

Unclassified

DAF/COMP/LACF(2016)6

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

14-Mar-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session II: Leniency Programmes in Latin America and the Caribbean –  
Recent Experiences and Lessons Learned**

-- Contribution from Brazil --

12-13 April 2016, Mexico City, Mexico

*The attached document from Brazil is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.*

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**JT03391876**

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# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



## 14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

### Session II: Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned

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#### LENIENCY PROGRAMME IN BRAZIL – RECENT EXPERIENCES AND LESSONS LEARNED<sup>1</sup>

#### -- CONTRIBUTION FROM BRAZIL --

#### 1. The Brazilian Leniency Programme<sup>2</sup>

1. The prosecution of cartels in Brazil is carry out at three levels: administrative, criminal, and civil. The administrative prosecution is performed by the Administrative Council for Economic Defense (“Cade” in its Portuguese acronym)<sup>3</sup>. In the criminal sphere, the state and federal Public Prosecution Services (“MP” in its Portuguese acronym) are entitled to investigate and bring to courts actions against the defendants when

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<sup>2</sup> For more information, see Cade's Guidelines on the Antitrust Leniency Program, available in English at [<http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf>].

<sup>3</sup> Administrative fines for companies may vary from 0.1% to 20% of the gross revenues of the company, while individuals can be fined in 1% to 20% of the total amount imposed to the company. See art. 36 of Law No. 12.529/2011.

there is sufficient evidence<sup>4</sup>. In the civil sphere, injured consumers can file lawsuits in courts against the cartel participants to obtain an order to cease the antitrust violation and to receive damages<sup>5</sup>.

2. Cade's Leniency Programme<sup>6</sup> has been one of the most important investigative tools for detecting collusive conduct among competitors in Brazil. The Public Prosecution Service traditionally takes part in the Leniency Agreements celebrated with Cade's General Superintendence in order to guarantee the criminal benefits for the leniency applicant and the incentives of the Leniency Programme in the criminal sphere as well.

3. Cade, a federal agency linked to the Ministry of Justice, first introduced the leniency benefit in the legislation in 2000<sup>7</sup>, with the objective of strengthening the activity of fighting against antitrust violations. The prosecution of hardcore cartels has been considered a top priority since 2003, when the first leniency agreement was signed in Brazil<sup>8</sup>.

4. On May 29, 2012, with the advent of Law No. 12.529/2011 ("the Brazilian Competition Law"), the current Cade's Leniency Programme was introduced, with some minor modifications compared to the former Law No. 8.884/1994. The Leniency Programme allows for companies and/or individuals involved in a cartel or other antitrust conspiracy to obtain administrative and criminal immunity by committing to cease the illegal conduct, report and confess the wrongdoing, and cooperate with the investigations by submitting information and documents throughout the negotiation. Cade has established a marker system<sup>9</sup> to hold an applicant's place in the line for leniency and grants only one leniency agreement (immunity) per conspiracy.

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<sup>4</sup> Criminal penalties for individuals may vary from 2 to 5 years of imprisonment and fine. See art. 4º, II, of Law No. 8.137/1990. According to article 12 of the same law, such penalty may be increased by one-third to one-half if the crime causes serious harm to society, is committed by a public-sector employee in the exercise of his or her duties, or is related to goods or services essential to life or health. According to CALLIARI, there are today over 300 individuals currently facing criminal prosecution in Brazil regarding cartel violations. CALLIARI, Marcelo. Criminalization of Cartels and Leniency: An Exercise in Complexity. *CPI Antitrust Chronicle*, Sep 1<sup>st</sup> 2015.

<sup>5</sup> Civil prosecution is described in art. 47 of Law No. 12.529/2011. "*The aggrieved parties, on their own accord or by someone legally entitled and referred to in Article 82 of Law No. 8078, of September 11th, 1990, may take legal action in defense of their individual interests or shared common interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative proceeding, which will not be suspended due to Tribunal action.*". For updated information regarding private damages in Brazil, see: MARTINEZ, Ana Paula. ARAÚJO, Mariana Tavares. Private Damages in Brazil: Early beginnings, bid stumbling blocks. *CPI Antitrust Chronicle*, Feb 1<sup>st</sup> 2016.

<sup>6</sup> For the purpose of this document, "leniency" refers to full immunity, amnesty or reduction in fine in case Cade is already aware of the reported violation but still does not have enough evidence against the applicant.

<sup>7</sup> Law No. 10.149/2000, which amended Law No. 8.884/1994 (arts. 35-B and C).

<sup>8</sup> In October 2003, one of the members of a bid rigging cartel involving security service provider companies with activities in the state of Rio Grande do Sul applied for leniency in Brazil. In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence of the bid rigging, including employees' testimonies and audio records of telephone conversations held between the applicant's employees and the other cartel participants. For more information see Cade, "Fighting Cartels: Brazil's Leniency Program" (2009), available at: [[http://www.cade.gov.br/upload/Brazil\\_Leniencia\\_Program\\_Brochure.pdf](http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf)].

<sup>9</sup> For further information on Brazil's marker system, see OECD. Use of markers in Leniency Programmes. Dec. 16, 2014. For Brazil's contribution, see: [[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3/wd\(2014\)47&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3/wd(2014)47&doclanguage=en)].

5. Regarding the administrative benefit, applicants may receive full immunity (total leniency) or the reduction by one-third to two-thirds of the applicable fine (partial leniency)<sup>10</sup>. In the criminal sphere, the execution of a Leniency Agreement leads to suspension of the limitation period and prevents the criminal prosecution of the agent benefitting from the leniency<sup>11</sup>. Both benefits are definitively granted upon declaration of fulfillment of the Leniency Agreement by the plenary session of Cade's Tribunal, when the administrative proceeding is finally judged (art. 86, paragraph 4, of Law No. 12.529/2011)<sup>12</sup>.

6. If a second, third, fourth or so on company and/or individual inquire Cade's General Superintendence about a leniency application while the case is still under negotiation with the first-in, latecomers stay "in line", in the event of the subsequent availability of the marker. If the marker is not available, the second-in applicant and all subsequent applicants, in order of arrival, can propose a Cease and Desist Agreement (TCC in its Portuguese acronym) to Cade<sup>13</sup>. Signing a TCC generates benefits in the administrative sphere if the applicant: (i) pays a pecuniary contribution; (ii) admits having participated in the investigated conduct; and (iii) cooperates with the investigation. The financial contribution is subject to fine reduction brackets, depending on the order of arrival of companies and/or individuals.<sup>14</sup>

7. Unlike the Leniency Agreement, the TCC does not automatically generates criminal benefits, although Cade's General Superintendence can assist the applicant in the interaction with the Prosecution Service and/or Federal Police for the negotiation of a potential agreement with such authorities. There are no limits to TCCs that can be signed with Cade, while Leniency Agreements are signed only with the first-in applicant who fulfilled its application.

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<sup>10</sup> See art. 86, paragraph 4, of Law No. 12.529/2011. "*The Tribunal shall, upon the judgment of the administrative proceeding, once compliance with the agreement is verified: I – terminate the punitive action of the public administration in favor of the transgressor, if the settlement proposal has been submitted to the General Superintendence without prior knowledge of the notified violation; or II – in the other cases, reduce the applicable penalties from one (1) to two-thirds (2/3), observing what is set forth in Art. 45 of this Law, also considering the classification of the penalty with the effective cooperation provided and the transgressor's good faith in the complying with the lenience agreement.*". If Cade's SG already had prior knowledge of the conduct but did not have enough proof to ensure a conviction, then the applicant will be entitled to receive partial leniency depending on the applicant's cooperation to fulfill the Leniency Agreement.

<sup>11</sup> The criminal benefits involves specifically the crimes set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to participation in a cartel, such as those set forth in the General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Once the Leniency Agreement has been signed, the ability to sanction the above crimes is automatically extinguished, according to article 87 of Law No. 12.529/2011.

<sup>12</sup> Until today, there has not been a case of benefit withdrawal.

<sup>13</sup> For further information concerning Cease and Desist Agreements ("TCC" in its Portuguese acronym), see art. 85 of Law No. 12.529/2011 combined with arts. 184 to 189, Ricade, as well as Cade's Guidelines on TCC in cartel cases, available in Portuguese (and in the near future in English) at [<http://www.cade.gov.br/upload/Guia%20TCC%20-%20Vers%C3%A3o%20Atual.pdf>].

<sup>14</sup> While a proceeding is still being investigated by Cade's General Superintendence, the first TCC applicant can be granted a reduction from 30% to 50% of the expected fine, the second TCC applicant can receive a reduction from 25% to 40%, and the others a reduction of up to 25%. After the case is remitted do Cade's Tribunal, the applicant may be granted a reduction of up to 15%. See arts. 187, parts I, II, III and 188 of Ricade. The discount brackets are explained in detail at Cade's Leniency Guidelines (2016).

8. The numbers reflect the success of both instruments and place Cade's policy on fighting cartel as one of the most active jurisdictions among developing and developed countries<sup>15</sup>. Since the introduction of the Leniency Programme in Brazil until 2015, 50 Leniency Agreements and 14 Addendums were signed. Specifically in the last 4 years (i.e., 2012-2015), 28 Leniency Agreements (56%) and 11 Addendums were signed (79%), which represent a huge increase in the interest in this investigative tool. Additionally, in the same period, over 100 TCCs were signed with Cade in cartel cases, 32 in international cartel investigations. Regarding the fines collected, the Fund for the Defense of Diffuse Rights ("FDD" for its Portuguese acronym) received over BRL 500 million in 2015, ten times the amount received in 2012<sup>16</sup>.

9. Yet, in order to further promote Cade's Leniency Programme and Settlements Policy involving cartels persecution, in 2015 Cade released preliminary versions of Guidelines for both instruments<sup>17</sup>, aiming at making its policy and practices more transparent, predictable, efficient, and secure. The final version of the Guidelines are expected to be released in 2016.

## 2. Recent Experiences and Lessons Learned by the Brazilian Leniency Programme

10. Some recent experiences and lessons learned by Cade's Leniency Programme can be highlighted, such as the followings: (i) the growing number of cartel cases decided by Cade's Tribunal, including cases resulting from Leniency Agreements; (ii) the recent experience with Leniency Plus cases; (iii) the interface of the Antitrust Leniency Agreement with other agreements prescribed in other laws (such as the Anticorruption Act); (iv) the enhancement of confidentiality and digital evidence proceedings during the leniency negotiation; (v) the requirement of a high standard of evidence to execute a Leniency Agreement; (vi) the closest cooperation with the Prosecution Service during the course of the investigation; and (vii) the international and national awareness of Brazil's fighting cartel policy, as detailed below.

11. First, Cade is experiencing a growing effectiveness of its policy on fighting cartel, which can be attested by the number of cartel cases decided by Cade's Tribunal. In 2015, for instance, 22 cartel cases were judged by Cade's Tribunal, against a historical average of 4 cases per year<sup>18</sup>. Until today, 6 cartel cases resulting from Leniency Agreements were judged by Cade's Tribunal, 3 of them in 2015 and 2016<sup>19</sup>, all with convictions.

<sup>15</sup> For instance, SNYDER recognized the importance of cartel prosecution in foreign competition authorities, such as the one taken in Brazil. SNYDER, Brent. *Individual Accountability for Antitrust Crimes*. Remarks Prepared for the Yale School of Management – Global Antitrust Enforcement Conference, Feb. 19, 2016. p. 1.

<sup>16</sup> See Cade's 2015 Report (2016), available at <http://www.cade.gov.br/upload/Balan%C3%A7o%20-%202015%20-%28final-site%29.pdf>.

<sup>17</sup> Cade's draft Guidelines on (i) the Leniency Program is available at [<http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf>] and (ii) TCCs is available at [<http://www.cade.gov.br/upload/Guia%20TCC%20-%20Vers%C3%A3o%20Atual.pdf>]

<sup>18</sup> See Carvalho, V. M., "Cartéis Internacionais: perdidos em Marte?" (Março, 2016), Portal Jota, available at [<http://jota.uol.com.br/elos-entre-jurisdicoes-as-pontes-no-combate-a-carteis>].

<sup>19</sup> See Administrative Proceedings (i) No. 08012.001826/2003-10 (private security firms cartel, judged by Cade's Tribunal in 2007); (ii) No. 08012.004702/2004-77 (hydrogen peroxide cartel, judged by Cade's Tribunal in 2012); (iii) No. 08012.011027/2006-02 (air cargo cartel, judged by Cade's Tribunal in 2013); (iv) No. 08012.010932/2007 (marine hose cartel, judged by Cade's Tribunal in 2015); (v) No. 08012.001029/2007-66 (perborates cartel, judged by Cade in 2016); and (vi) No. 08012.000820/2009-11 (compressors cartel, judged by Cade's Tribunal in 2016).

12. Second, the Brazilian Leniency Programme noticed an increase of its attractiveness related to the use of the Leniency Plus<sup>20</sup> tool. The first public case in which a Leniency Plus benefit was granted was judged by Cade's Tribunal in 2015<sup>21</sup>, and this instrument is being increasingly applied by the companies and individuals. This is consistent with Cade's higher objective of combatting cartels, given that the collaboration by the applicants provides information and documents regarding different anticompetitive conducts<sup>22</sup>.

13. Third, Cade is learning and working to harmonize the rules of its Antitrust Leniency Programme with other agreements provisions in the legislation, such as the recent Anticorruption Act (Law No. 12.846/2013). This new law foresees a leniency agreement for companies – not for individuals – that collaborates with the investigation. This new provision for leniency at the Anticorruption Act can boost Cade's Antitrust Leniency Programme, as many cartel cases occur in the context of public bids in which there are also corruption-related offenses involved<sup>23</sup>, which also enhances the need for companies to implement effective compliance programmes.

14. Forth, Cade's General Superintendence has also experienced the maturity of even more strict confidentiality<sup>24</sup> proceedings regarding the negotiation of leniency and settlements, as well as special safeguards regarding electronic evidence.<sup>25</sup>

15. Fifth, Cade has learned throughout the years and has been requiring a high standard of evidence by the current Leniency Program. Cade has been prioritizing “strong” cases, with robust probative value *vis a vis* “weak” cases, in which the evidence of anticompetitive behavior does not suffice. Especially in international

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<sup>20</sup> A Leniency Plus consists of the reduction by one-third to two-thirds of the applicable penalty for a company and/or individual that does not qualify for a Leniency Agreement in connection with the cartel in which it has participated, but that provides information on a second cartel about which Cade had no prior knowledge of (art. 209 of the RICADE combined with art. 86, paragraph 7, and paragraph 8 of Law No. 12.529/2011).

<sup>21</sup> For further information, see [<http://www.cade.gov.br/Default.aspx?d064b246df35cb57a390a3be8ab3>] and [<http://globalcompetitionreview.com/news/article/38253/cade-publish-leniency-details-bid-rigging-probe/>]. In that case, a company investigated in the Administrative Process regarding the alleged Petrobras cartel applied for a marker of leniency in a different market – public bid of Eletronuclear S/A – Eletronuclear –, where Cade's General Superintendence has no prior information of the cartel. Additionally, the company decided to propose a TCC in Cade's General Superintendence regarding the Petrobras cartel investigation. In this sense, by bringing to Cade's attention an alleged cartel in Eletronuclear Angra 3 and by confessing its guilty and collaborating to both investigations, the company qualified for the application of the pecuniary reduction in the TCC signed in the investigation of the alleged cartel in Petrobras, in addition to the pecuniary reduction derived from the Leniency Plus signed in the investigation of the cartel in Eletronuclear Angra 3.

<sup>22</sup> Regarding the new violation reported (New Leniency Agreement), once the legal requirements have been met, the leniency applicant will receive all the benefits of the Leniency Agreement (art. 86, paragraph 1, and art. 86, paragraph 4, I and II, of Law No. 12.529/2011). With regard to the violation already under investigation by the SG/Cade (Original Leniency Agreement), the leniency applicant may benefit from a reduction of one-third of the applicable penalty (leniency plus), to the extent it cooperates with the investigations. It is possible to obtain discounts related to both the TCC and Leniency Plus agreements, as detailed by Cade's Leniency Guidelines.

<sup>23</sup> See, for example, the notorious “Operation Car Wash” investigating crimes of money laundry, corruption, cartel, among others regarding Petrobras.

<sup>24</sup> For further information on the confidentiality proceedings adopted by Cade, see questions 44, 57, 73 and 84 of Cade's Guidelines on the Antitrust Leniency Program.

<sup>25</sup> For further information on the electronic evidence proceedings adopted by Cade, see question 48 of Cade's Guidelines on the Antitrust Leniency Program.

cartel cases, the leniency applicants have to provide strong information and evidence not only on the existence of the collusion, but also about the potential anticompetitive effects of the international cartel in Brazil.<sup>26</sup> So much so that for each Leniency Agreement signed with Cade, there were around two leniency applications rejected and/or withdrawn in 2015. The robustness of the cases can be easily noticed by the number of TCCs proposed right after a Leniency Agreement is signed. In 2015, for instance, 90% of the Leniency Agreements signed had at least one company applying for a TCC in Cade.

16. Sixth, Cade is experiencing increasing cooperation with state and federal Public Prosecution Services, which is generating a better and coordinated public enforcement in combating cartels in the administrative and criminal spheres, respectively. In 2015, there have been successful precedents in which a TCC signed with Cade led to a plea agreement in the criminal sphere, and vice versa, facilitating the prosecution of the offense. Cade is also in the final stretch of signing a Memorandum of Understanding with the federal Public Prosecution Service in São Paulo – with strong experience in fighting cartels and with a specialized group of Prosecutors in this matter –, which may provide even more transparency and predictability of the cooperation steps taken between the authorities.

17. Seventh and finally, the international and national awareness of Brazil's fighting cartel policy has become evident with the fact that recently the majority of Leniency Agreements signed with Cade are no longer derived from international cartels investigations – demystifying a commonsense regarding the Brazilian Leniency Programme. Of the 10 Leniency Agreements signed in 2015, 70% were national, 20% were international and 10% were “mixes” (part national and part international). This demonstrates that the Brazilian domestic society is each time more aware of Cade's strong prosecution of cartels and that they are realizing the increased risk of detection as well as fearing severe sanctions. International cartels investigations, by their side, continue being a target when it has potential anticompetitive effects in Brazil.

18. In conclusion, Cade's Leniency Programme is an important tool to fight cartels. The prosecution of those cartels though is not reliant exclusively on the Leniency Programme. In the last 5 years, for instance (i.e., from 2011 to 2015) 70 different investigations of cartels were opened, while there were signed 17 new Leniency Agreements (25%). In this sense, companies and individuals involved in cartels should be aware of Cade's *ex officio* expertise to detect and combat domestic and international cartels, which consequently incentives early approach of the offenders to Cade's General Superintendence to apply for a Leniency Agreement.

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<sup>26</sup> ROSEMBERG, Barbara. TEREPINS, Sandra. GALVAO, Luiz. EXPOSTO, Marcos. Recent Trends in Leniency Agreements in Brazil. CPI, Feb 26, 2014. A leading case regarding Cade's General Superintendence on the minimum requirements to investigate an international cartel with regard to the effects in Brazil was first stated in the CRT's glass' Administrative Proceeding final conclusion (PA) n. 08012.005930/2009-79, dated from November, 2015.