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**BRAZIL'S LENIENCY PROGRAM:
CHALLENGES AHEAD**

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Brazil's Leniency Program: Challenges Ahead

*By Ana Paula Martinez**

1. Introduction

Over the last decade the cartel enforcement landscape has significantly changed in Brazil: in 2000 new investigative tools were granted by Congress (dawn raids and leniency agreements), and since 2003 the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that placed hard-core cartel prosecution as the top priority. As a result, Brazil now has an increasing number of cartel investigations, including alleged international cartels, record fines for cartel offenses, individuals being held criminally accountable, and increasing cooperation among criminal and administrative enforcers, with the change in perception by the criminal prosecutors and judges as to the seriousness of cartels. Such achievements are internationally recognized: according to the OECD 2010 Competition Law & Policy in Brazil – A Peer Review, “*Brazil’s anti-cartel programme is now widely respected in Brazil and abroad*” and, specifically regarding the leniency program, the report states that “*Brazil has an active leniency programme, which is generating applications and cases*”.

This article focuses on the Brazilian experience regarding the implementation of its Leniency Program. More than 20 leniency agreements have been executed since 2003, most of them related to alleged international cartels, and today, whenever a member to an international cartel is considering where to apply for leniency, Brazil has to come into the discussions. The effectiveness of the program is built mainly on three pillars: fear of detection (with the increasing number of dawn raids and wiretaps), threat of severe sanctions (with the record fines and jail sentences) and transparency efforts (with the issuance of new regulations and policy papers).

Despite all the improvements, significant challenges remain ahead for the program to continue to be viewed as attractive, including: the interplay of leniency and private claims (confidentiality issues and joint and several liability provisions), the interplay of leniency and cartel settlements, the limited extent of protection regarding criminal liability, the legal uncertainty regarding Federal or State-level jurisdiction over criminal cartel matters, the need for individuals other than officers and directors to sign the leniency letter and be included in the investigation, which reflects in the length of the proceedings, and the need to turn the program attractive to members to Brazilian cartels.

Before addressing the issues above, we will provide an overview of the Brazilian Anti-Cartel Program, considering both the administrative and criminal systems.

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2. Administrative enforcement

At the administrative level, the Brazilian antitrust system is composed of three agencies - namely, the Secretariat for 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 Defence (“CADE”). The SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. The SEAE primarily issues non-binding opinions in merger cases. The CADE is the administrative tribunal, which makes the final rulings in connection with both anticompetitive practices and merger review, after reviewing SDE’s and SEAE’s opinions. CADE’s decisions should be “independent,” that is, should be based on the facts and the law, and not on political considerations, and are all subject to judicial review.

Cartels, as an administrative offence, can be sanctioned with fines imposed on companies by CADE that may range from 1 to 30 per cent of a company’s pre-tax revenues in the year preceding the initiation of the proceedings¹. Managers and directors responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of corporate fines. Other individuals, business associations and other entities that do not engage in commercial activities may be fined from approximately \$ 6 thousand to \$ 6 million Brazilian Reais.² Fines for repeated violations are doubled.

Apart from fines, the Brazilian Competition Law provides for other sanctions, such as publication of the decision in a major newspaper at the wrongdoer’s expense; the prohibition of the wrongdoer from participating in public procurement procedures and obtaining funding from public banks for up to five years; and recommendation to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in instalments or obtain tax benefits.

There is an increasing number of investigations of anticompetitive practices, leniency applications and dawn raids in Brazil. More than 20 leniency agreements were signed since 2003, and, as for dawn raids, from 2003 to 2006, 30 warrants were served while from 2007 to 2010, more than 300 warrants were served. In various occasions CADE has shown its strong commitment to severely punish hard-core cartels. One great example was the crushed rock cartel case, where the tribunal fined the defendant companies in amounts ranging from 15 to 20 per cent of their 2001 pre-tax revenues. Other cartels were also sanctioned by CADE such as the airlines cartel (2004), newspaper cartel (2005), pharmaceuticals cartel (2005), international vitamins cartel (2007), security services cartel (2007), and sand extractors cartel (2008) – in this last case, CADE imposed the record fine of 22.5 per cent of the defendants pre-tax revenues in the year preceding the initiation of the proceedings (please see Annex I for a list of selected cartel cases sanctioned by CADE from 1999 to 2010).

¹ Exceptionally, due to proportionality principles, CADE applied the percentage provided for in the law to the revenues generated in the relevant market as opposed to total revenues.

² Approximately US\$ 2,7 thousand to US\$ 2,7 million (exchange rate of 1 USD = 2.17325 BRL).

3. Criminal Enforcement

Apart from being an administrative infringement, cartel is also a crime in Brazil, punishable by a criminal fine or imprisonment from two to five years. According to Brazil's Economic Crimes Law (Law No. 8,137/90), this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market essential to life or health. Also, Law No. 8,666/93 specifically targets bid-rigging, providing for a jail time of two to four years and the payment of a criminal fine.

Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Also, the Police (local or the Federal Police) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who may indict or not the reported individuals.

According to the OECD 2010 Competition Law & Policy in Brazil – A Peer Review, “*In a few short years Brazil has developed a programme for criminally prosecuting cartels that places it as one of the most active of all countries in this area.*” In fact, since 2003, the SDE, as the chief investigative antitrust authority, is increasing cooperation with the Federal and local Police, and Public Prosecutors to strengthen criminal anti-cartel enforcement in Brazil.

In order to achieve effective cooperation with the criminal prosecutors, a number of initiatives were taken. First, SDE aimed to get public prosecutors interested and included in the enforcement process. The agency has been working to convince prosecutors of the importance of fighting cartels and that leniency is as valuable a tool for their prosecution efforts as it is for the administrative agencies. Prosecutors are viewed by SDE as partners in the leniency process and they are invited to sign the leniency letters. This is a way to ensure, to the extent possible, that administrative and criminal liabilities are addressed together.

Also, the administrative authorities have been setting 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 Public Prosecutor's 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 São Paulo State Prosecutor's Office - 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 by SDE as a reference point to foster relationships with other prosecutors and today there are 23 state cooperation agreements. In December 2007, the SDE and the Federal Police executed a cooperation agreement and an “*Intelligence Centre for Cartel Investigations*” was established to advance cooperative efforts in joint criminal and administrative investigations of cartels. Along the same line, the Prosecutor's Office of the State of Paraíba, Rio de Janeiro, Santa Catarina, Amazonas, Minas Gerais, Rio Grande do Norte and Piauí have recently created special anti-cartel units, with SDE's support. In October 2009, the Ministry of Justice launched the National Anti-Cartel Strategy, a permanent forum composed of both criminal and

administrative antitrust authorities to discuss the implementation of the country's criminal anti-cartel laws.

Before the efforts to engage prosecutors, cartel investigations inevitably began with the agency's administrative case. When SDE initiates an investigation of hard-core cartel conduct, they routinely ask prosecutors to start a parallel criminal investigation. More recently, however, prosecutors have begun to uncover their own leads and initiated cartel investigations themselves. Due to the existing relationships, the prosecutors have sought the competition agencies' assistance in such investigations. Additionally, SDE's interaction and cooperation with public prosecutors gives SDE the ability to tap into the different investigation tools (such as wiretaps) and resources available through the police and prosecutors.

There are already a number of joint cartel investigations that resulted in criminal proceedings against key executives of companies involved in cartel conduct. To date there are more than 200 executives 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. Other 21 executives were to serve jail terms of two and a half to five years for cartel offenses. Although there are appeals pending review against such judicial decisions, the decisions themselves signals that Brazilian judges are starting to regard cartel conduct as a serious violation that justifies jail time. Other executives settled the case with the Public Prosecutors upon some conditions, as the payment of a criminal fine, and appearance every two months before a judge to state that he or she is not involved in cartel conduct.

Foreign executives may also be subject to Brazil's criminal system as long as their conduct produces effects in Brazil. In fact, some of the criminal settlements mentioned above involved foreign executives, who had, as part of their obligations, to appear every other month before a Brazilian Embassy located in their country of residence.

4. *Brazil's Leniency Program*

4.1 Overview

The Brazilian Leniency Program³ was launched in 2000, and it was inspired by the U.S. Leniency Program, adopting a "*winner-takes-all approach*".⁴ Article 35-B of the Brazilian Competition Law authorizes the SDE 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

³ Cartels are often difficult to detect and investigate without the cooperation of the cartel members, as they require the elements of secrecy and deception. For that reason, a significant number of jurisdictions have adopted leniency programs in order to uncover such conduct. Brazil is no exception to that: Law No. 8,884/94 considers that it is in the interest of Brazilian consumers to reward cartel participants which are willing to confess, put an end to their participation in the cartel and fully cooperate with the Brazilian antitrust authorities to ensure condemnation of the practice.

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

under Law No. 8,884/94.⁵ It is worth noting that the program is not restricted to cartel conduct. However, to date, all the leniency agreements signed were related to alleged cartels.

Article 35-C provides that successful fulfillment of a leniency agreement also protects cooperating parties from *criminal prosecution* under Brazil's Economic Crimes Law (Law No. 8,137/90). Prosecutors are viewed by the SDE as partners in the leniency process and they may be involved (both at the Federal and State levels, when applicable) in the execution of the leniency agreement.

Pursuant to Brazilian Competition Law, in order to benefit from the Leniency Agreement, the following requirements have to be fulfilled:

- i. The applicant (a company⁶ or an individual) is the first to come forward and confesses its participation in the unlawful practice;
- ii. The applicant ceases its involvement in the anticompetitive practice;
- iii. The applicant was not the ring-leader of the activity being reported;
- iv. The applicant agrees to fully cooperate with the investigation;
- v. The cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice;
- vi. At the time the applicant comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

While adjudicating a case, CADE must verify whether the applicant complied with the terms and conditions provided in the leniency agreement and, if this is the case, confirm the full or partial immunity granted by the SDE.

As in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (either by being the second to come forward, or by being the cartel ring-leader), but discloses a second cartel, and meets the other Leniency Program 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. The goal is to encourage subjects and targets of ongoing investigations to consider whether they may qualify for leniency in other markets where they are active. To receive such benefits, the applicant has to disclose the second cartel before the first case is sent by the SDE to the CADE for final judgment.

⁵ Full or partial administrative immunity for companies and individuals depending on whether the SDE was previously aware of the illegal conduct at issue. If the SDE was unaware of the cartel, the party may be entitled to a waiver from any applicable penalties. If the SDE was previously aware of the cartel, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement. In the leniency agreement, the SDE states whether it was previously aware of the conduct, in order to give more transparency to the party as to the expected benefits.

⁶ If a company qualifies for leniency, directors, officers and employees of the company who admit their involvement in the cartel as part of the corporate admission may receive leniency in the same form as the corporation. In order to benefit from the Leniency Program, directors, officers and employees have to sign the agreement along with the company (not necessarily at the same time), and agree to cooperate with the SDE in the same manner as the company during the investigations.

The first leniency applicant came before SDE in 2003 after two dawn raids had taken place during that year and the Secretariat had already amassed some positive reputation on its ability to uncover anticompetitive behavior. At that point, in addition to search and seizure procedures, the agency had intensified the use of other means of proof, in cooperation with the criminal authorities (such as wire-tapping). Since that year, the SDE improved the leniency program in order to provide more transparency and certainty to the program. In 2008, the SDE issued the “*Leniency Policy Interpretation Guidelines*” and a “*Model Annotated Leniency Agreement*”, both available in English version.

Also, due to an increasing concern with discovery, the SDE took additional precautionary measures to make sure that the identity and the documents presented by the leniency applicant will remain confidential throughout the proceedings (the Program was revised in 2010 to provide for additional incentives to self-report and cooperate). Other concerns were also addressed – as an example, additional individuals may now be admitted as signatories to the leniency agreement after its initial execution by the corporate applicant.

There are a number of international cases that have been initiated through a leniency agreement in Brazil, including the following products: marine hose, compressors, air cargo, air freight forwarding, gas-insulated switchgear, and a number in the chemical and petrochemical sectors. Companies that are not eligible for the Leniency Program, but wish to put an end in the investigation, may enter into settlements and may have their sanctions reduced. A number of settlements involving cases initiated through a leniency agreement have been executed by CADE since 2007, including defendants in the compressors and marine hose investigations.

4.2 Challenges Ahead

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

Interplay of leniency and private claims. In Brazil, cartel members, with no exception to the leniency applicant, are jointly and severally liable for damages caused by their illegal practices, i.e., each cartel member may be held liable for the entire cartel-related damage. Other jurisdictions provide for incentives for the leniency applicant regarding damage recovery for victims. For example, in the U.S., the *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* (“ACPERA”) protects leniency applicants from treble damages and joint and several liability in private lawsuits in exchange for cooperation with plaintiffs. Other co-conspirators, however, remain jointly and severally liable for all damages, including treble damages. Another example is Hungary: the 2009 Competition Act states that a leniency applicant is not obliged to compensate injured parties unless they are unable to collect their claims from the other cartel members.

The fact that in Brazil leniency applicants are joint and severally liable with the co-conspirators for the damages caused by the illegal conduct have not significantly deterred parties from applying for leniency. This is so because to date Brazil has few cases brought by private parties requiring to be compensated for cartel damages. This is

starting to change: in 2010, CADE, Brazil's Antitrust Tribunal, for the first time included in a cartel decision a recommendation for a copy of the decision to be sent to potential injured parties for them to file lawsuits.⁷ Following that, a number of alleged injured parties presented claims before the courts. If private claims become a reality in Brazil, it could have an adverse effect over leniency. To address this issue, Congress needs to pass new legislation excluding the leniency applicant from joint and several liability.

Another important aspect regarding private claims is confidential treatment. For the incentives for leniency to be preserved, adequate protection against disclosure in private lawsuits shall be ensured for documents submitted under the leniency program to avoid placing the leniency applicant in a less favourable situation than the other cartel members. The risk of disclosure of such leniency documents, especially in view of cross-jurisdictional cases, might deter a cartel member from applying for leniency in Brazil. Even though the SDE has been adopting a number of measures to ensure that the leniency documents and the identity of the leniency applicant remain confidential throughout the investigation, it is still unclear how CADE will treat the leniency documents following the adjudication of the case. Today, only one leniency case has been adjudicated by CADE (the security guard services case⁸), and that case had particular features that prevents us from taking such decision as a reference for future cases. In that case, there was an on-going investigation by the Federal Police in the South Region of Brazil and the SDE decided to actively present to one of the companies being investigated the opportunity to sign a leniency agreement. There was no concern in protecting the identity of the leniency applicant or related documents as the information was already public in the criminal files. Also, if the leniency case involves a dawn raid and / or a parallel criminal investigation, confidential treatment may not be granted by the courts and, therefore, the documents would be accessible by any third-parties. It remains to be seen how CADE and the courts will address this issue.

Interplay of leniency and cartel settlements. Brazil's Cartel Settlement Program was introduced in 2007, through an amendment to Brazil's Antitrust Law. As the law now stands, defendants can propose to settle whether the case is being handled by SDE or CADE. In all cases, however, the whole negotiation process takes place at CADE. The general rules are: (i) the defendant can only try to settle once ("*one-shot game*"), and (ii) the negotiation period is for 30 days, renewable for another 30 days. The negotiation process may be confidential at the discretion of CADE. Approximately ten settlements were executed by CADE since 2007, including with members to international cartels (e.g., marine hose and compressors cartel investigations).

It is critical for the authorities to achieve the right balance between leniency and settlements: "*if settlement incentives are too high, cartel participants will choose to*

⁷ See Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010.

⁸ Proceedings No. 08012.001826/2003-10, adjudicated by CADE on September 19, 2007. CADE imposed a fine on 16 companies ranging from 15 to 20 per cent of their 2002 gross turnover for cartel conduct. Executives of the condemned companies and three industry associations were also found guilty of cartel offense and fined by the CADE. The total amount of fines imposed was in excess of R\$40 million. At the same occasion, CADE recognized that the leniency applicant fulfilled all the conditions imposed in the agreement with the SDE and, therefore, no administrative sanctions were imposed.

utilize available settlement systems rather than leniency programs, and settlements would result in a negative effect on the leniency program.”⁹

As for the interplay of leniency and settlements in Brazil, CADE included a provision in its Resolution No. 46/2007 providing that if the case was initiated using evidence obtained under a leniency agreement, it can only be settled with admission of guilt. In all the other cases, CADE will decide on a case-by-case basis whether to settle where the defendant is not prepared to admit guilt (*nolo contendere*). Furthermore, the amount to be paid must be at least one per cent of the entire gross revenues of the company in the year before the initiation of the investigation. There is no maximum sum determined by the law and it is up to CADE to determine on a case-by-case basis what the appropriate sum is. CADE has been requiring defendants to pay amounts ranging from 5 to 15% of the revenues generated by the defendant in the year prior to the investigation in order to settle a case.

Based on CADE’s recent experience, the benefits of settling over applying for leniency may be as follows: (i) very broad confessions accepted by CADE in settlements, which contrasts with the specific description the leniency applicant has to provide of its participation in the cartel; (ii) no need for effective cooperation (as opposed to cooperation on technical aspects of the affected market, which is what is generally required in settlements); (iii) the defendant is free to go home the day following the execution of the settlement (subject to the fully compliance of the conditions set forth in the settlement), while the leniency applicant is stuck in the proceedings for an average of eight years; (iv) CADE has been including in the settlement agreement an umbrella provision, protecting all employees and former employees of the corporate defendant, even if they have not been identified at the time the agreement was signed. In itself this may be viewed as an improvement of the law enforcement; however, as such treatment is not secured for the leniency applicant, it creates an uneven situation, reducing the incentives for leniency. On the other hand, there is one major advantage of leniency over settlements, assuming there is an active criminal enforcement in place: while the leniency applicant addresses together the administrative and criminal liabilities (being entitled to criminal immunity), the defendant interested in settling an on-going case has to deal with the administrative and criminal investigations separately and criminal immunity is no longer available.

Length of the proceedings. The fact that Brazil’s Antitrust Law requires the corporate applicant to identify all the individuals, even low level employees, for them to sign the leniency letter in order to be protected and also identify the equivalent individuals working for other cartel members to be included as defendants in the investigation results in a very large number of defendants in one single case (sometimes sixty or more defendants). This significantly extends the length of the administrative proceedings, specially considering that the legal system in Brazil enables the exercise of broad rights of defense and access to courts while the proceedings are pending. Also, the fact that there are an increasing number of foreign individuals being investigated in Brazil makes the situation even worse, as apart from the translation requirements, the SDE has to locate the individuals (which may not be working for the company allegedly involved in the cartel anymore) and serve process through a central authority (in Brazil, the

⁹ See International Competition Network, *Cartel Settlements*, 2008, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>.

Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional -- DRCI) or consular and diplomatic channels; serving process itself may take one to two years. To deal with this challenge, CADE may have to limit through case law the extent of the individuals which may be held administratively (as opposed to criminally) liable for cartel conduct: ideally, only officers and directors may be investigated and punished by SDE and CADE. Indeed, there were some discussions along such lines in 2007, in connection with the adjudication of the first leniency agreement signed in Brazil.¹⁰ The majority of the Commissioners considered that managers and employees should not be included in the administrative investigation, but only in the criminal investigation. However, the topic has not been brought more recently and the SDE and leniency applicants have been adopting a conservative approach and including in the investigation all the individuals, irrespective of their position at the company. CADE needs to address this issue as soon as practicable and limit the administrative liability at the individual level to officers and directors.

Protection from criminal liability. Article 35-C of Brazil's Antitrust Law provides that successful fulfillment of a leniency agreement protects cooperating parties from criminal prosecution under Brazil's Economic Crimes Law (Law No. 8,137/90). However, there are other laws that encompass cartel conduct which have not been included in the law, such as Law No. 8,666/93, which specifically targets bid-rigging. There is a bill pending approval before Congress which broadens the leniency grant to extend to these crimes as well.¹¹ If approved, this will enhance legal certainty, increasing the incentives for leniency.

Criminal jurisdiction of state and federal courts. The judicial system in Brazil is made up of two different court systems: the federal court system and the state court systems. Brazil's body of laws and case law is unclear about which system has criminal jurisdiction over cartel conduct: if federal or state courts. While the Economic Crimes Law and the Public Procurement Law are federal statutes, state courts may have jurisdiction to enforce it. Pursuant to Brazil's Constitution, the state courts have jurisdiction over all economic-related matters, unless otherwise provided by a federal law or if the matter directly affects the interest of the federal government. As both the Economic Crimes Law and the Public Procurement Law are silent regarding jurisdiction, some scholars and courts take the view that federal courts will only retain jurisdiction if the conduct under scrutiny directly affects the interests of the federal government. A 2002 law¹² allows the Federal Police to criminally investigate cartels when the conduct has interstate or international effects and there are conflicting decisions of the Superior Court of Justice on the sufficiency of such standard to establish federal jurisdiction.¹³ A bill pending before Congress¹⁴ intends to resolve the jurisdictional dispute and provides for the inclusion of the following provision in the Economic Crimes Law: "Federal courts have jurisdiction over the economic crimes provided for in Articles 5 and 6 of this law". The setback is that the cartel conduct is provided for in Article 4 and, therefore, the bill is not sufficient to resolve the issue.

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

¹¹ See Projeto de Lei do Senado No. 06/2009.

¹² Law No. 10,446/2002.

¹³ See Habeas Corpus No. 32.292 - RS (2003/0223642-5), adjudicated on April 1, 2004.

¹⁴ See Projeto de Lei do Senado No. 06/2009.

This situation creates legal uncertainty for the leniency applicant and reduces the incentive for leniency. From a practical point of view, the SDE has been inviting both federal and state-level prosecutors to sign the leniency letter but legal certainty will only be achieved with the passage of a law clearly establishing federal or state-level criminal jurisdiction over cartel conduct.

Attracting to the leniency program members to Brazilian cartels. Out of the twenty leniency agreements executed to date, eighty percent were signed with members to alleged international cartels. Despite all the education efforts undertaken by the authorities in recent years, the fact is that Brazilian companies and executives still do not feel comfortable with the idea of coming forward and cooperating with the authorities, which seems to be related mostly with cultural issues (which may affect both the business and the legal communities).

Cartel ring-leader. Brazil's Antitrust Law disqualifies a leniency applicant if it is the "clear ring-leader" of the cartel activity. Pursuant to the brochure published by SDE and CADE on the Leniency Program (2009), "*The SDE recognizes that in many cartels there is no clear ring-leader. The mere fact that one party has arranged a meeting or maintained records will not necessarily exclude the application of the leniency to it. Furthermore, there will be no clear leader if two or more parties are properly considered equals in the conduct. For example, if in a two-firm conspiracy each firm played an equal role in the operation of the cartel, both firms are potentially eligible for leniency. Finally, the fact that an undertaking is a market leader does not necessarily entail that it is the ring-leader of the cartel.*" Nonetheless, the fact is that extensive discussions take place during the already lengthy proceedings on whether a given leniency applicant was or not the ring-leader. In order to reduce the timeframe of the proceedings and also to provide for additional legal certainty¹⁵, it would be advisable to exclude from the law the current rule that leniency is not available to a "leader" of the cartel. The bill pending review before Congress already addresses this issue.

5. Conclusion

As a policy matter, Brazilian enforcers are determined to impose stiffer sentences against harmful cartels that target businesses and consumers. More individuals – both foreigners and nationals – will be sentenced to jail, and corporations and individuals will pay higher administrative fines. We can expect deterrence to increase in Brazil in the coming years – which naturally affects the incentives for leniency.

As the Brazilian leniency program evolves, the challenges facing practitioners and enforcers alike tend to get more complex and intertwined. Issues related to discovery and confidentiality, especially in view of cross-jurisdictional cases, and the interplay between leniency and settlements, among other issues, are first and foremost symptoms of a system which is no longer in its infancy. The transition of Brazil's leniency program into a mature and tested set of rules and practices is a process that we are seeing now -- as in any such transitions, it will not be without some turbulence.

¹⁵ In the absence of legal certainty, companies and individuals involved in cartel conduct may ultimately decide against self reporting and cooperation, and existing cartels will go unreported and unpunished.

Annex I

Examples of fines imposed by CADE in connection with cartel investigations

| Case | Year | Defendants | Fine (in R\$) | Fine (in %) | Reference |
|--------------------------|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|-----------------|
| <i>Flat Steel</i> | 1999 | Cia. Siderúrgica Nacional - CSN Usinas Siderúrgicas de Minas Gerais - USIMINAS Cia. Siderúrgica Paulista-COSIPA | R\$ 22.180.000,00 R\$ 16.180.000,00 R\$ 13.150.000,00 | 1% | Total turnover |
| <i>Airlines</i> | 2004 | Viação Aérea Rio Grandense - VARIG Transporte Aéreos Regionais - TAM Transbrasil Linhas Aéreas - VASP | N/A | 1% | Relevant market |
| <i>Newspapers</i> | 2005 | Infoglobo Comunicações Jornal do Brasil O Dia | N/A | 1% | Total turnover |
| <i>Steel bars</i> | 2005 | Gerdau Companhia Siderúrgica Belgo-Mineira Siderúrgica Barra Mansa | N/A | 7% | Total turnover |
| <i>Crushed rock</i> | 2006 | Holcim Embu Engenharia e Comércio Lafarge Brasil Pedreira Cachoeira Pedreira Sargon Geocal Mineração Itapiserra Mineração Iudice Mineração | R\$ 2.682.714,69 R\$ 5.172.637,60 | 20% | Relevant market |
| | | Indústria e Comércio de Extração de Areia Khour Mineradora Pedrix Pedreira Dutra Pedreira Mariutti Pedreira Santa Isabel Reago Indústria e Comércio Basalto Pedreira e Pavimentação Panorama Industrial de Granitos Pedreiras São Matheus | N/A | 15% | Total turnover |
| <i>Vitamins</i> | 2007 | Aventis Animal Nutrition do Brasil BASF Aktiengesellschaft F. Hoffmann - La Roche | R\$ 847.125,19 R\$ 4.726.362,37 R\$ 12.112.558,32 | 20% | Relevant market |
| <i>Security services</i> | 2007 | Rudder Segurança Empresa Brasileira de Vigilância Mobra Serviço de Segurança Segurança e Transporte de Valores Panambi Protevale Vigilância e Segurança Seltec Vigilância Especializada Vigilância Pedrozo | R\$ 7.992.045,46 R\$ 2.331.231,69 R\$ 2.107.654,43 R\$ 2.252.378,02 R\$ 451.792,16 R\$ 1.061.167,04 R\$ 9.171.684,11 | 15% | Total turnover |
| | | Ondrepsb Serviços de Guarda e Vigilância Secure Sistemas de Segurança Ltda. Senior Segurança MD Serviço de Segurança Delta Serviços de Vigilância Reação Segurança e Vigilância Empresa Portoalegrense de Vigilância Rota Sul Empresa de Vigilância Protege Serviços de Vigilância | N/A N/A R\$ 166.032,73 R\$ 1.142.307,36 R\$ 709.430,04 R\$ 727.442,86 R\$ 2.301.395,58 R\$ 1.788.096,50 R\$ 2.481.983,50 | 20% | |
| <i>Meat packers</i> | 2008 | Bertin Indústria e Comércio de Carnes Minerva Franco Fabril Alimentos Frigorífico Mataboi | N/A | 5% | Relevant market |
| <i>Sand extractors</i> | 2008 | Aro Mineradoras Sociedade dos Mineradores do Rio Jacuí Sociedade Mineradora Arroio dos Ratos Consultoria Comprove | R\$ 539.984,11 R\$ 1.342.910,52 R\$ 1.041.545,36 R\$ 3.034,41 | 22,5% 20% 17,5% 10% | Total turnover |
| | | White Martins Gases Industriais Air Liquide Brasil Air Product Brasil Linde Gases Indústria Brasileira de Gases | R\$ 1.758.545.326,50 R\$ 249.257.134,59 R\$ 179.202.512,38 R\$ 188.391.885,29 R\$ 8.464.063,31 | 50% (recidivism) 25% | |