

ICN Anti-cartel Enforcement Template

Cartel Working Group

Subgroup 2: Enforcement Techniques

2016

ICN Anti-Cartel Enforcement template

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time, the template supplies information for businesses participating cartel activities about the rules applicable to them; moreover, it enables businesses, which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

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| A. Law(s) covering cartels: | <p>Law No. 12.529/2011, "Brazilian Competition Law" (available in Portuguese at http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/Lei/L12529.htm, and in English at www.cade.gov.br).</p> <p>Law No. 10.446/2002, which provides that the Federal Police may investigate cartels with interstate or international effects (available in Portuguese at http://www.planalto.gov.br/ccivil_03/leis/2002/L10446.htm).</p> <p>Law No. 9.873/1999 that provides the limitation period to the Federal Public Administration to exercise its power to punish illegal actions (available in Portuguese at http://www.planalto.gov.br/ccivil_03/leis/L9873.htm).</p> <p>Law No. 8.666/1993, which sets out rules regarding public procurement (available in Portuguese at http://www.planalto.gov.br/ccivil_03/LEIS/L8666cons.htm).</p> <p>Law No. 8.137/1990, "Brazilian Economic Crime Law", which defines cartel as a crime against the fiscal and the economic order (available in Portuguese at http://www.planalto.gov.br/ccivil_03/leis/L8137.htm). Law Decree No. 2.848/1940, whose article 288 disposes on crimes of criminal association (available in Portuguese at http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm#art288).</p> |
| B. Implementing regulation(s) (if any): | <p>CADE's Resolution No. 3 (May 2012) states a list of businesses activities related to the Art. 37 of the Law No. 12.529/11.</p> |

CADE's Resolution No. 5 (March 2013), which approves a regimental amendment that modifies the section concerning the cease and desist agreements.

CADE's Resolution No. 6 (April 2013), which provides ways to monitor the fulfillment of decisions, commitments and agreements stated in Art. 52 of the Law No. 12.529/11.

CADE's Resolution No. 12 (March 2015), which allows any parts concerned to open consultations with CADE's Tribunal to clarify the possible illegality of certain conduct.

CADE's Internal Statute (October 2014).

All documents are available in Portuguese at www.cade.gov.br.

C. Interpretative guideline(s) (if any):

CADE's Guidelines for Competition Compliance Programs (January 2016), available in Portuguese and in English at www.cade.gov.br.

CADE's Guidelines on Leniency Agreements, still in its preliminary version, available in Portuguese and in English at www.cade.gov.br.

CADE's Guidelines on Cease and Desist Agreements, still in its preliminary version, available in Portuguese at www.cade.gov.br.

D. Other relevant materials (if any):

Leniency Program Webpage (available in Portuguese at www.cade.gov.br).

Portal da Concorrência that provides case law and studies related to the Brazilian Competition Policy System (available in Portuguese at <http://www.portalconcorrencia.com.br/>).

2. Scope and nature of prohibition on cartels

A. Does your law or case law define the term "cartel"? If not please indicate the term you use instead.

Article 36, paragraph 3, subsection I and II of Law 12.529/2011 provides legal definition on conducts considered as cartel violations. According to the law:

§ 3 The following acts, among others, to the extent to which they conform to the principles set forth in the caput of this article and its

clauses, shall characterize violations of the economic order:

I – to agree, join, manipulate or adjust with competitors, in any way:

a) the prices of goods or services individually offered;

b) 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;

c) 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;

d) prices, conditions, privileges or refusal to participate in public bidding;

II - to promote, obtain or influence the adoption of uniform or agreed business practices among competitors.

B. Does your legislation or case law distinguish between very serious cartel behavior (“hardcore cartels” – e.g. price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?

Law No. 12.529/11 and Law No. 8.137/90 do not distinguish between different types of cartel, but provides definitions for different types of collusive conducts (*see* question 2A).

C. Scope of the prohibition of hardcore cartels: [including any exceptions, and

The scope of prohibition provided by Law No. 12.529/2011 is set forth in article 2:

Art. 2. This Law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in

¹ In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

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| <p>defenses e.g. for particular industries or sectors]</p> | <p>part, on the national territory, or that produce or may produce effects thereon.</p> <p>Also, articles 31 to 33 provides the scope of application of the Competition Law:</p> <p>Art. 31. This Law applies to individuals or legal entities of public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, even if engaged in business under the legal monopoly system.</p> <p>Art. 32. The various types of economic order violations implicate jointly the liability of the company and the individual liability of each of its directors or officers, jointly and severally.</p> <p>Art. 33. The companies and their entities, de facto or de jure, shall be jointly and severally liable when at least one of them engages in violations of the economic order.</p> <p>The scope of conducts considered as cartel violations is set forth by article 36 (<i>see</i> question 2A).</p> |
| <p>D. Is participation in hardcore cartels illegal <i>per se</i>?</p> | <p>Pursuant to the Brazilian Competition Law, there is no <i>per se</i> infringement. However, according to Brazilian case law, the sole existence of evidence of collusion is enough to characterize the unlawfulness.</p> |
| <p>E. Is participation in a hardcore cartel a civil, administrative or criminal offence, or a combination of these?</p> | <p>A combination of these. Whereas Law No. 12.529/11 provides that cartels are administrative offences, Law No. 8.137/90 sets out that cartels are also considered as criminal offences, subject to the penalty of two to five years of custody. Furthermore, under the Brazilian Competition Law, any anticompetitive conduct may also be considered a civil violation, thus allowing the claim for damages through civil actions.</p> |

3. Investigating institution(s)

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| <p>A. Name of the agency which investigates cartels:</p> | <p>The Administrative Council for Economic Defense (CADE) has administrative competence to investigate cartels. Within CADE, the investigative body is the General Superintendence.</p> |
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B. Contact details of the agency: SEPN 515, Conjunto D, Lote 4
Edifício Carlos Taurisano
ZIP Code: 70770-504 – Brasília, DF, Brazil
Phone: +55 61 3221 8445
Fax: +55 61 3326 9733
E-mail: international@cade.gov.br
Website: www.cade.gov.br

C. Information point for potential complainants: EDUARDO FRADE RODRIGUES
General Superintendent
Phone: +55 61 3221 8445
E-mail: eduardo.rodrigues@cade.gov.br

DIOGO THOMSON DE ANDRADE
Deputy General Superintendent
Phone: +55 61 3221 8445
E-mail: diogo.andrade@cade.gov.br

D. Contact point where complaints can be lodged: Written complaints can be sent to the following postal address:

SEPN 515, Conjunto D, Lote 4
Edifício Carlos Taurisano
ZIP Code: 70770-504 – Brasília, DF, Brazil

Electronic complaints can be sent to the following e-mail:

superintendencia@cade.gov.br

Furthermore, complaints can be lodged through the virtual tool “*Clique Denúncia*”, an application form integrated to CADE’s Electronic Information System, through which citizens can report anticompetitive practices. The link is available at www.cade.gov.br.

E. Are there other authorities, which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide. Yes. Cade has extensive collaboration with other bodies and authorities in order to foster mutual assistance.

The State and Federal Prosecutors may assist CADE in joint cartel investigations. In these situations, the aim is to conduct parallel administrative and criminal investigations, including the possibility to apply for leniency in both administrative and criminal spheres.

CADE signed recently many agreements with Public Prosecutors’ Offices from different states in Brazil, in order to promote the cooperation in these types of

investigation when the authorities need to conduct parallel proceedings. In this sense, CADE also signed a cooperation agreement with the Brazilian Federal Revenue's Secretariat, which aims at exchanging information of mutual interest between the two bodies.

The Federal Police may assist CADE in dawn raids to fulfill search and seizure warrants, upon CADE's request.

It is also worth mentioning that CADE cooperates with the Office of the Comptroller General (CGU in its Portuguese acronym), which has the jurisdiction over corruption crimes and has recently established its own leniency program.

The CGU signed a Cooperation Agreement with CADE in late 2014, which sets out a framework for information exchange in connected investigations. The need for integration between anticorruption and antitrust enforcers exists and both authorities are invested in establishing mechanisms to ensure effectiveness in investigations.

Since 2014, there have been advances: CGU's intelligence unit is engaged in exchanging information with CADE regarding the use of screening to identify possible collusion public procurement.

CGU is also in the process of training CADE's staff, in order to increase its capacity to open *ex officio* proceedings to investigate bid rigging. On the other hand, CADE has transmitted institutional experience to CGU by providing it with models in leniency documents, in order to facilitate the implementation of a leniency program at CGU.

4. Decision-making institution(s)² [to be filed in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases: The Administrative Council for Economic Defense (CADE) has administrative competence to decide upon cartel cases. Within CADE, the decision body is the Administrative Tribunal.

B. Contact details of the agency: SEPN 515, Conjunto D, Lote 4
Edifício Carlos Taurisano

² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

ZIP Code: 70770-504 – Brasília, DF, Brazil
Phone: +55 61 3221 8445
Fax: +55 61 3326 9733
E-mail: international@cade.gov.br
Website: www.cade.gov.br

C. Contact point for questions and consultations:

Questions and consultations should be addressed to CADE's International Unit:

LUIZA KHARMANDAYAN
Head of International Unit
Phone: +55 61 3221 8533

E-mail: international@cade.gov.br.

D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.

CADE's General Superintendence is the body within the agency responsible for preparing and initiating administrative proceedings for the imposition of sanctions due to violations of the economic order. According to the law, the Superintendence shall monitor and follow up on market practices; decide when there is a lack of grounds to proceed; use different avenues to obtain information for the referred proceedings; appeal *ex officio* to the Tribunal upon dismissal of the administrative proceeding; submit to the Tribunal, for trial, the administrative proceedings it established; propose terms for a cease-and-desist commitment for violations to the economic order, submitting them the approval of the Tribunal; adopt preventive measures to cease practices that constitute violations of the economic order; and provide the Judiciary, upon request, with information on the progress of investigations.

E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?

Administrative and criminal proceedings are independent in Brazil. This means that CADE has full investigative powers with respect to the investigation at the administrative level. In respect to the criminal authorities, the Federal Police, and State and Federal Public Prosecutors have full investigative powers with respect to the investigation at the criminal level. In recent years, administrative and criminal authorities have been working closely in order to benefit from information exchange and investigative techniques.

5. Handing complaints and initiation of proceedings

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| <p>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc]</p> | <p>An investigation on a given cartel may be initiated through complaints, whistleblowers, <i>ex officio</i>, or based on leniency applications.</p> |
| <p>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?</p> | <p>Complaints should be made to CADE by telephone, e-mail, in writing or in person. Furthermore, anticompetitive conducts may be reported through the virtual tool “<i>Clique Denúncia</i>”, (available at www.cade.gov.br), in which anyone can fill in an electronic form reporting a suspicious conduct anonymously.</p> |
| <p>C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]</p> | <p>None. CADE accepts and analyses all complaints it receives.</p> |
| <p>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?</p> | <p>CADE has discretion to decide on which complaint it is going to take action. However, the agency is obliged by law to formally respond to each complaint it receives. All the acts performed by the investigative authority – even the dismissal of frivolous complaints or complaints without legal cause – must be duly justified.</p> |
| <p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p> | <p>CADE is bound by law to provide formal responses to all complaints it receives (<i>see</i> question 5D).</p> |
| <p>F. Is there a time limit counted from the date of receipt of a</p> | <p>No.</p> |

complaint by the competition agency for taking the decision on whether to investigate or reject it?

6. Leniency policy ³

A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]

The official name of CADE's leniency policy is "*Programa de Leniência*" (Leniency Program). The Leniency Program is prescribed by the Law No. 12.529/2011 (articles 86 and 87) and by CADE's Internal Statute (articles 197 to 210), both are available at www.cade.gov.br.

CADE has published Guidelines on Antitrust Leniency Program. It is available in English at <http://en.cade.gov.br/topics/leniency-program/guidelines-cades-antitrust-leniency-program.pdf>

B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction/ fine), depending on the case?

Leniency/immunity is only available for first-ins and can be total or partial.

Second-ins can take part in the Settlements Program, with proportional discounts in fines.

C. Who is eligible for full leniency?

Leniency is only available for first-ins. Companies and/or individuals currently involved or that were involved in a cartel or other antitrust conspiracy are eligible to apply for leniency. A successful applicant must commit to cease the illegal conduct, report and confess the wrongdoing, and cooperate with the investigations by submitting information and documents relevant to the investigation.

D. Is eligibility for leniency dependent on the enforcing

CADE has both total and partial leniency. According to the Guidelines on Leniency Program,

³ For the purpose of this template the notion of "leniency" covers both full leniency and a reduction in the sanction or fines, Moreover, for the purpose of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.

agency having
either no
knowledge of the
cartel or
insufficient
knowledge of the
cartel to initiate an
investigation?

In this context, is
the date (the
moment) at which
participants in the
cartel come
forward with
information (before
or after the opening
of an investigation)
of any relevance for
the outcome of
leniency
applications?

Full immunity (total leniency) or the reduction by one to two-thirds of the applicable fine (partial leniency) (art. 86, paragraph 4, of Law No. 12.529/2011), depends on the “prior knowledge” of CADE’s General Superintendence concerning the reported conduct (art. 208, I and II, RICADE);

I. if the SG/CADE did not have prior knowledge of the violation, the company and/or individual will receive, upon declaration of fulfillment of the Leniency Agreement by the plenary session of CADE’s Tribunal, the benefit of full immunity by the public administration regarding the reported conduct;

II. if the SG/CADE already had prior knowledge of the conduct but did not have enough proof to ensure a conviction, then the company and/or individual may enter into a leniency agreement with partial benefits and will receive, upon declaration of fulfillment of the Leniency Agreement by the plenary session of CADE’s Tribunal, the benefit of a reduction of one to two-thirds of the applicable penalty, depending on how effective the cooperation and good faith of the offender is in fulfilling the Leniency Agreement.

E. Who can be a beneficiary of the leniency program (individual/businesses)?

Companies and/or individuals.

Under the Corporate Leniency Policy, a corporation and all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity and cooperate with the agency.

F. What are the conditions of availability of full leniency:

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

i. The applicant (a company or an individual) is the first to come forward and confesses its participation in the unlawful practice;

ii. The applicant ceases its involvement in the anticompetitive practice;

iii. The company confesses having participated in the tort and fully and permanently cooperates with the investigations and administrative proceeding, attending, at its own expense, whenever required, at all procedural acts, until the conclusion thereof;

v. The cooperation results in the identification of other members of the conspiracy, and in the obtainment of documents that evidence the anticompetitive practice;

vi. At the time the applicant comes forward, the General Superintendence has no knowledge of the cartel.

G. What are the conditions of availability of partial leniency (such as reduction of sanction/ fine/ imprisonment):

According to the Guidelines on Antitrust Leniency, partial leniency is available for first-ins in the case

the SG/CADE already had prior knowledge of the conduct but did not have enough proof to ensure a conviction, then the company and/or individual may enter into a leniency agreement with partial benefits and will receive, upon declaration of fulfillment of the Leniency Agreement by CADE's plenary Tribunal, the benefit of a reduction of one to two-thirds of the applicable penalty, depending on how effective the cooperation and good faith of the offender is in fulfilling the Leniency Agreement.

With respect to criminal liability, a partial leniency also fully protects individuals from criminal prosecution.

Besides the partial leniency available for first-ins applicants, there is an option for second-ins applicants, which is the Cease and Desist Agreement (TCC in its acronym in Portuguese). The TCC generates benefits only in the administrative sphere, without automatic benefits in the criminal sphere.

According to the Guidelines on Antitrust Leniency Program, specifically for cases of agreement, coordination, manipulation, or arrangement among competitors, such as the case of a cartel, the TCC has the following requirements:

I. payment of a monetary contribution to the Fund for the Defense of Diffuse Rights, according to articles 85,

paragraph 1, III, of Law No. 12.529/2011 and 184, introductory paragraph, of the RICADE, which is established based on the amount of the expected fine, subject to a percentage reduction that will vary depending on when the TCC is proposed and the scope and utility of the collaboration of the committed party in the fact-finding, according to article 187, parts I, II, III, and article 188 of the RICADE, as follows:

a. immediately after initiation of an administrative proceeding and before the proceeding is remitted to CADE's Tribunal, the monetary contribution will be calculated based on the expected fine, which will be subject to:

i. a reduction of 30% to 50% for the first in;

ii. a reduction of 25% to 40% for the second in;

iii. a reduction of up to 25% for the remaining proponents of a TCC;

b. after the case is remitted to CADE's Tribunal: the monetary contribution will be calculated based on the expected fine, subject to a reduction of up to 15% (these parameters may be changed if Leniency Plus has also been granted);

II. the proponent must admit having participated in the investigated conduct, according to article 185 of the RICADE;

III. the proponent must collaborate in the fact-finding process, according to article 186 of the RICADE;

IV. the proponent must commit not to engage in the invested conduct, according to paragraph 1, of article 85 of Law No. 12.529/2011;

V. a fine will be set for total or partial nonfulfillment of the obligations undertaken.

H. Obligations for the beneficiary after the leniency application has been accepted:

Beneficiaries of leniency must cooperate with CADE and criminal authorities throughout the investigation, providing all information, documents or other related materials of which they hold possession, and which may contribute to the investigations. Furthermore, they must cease their involvement in the conduct, confess their

guilty, and cooperate fully and permanently with the investigation by identifying other parties involved and gathering evidence and relevant information to prove the infringement.

I. Are there formal requirements to make a leniency application?

The Leniency Agreement proposal can be submitted to CADE's General Superintendence in writing or orally.

If submitted orally, the procedure is the following:

i. The interested party has to contact the Chief of Staff of the General Superintendence to arrange a secret meeting with the General Superintendent.

ii. In the meeting, the interested party has to present a description of the anticompetitive practice ("what", "when" & "where"), including its participation and the identification of others involved in such practice ("who"), and a description of the evidence that can be provided to the General Superintendence; no evidence has to be brought at this first meeting;

iii. The General Superintendent will prepare a short draft of the meeting to be kept by the applicant.

iv. At each meeting before the agreement is finally executed, a new draft should be prepared and given to the applicant.

If submitted in *writing*, the procedure is the following:

i. The proposal has to be submitted to the General Superintendence's Chief of Staff, in a sealed envelope, indicating that it contains a proposal for a Leniency Agreement (in Portuguese, "*Proposta de Acordo de Leniência*");

ii. The proposal will receive confidential treatment and only the General Superintendent and people authorized by he/she will have access to the document;

iii. The proposal has to necessarily contain a description of the anticompetitive practice ("what", "when" & "where"), including its participation and the identification of others involved in such practice ("who"), a description of the evidence that can be provided to the General Superintendence, and if there are any leniency application to other authorities in relation to the alleged cartel;

Even though the confession of wrongdoing can be made orally or in writing, the Leniency Agreement is itself a written agreement that contains an express clause referring to admission of the participation of the company and/or individual in the antitrust conspiracy reported.

J. Are there distinct procedural steps within the leniency program?

According to the Guidelines on Antitrust Leniency Program,

Generally, the negotiation of a Leniency Agreement occurs in three phases:

- I. Phase of securing a marker;
- II. Phase of submission of evidentiary information and documents of the offense reported or under investigation; and;
- III. Phase of execution of the Leniency Agreement.

If the applicant satisfies the requirements for leniency, a Leniency Agreement will be signed within the General Superintendence. While adjudicating a case, CADE must verify whether the beneficiary complied with the terms and conditions provided in the leniency agreement and, if this is the case, acknowledge the full or partial immunity.

K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?

According to the Guidelines on Antitrust Leniency Program,

Securing a marker does not guarantee entering into a Leniency Agreement, because it depends on the fulfillment of all legal requirements and the conclusion of all phases of negotiation of the Leniency Agreement in CADE.

Once all the requested information and documents have been submitted, the SG/CADE's Chief of Staff will forward the Leniency Agreement proposal to the Deputy General Superintendent for analysis. The Deputy General Superintendent may suggest new arrangements and/or explanations from the leniency applicant or may forward the proposal to the General Superintendent for final analysis. If the analysis is positive, the proposal will be considered complete by CADE's General Superintendence and the case will move on to

the phase of execution of the Leniency Agreement.

L. What is the legal basis for the power to agree to grant leniency? Is leniency granted in the basis of an agreement or its laid down in a (formal) decision? Who within the agency decides about leniency applications?

Leniency is a written agreement signed between CADE's General Superintendence jointly with Public Prosecutor's Office and the applicant. CADE's General Superintendence has authority to grant leniency pursuant to Brazil's Competition Law.

M. Does your legislation have a marker system? If yes, please describe it.

Yes. A company/individual can get a "marker" to secure its place in line for leniency. The party then has a given amount of time (maximum 30 days) to complete its internal investigation and perfect its leniency application.

To be eligible to secure a marker, the applicant must provide the General Superintendence with information concerning its name and address, the parties to the alleged cartel ("who"), the affected product(s) and territory(ies) ("what" & "where"), and the estimated duration of the alleged cartel ("when"). The applicant should also inform the General Superintendence on leniency applications to other authorities in relation to the alleged cartel.

N. Does the system provide for any extra credit⁴ for disclosing additional violations?

Yes. The Leniency Plus Program allows a company that does not qualify for leniency for an initial matter under investigation to offer information about another cartel of which CADE has no prior knowledge. In this modality, the applicant can obtain all the benefits from leniency in regards to the second infringement and a reduction of one to two-thirds of the applicable sanction in regards to the first infringement, depending on its cooperation with the investigations.

O. Is the agency required to keep the

Yes. CADE's confidentiality policy for leniency applicants provides that CADE will not identify a

⁴ Also known as: "leniency plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about in another cartel distinct from the one which is the subject of its first leniency application.

identity of the beneficiary confidential? If yes, please elaborate.

leniency applicant prior to CADE's final judgment of the case or share information provided by the applicant with third parties. The only exceptions to this are i) if the agency is requested by a court order ii) _or if the applicant consents to waiver. In addition, if the applicant identifies itself first, then CADE is free to confirm. Please note that with respect to the defendants, they have the right to access the proceedings' files and know the identity of the applicant.

P. Is there a possibility of appealing an agency's decision rejecting a leniency application?

No.

Q. Contact point where a leniency application can be lodged:

EDUARDO FRADE RODRIGUES
General Superintendent
Phone: +55 61 3221 8445
E-mail: eduardo.rodriques@cade.gov.br

DIOGO THOMSON DE ANDRADE
Deputy General Superintendent
Phone: +55 61 3221 8445
E-mail: diogo.andrade@cade.gov.br

AMANDA ATHAYDE LINHARES MARTINS
Chief of Staff of the General Superintendence
Phone: +55 61 3221 8445
E-mail: amanda.martins@cade.gov.br

R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?

A leniency agreement cannot be revoked, but only rejected. According to the Guidelines on Antitrust Leniency Program,

A leniency application can be rejected by CADE for several reasons, including the following:

- I. failure to submit the Leniency Agreement proposal within 30 days after the marker is secured ;
- II. failure to cooperate throughout the negotiation, either by not supplying the information and documents requested by CADE's General Superintendence, or

- by otherwise obstructing the investigations;
- III. insufficiency of the evidentiary information and/or documents of the alleged conduct reported or under investigation;
- IV. failure to demonstrate the impact on the Brazilian territory of a conduct that took place abroad.

At the discretion of the SG/CADE, prior notice may be given to the leniency applicant of the intent to reject the marker request, giving the leniency applicant one last opportunity to submit the requested information and documents on the case.

S. Does your policy allow for “affirmative leniency”, that is the possibility of the agency approaching potential leniency applicants? Yes.

7. Investigative powers of the enforcing institution(s)⁵

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information searches/ raids⁶, electronic or computer searches, export opinion, etc. and indicate whether such measures requires a court warrant.

Search and seizure warrants must be granted by a Court. Computers can be searched and seized if necessary pursuant to a search warrant. CADE may also conduct inspections at business premises without a court order, but with a 24 hours prior notice to the defendant. Requests for information are commonly used as an investigative measure not subject to court authorization. For more detailed information about the agency’s investigative powers, see article 11 and article 13 VI of Law 12.529/2011, available in English at <http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>

⁵ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁶ “Searches/raids” means all types of search, raid or inspection measures.

B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorization by a court?

Yes, private locations, automobiles, briefcases and persons may be searched pursuant to a search warrant granted by a court.

C. May evidence not falling under the scope of the authorization allowing the inspection be seized/ used as evidence in another case? If yes. Under which circumstances (e.g. is a post-search court warrant needed)?

In general, the scope of the warrant is set broadly. According to the Brazilian Competition Law, CADE's General Superintendence may request to the Judiciary a search and seizure warrant for objects, papers of any kind, log books, computers and magnetic files from a company or an individual, whenever it is in the interests of administrative inquiries or administrative proceedings in order to impose administrative sanctions for violations to the economic order (Art. 13, VI, d).

According to the Brazilian case law, if evidence concerning an anticompetitive conduct outside the scope of the warrant is found, it might be, as well, seized and used in a new investigation related to the evidence of the new anticompetitive conduct found. However, if this evidence refers to a conduct or crime under the jurisdiction of another public body, the latter must obtain a judicial authorization, in order to have access to it .

D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.

CADE has been working on measures to protect confidential information in order to prevent sensitive information to be disclosed by court orders, and to ensure the rights and protection of the leniency applicants. Furthermore, there are ongoing advocacy initiatives, in order to explain to courts the importance of confidentiality in antitrust cases.

A. Key rights of defense in cartel cases: The Brazilian legislation ensures that the following rights are granted to defendants:

- The right of access to file and documents in the possession of the enforcing authority;
- the right to a written statement of the case against the defendant;
- the right to respond to the case in writing or orally;
- the right to confront companies or individuals that make allegations against the defendant;
- the right to legal counsel,
- the right against self-incrimination;
- the right to be officially communicated of every decision adopted in the process;
- the right to have reasonable deadlines to respond to accusations and questionings of the authority and third parties;
- the right to produce all types of proofs (oral, documental, technical).

B. Protection awarded to business secrets (competitively sensitive information): Is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?

The same rules apply to all confidential information, irrespective of where it was obtained. Commercial and personal information, which CADE considers (after submissions from the undertaking) might significantly harm legitimate interests, can be restricted.

Sensitive information will only be used by the competition agency for a legitimate law enforcement purpose and the authorities will not disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose.

9. Limitation periods and deadlines

A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation/proceedings A cartel case must be brought within 12 years of the end of the illegal activity. However, if the administrative proceedings are on hold for more than 3 consecutive years, such proceedings shall be closed without a decision in the merits of the case.

must begin or a decision in the merits of the case must be made?

B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?

The investigation at CADE starts with an Administrative Inquiry, which has a term of one hundred and eighty (180) days to be concluded, as of its starting date. This deadline can be extended, as often as necessary, for terms of sixty (60) days each, when the facts are complex. Every deadline renewal must be justified by the circumstances of the case.

If CADE's General Superintendence understands there is enough evidence on the Administrative Inquiry, it may open an Administrative Proceeding, by accusing formally the parties of violations against the economic order. The decision on the merits of the Administrative Proceeding has no deadline to be rendered.

C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?

A company has five years from the rendering of CADE's final decision to appeal to the Judiciary.

10. Types of decisions

A. Please list which types of decision on the merits of the case can be made under the laws listed under Section 1.

At the conclusion of a case, defendants can be condemned or the case can be filed by CADE.

Cartels, as an administrative offence, can be sanctioned with fines imposed on companies by CADE and they may range from 0,1 to 20 per cent of the company's revenues in the year preceding the initiation of the proceedings. Individual managers responsible for unlawful corporate conduct may be fined in an amount ranging from 1 to 20 per cent of the corporate fine. Associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50,000 to BRL 2 billion. Fines for repeated violations are doubled.

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

At the criminal level, the Judiciary may find the prosecuted individuals to be guilty or not of a cartel offense. The penalties may include the payment of criminal fines or imprisonment from two to five years.

B. Please list which types of decisions on the merits of the case can be made in hardcore cartels under the laws listed under Section 1 (if different from those listed under 10/A). *See question 10A.*

C. Can interim measures⁷ be ordered during the proceedings in cartels cases? (If different measures for hardcore cartels please describe both⁸). Which institution (the investigatory/ the decision-making one) is authorized to take such decisions? What are the Yes, at any phase of the administrative investigation, to assess violations or administrative proceedings in order to impose sanctions for violations to the economic order, the General Superintendent or the Reporting Commissioner may, at their initiative or upon the request of CADE's Chief Attorney, adopt preventive measures, upon indication or reasoned concern that the defendant directly or indirectly causes or may cause irreparable damage, or make ineffective the final outcome of the proceedings (article 84 of Law No. 12.529/11).

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition either the investigator or the decision-makings agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

⁸ Only for agencies which answered "yes" to question 2.C. above.

conditions for
taking such a
decision?

11. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

A. Grounds for the imposition of procedural sanctions/fines: There are sanctions established by the Brazilian legislation for companies or individuals who fail to comply with requirements to provide information by, for example, destroying documents or providing false or misleading information.

According to the Law No. 12.529/2011,

Art. 40. The refusal and failure or unwarranted delay to supply information or documents requested by Cade or the Secretary for Economic Monitoring constitutes a violation punishable by daily fines of five thousand reais (BRL 5,000.00), which can be increased by up to twenty (20) times, if necessary, to ensure the effectiveness thereof, depending on the economic situation of the transgressor.

Art. 41. Unjustified absence of the defendant or third parties, when subpoenaed to provide clarification in the course of the investigation or administrative proceeding, shall subject him/them to a fine of five hundred reais (BRL 500.00) to fifteen thousand reais (BRL 15,000.00) for each absence, depending on his/their economic situation.

Art. 42. Preventing, obstructing or otherwise hindering the performance of inspections authorized by the Plenary of the Tribunal, the Reporting Commissioner or the General Superintendence during preparatory proceeding, administrative investigation, administrative proceeding or any other proceeding, shall subject the inspected party to a fine of twenty thousand reais (BRL 20,000.00) to four hundred thousand reais (BRL 400,000.00), depending on the

⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc) can be sanctioned.

economic status of the transgressor, upon the issuance of the notice of violation by the competent body.

Art. 43. The deceitfulness or falsity of information, documents or statements made by any person to Cade or to the Secretary for Economic Monitoring shall be punishable with a fine of five thousand reais (BRL 5,000.00) to five million reais (BRL 5,000,000.00), depending on the seriousness of the facts and the economic status of the transgressor, without prejudice to other applicable legal sanctions.

Art. 44. One who provides services to CADE or SEAE, in any way, and causes, even if recklessly, the improper dissemination of confidential information about the company, shall be punished with a fine of one thousand reais (BRL 1,000.00) to twenty thousand reais (BRL 20,000.00), without prejudice to the opening of other applicable procedures.

B. Types and nature of the sanction (civil, administrative, criminal, combined): In cartel cases, sanctions may be civil, criminal, administrative or combined.

C. On whom procedural sanctions can be imposed? Sanctions can be imposed against both the individual and the company.

D. Criteria for determining the sanction/fine: Sanctions may be imposed by the competition agency or a court and may vary according to the seriousness of the infringement and the financial capacity of the individual/ corporation. According to the Law No. 12.529/2011,

Art. 45. In the application of the penalties set forth in this Law, the following shall be taken into consideration:

I - the seriousness of the violation;

II - the good faith of the transgressor;

III - the advantage obtained or envisaged by the violator;

IV – whether the violation was consummated or not;

V - the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties;

VI - the negative economic effects produced in the market;

VII - the economic status of the transgressor; and

VIII – any recurrence.

E. Are there maximum and/or minimum sanctions fines? Yes. *See* question 11A

12. Sanctions on the merits of the case

A. Types and nature of sanctions in cartel cases (civil, administrative, criminal, combined): on whom can sanctions be imposed? Defendants condemned for cartel conduct may be sanctioned in the administrative, civil and criminal spheres.
Civil and administrative sanctions may be imposed on both individuals and legal entities. Criminal sanctions may only be imposed on individuals.

B. Criteria for determining the sanction/fine: According to the Law No. 12.529/2011,
Art. 45. In the application of the penalties set forth in this Law, the following shall be taken into consideration:
I - the seriousness of the violation;
II - the good faith of the transgressor;

III - the advantage obtained or envisaged by the violator;

IV – whether the violation was consummated or not;

V - the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties;

VI - the negative economic effects produced in the market;

VII - the economic status of the transgressor; and

VIII – any recidivism.

C. Are there maximum and/or minimum sanctions fines? *See question 10A.*

D. Guideline(s) on calculation of fines: [names and reference number, availability (homepage address) and indication of the languages in which these materials are available] *No See question 10A.*

E. Does a challenge to a decision imposing a sanction/ fine have an automatic suspensory effect on that sanction/ fine? If it is necessary to apply for suspension, what are the criteria? *There is no automatic suspensory effect, but courts may grant it, if requested by the party. If the fine is upheld by the courts, interest on the fine runs from the date when it was originally due. In addition, more recently, the courts have been requiring a court deposit of the fine amount being challenged.*

13. Possibilities of appeal

- A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?** Yes. A defendant may appeal on errors of law, fact, or procedural breach to the Brazilian Judiciary.
- B. Before which court or agency should such a challenge be made? [If the answer to question 13/A is affirmative]** Appeals against decisions rendered by CADE's Administrative Tribunal should be filed with a Federal court.