

# GCR | Know-how

## Immunity, Sanctions & Settlements – Brazil

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### 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.

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.

#### 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.

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.

#### 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 program 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 offenses under Brazil's Economic Crimes Law (Law No. 8,137/90) and for other criminal offenses committed in connection with the antitrust violation, such as fraudulent bidding practices (Law No. 8,666/93) and conspiracy to commit crimes (article 288 of Brazil's Criminal Code). 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 offenses 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?**

CADE's Internal Rules (Resolution No. 1/2012) set forth the general rules and procedure that apply to the Leniency Programme. Moreover, in 2009, CADE published, jointly with the SDE (the chief investigative body in matters related

to anti-competitive practices under Law No. 8,884/94), a brochure on Brazil's Leniency Program that provides information on enforcement policy as well. The brochure is available at: [www.cade.gov.br/upload/Brazil\\_Leniencia\\_Program\\_Brochure.pdf](http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf).

### **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. Within three days CADE will then inform whether leniency is available or not. If available, the applicant would have up to 30 days to perfect the marker.

#### **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 geographic markets, and duration of the 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.

#### **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 198 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.

#### **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 use to ensure 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 203, 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. Moreover, none of the several decisions issued by the courts in the lawsuits that follow the dawn raids in cartel cases include public rulings on the extent to which the general rule on privilege applies with respect to emails and other documents created by or directed to in-house counsel and compliance personnel or to communications with outside counsel.

### **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?**

The SDE (chief investigative body in matters related to anti-competitive practices under Law No. 8,884/94) published a model-annotated agreement in Portuguese and English available at [www.mj.gov.br](http://www.mj.gov.br). CADE has not published a model letter since Law No. 12,529/11 entered into force.

### **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.

### **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 206, 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 209, paragraph 2, of CADE's Internal Rules:

- effectiveness of the cooperation;
- applicant's good faith in complying with the leniency agreement
- 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 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 judgement.

### 54 How is the Amnesty Plus discount calculated?

The discount is fixed – one-third reduction in fine with respect to the first offence as set forth by article 209 of CADE's Internal Rules and Brazil's Antitrust Law.

## 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?

As for Leniency Plus, the amount of the reduction of sanctions is predetermined, there is little room to challenge CADE's decision before courts. The same is true for the discounts ensured under the Settlement Programme, which provides benefits for parties willing to cooperate after one leniency applicant has already approached the authority.

## Settlements

### 62 How is the settlement process initiated?

According to CADE's Internal Rules, 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.

### 63 Is the amount of the sanction always fixed in the settlement agreement?

The new regulation introduces 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 and 50 per cent for the first to propose to settle;
- 25 per cent to 40 per cent for the second in; and
- for 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 engaging 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?**

Under the settlement rules issued by CADE in March 2013, 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 180 of CADE's Internal Rules.

**69 Will the authority settle with subjects who refuse to cooperate?**

Not for cartel investigations still pending before the DG. The new regulation requires all cartel defendants that wish to settle to provide meaningful cooperation with CADE's DG. Article 186 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?**

There is no statutory or policy rule on this issue.

**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. Under Brazil's legal system, 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 (in cases, where, for example, CADE included illegal provisions). We are not aware of any instance where this has happened.

**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 not published any policy paper or other guidance materials on the subject.



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**Mariana Tavares de Araujo** Mariana Tavares de Araujo practices in the areas of Antitrust, Product Liability and Government Relations. She also provides preventive counseling 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 United States Department of Justice the cartels sub-group of the International Competition Network (ICN). Before working for the government, she was the General Counsel of a biotech firm in Brazil. Ms. Araujo provides counseling in competition-related matters for the World Bank and is a member of the International Bar Association (IBA) and of the American Bar Association (ABA) Section of Antitrust Law. She currently co-chairs the IBA Working Group on International Cartels and is a member of the ABA International Cartel Task Force. Ms. Tavares is also a law professor on the graduate programme at Fundação Getúlio Vargas-RJ. Global Competition Review named her on its list of the 'Top 100 Women in Antitrust' and Latin Lawyer included her among the 'Inspiring Women in the Legal Profession'. Who's Who Legal, Legal 500 and Chambers and Partners listed her among the world's leading competition lawyers and she has been nominated by the members of the Latin American Corporate Counsel Association (LACCA) for inclusion in LACCA Approved 2013. Ms. Araujo holds a LL.M. from the Georgetown University Law Center, Washington, DC.

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