



NEARLY 16 YEARS OF THE LENIENCY PROGRAM IN BRAZIL: BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION



By Amanda Athayde Linhares Martins & Andressa Lin Fidelis¹

I. INTRODUCTION

The Brazilian Leniency Program²⁻³ was first introduced in 2000,⁴ with the objective of strengthening the activity of fighting cartel. The prosecution of hardcore cartels is a top priority in Brazil since 2003, when the first leniency agreement was signed.⁵ Throughout those almost 16 years, the Leniency Program has been one of the most important investigative tools for detecting collusive conduct among competitors in Brazil.⁶ Since its introduction until April

¹ Amanda Athayde is a PhD candidate in Commercial Law at USP. Her research focuses on Competition Law. Ms. Athayde is the Head of the Leniency Unit in the Brazilian Competition Authority, serving as the Chief of Staff in the General Superintendence of the Administrative Council for Economic Defense (SG/Cade). For further contact: amandathayde@gmail.com. Andressa Lin Fidelis holds an LL.M. with focus on US and EU competition law from Georgetown Law. She served as an international consultant at the US Federal Trade Commission in 2014. Ms. Fidelis is currently a Coordinator of the Leniency Unit at SG/Cade. For further contact: alf62@georgetown.edu. The views expressed here are solely those of the authors in their private capacity and do not represent the views of Cade.

² For more information, see Cade's draft Guidelines on the Antitrust Leniency Program ("2016 Leniency Guidelines"), available at [<http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf>].

³ 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.

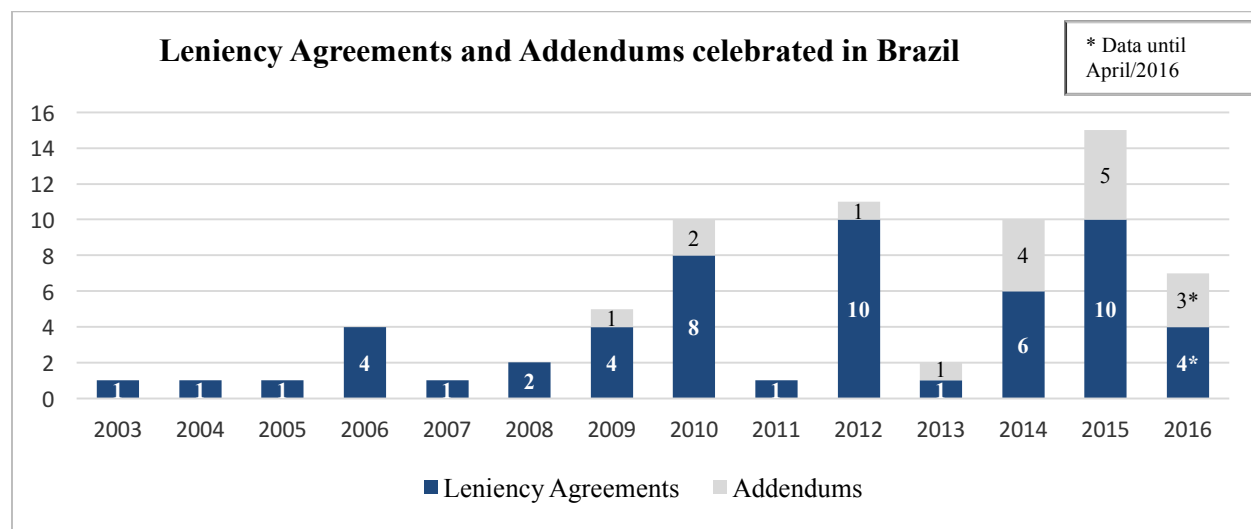
⁴ Law No. 10.149/2000, which amended Law No. 8.884/1994 (arts. 35-B and C).

⁵ In October 2003, one of the members of a bid-rigging cartel involving security service provider companies with activities in the state of RS applied for leniency in Brazil. In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence, including employees' testimonies and audio records of telephone conversations held between competitors. 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].

⁶ Out of the 70 administrative proceedings opened to investigate cartels in Brazil in the last five years (2011-2015), 28 of them were opened after a Leniency Agreement was signed.



2016, 54 Leniency Agreements and 17 Addendums were signed (see graphic below).



The authority responsible for the execution of the Leniency Program in Brazil is the Administrative Council for Economic Defense (“Cade” in its Portuguese acronym), through its investigative body, the General Superintendence (“SG/Cade” in its Portuguese acronym). The Leniency Program allows companies and/or individuals involved in a cartel or other antitrust conspiracy to obtain administrative and criminal immunity by committing to cease the reported conduct, confess the participation in the wrongdoing and cooperate throughout the investigation process by submitting information and documents capable of proving the reported conduct and identifying other participants.

The prosecution of cartels in Brazil is carried out at three levels: administrative, criminal, and civil. The administrative prosecution is performed by Cade.⁷ In the criminal level, the state and federal Public Prosecution Services⁸ are entitled to investigate and bring to courts actions against the defendants when there is sufficient evidence.⁹ In the civil level, injured consumers can file lawsuits in courts against the cartel participants to obtain an order to cease the

⁷ Administrative fines for companies may vary from 0.1 percent to 20 percent of the gross revenues of the company, while individuals can be fined in 1 percent to 20 percent of the total amount imposed to the company. See art. 36 of Law No. 12.529/2011.

⁸ The Public Prosecution Service (“MP” in its Portuguese acronym) traditionally takes part in the Leniency Agreements celebrated with SG/Cade in order to guarantee the criminal benefits for the leniency applicant and the incentives of the Leniency Program in the criminal sphere.

⁹ Criminal penalties for individuals vary from 2 to 5 years of imprisonment and fine. See art. 4º, II, of Law No. 8.137/1990. According to art. 12, such penalty may be increased by 1 to ½ if the crime causes serious harm to society, is committed by a public-sector employee, or is related to goods or services essential to life or health. There are today over 300 individuals currently facing criminal prosecution in Brazil regarding cartel violations. See CALLIARI, Marcelo. “Criminalization of Cartels and Leniency: An Exercise in Complexity” (2015). *CPI Antitrust Chronicle*.



antitrust violation and to receive damages.¹⁰

The Brazilian Leniency Program provides administrative and criminal benefits. Administratively, applicants may receive full immunity (total leniency) or the reduction by one-third to two-thirds of the applicable fine (partial leniency).¹¹ Criminally, entering into a Leniency Agreement suspends the limitation periods and prevents the criminal prosecution of the leniency recipient.¹² 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 decided (art. 86, §4, of Law No. 12.529/2011).¹³ There is no benefit granted in the civil level, and even the leniency applicant may be held jointly liable for civil damages resulting from the overcharge caused by the cartel (art. 927 of the Civil Code).

In order to carry out the Leniency Program, Cade has established a marker system¹⁴ as it only grants one Leniency Agreement (immunity) per conspiracy – not per market/product. If a second, third, fourth or so on company and/or individual inquire SG/Cade about a leniency application while the case is still under negotiation with the first-in, latecomers stay “in line” in the event the marker becomes available again. If the marker is not available and/or the Leniency Agreement is executed, 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.¹⁵

¹⁰ 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 . . . 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 information regarding private damages in Brazil, see: MARTINEZ, Ana Paula. ARAÚJO, Mariana Tavares. “Private Damages in Brazil: Early beginnings, bid stumbling blocks” (2016). *CPI Antitrust Chronicle*.

¹¹ See art. 86, §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 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 SG/Cade already had prior knowledge of the conduct but did not have enough proof to ensure a conviction, then the applicant may be entitled to receive partial leniency.

¹² 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). Signing the Leniency Agreement extinguishes the ability to sanction the above crimes (art. 87 of Law No. 12.529/2011). It is worth noting that after Brazil’s Federal Supreme Court has decided that the serving time can begin right after the first Court of Appeal confirms the first instance’s conviction decision, the number of individuals actually serving time due to cartel activity in Brazil it is expected to increase. See <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=310153>.

¹³ Until today, there has not been a case of benefit withdrawal when the administrative proceeding is finally decided by Cade.

¹⁴ For further information on Brazil’s marker system, see OECD. “Use of markers in Leniency Programmes” (2014). Available at [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)].

¹⁵ 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 TCC Guidelines (“TCC Guidelines”), available at <http://www.cade.gov.br/upload/Guia%20TCC%20-%20Vers%C3%A3o%20Atual.pdf>].



Signing a TCC generates benefits in the administrative sphere if the proponent: (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 the companies and/or individuals.¹⁶ There are no limits in terms of quantity of TCCs that can be signed with Cade, being that a subsequent proponent will not be entitled to receive the same amount of fine reduction already granted by Cade to the previous one.

In order to further promote Cade's Leniency Program and Settlements Policy involving cartels persecution, in 2015 Cade released Guidelines for both instruments,¹⁷ in order to make its policy and practices more transparent, predictable, efficient, and secure.

II. BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION THROUGH THE BRAZILIAN LENIENCY PROGRAM

The data reflects the success of Cade's Leniency Program to fight cartel as one of the most active jurisdictions among developing – and even developed – countries.¹⁸ In those nearly 16 years of Leniency Program in Brazil, it is possible to point out two main phases: “Phase One: Establishment of the Brazilian Leniency Program” (2000-2011) and “Phase Two: Consolidation of the Brazilian Leniency Program” (2012-2016). This analysis allows some conclusions about the breakthroughs of Brazil's Leniency Program.

“Phase one: Establishment of the Brazilian Leniency Program” (2000-2011), would represent the first years that were necessary for the establishment of the Leniency Program in Brazil. It took some years for the companies, individuals, lawyers and the Brazilian society in general to be aware of the legislation, to be attracted to it and to be confident with its procedures. In this sense, the Leniency Agreements of this early phase were mostly related to international cartels. Cade had already imposed one of its highest fines in 2010, totaling around R\$2,9 billion, in the international cartel case known as “industrial gases.”¹⁹ The overseas experience in negotiating Leniency Agreements with other antitrust authorities allowed positive spillovers for the Brazilian cartel enforcement. In this “Phase One,” 23 new Leniency Agreements were celebrated and three Addendums. Taking into account those 23 Leniency Agreements, seven of them related exclusively to domestic cartels (30 percent), eight exclusively to international cartels (35 percent) and eight to “mixed” cartels (i.e., those related to cartels that occurred partially in Brazil and partially abroad) (35 percent). In this sense, 70 percent of the Leniency Agreements in “Phase One” were related to international cartels, either

¹⁶ While a proceeding is still being investigated by SG/Cade, the first TCC applicant can be granted a reduction from 30 percent to 50 percent of the expected fine, the second TCC applicant can receive a reduction from 25 percent to 40 percent, and the others a reduction of up to 25 percent. After the case is remitted to Cade's Tribunal, the applicant may be granted a reduction of up to 15 percent (arts. 187, parts I, II, III and 188 of Ricade). The discount brackets are explained at Cade's 2016 Leniency Guidelines.

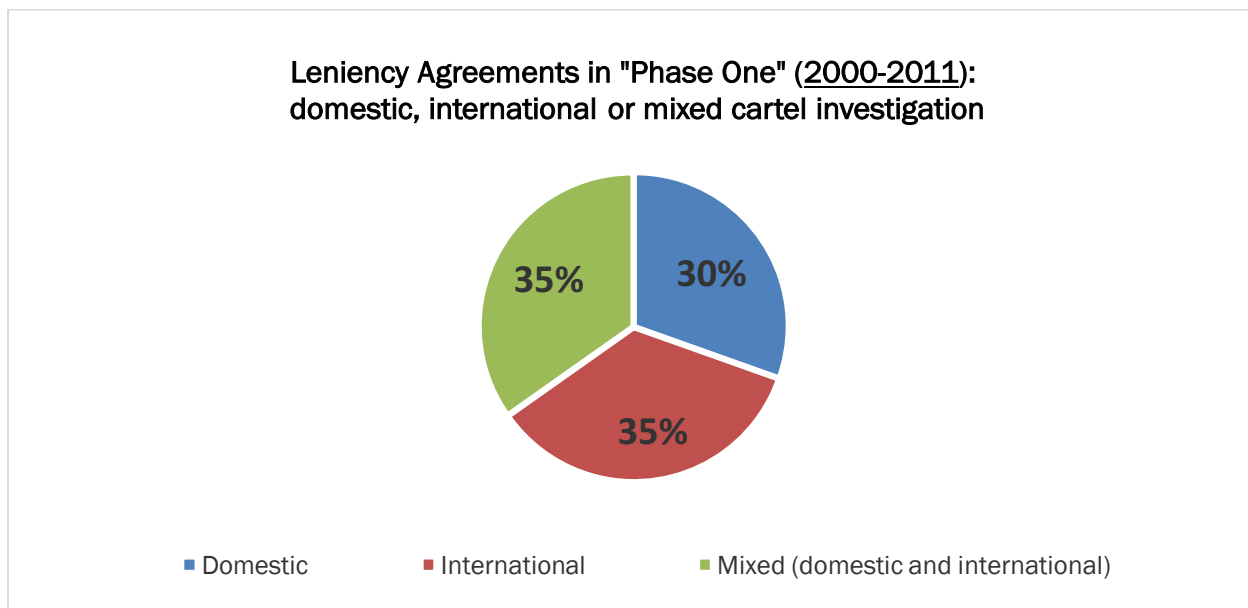
¹⁷ See Cade's 2016 Leniency Guidelines and TCCs Guidelines.

¹⁸ For instance, see SNYDER, Brent. *Individual Accountability for Antitrust Crimes* (2016). Remarks Prepared for the Yale School of Management – Global Antitrust Enforcement Conference, p. 1.

¹⁹ Administrative Proceeding No. 08012.009888/2003-70, Reporting Commissioner Fernando Furlan, decided on 09.01.2010.



exclusively or partially (see graphic below).



The entry into force of Law No. 12.529/2011 (“the Brazilian Competition Law”) on May 29, 2012, represents a new momentum of development of the Brazilian Leniency Program and launched “Phase Two: Consolidation of the Brazilian Program” (2012-2016).

Phase Two is characterized by severe fines imposed by Cade’s Tribunal and an accentuated cartel prosecution activity conducted by SG/Cade. In 2015, for instance, 22 cartel cases were judged by Cade’s Tribunal, against a historical average of four cases per year.²⁰ Those cartel convictions resulted in the imposition of fines against companies and individual that already exceeded R\$4,3 billion.²¹ Out of those fines imposed, it has been effectively received over R\$500 million in 2015, which is ten times the amount received in 2012.²²

Phase Two also highlights the high risk of detection of the anticompetitive conducts in Brazil. Thereby, during 2012-2016, 31 new Leniency Agreements and 14 Addendums were celebrated. Taking into account those 31 Leniency Agreements, 20 of them related exclusively to domestic cartels (65 percent), five exclusively to international cartels (16 percent), and six to “mixed” cartels (19 percent). It represents a significant shift, since 84 percent of the Leniency Agreements in “Phase Two” therefore relates to domestic cartels, either exclusively or partially. Still, international cartels investigations continue to be a remarkable target when

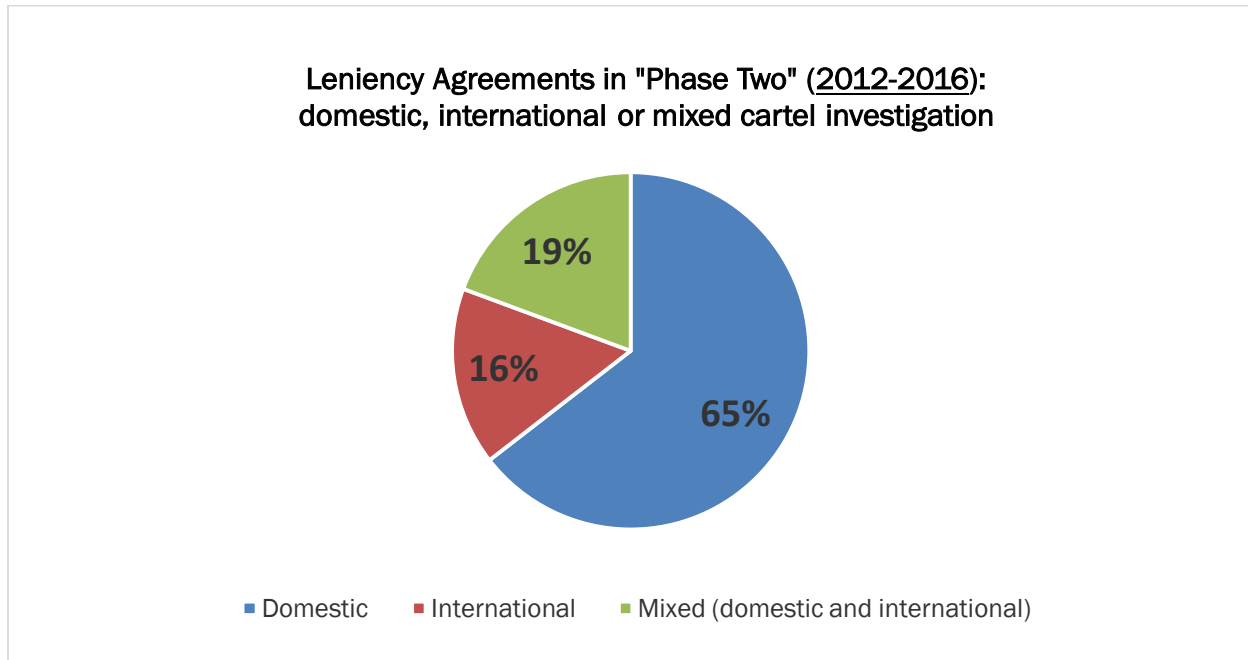
²⁰ See Carvalho, V. M., “Cartéis Internacionais: perdidos em Marte?” (2016), Portal Jota, available at [\[http://jota.uol.com.br/clos-entre-jurisdicoes-as-pontes-no-combate-a-carteis\]](http://jota.uol.com.br/clos-entre-jurisdicoes-as-pontes-no-combate-a-carteis).

²¹ It is worth noting that in 2014 only, Cade imposed one of its higher fines in a cartel case in the cement market, totaling about R\$ 3,1 billion, charged from 6 companies, 6 individuals, and 3 associations. See Administrative Proceeding No. 08012.011142/2006-79, Reporting Commissioner Alessandro Octaviani, case decided on 05.28.2014.

²² See Cade’s 2015 Report (2016), available at <http://www.cade.gov.br/upload/Balan%C3%A7o%202015%202015%2028final-site%29.pdf>.



the conduct has potential anticompetitive effects in Brazil.²³



During this Phase Two, Cade has learned from its own experience and has been requiring stronger cooperation and a higher standard of evidence from the leniency applicants. Cade has been prioritizing “strong” applications, with robust probative value *vis a vis* “weak” applications, in which the evidence of anticompetitive behavior does not suffice. Especially in international cartel cases, the leniency applicants have to provide solid information and evidence not only on the existence of the collusion, but also about the potential anticompetitive effects of the international cartel in Brazil.²⁴ So much so that for each Leniency Agreement signed with Cade in 2015, there were around two leniency applications rejected and/or withdrawn. The robustness of the cases can be noticed by the number of TCCs proposed right after a Leniency Agreement was signed. In 2015, for instance, 90 percent of the Leniency Agreements signed were followed by at least one company applying for a TCC in Cade.

Additionally, it is important to notice that cartel prosecution in Brazil does not depend exclusively on the Leniency Program. In fact, over the last five years, 70 different administrative proceedings of cartels were opened, while only 17 new Leniency Agreements were signed. Companies and individuals involved in cartels are increasing their awareness of Cade’s *ex officio* expertise to detect and fight domestic and international cartels – including through the innovative use of screening intelligence –, encouraging an early approach of the offenders to

²³ Although the Brazilian Competition Law could theoretically reach a wide scope of domestic and international cartels around the world with any kind of actual or potential direct/indirect impact on the Brazilian economy, Cade only prosecutes the ones that fulfill the minimum requirements established by the Authority. See SG/Cade’s final conclusion in the CRT glass’ Administrative Proceeding No. 08012.005930/2009-79 (Nov/2015).

²⁴ ROSEMBERG, Barbara. et al. “Recent Trends in Leniency Agreements in Brazil” (2014). *CPI*. A leading case regarding SG/Cade on the minimum requirements to investigate an international cartel with regard to the effects in Brazil was first stated in the CRT’s glass’ cartel case.



apply to Cade for leniency.

Unavoidably, those breakthroughs consequently involve new challenges.

One challenge involves the rate of final decisions reached by Cade in administrative proceedings that followed a Leniency Agreement. As previously mentioned, until April 2016 there were 54 new Leniency Agreements celebrated in Brazil. However, only nine cartel cases resulting from Leniency Agreements have been decided by Cade's Tribunal,²⁵ all with convictions. There are other six²⁶ cases pending judgment by Cade's Tribunal, which is expected to occur in 2016, and the others are still in the SG/Cade.²⁷ Those forthcoming decisions will provide legal certainty for the leniency and settlement applicants, as well as for the ones who chose not to cooperate, better signaling the incentives that the antitrust authority aims to establish for the early approach of the parties. Cade's final decision in those cartel cases are also expected to increase the deterrence effects of the Leniency Program, improving consumer's welfare.

Another challenge in Brazil is related to the use of the Leniency Plus.²⁸ Cade granted this benefit for the first time in 2015, in the alleged Petrobras cartel case,²⁹ alongside with other two cases. This instrument is being increasingly applied by companies and individuals. This innovative tool is consistent with Cade's higher objective of fighting cartels, given that the collaboration by the applicants provides information and documents regarding different anticompetitive conducts that the antitrust authority had no previous information.³⁰ However,

²⁵ Those cartel cases occurred in the following markets: (i) private security firms (08012.001826/2003-10); (ii) hydrogen peroxide (08012.004702/2004-77 and 08012.007818/2004-68); (iii) air cargo (08012.011027/2006-02 and 08012.000084/2010-34); (iv) marine hose (08012.010932/2007 and 08012.001127/2010-07); (v) perborates (08012.001029/2007-66); and (vi) compressors (08012.000820/2009-11).

²⁶ Those cartel cases occurred in the following markets: (i) gas-insulated switchgear (08012.001376/2006-16) (ii) CRT's glass (08012.005930/2009-79); (iii) DRAM (08012.005255/2010-11); (iv) TPE plastic (08012.000773/2011-20); and (v) ABS plastic (08012.000774/2011-74 and 08700.009161/2014-97).

²⁷ The vast majority of international cases awaiting Cade's final decision are due to pending notification of the defendants located abroad, postponing the beginning of the proceeding.

²⁸ 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 a 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).

²⁹ 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 already investigated in the administrative proceeding involving the alleged cartel applied for a marker in a different market (i.e., public bid of Eletronuclear – Angra 3), in which SG/Cade had no prior information. Additionally, the company decided to propose a TCC regarding the Petrobras cartel investigation. By informing Cade of the alleged Eletronuclear cartel and by confessing its guilty and collaborating to both investigations, the company qualified for receiving the TCC discount cumulated with the discount derived from the Leniency Plus signed in the investigation of the cartel in Eletronuclear.

³⁰ 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 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 1/3 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.



Cade's challenge is to be aware of the potential strategic use of this tool by leniency applicants, and to assess the convenience to apply a "penalty plus" for those who deliberately chose not to present all cartels in which they were involved.

A third challenge in Brazil concerns the harmonization of the procedures of the administrative Antitrust Leniency Program with the one in the criminal sphere. Unlike the Leniency Agreement, the TCC does not automatically generate criminal benefits, although SG/Cade 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. In this context, Cade is experiencing increasing cooperation with the criminal authorities, which is generating a better and coordinated public enforcement in combating cartels. 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. A cornerstone in this cooperation between the administrative and the criminal authorities in the field of TCC was taken in March 2016, when Cade announced the celebration of a Memorandum of Understanding with the Federal Prosecution Service in São Paulo, in its Anti-Cartel Group.³¹ Through this MOU, the dynamics for the cooperation with the criminal authority was first drawn, signaling the possibility of two types of cooperation agreements depending on the characteristics of the case and the phase of the proposal: one based on the Law No. 12.850/2013 (art. 4º)³² and another based on the Law No. 8.137/90 (art. 16º).³³ This step is expected to provide more transparency and predictability in the cooperation between the administrative and the criminal authorities.

Additionally, there is the fourth challenge in Brazil of harmonizing procedures of the Antitrust Leniency Program with other administrative collaboration agreements in the Brazilian legislation. For instance, there is the Leniency Agreement established in the Anticorruption Act (Law No. 12.846/2013), applied by the Federal General Controller ("CGU," in its Portuguese acronym). This law foresees a Leniency Program for companies — not for individuals — that collaborates with the investigation. This new provision for Leniency at the Anticorruption Act can boost Cade's Leniency Program, as many cartel cases occur in the context of public bids in which there are also corruption-related offenses involved.³⁴ There is a path to be trekked in order to align the incentives of those two Programs, especially considering the current uncertainty surrounding the Anticorruption Leniency Agreements.³⁵ Alongside with this boost comes the need of a harmonic negotiation process, urging the need of cooperation between the two independent instances.

³¹ For further information concerning the MOU between Cade and the Anti-Cartel Group of MPF/SP, see: [http://www.cade.gov.br/upload/MEMORANDO%20DE%20ENTENDIMENTOS%20SG%20e%20MPFSP_TCC%20e%20Acordos%20de%20Colabora%C3%A7%C3%A3o_15.03.2016.pdf].

³² Criminal Organization Act (Law No. 12850/2013).

³³ Economic Crimes Act (Law No. 8.137/1990).

³⁴ See, for example, the notorious Operation Car Wash investigating crimes of money laundry, corruption, cartel, among others regarding Petrobras.

³⁵ The Interim Measure No. 703/2015 amended the Anticorruption Act to allow second-in companies to apply for leniency and to allow leniency recipients to continue participating in public procurement proceedings. Regarding this measure, the Federal Court of Accounts (TCU in its Portuguese acronym) is assessing whether it can be at odds with its Normative Instruction No. 74/15.



Finally, Cade's Leniency Program faced recently a fifth challenge, related to civil actions for antitrust damages. Although the Brazilian experience with private enforcement of antitrust law is incipient, the Superior Court of Justice in Brazil has recently ruled that the confidentiality of leniency materials could be disclosed before Cade's Tribunal reaches its final decision on the administrative proceeding. Although the case is still pending final decision in Brazil, and even though its reasoning may be convergent to some aspects of foreign jurisdictions (such as the 2014's Directive of the European Commission), it would be valuable if Cade takes this challenge as an opportunity to give one step forward to address the adequate balance between private and public enforcement rules.³⁶ It might include not only the topic of access to the leniency's documents and informations, but also joint/limited liability, treble/de-treble damages and limitation periods for bringing the lawsuit. In the meanwhile, Cade commits to use its best efforts to maintain the confidentiality of the leniency material.

In conclusion, those almost 16 years of the Brazilian Leniency Program exhibit breakthroughs achieved in terms of new Leniency Agreements signed, the use of innovative tools and the reliability of Cade's procedures, recognized nationally and internationally.³⁷ Consequently, those results increase Cade's responsibility to be assertive and effective in the execution of its Leniency Program, as well as to be prepared to address the new challenges that are on its way.

³⁶ According with art. 207 of Ricade, the identity of the leniency applicant and the essential information to understand the case may be disclosed only after Cade's final decision.

³⁷ E.g., Competition Advocacy Award (honorable mention, 2016), promoted by ICN and WB; Agency of the Year – Americas (2015); promoted by GCR; III Best Practices Award (2015), promoted by the CGU.