



Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

A glimpse into Brazil's experience in international cartel investigations: Legal framework, investigatory powers and recent developments in Leniency and Settlements Policy

International | Concurrences N° 3-2016

www.concurrences.com

Amanda Athayde

amandathayde@gmail.com

Head of the Leniency Unit, Brazilian Competition Authority (CADE)

Chief of Staff, General Superintendence of the Administrative Council for Economic Defense, CADE, Brazil

Marcela Campos Gomes Fernandes

marcelafernandes@hotmail.com

Competition Lawyer and Researcher, University of Sao Paulo (USP)

Former Head of the International Cartel Unit, Administrative Council for Economic Defense, CADE, Brazil

Amanda Athayde

amandathayde@gmail.com

Head of the Leniency Unit, Brazilian Competition Authority (CADE)
Chief of Staff, General Superintendence of the Administrative Council for Economic Defense, CADE, Brazil

Marcela Campos
Gomes Fernandes

marcelafernandes@hotmail.com

Competition Lawyer and Researcher, University of Sao Paulo (USP)
Former Head of the International Cartel Unit, Administrative Council for Economic Defense, CADE, Brazil

ABSTRACT

L'article analyse l'expérience brésilienne dans la poursuite des cartels de dimension internationale sur la période 2000-2016. Il prend en compte quatre aspects centraux des activités de poursuites au Brésil : premièrement, le cadre juridique de la répression des cartels ; deuxièmement, les principales compétences de l'Autorité de la concurrence brésilienne (CADE) ; troisièmement, le Programme de Clémence Brésilien ; quatrièmement, la Politique d'engagements en matière de concurrence adoptée par le CADE. L'article évoque ensuite un certain nombre d'améliorations entreprises pour améliorer les enquêtes à l'encontre des cartels internationaux. Les auteurs fournissent des statistiques sur ces enquêtes menées par le CADE, mettant en avant à la fois certaines améliorations récentes ainsi qu'une partie des principaux défis à surmonter. Afin de surmonter ces difficultés dans la poursuite des cartels internationaux, les auteurs suggèrent l'adoption de certaines mesures pour renforcer la coopération entre les autorités de la concurrence.

This article analyzes the Brazilian experience in international cartels enforcement within 2000-2016. Initially, it presents four central aspects of the enforcement activities in Brazil. First, the legal framework on fighting cartels. Second, the main investigatory powers of the Brazilian Competition Authority, the Administrative Council for Economic Defense (CADE). Third, the Brazilian Leniency Program. Fourth, the Settlement Policy adopted by CADE. Subsequently, the article hint at some improvements accomplished in Brazil's performance investigating international cartels. The authors provide statistics of CADE's international cartel investigations, which highlight some recent developments as well as some of the main challenges to overcome. The authors then suggest, as a strategy to overcome those challenges in international cartels enforcement, some measures for strengthening cooperation between competition authorities.

*The views expressed in this paper are those of the authors and do not necessarily represent those of the CADE.

A glimpse into Brazil's experience in international cartel investigations: Legal framework, investigatory powers and recent developments in Leniency and Settlements Policy

Introduction

1. International cartels can cause harmful effects to consumers and to the economy, possibly leading to higher overcharges than domestic ones.¹ Their impact can be especially severe for developing countries.² In Latin America only, the estimated overcharges due to the 84 global cartels discovered between 1990 and 2000 are worth at least 35 billion dollars.³ International cartel enforcement, which has been considered a top priority by competition authorities in North America and Europe for several decades, has been on the rise in the so-called "Rest of the World" (ROW): Africa, Asia and Latin America.⁴

2. In this paper, the authors present a brief overview of Brazil's experience in this area,⁵ examining improvements and challenges to overcome. As the statistics⁶ show, the Brazilian Competition Authority (the Administrative Council for Economic Defense — CADE, in its Portuguese acronym) has made important improvements in the prosecution of international cartels in the last decade and

1 J. M. Connor, Price-Fixing Overcharges: Revised 3rd Edition (February 24, 2014). Available at SSRN: <http://ssrn.com/abstract=2400780> or <http://dx.doi.org/10.2139/ssrn.2400780>.

2 M. Levenstein, V. Suslow and L. Oswald, International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies, Cambridge: National Bureau of Economic Research, 2003. Available at: <http://www.nber.org/papers/w9511.pdf>.

3 J. M. Connor, Latin America Cartel Control (March 14, 2008). Chapter XIV pp. 291–324, in *Competition Law and Policy in Latin America*, E. M. Fox and D. D. Sokol (eds.), Oxford: Hart Publishing (July 2009). Available at SSRN: <http://ssrn.com/abstract=1156401> or <http://dx.doi.org/10.2139/ssrn.1156401>.

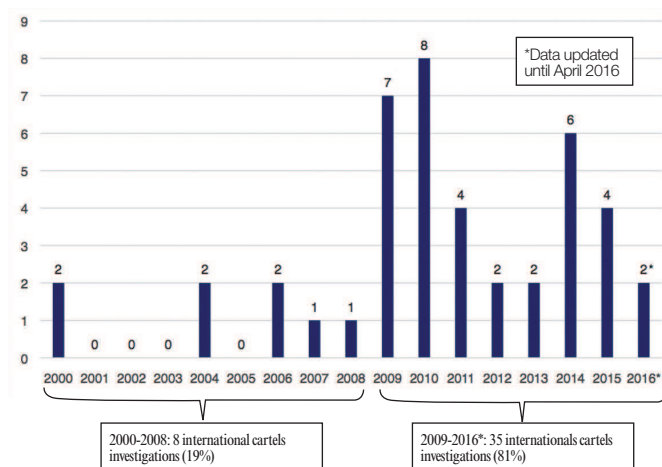
4 J. M. Connor, The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America (January 6, 2016). Available at SSRN: <http://ssrn.com/abstract=2711972> or <http://dx.doi.org/10.2139/ssrn.2711972>.

5 For the purposes of this paper and due to limitations of our research, we will consider as international cartel investigations only the ones in which the alleged violations are international in a geographic sense and have alleged potential effects in Brazil. They include cartels that operated nationally, but were part of an international agreement. They do not include national cartels with one or more offenders located outside Brazil.

6 All the numbers presented in this paper were extracted from CADE's proceedings and information, and aggregated by the authors. They have been updated to April 30, 2016. Any inaccuracy is the authors' responsibility only.

a half. From 2000 to April 2016, the Authority opened 43 new proceedings to investigate international cartels (see figure 1 below). Even though the first two investigations started in the year 2000, the prosecution of international cartels in Brazil truly took off in 2009, with the opening of 7 new proceedings in the same year. Likewise, 35 of the 43 proceedings were initiated between 2009 and April 2016, which indicates that in the last seven years Brazil has opened 81% of the total number of investigations into international cartels. This leads to the inference that the enforcement of international cartels in Brazil has only really started recently and is rising.

Figure 1. Number of new proceedings per year in Brazil (international cartels only)

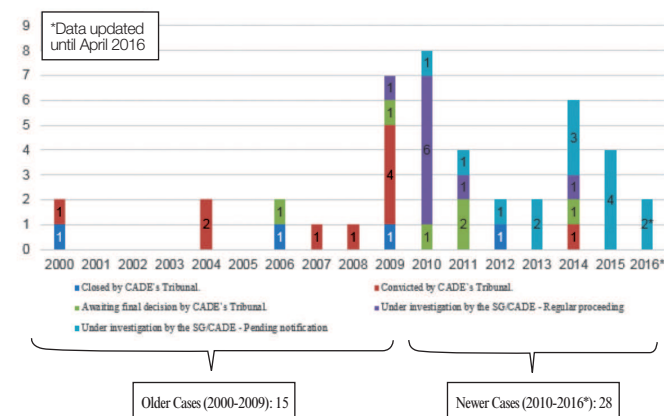


3. Within the same time frame (i.e., from 2000 to April 2016), 27 leniency agreements regarding either fully or at least partially international cartels allowed the initiation and/or the continuation of the international cartel investigations (see figure 4 below), and 44 settlement agreements were signed related to international cartel proceedings (see figure 5 below).

4. However, challenges associated with the investigation of this kind of violation still need to be dealt with by the Authority.⁷ As the numbers indicate, only 14 of the 43 proceedings against international cartels resulted in a formal final decision by CADE's Tribunal⁸ by April 2016 (32%). 10 of them ended convicted (23%) and 4 closed (9%).⁹ In 14 cases, the authorities are still trying to locate all the companies and/or individuals involved and notify them of being subject to investigation in order to initiate

the legal deadline for presenting their defenses (32%).¹⁰ 9 further cases are under investigation by CADE's investigative body (the General Superintendence—SG/CADE in its Portuguese acronym) (21%) and 6 are awaiting a final decision by CADE's Tribunal (14%) (see figure 2 below).

Figure 2. Current phases of the proceedings per year (international cartels only)



5. When it comes to the 15 older cases, i.e. those started between 2000 and 2009, SG/CADE has already made a recommendation for 14 (93%). The majority of those 14 cases have already been judged by CADE's Tribunal (12), the majority with conviction (9) and a few closed (3). There are other 2 cases awaiting final decision by CADE's Tribunal. However, when it comes to the 28 newer cases, i.e. those started from 2010 to April 2016, the majority of those (22) are either pending notification of the defendants (14) or under the regular proceeding of this evidentiary stage (8). 4 of them are awaiting a final decision by CADE's Tribunal, 1 was convicted and 1 closed. Therefore, the bottleneck associated with locating and notifying the defendants seems to have narrowed since 2010.

6. The bottleneck was probably caused by at least two factors. One is that the above period coincided with the Brazilian Competition Authority's decision to intensify

7 In these cross-border violations, companies and individuals involved are typically located in different countries, all around the world, as well as are most of the evidences and the witnesses, making it difficult to the authorities to get together all the pieces of the puzzle. Besides, language barriers and procedural obstacles can also represent a great burden when dealing with transnational investigations.

8 At the end of each investigation, CADE's General Superintendence (hereafter "SG/CADE"), which is the investigative body, issues an opinion either on the condemnation or the closing of the case and submits it for judgment by CADE's Tribunal (which is the final decision body).

9 By convicted, we also considered the proceedings closed after a settlement. By closed, we also considered cases that are still under investigation, but already had their international part closed.

10 According to Art. 70 of Law 12.529/2011, in "the decision initiating the administrative proceeding, the respondent shall be notified so that, within thirty (30) days, he presents a defense and specifies the evidence to be produced, and presents the complete qualifications of up to three (03) witnesses. The initial notice shall contain the entire contents of the decision approving the initiation of the administrative proceeding and representation, as the case may be." In case of international cartels, individual defendants residing outside Brazil also have to be notified. The exact location of foreign individuals is often an obstacle for the Authority, especially when they are former employees of the companies being investigated or when they live in countries with personal data protection laws that forbid the employers to provide their addresses.

investigations against individuals.¹¹ In turn, this increased the burden of locating individual defendants. The other factor was related to legal issues regarding having the notification documents translated into the defendants' language.¹² These translation issues slowed down the notification process of individual and corporate defendants.

7. To deal with this bottleneck, the Authority first chose to split the proceedings between defendants notified and not yet notified, but this division had the effect of multiplying the number of cases. Additionally, since 2015 the Authority has resorted to shifting the burden of providing the translation of the notification documents to the leniency and settlement applicants. The solution was achieved by introducing clauses of procedural cooperation for document translation in the Leniency and Settlement Agreements. Since this shift was only introduced last year, however, the results are not yet reflected in the numbers. An additional tool for speeding up investigations was incentivizing defendants to negotiate settlements with SG/CADE even if the proceedings were still pending notification of the defendants or under proceeding of this evidentiary stage. The incentive came in the form of offering discounts on penalties for approaching the Authority as early as possible (as detailed in section III).

8. Below, the authors analyze in more detail Brazil's international cartel enforcement. In the first section, the authors give a quick overview of the legal framework on cartels in Brazil, as well as of CADE's main investigatory powers. In the second and third sections, the authors describe CADE's Leniency Program and Settlement Policy, respectively, which are the two main pillars of Brazilian international cartel investigations. In the last section, the authors present their final considerations about the issues discussed in the paper.

I. Legal framework on cartels in Brazil and CADE's main investigatory powers

9. In Brazil, cartels are an administrative¹³ as well as a criminal¹⁴ violation. Regarding the administrative prosecution of international cartels, the Brazilian Competition Law adopts the "effects doctrine" and therefore applies it to any practice performed, in full or in part, on the national territory, or that produces or may produce effects thereon.¹⁵ It is also relevant to note that CADE considers cartels as a violation by its object, and therefore it is not required to prove its actual effects¹⁶.

10. Although Brazilian Law could theoretically reach a wide scope of national 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. In a recent leading case,¹⁷ SG/CADE made public what those requirements are, providing a clear position on at least three types of international cartels. These are: (i) international cartels of global scope or involving specific regions or countries in which there is evidence of the inclusion of Brazil in the scope of the agreement—this type of cartel can be prosecuted and punished under Brazilian jurisdiction; (ii) international cartels of global scope or involving specific

11 This tendency of prosecution against individuals is also verified in the United States, for instance. According to the Deputy Assistant Attorney General of the Department of Justice, Brent Snyder, "During the 1990s, the Antitrust Division prosecuted almost equal numbers of individuals (476) as corporations (480). From 2000–2009, we prosecuted more than twice as many individuals (453) as corporations (220). And during the most recent five-year period, we prosecuted almost three times as many individuals (352) as corporations (123)." B. Snyder, Individual Accountability for Antitrust Crimes, Remarks as Prepared for the Yale School of Management—Global Antitrust Enforcement Conference, Feb. 19, 2016.

12 In order to resort to international legal cooperation mechanisms, based in Mutual Legal Assistance Treaties or reciprocity agreements, it is usually required a certified or official translation of the proceedings documents into the requested country official language. Specific requirements related to the translation are those of the requested country.

13 In the administrative area, the Brazilian Competition Law (Law No. 12.529/2011) is the legislation governing the prosecution. The administrative prosecution focus on companies and individuals that agree, join, manipulate or adjust with competitors, in any way, on one of the following market variants: (i) the prices of goods or services individually offered; (ii) the production or sale of a restricted or limited amount of goods or the provision of a limited or restricted number, volume or frequency of services; (iii) the division of parts or segments of a potential or current market of goods or services by means of, among others, the distribution of customers, suppliers, regions or time periods; or (iv) the prices, conditions, privileges or refusal to participate in public bidding. Those acts will be considered administrative violations in Brazil under any circumstance if they have as an objective or may have, regardless of fault, even if not achieved, one of the following effects: (a) to limit, restrain or in any way injure free competition or free initiative; (b) to control the relevant market of goods or services; (c) to arbitrarily increase profits; and (d) to exercise a dominant position abusively. Law 12.529/2011 (Brazilian Competition Law), Article 36, § 3º, I. Available at: <http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>

14 In the criminal area, the Brazilian Economic Crimes Law (Law No. 8.137/1990, Article 4, II) is the legislation governing the prosecution. The criminal prosecution focus only on the individuals that reach an agreement, compromise, adjustment or alliance among offers aiming at one of the following objectives: (a) artificially fixing prices or quantities sold or produced; (b) regional control of the market by a company or group of companies; (c) or control of a distribution or supply network, detrimental to the competition. Those acts of the individuals face a penalty in Brazil of two to five years of imprisonment and fines, and the prosecution is charge of the Public Prosecution Service—either by the State Prosecutors or the Federal Prosecutors.

15 Law No. 12.529/2011 (Brazilian Competition Law), Article 2.

16 Leading Cases: Administrative Proceedings (PA) No. 08012.002127/2002-14, 08012.004702/2004-77 and 08012.004472/2000-12.

17 The document in which that position was first stated was the SG/CADE's final conclusion in the CRT glass' Administrative Proceeding (PA) No. 08012.005930/2009-79, dated from November 2015.

regions or countries in which there is evidence that some or all of the participants in the collusion exported the cartelized product directly to Brazil—this type of cartel can be prosecuted and punished under Brazilian jurisdiction, and even companies that did not export their products directly to Brazil may be subject to liability; (iii) cartels involving regions of the world or specific countries in which there is no evidence that its members exported the cartelized product directly to Brazil, but only indirectly¹⁸—this type of cartel may or may not be prosecuted and punished under Brazilian jurisdiction depending on the materiality and substantiality of the potential effects of the conduct in Brazil.

11. To investigate domestic and/or international cartels, CADE has the most common and relevant investigatory powers available for competition authorities around the world. Since 2000, Brazil has had a well-structured and strong Leniency Program¹⁹ as well as the power to request search and seizure warrants.²⁰ Additionally, in 2012, Brazil acquired the power to make unannounced inspections,²¹ and in 2013 it introduced a major change in its Settlements Policy,²² which resulted in an impressive increase in the use of this investigative tool.

12. When it comes to international cartels, Brazil usually relies intensively, even though not exclusively, on Leniency and Settlements Agreements. In addition, the Authority often resorts to the use of decisions and settlements from other jurisdictions as an investigative resource. Moreover, international cooperation with other antitrust authorities is being intensified. For instance, when a case originates from a leniency agreement, international cooperation is commonly established if the leniency applicant provides SG/CADE with a waiver,²³ either procedural or full, which may continue during the entire proceeding. Finally, informal cooperation to exchange impressions and non-confidential information about the case is usual too.

13. Through the use of all of these instruments, Brazil has investigated some of the most well-known international cartels, such as the ones in the lysine,²⁴ vitamins,²⁵ hydrogen peroxide,²⁶ gas and air insulated switchgears (GIS²⁷ and AIS²⁸), marine hoses,²⁹ air cargo,³⁰ compressors,³¹ sodium perborate,³² graphite electrodes,³³ TFT-LCD,³⁴ CRT glass,³⁵ soda ash,³⁶ Cathode Ray Tube for television sets (CPT³⁷), Color Display Tubes for computer monitors (CDT³⁸), DRAM,³⁹ submarine cables,⁴⁰ air and sea international transport services/

¹⁸ For “indirectly” exporting we refer the entry into Brazil of final products manufactured with intermediate products sold by the cartel members outside Brazilian territory.

¹⁹ Law 12.529/2011 (Brazilian Antitrust Law), Articles 86 and 87, and CADE’s Internal Rules Articles 197 to 210. For further information, check the English version of the draft of CADE’s Guidelines on the Leniency Program: <http://www.cade.gov.br/acesso-a-informacao/participacao-social-1/contribuicoes-da-sociedade/arquivos/guidelines-cades-antitrust-leniency-program.pdf>

²⁰ Law 12.529/2011 (Brazilian Antitrust Law), Article 13, VI, d).

²¹ Law 12.529/2011 (Brazilian Antitrust Law), Article 13, VI, c).

²² Law 12.529/2011 (Brazilian Antitrust Law), Article 85 and CADE’s Internal Rules Articles 179 to 196. For further information, check the English version of the draft of CADE’s Guidelines on the Settlements in Cartel cases: http://www.cade.gov.br/acesso-a-informacao/participacao-social-1/contribuicoes-da-sociedade/arquivos/guidelines_tcc.pdf

²³ CADE does not share information from a leniency agreement with antitrust authorities of other countries, except if the leniency applicants and/or recipients expressly allow the sharing of the provided information with the authorities of other jurisdictions (waiver). The waiver can involve both formal aspects (procedural waiver) and material aspects of the investigation (full waiver).

²⁴ **Lysine’s** Administrative Proceeding (PA) No. 08012.004897/2000-23. Closed by CADE’s Tribunal.

²⁵ **Vitamins’** Administrative Proceeding (PA) No. 08012.004599/1999-18. Convicted by CADE’s Tribunal.

²⁶ **Hydrogen Peroxide’s** Administrative Proceedings (PA) No. 08012.004702/2004-77 and 08012.007818/2004-68. Both convicted by CADE’s Tribunal.

²⁷ **Gas Insulated Switchgear’s** Administrative Proceeding (PA) No. 08012.001376/2006-16. Awaiting final decision by CADE’s Tribunal.

²⁸ **Air Insulated Switchgear’s** Administrative Proceeding (PA) No. 08012.001377/2006-52. Although the proceeding is still under investigation by the SG/CADE, the probe about a possible international aspect of the violation was closed by CADE’s Tribunal.

²⁹ **Marine Hoses’** Administrative Proceedings (PA) No. 08012.010932/2007-18 and 08012.001127/2010-07. Both convicted by CADE’s Tribunal.

³⁰ **Air Cargo’s** Administrative Proceedings (PA) No. 08012.011027/2006-02 and 08012.000084/2010-34. Both convicted by CADE’s Tribunal. The first one was convicted in formal final decision. The other was archived after a settlement with recognition of participation on the cartel (considered in this paper as convicted).

³¹ **Compressors’** Administrative Proceeding (PA) No. 08012.001104/2009-51. Convicted by CADE’s Tribunal.

³² **Sodium Perborate’s** Administrative Proceeding (PA) No. 08012.001029/2007-66. Convicted by CADE’s Tribunal.

³³ **Graphite Electrodes’** Administrative Proceedings (PA) No. 08012.009264/2002-71, 08700.007247/2014-85 and 08700.009509/2012-84. The first two were closed by CADE’s Tribunal due to procedural issues. The third one was archived after a settlement with recognition of the participation on the cartel (considered in this paper as convicted).

³⁴ **TFT-LCD** Administrative Proceedings (PA) No. 08012.011980/2008-12 and 08012.008871/2011-13. Both under investigation by the SG/CADE. The first one is under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.

³⁵ **CRT glass’** Administrative Proceeding (PA) No. 08012.005930/2009-79. Awaiting final decision by CADE’s Tribunal.

³⁶ **Soda ash’** Administrative Proceeding (PA) No. 08012.008881/2010-60. Under investigation by the SG/CADE—regular proceeding.

³⁷ **CPT’s** Administrative Proceedings (PA) No. 08012.002414/2009-92 and 08700.010731/2013-00. Both under investigation by the SG/CADE. The first one is under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.

³⁸ **CDT’s** Administrative Proceeding (PA) No. 08012.010338/2009-99 and 08700.010979/2013-71. Both under investigation by the SG/CADE. The first one is under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.

³⁹ **DRAM’s** Administrative Proceeding (PA) No. 08012.005255/2010-11. Awaiting final decision by CADE’s Tribunal.

⁴⁰ **Submarine Cable’s** Administrative Proceedings (PA) No. 08012.003970/2010-10 and 08700.008576/2012-81. The first one is under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.

freight forwarding,⁴¹ methionine,⁴² ODD,⁴³ TPE plastic,⁴⁴ ABS plastic,⁴⁵ auto parts,⁴⁶ capacitors⁴⁷, FOREX⁴⁸ and shipping⁴⁹ markets.

14. In the light of recent developments, in the next two sections we will focus our analysis on the impact of two of CADE's investigatory powers in international cartel investigations: the Brazilian Leniency Program (II.) and the Brazilian Settlement Policy (III.).

II. Brazilian Leniency Program

15. Leniency⁵⁰ Programs are an important, if not the most important, investigatory tool designed to fight cartels.⁵¹ The Brazilian Leniency Program was started in 2000, and since then it has been able to attract different companies and/or individuals in different markets and provide them with relevant benefits to cooperate⁵² with the Authority.⁵³

16. In the administrative sphere, the first candidate entering into a leniency agreement can obtain full immunity or a reduction of the applicable fine. In the criminal sphere, entering into a leniency agreement leads to the suspension of the limitation periods⁵⁴ and prevents the criminal prosecution of the candidate with respect to the antitrust 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

41 **Air and sea international transport services/freight forwarding's** Administrative Proceeding (PA) No. 08012.001183/2009-08. Under investigation by the SG/CADE—regular proceeding.

42 **Methionine's** Administrative Proceeding (PA) No. 08012.009581/2010-06. Under investigation by the SG/CADE—regular proceeding.

43 **ODD's** Administrative Proceedings (PA) No. 08012.001395/2011-00 and 08012.011403/2011-18. Both under investigation by the SG/CADE. The first one is under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.

44 **TPE Plastic** Administrative Proceeding (PA) No. 08012.000773/2011-20. Awaiting final decision by CADE's Tribunal.

45 **ABS Plastic** Administrative Proceedings (PA) No. 08012.000774/2011-74 and 08700.009161/2014-97. Both are awaiting final decision by CADE's Tribunal.

46 In 2014, 2015 and 2016, the General Superintendence opened eight Administrative Proceedings to investigate cartels from different automobile parts, domestic and/or international. Among them, there are international cartels, such as those related to: The **sparkling plugs** market (Administrative Proceeding (PA) No. 08700.005789/2014-13)—under investigation by the SG/CADE, pending notification of the defendants—; The **anti-friction bearings** market (Administrative Proceeding (PA) No. 08012.005324/2012-59 and 08700007052/2015-16) — the first one in under regular proceeding of investigation by the SG/CADE. The second is pending notification of the defendants.—; The **clutch coating** market (Administrative Proceeding (PA) No. 08700.010321/2012-89)—under investigation by the SG/CADE, pending notification of the defendants—; The **wire harnesses** market (Administrative Proceeding (PA) No. 08700.009029/2015-66)—under investigation by the SG/CADE, pending notification of the defendants—; The **honeycombs market** (Administrative Proceeding (PA) No. 08700.009167/2015-45)—under investigation by the SG/CADE, pending notification of the defendants; The **steering systems** (Administrative Proceeding (PA) 08700.003735/2015-02) —under investigation by the SG/CADE, pending notification of the defendants The auto parts market was already the object from dawn raids complied by the SG/CADE in August 2014. There are still other investigations ongoing in the sector.

47 **Capacitors'** Administrative Proceeding (PA) No. 08700.0010056/2014-09. Under investigation by the SG/CADE. Pending notification of the defendants.

48 **FOREX's** Administrative Proceeding (PA) No. 08700.004633/2015-04. Under investigation by the SG/CADE. Pending notification of the defendants.

49 **Shipping's** Administrative Proceeding (PA) No. 08700.001094/2016-26. Under investigation by the SG/CADE. Pending notification of the defendants.

50 For the purpose of this paper, "leniency" refers to full immunity, amnesty or reduction in fine in the case CADE is already aware of the reported violation but still doesn't have enough evidence against the candidate. According to article 86, paragraph 4, of Law No. 12.529/2011, combined with article 208 of the Internal Rules of CADE, once CADE's Tribunal declares that the leniency agreement has been fulfilled, the leniency recipients will benefit from: (i) administrative immunity under Law No. 12.529/2011, in cases in which the leniency agreement's proposal is submitted to CADE's General Superintendence when this authority was not aware of the reported violation; or (ii) a reduction by one to two-thirds of the applicable fine under Law No. 12.529/2011, in cases in which the leniency agreement's proposal is submitted to the SG/CADE after this authority becomes aware of the reported violation.

51 S. D. Hammond. Cornerstones of an Effective Leniency Program. In: ICN Workshop on Leniency Programs, Sydney, 2004, pp. 22–23. Available at: <http://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>.

52 According to the Brazilian Competition Law, there are six cumulative requirements to apply for a leniency agreement, which are the following: "(i) the company must be the first in with respect to the violation reported or under investigation; (ii) the company and/or individual must cease its participation in the violation reported or under investigation; (iii) when the agreement is proposed, CADE's General Superintendence must not have sufficient evidence to ensure the conviction of the company and/or the individuals; (iv) the company and/or individuals must confess the wrongdoing; (v) the company and/or individual must fully and permanently cooperate with the investigation and the administrative proceeding, and attend, at their own expenses, whenever requested, at all procedural acts, until a final decision is rendered by CADE on the reported violation; and (vi) the cooperation must result on the identification of the others involved in the violation and the collection of evidentiary information and documents of the offense reported or under investigation."

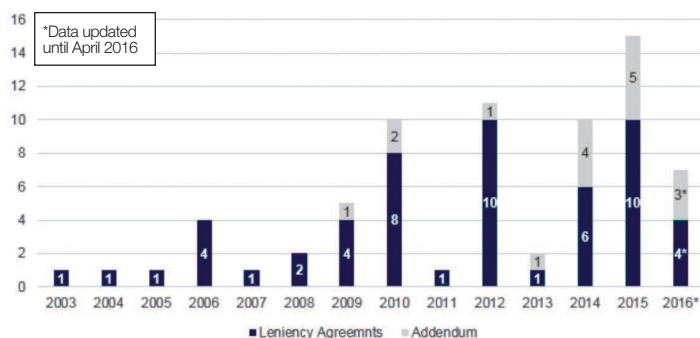
53 "According to article 86 of Law No. 12.529/2011, the government body responsible for negotiation and execution of Leniency Agreements is [SG/CADE]. CADE's Tribunal does not participate in the negotiation and/or execution of Leniency Agreements and is only responsible for issuing a final decision as to whether or not the agreement has been fulfilled, at the time of the judgment of the administrative proceeding (art. 86, paragraph 4, of Law No. 12.529/2011). Although arts. 86 and 87 of Law No. 12.529/2011 do not expressly require the participation of the state and/or federal Prosecution Services for entering into a Leniency Agreement, CADE's consolidated experience shows that, in light of the criminal repercussions of a cartel, the Prosecution Service should be invited to co-sign, as it is the competent entity to bring criminal charges and initiate a public criminal action. Hence, the state and/or federal Prosecution Services can participate in the agreement as an interested party, in order to grant greater legal security for the leniency recipients and facilitate the criminal investigation of the cartel." In this sense, the administrative and the criminal investigations are independent in both spheres, including in international cartel investigations.

54 In Brazil, Article 46 of Law No. 12.529/2011 provides for a five-year limitation period determined either from the date when the anticompetitive practice took place or, in the event of a permanent or continued violation, the date on which it ceases. In situations where the conduct investigated under the Antitrust Law is also a criminal violation (such as cartels), the limitation period is twelve years, applied both to the Criminal Public Prosecutor and to CADE.

General Procurement Act (Law No. 8.666/1993) and in Article 288 of the Criminal Code (criminal conspiracy). It is important to stress that the Brazilian Leniency Program offers this benefit only to the first company and/or individual who approaches the Competition Authority, and all the others who later approach CADE can negotiate settlements with benefits that are quite different than those offered to leniency applicants (see section III below).

17. Over the years, domestic and international corporations and/or individuals became aware of the Brazilian Leniency Program and started applying for Leniency—perhaps realizing the threat of severe sanctions and fearing detection. From 2000 to April 2016, Brazil has signed 54 new leniency agreements and 17 addendums,⁵⁵ referring to domestic, international and mixed⁵⁶ cartels (see figure 3 below). Even though the legislation came into force in 2000, the first leniency agreement was signed only in 2003, paving the way for the first ever cartel search and seizure warrant in Brazil. Of the more than fifteen years of the Leniency Program, twelve of which included signing leniency agreements, the last four need to be highlighted. From 2012⁵⁷ to April 2016, 31 new leniency agreements were signed, which represent 57% of the total number of new leniency agreements signed in the history of the Brazilian Program. These numbers clearly demonstrate the importance of the Brazilian Leniency Program in detecting cartels.

Figure 3. Number of new leniency agreements/addendums per year in Brazil (including domestic, international and mixed cartels)



18. Among the new leniency agreements, Brazil has a diversified portfolio of domestic, international or mixed (domestic and international) cartel investigations (see figure 4 below). Twenty-seven of the total of 54 new leniency agreements relate to domestic cartels

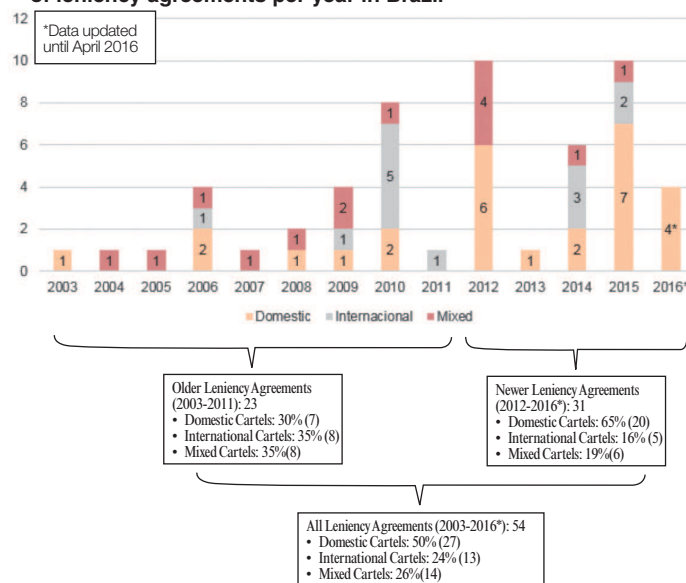
⁵⁵ An addendum to the leniency agreement means signing of a document to include individuals to the original leniency agreement. “It should be noted that an Addendum to the Leniency Agreement will be possible only upon the fulfillment of the requirements for execution of a Leniency Agreement, such as having participated in the conduct, confessing the wrongdoing, and collaborating with the investigations, and as long as the SG/CADE does not have sufficient evidence to ensure a conviction.”

⁵⁶ For “mixed” cartels, we refer to those investigations in which the alleged violation operated both domestic and internationally.

⁵⁷ Before the entry into force of the Law No. 12.529/2011 (Brazilian Competition Law), the law governing the competition issues was the Law No. 8.884/1994.

(50%), 13 to international cartels (24%) and 14 to mixed ones (16%). Whereas in the beginning of the Brazilian Leniency Program the new Agreements were mostly related to international cartels, this is no longer the case in recent years even though Brazil continues to use leniency agreements to detect international violations. From 2003 to 2011, 30% of the total of 23 new leniency agreements were domestic cartels, 35% international and 35% mixed ones. On the other hand, from 2012 to April 2016, 65% of the total of 31 new leniency agreements were domestic cartels, 16% international and 19% mixed ones.

Figure 4. Types of cartels investigated as a result of leniency agreements per year in Brazil



19. The above numbers clearly reveal some important features in the Brazilian Leniency Program, especially regarding the direction it has been taking in the last four years. The first feature is that 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.⁵⁸ The second feature is that Brazil is prosecuting a wide range of types of cartels, including domestic, international and mixed ones, in different markets. The third one is that the Brazilian investigations of international cartels are not reliant exclusively on the Leniency Program.⁵⁹ The fourth feature is that the new leniency agreements, each time more robust, are generating external impacts on the Settlements Policy in Brazil, which is visible from the fact that, in 2015, 90% of the new leniency agreements were followed by at least one request to settle. And the fifth feature is that the domestic and international business community—including lawyers, business employees, compliance staff, individuals, etc.—is becoming more aware of Brazil’s activities on the prosecution of cartels, which in turn increases the effectiveness of the Brazilian Leniency Program.

⁵⁸ B. Rosenberg, S. Terepins, L. Galvao and M. Exposto, Recent Trends in Leniency Agreements in Brazil, *CPI*, Feb 26, 2014.

⁵⁹ In 2015, for example, CADE received 244 new claims of anticompetitive conducts and opened 37 formal proceedings to investigate them, among which only a few were originated from the leniency agreements. This means that the Brazilian Competition Authority not only relies on leniency applications to prosecute cartels.

20. To further enhance transparency, accessibility, predictability and legal certainty in the Brazilian Leniency Program, in 2015 CADE released the preliminary version of its Frequently Asked Questions (also available in English⁶⁰). The FAQs are meant to provide further insight for the national and international competition community into the Brazilian Leniency Program.

III. Brazilian Settlement Policy

21. In Brazil, the Settlement Agreement signed with the Competition Authority in a cartel investigation is called TCC, which is the Portuguese acronym for Termo de Compromisso de Cessação (Cease and Desist Consent/Agreement). Through this instrument CADE can suspend and afterwards close the investigations against companies and/or individuals charged for collusive violations under certain circumstances and subject to the commitment of ceasing the practice and paying a pecuniary contribution. The TCC, unlike the leniency agreement, does not offer any automatic criminal benefits.⁶¹

22. Until 2013, there were few cartel cases in which TCCs were actually used since the regulation of the instrument did not provide enough incentives for the Authority and for the defendants to settle. On the one hand, the TCC did not require an obligation on the defendants' part to cooperate with the investigations, making it less attractive for the Authority to settle when there was enough evidence for a conviction. On the other hand, there were no clear rules on how the amount of the pecuniary contribution would be defined, making it less attractive for defendants to settle due to a lack of legal certainty about the outcomes of the negotiations.

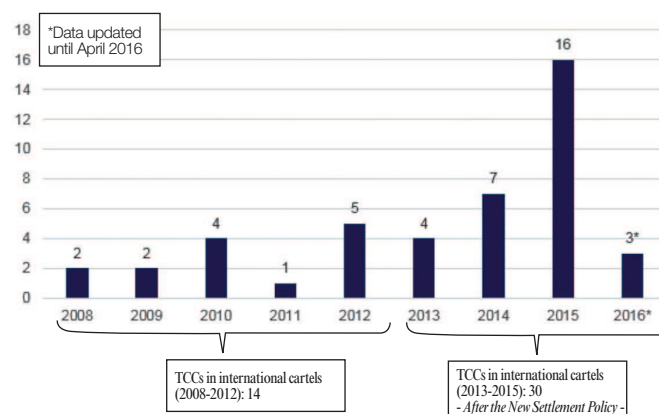
23. In 2013, however, CADE changed its Settlement Policy.⁶² The goal was to make TCCs more similar to leniency agreements in terms of incentives and thus to encourage companies and/or individuals involved in cartel cases to cooperate with the Authority when they were not the first in and therefore did not qualify for a leniency agreement.⁶³ Accordingly, more stringent requirements were established to sign a TCC in a cartel investigation. To settle in such a case, defendants now

have not only to (i) cease their involvement and (ii) pay a pecuniary contribution, but also to (iii) admit the practice that is being investigated, and, in order to have greater financial benefits, they have to (iv) cooperate with the investigations by providing evidence and/or explaining, translating and supplying details about documents and information.

24. The new Settlement Policy also introduced clear discount slots⁶⁴ related to the expected fine. While a proceeding is still being investigated by SG/CADE, the first TCC applicant can be granted a reduction of 30 to 50% of the expected fine, the second one can receive a reduction of 25 to 40% and the others a reduction of up to 25%. The exact amount of the discount is primarily determined by the quality of the cooperation with the investigation as whole. If, however, the proceeding is already at CADE's Tribunal to be decided, cooperation is not required by the regulation (although it can be requested by the Authority) and the TCC applicant can receive a reduction of up to only 15% of the expected fine.

25. In the context of those changes, Brazil has seen an impressive increase in the number of TCCs signed. Regarding international cartels, until 2013, Brazil had 14 TCCs in international cartel cases (see figure 5 below).⁶⁵ After the new Settlement Policy came into force, that is from 2013 to April 2016, the country had 30 TCCs, which is more than a twofold increase.⁶⁶

Figure 5. Number of TCCs per year in Brazil (international cartels only)



26. This shift in Brazil's Settlement Policy represents important steps for the country's cartel enforcement as more TCCs translate into less procedural costs, into shorter proceedings, into better-documented cases with high chances to result in convictions and into advance

⁶⁰ English version of the draft of CADE's Guidelines on the Leniency Program: <http://www.cade.gov.br/aceso-a-informacao/participacao-social-1/contribuicoes-da-sociedade/arquivos/guidelines-cades-antitrust-leniency-program.pdf>

⁶¹ Since the TCC does not generate automatic benefits in the criminal sphere, the Prosecution Service does not participate in the agreement and may bring criminal action against the parties to the TCC. Nevertheless, if the person interested in entering into a TCC with CADE also wishes to concurrently negotiate a cooperation agreement with the Prosecution Service and/or the Federal Police, then SG/CADE can assist in the interaction with the Prosecution Service and/or Federal Police, and the negotiation and execution of any agreements will be up to the discretion of such authorities.

⁶² Article 179 and following of Cade's Internal Rules.

⁶³ As explained above, in Brazil, only the first one to contact the Authority is eligible to a leniency agreement.

⁶⁴ The Department of Justice of the United States uses the expression "cooperation discounts" to refer to the "discount slots" mentioned in this paper.

⁶⁵ Before 2008, there wasn't any TCC signed on cartel investigations.

⁶⁶ It is relevant to note that the number of TCC's subscribers had an even bigger increase, given that, after the entry into force of the new Settlement Policy, companies and their employees can sign the TCC jointly, what was not an option before.

payment of pecuniary contributions for the Authority. The impact for international cartel investigations is particularly relevant, as the cooperation can help the Competition Authority to break territorial barriers to access evidences, to locate offenders and to collect advanced payments of fines from companies and/or individuals with no assets in Brazil.⁶⁷

27. Finally, it is worth mentioning that another development in Brazil's Settlement Policy was announced in January 2016, when CADE released the preliminary version of its Guidelines for TCC negotiations in cartel cases.⁶⁸ The Guidelines contain CADE's best practices in the field and also aim to provide more transparency and predictability for the negotiations. The document explains all the steps of the negotiation process and indicates clearly the Authority's criteria for establishing the base amount and the percentages of the expected fine,⁶⁹ and for calculating the exact percentage of the discount on the expected fine within the established discount slots. This step forward might also help the international competition community gain a clearer insight into the Brazilian Settlement Policy.

Final observations

28. In this paper, we attempted to provide a glimpse into the Brazilian experience in international cartel investigations. Recent improvements in the Leniency Program and Settlement Policy seem to have boosted Brazil's results. In our opinion, some factors provided the incentives and legal certainty that the parties involved in anti-competitive misconducts need to "become clean" with Brazilian authorities. Among those factors, the relentless cartel enforcement promoted by CADE's Tribunal with its increasingly heavy fines evince the threat of severe sanctions and the high risk of detection. Additionally, the above-mentioned definition and consolidation of clearer and more objective applicable criteria regarding requirements and internal proceedings of the Leniency and Settlement programs provided transparency, predictability and certainty. This context has resulted in a

greater number of investigations and has provided even more incentives for the companies and/or individuals currently investigated to settle up and to early approach the competition authority for leniency. Hence, that has helped improving of the quality of CADE's international cartel cases, as they have been able to count on more confessions and on robust evidences. In a virtuous circle, this has paved the way to even better decisions and higher penalties.

29. However, due to the specificities of this kind of investigation, access to evidence, location of offenders, enforcement of decisions and, above all, deterrence of international cartels may remain challenges to overcome in Brazil. These challenges are likely to be shared by other competition authorities from developing countries—and may also be faced by the ones in developed countries. Additionally, it is important to note that 29 of the 43 proceedings opened to investigate international cartels in Brazil have not had yet a final decision of CADE's Tribunal (67%). These cases might provide further basis for even deeper discussions on the Brazilian policy regarding the prosecution of international cartels and the criminal prosecution of those involved.

30. One of the keys to overcoming the above challenges can be the strengthening of cooperation between competition authorities. To deal with global suboptimal deterrence, in our opinion, it is crucial that competition authorities join their resources in the fight against such a geographically dispersed violation. Important traditional strategies such as Leniency and Settlement Agreements may reach some limit and new approaches in this field should be considered, especially in multi-jurisdiction investigations, where there is the risk of global exposure.⁷⁰ We advocate the establishment of an international intelligence network to share non-confidential filings of international cartel cases, non-confidential information of interest to specific countries, successful strategies, etc., through the creation of an appropriate data warehouse. In our view, this could have a huge impact on the performance and results, especially those of competition authorities from developing countries, such as Brazil. ■

67 In fact, today it is common to have defendants presenting themselves spontaneously to CADE in the early stages of an investigation, what did not used to happen before, especially in international cartel cases.

68 English version of the draft of CADE's TCC Guidelines on cartel investigations: http://www.cade.gov.br/aceso-a-informacao/participacao-social-1/contribuicoes-da-sociedade/arquivos/guidelines_tcc.pdf

69 According to Brazilian Law (Article 37), antitrust infringements subjects the ones responsible to the following fines, among other penalties: (i) in the case of a company, a fine of 0.1% to 20% of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof; (ii) in the case of the administrator, directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, a fine of 1% to 20% of that applied to the company or to legal entity; (iii) in the case of other individuals or public or private legal entities, as well as any association of persons or de facto or the jure legal entities, even if temporary, or unincorporated, which do not perform business activity, not being possible to use the gross sales criteria, a fine between fifty thousand reais and two billion reais.

70 B. Snyder, *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?*, Remarks as Prepared for Delivery at the Sixth Annual Chicago Forum on International Antitrust, Chicago, Illinois June 8, 2015. Available at: <http://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf>.

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

Editoriaux

Jacques Attali, Elie Cohen, Claus-Dieter Ehlermann, Ian Forrester, Eleanor Fox, Laurence Idot, Frédéric Jenny, Jean-Pierre Jouyet, Hubert Legal, Mario Monti, Margrethe Vestager, Bo Vesterdorf, Louis Vogel, Denis Waelbroeck, Marc van der Woude...

Interviews

Sir Christopher Bellamy, Thierry Dahan, Jean-Louis Debré, John Fingleton, François Hollande, Frédéric Jenny, William Kovacic, Neelie Kroes, Christine Lagarde, Emmanuel Macron, Ségolène Royal, Nicolas Sarkozy, Christine Varney...

Dossiers

Jacques Barrot, Jean-François Bellis, David Bosco, Murielle Chagny, John Connor, Damien Gérardin, Assimakis Komninos, Christophe Lemaire, Ioannis Lianos, Pierre Moscovici, Jorge Padilla, Emil Paulis, Robert Saint-Esteben, Jacques Steenbergen, Florian Wagner-von Papp, Richard Whish...

Articles

Guy Canivet, Emmanuelle Claudel, Emmanuel Combe, Thierry Dahan, Luc Gyselen, Daniel Fasquelle, Barry Hawk, Nathalie Homobono, Laurence Idot, Frédéric Jenny, Bruno Lasserre, Luc Peeperkorn, Anne Perrot, Nicolas Petit, Catherine Prieto, Patrick Rey, Joseph Vogel, Wouter Wils...

Pratiques

Tableaux jurisprudentiels : Bilan de la pratique des engagements, Droit pénal et concurrence, Legal privilege, Cartel Profiles in the EU...

International

Germany, Belgium, Canada, China, Hong-Kong, India, Japan, Luxembourg, Switzerland, Sweden, USA...

Droit & économie

Emmanuel Combe, Philippe Choné, Laurent Flochel, Frédéric Jenny, Gildas de Muizon, Jorge Padilla, Penelope Papandropoulos, Anne Perrot, Etienne Pfister, Francesco Rosati, David Sevy, David Spector...

Chroniques

ENTENTES

Ludovic Bernardeau, Anne-Sophie Choné Grimaldi, Michel Debroux, Etienne Thomas

PRATIQUES UNILATÉRALES

Frédéric Marty, Anne-Lise Sibony, Anne Wachsmann

PRATIQUES COMMERCIALES DÉLOYALES

Frédéric Buy, Muriel Chagny, Valérie Durand, Jean-Louis Fourgoux, Jean-Christophe Roda, Rodolphe Mesa, Marie-Claude Mitchell

DISTRIBUTION

Nicolas Ereseo, Dominique Ferré, Didier Ferrier, Anne-Cécile Martin

CONCENTRATIONS

Olivier Billard, Jean-Mathieu Cot, Ianis Girsenson, Jacques Gunther, Sergio Sorinas, David Tayar

AIDES D'ÉTAT

Jacques Derenne, Bruno Stromsky, Raphaël Vuitton

PROCÉDURES

Pascal Cardonnel, Alexandre Lacresse, Christophe Lemaire

RÉGULATIONS

Laurent Binet, Hubert Delzangles, Emmanuel Guillaume, Jean-Paul Tran Thiet

MISE EN CONCURRENCE

Bertrand du Marais, Arnaud Sée

SECTEUR PUBLIC

Jean-Philippe Kovar, Francesco Martucci, Stéphane Rodrigues

JURISPRUDENCES

EUROPÉENNES ET ÉTRANGÈRES

Karounga Diawara, Pierre Kobel, Silvia Pietrini, Jean-Christophe Roda, Per Rummel, Julia Xoudis

POLITIQUES INTERNATIONALES

Sophie-Anne Descoubes, Marianne Faessel, François Souty, Stéphanie Yon-Courtin

Livres

Sous la direction de Stéphane Rodrigues

Revues

Christelle Adjémian, Mathilde Brabant, Emmanuel Frot, Alain Ronzano, Bastien Thomas

> **Revue Concurrences** | **Review Concurrences**

☐ Abonnement annuel - 4 n° (version électronique + e-archives) <i>1 year subscription (4 issues) (electronic version + e-archives)</i>	515,00 €	618,00 €
☐ Abonnement annuel - 4 n° (version papier) <i>1 year subscription (4 issues) (print version)</i>	538,00 €	567,59 €
☐ Abonnement annuel - 4 n° (versions papier & électronique + e-archives) <i>1 year subscription (4 issues) (print & electronic versions + e-archives)</i>	804,00 €	964,80 €

> **e-Bulletin e-Competitions** | **e-Bulletin e-Competitions**

☐ Abonnement annuel + e-archives <i>1 year subscription + e-archives</i>	719,00 €	862,80 €
--	----------	----------

> **Revue Concurrences + e-Bulletin e-Competitions** | **Review Concurrences + e-Bulletin e-Competitions**

☐ Abonnement annuel revue (versions papier + e-Bulletin + e-archives) <i>1 year subscription to the Review (print version + e-Bulletin + e-archives)</i>	866,00 €	1039,20 €
☐ Abonnement annuel revue (version électronique + e-Bulletin + e-archives) <i>1 year subscription to the Review (online version + e-Bulletin + e-archives)</i>	924,00 €	1108,80 €
☐ Abonnement annuel revue (versions papier & électronique + e-Bulletin + e-archives) <i>1 year subscription to the Review (print & electronic versions + e-Bulletin + e-archives)</i>	1040,00 €	1248,00 €

Renseignements | **Subscriber details**

Nom-Prénom | *Name-First name*

e-mail

Institution | *Institution*

Rue | *Street*

Ville | *City*

Code postal | *Zip Code* Pays | *Country*

N° TVA intracommunautaire | *VAT number (EU)*

Formulaire à retourner à | **Send your order to:**

Institut de droit de la concurrence

21 rue de l'Essonne - 45 390 Orville - France | contact: webmaster@concurrences.com

Conditions générales (extrait) | Subscription information

Les commandes sont fermes. L'envoi de la revue ou des articles de Concurrences et l'accès électronique aux Bulletins ou articles de e-Competitions ont lieu dès réception du paiement complet. Tarifs pour licences monopostes; nous consulter pour les tarifs multipostes. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of Concurrences and on-line access to e-Competitions and/or Concurrences require full prepayment. Tarifs for 1 user only. Consult us for multi-users licence. For "Terms of use", see www.concurrences.com.

Frais d'expédition Concurrences hors France 30 € | 30 € extra charge for shipping outside France