrative level and need not to be confirmed by the courts. Defendants usually seek judicial review of CADE's decisions denying engagement in settlement discussions or settling an investigation, or even which would be the applicable rules for a given case. For example, defendants in a cartel investigation in the fuel retail sector in the state of Espírito Santo challenged in court CADE's decision to apply the settlement rules issued by CADE in March 2013 – which require that defendants that wish to settle must "acknowledge participation" in the cartel – to cases initiated under the previous regulation.

65 Are the settlement documents, including any factual admissions, made public?
The Reporting Commissioner or the DG may, at their discretion, determine the confidentiality of the request, including its terms, status and negotiation process. In exceptional cases, CADE has conducted a public consultation of the draft settlement. The settlement, however, will be made public on CADE's website within five days of its execution, remaining available there while effective, according to article 85, paragraph 7, of Law No. 12,529/11.

66 Is an admission of wrongdoing required?
Defendants in all cartel cases (and not only the ones initiated through a leniency agreement, as before) are required to acknowledge their involvement in the investigated conduct.

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. Furthermore, CADE has been ensuring confidential treatment of the statement detailing the conduct regarding which the defendant acknowledges participation.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?
Please refer to question 63.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?
No, the settlement procedure is individual and specific for each defendant that wishes to settle (be it a corporation or an individual). Despite that, the Reporting Commissioner or the DG may, if deemed convenient and suitable, jointly negotiate all requests concerning the same investigation, according to article 220 of CADE's Internal Rules and subsection II.2.2.4. of CADE's Settlement Guidelines.

69 Will the authority settle with subjects who refuse to cooperate?
Not for cartel investigations still pending before the DG. Resolution No. 5 requires all cartel defendants that wish to settle to provide meaningful cooperation with CADE's DG. Article 226 of CADE's Internal Rules provides that the final settlement proposal shall necessarily contain a commitment by the party to cooperate with the investigation. CADE's Tribunal has been rejecting settlement proposals based on the absence of a provision to cooperate, among other factors.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

According to CADE's Settlement Guidelines, information and documents (including electronic data) provided to the DG during the settlement negotiation shall be returned or destroyed in case the parties fail to reach an agreement.

71 May a party to the settlement agreement void the agreement after it is entered?

Under article 85, paragraph 11, of Law 12,529/11 if the party fails to comply with the settlement agreement, the Tribunal will apply the sanctions set forth in it and will determine the continuation of the investigation. As mentioned above, it would also be possible for a party to the settlement agreement to challenge the agreement before the courts on the grounds that it is void.

72 Does the competition authority publish guidance regarding settlements?

CADE's Internal Rules set forth the general rules and procedure that apply to settlements. CADE has published non-binding revised Guidelines on the subject in September 2017 consolidating its best practices and procedures usually adopted during cease and desist negotiations with the CADE in cartel cases.

The authors would like to thank Isabela Pannunzio for conducting the research needed for this chapter.

Levy & Salomão Advogados understands that it is ethically required to disclose that it has agreed to pay a certain amount to Global Competition Review to contribute to the Brazilian chapter of the "Immunity, Sanctions & Settlements" know-how project.

KNOW-HOW ▸ FIRM

LEVY & SALOMÃO
ADVOGADOS

Levy & Salomão Advogados is a full-service business law firm that was founded in 1989 to serve the needs of both Brazilian and foreign corporate clients. Our offices are located in São Paulo, Rio de Janeiro and Brasília.

The firm handles demanding and complex cases and clients are afforded the direct personal attention of experienced and renowned partners – which is possible because Levy & Salomão has a higher than average ratio of partners to associates.

Our lawyers are known for their strong analytical skills, their creativity in devising legal solutions, and their team-based approach to serving clients. Levy & Salomão attorneys combine solid academic backgrounds with substantial experience not only in the practice of law, but also in finance, capital markets, international business and accounting, and in government.

Many of our professionals have previously worked for foreign law firms in the United States and in Europe, and several are licensed to practise law in foreign jurisdictions. Our client base is comprised primarily of transnational corporations and Brazilian corporate groups that require legal counsel on diverse aspects of law.

www.levysalomao.com.br

KNOW-HOW ▸ BIOGRAPHY

Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil's federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a non-governmental adviser to the ICN. Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review* (GCR) named her on its lists 'Top Women in Antitrust' and '40 under 40'. *Chambers and Partners, The Legal 500, LACCA, Best Lawyers* and *Who's Who Legal* listed her among the world's leading competition practitioners. In 2015, she was selected as one of the top five lawyers globally in merger clearance matters by GCR, and in 2014 and 2016 GCR awarded her 'Lawyer of the Year – Under 40'. Ms Martinez is admitted to practise in New York and Brazil. She holds law master's degrees from both Harvard Law School and the University of São Paulo (USP) and a PhD in criminal law from USP.

amartinez@levysalomao.com.br

Mariana Tavares de Araujo practises in the areas of antitrust and compliance. She also provides preventive counselling in these practice areas through the review of client business practices. Ms Araujo worked with the Brazilian federal administration for nine years with special focus on competition, product liability and regulation. Ms Araujo attended meetings of the OECD's Committee on Competition and co-headed with the US Department of Justice the cartels subgroup of the International Competition Network. Before working for the government, she was the general counsel of a biotech firm in Brazil. Ms Araujo provides counselling in competition-related matters to the World Bank. She currently co-chairs the International Bar Association (IBA) Working Group on International Cartels and is the Latin American Regional Forum Liaison Officer of IBA Antitrust Committee. She is also a member of the American Bar Association (ABA) International Cartel Task Force. *Global Competition Review* named her "Lawyer of the Year" at 2017 GCR Awards and included her on its list 'Top 100 Women in Antitrust'. She has also been named one of the most inspiring women in legal profession by *Latin Lawyer* and one of the world's leading women in the investigations practice by *Global Investigations Review. Chambers and Partners, Who's Who Legal, LACCA, The Legal 500* and *Best Lawyers* listed her among the world's leading competition lawyers. Ms Araujo holds an LLM from the Georgetown University Law Centre.

mtavares@levysalomao.com.br

Alexandre Ditzel Faraco assists clients in antitrust and regulatory matters brought before administrative and judicial tribunals, and provides broad-based consulting in connection with business practices and antitrust and regulatory compliance. He has experience in working with complex issues in a wide range of industries, including telecommunications, media, energy, petrochemicals, timberland and beverages. He also advised government agencies regarding regulatory matters in network industries. Mr Faraco is currently a Professor of antitrust law and law and economics at the Federal University of Paraná and holds a PhD and a post-doctoral certification (Livre-Docência) from the University of São Paulo. He was a visiting scholar at Yale University. Mr Faraco is the author of Regulação e Direito Concorrencial - As Telecomunicações ("Regulation and Antitrust Law, Telecommunications"), Livraria Paulista, and Democracia e Regulação das Redes Eletrônicas de Comunicação - Rádio, Televisão e Internet (Democracy and Regulation of Electronic Communications Networks - Radio, Television and Internet), Forum.

afaraco@levysalomao.com.br