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ANTITRUST REVIEW 2021

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Preface

Global Competition Review's *Americas Antitrust Review 2021* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, and Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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London
August 2020

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Brazil: Anti-cartel Enforcement

Denise Junqueira and Renato Duarte Franco de Moraes
Cascione Pulino Boulos Advogados

In summary

This article provides an overview of anti-cartel enforcement in Brazil from two different perspectives: administrative and private litigation. In addition to presenting a brief overview of the Brazilian regulatory framework and procedures and the main legal instruments, this article discusses current trends and challenges faced by the authorities, companies and individuals involved in cartel investigation. Cartel behaviour is considered an offence under different spheres of enforcement, simultaneously triggering various liabilities, which makes navigating through these spheres a very complex task for all involved parties. We consider the significant developments of, and major cases decided in, the past year, to provide a cohesive picture of Brazilian law and its policy system.

Discussion points

- The Brazilian Competition Law's regulatory framework, procedure and legal instruments in anti-cartel enforcement
- Trends, challenges and recent decisions in anti-cartel enforcement by the Brazilian competition authority
- Regulatory framework for civil liability in cartel cases
- Trends and challenges in private damages actions

Referenced in this article

- Brazilian Administrative Council for Economic Defence
- Brazilian Federal Prosecutor's Office
- Law No. 12,529/2011 (the Brazilian Competition Law)
- Law No. 8,137/90 (the Brazilian Economic Crimes Law)
- Law No. 8,666/93 (the Brazilian Public Procurement Law)
- Law No. 7,347/1985 (the Brazilian Public Class Action Law)
- Bill No. 11,275/2018

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Overview

As an integrated policy system, Brazilian law provides that cartel conduct is subject to both public and private enforcement.

Regarding the public enforcement sphere, cartel behaviour can be considered as an administrative violation under Law No. 12,529/2011 (the Brazilian Competition Law (BCL)), as well as a criminal offence under Law No. 8,137/90 (the Brazilian Economic Crimes Law) and Law No. 8,666/93 (the Brazilian Public Procurement Law). In terms of private enforcement, by its turn, parties that suffer injury from anticompetitive conduct can initiate private actions – under the BCL and the Brazilian Civil Code's general rules for private liability for damages resulting from unlawful acts – for a court to order the recovery of the damages suffered.

The fact that cartel behaviour is considered as an offence under different spheres of enforcement, simultaneously triggering different scopes of liability, makes navigating through all these different spheres a very complex task for all the involved parties. In this sense, this article provides an overview of anti-cartel enforcement in Brazil under administrative and private litigation perspectives, and discusses current trends.

Administrative

CADE's regulatory framework and procedure

The BCL states that cartel practice comprises any sort of agreement, manipulation or adjustment among competitors, including agreements to fix prices of goods or services; fix, restrict or limit the production or commercialisation of products or provision of services; allocate potential or actual markets; or rig public bids.[1]

This list of types of conduct provided by the BCL is not exhaustive as there are other kinds of conduct that may be understood as cartel practice by the authority.

At the administrative level, the investigative, prosecutorial and adjudicative functions are consolidated into a single federal administrative body, the Administrative Council for Economic Defence (CADE). CADE is composed of two main divisions: the Superintendence General Office (SG), responsible for initiating and conducting all cartel investigations; and the Administrative Tribunal, responsible for adjudicating the cases investigated by the SG. CADE also comprises two independent offices that may render opinions before the Administrative Tribunal in all cases: CADE's Attorney General Office, which also represents CADE in court; and the Federal Prosecutor's Office, which is also responsible for criminal prosecutions.

Investigations may be initiated ex officio, based on evidence collected in the course of the authority's own investigation; through a leniency agreement; or based on a third party's complaint.

As regards the sanctions, CADE's Administrative Tribunal can impose sanctions directly, which may include fines, prohibition to contract with official financial institutions and to participate in public bidding processes and structural remedies (eg, divestitures, as detailed in 'Structural remedies').

1 Article 36 of the BCL.

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Companies can be subject to fines ranging from 0.1 per cent to 20 per cent of the gross revenue registered by the company or its economic group in the field of economic activity relating to the infringement, in the year preceding CADE's investigation. The penalty amount, however, cannot be lower than the financial benefit the company made from the infringement, whenever it is possible to calculate such benefit amount.[2] When information on the particular field of economic activity is not available, CADE may consider the company or economic group's total gross revenue, and in cases where it is impossible to rely on gross revenue data as the basis for the sanction, CADE can apply fines of between 50,000 and 2 billion reais.[3] Executives responsible for the cartel behaviour may be subject to penalties ranging from 1 per cent to 20 per cent of the corporate fine.[4] For other individuals, associations and entities not engaged in commercial activities, the fines range from 50,000 to 2 billion reais.[5] Fines for repeated violations are doubled.[6] The Organisation for Economic Co-operation and Development (OECD) has pointed out that such rules on fine calculation are unclear, and CADE has made efforts to clarify the methodologies applied in past decisions.[7]

For the past decade, CADE has intensified the prosecution of cartels and developed more aggressive investigative tools, a scenario that is partly related to the opening of numerous bid-rigging investigations related to *Operation Car Wash*, a huge anti-corruption operation involving corruption, collusion and money laundering matters. Indeed, in the past 12 months alone, CADE issued 11 final rulings on cases involving cartel behaviour, imposing fines totalling 563 million reais.[8]

Leniency agreements have been the most important tool for unravelling collusive behaviour in Brazil in recent years. In addition to leniency agreements, cease-and-desist agreements have also proven to be of major importance in deterring, disclosing and gathering evidence to prosecute anticompetitive conduct.

Leniency agreements

In 2020, CADE's leniency programme completed 17 years of operation. Essentially, the Brazilian programme, similarly to leniency programmes in many other jurisdictions, establishes a path through which companies and individuals that had been involved in cartels or other anticompetitive conduct can obtain administrative and criminal prosecution-related benefits through an agreement with the authority.

2 Article 37(I) of the BCL.

3 Article 37, paragraph 2, and article 37(II) of the BCL.

4 Article 37(III) of the BCL.

5 Article 37(II) of the BCL.

6 Article 37, paragraph 1 of the BCL.

7 OECD Peer Reviews of Competition Law and Policy, Brazil (2019), www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf.

8 See 'CADE in Figures', at http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true.

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Indeed, in Brazil a leniency agreement can result in full antitrust immunity (that is, no administrative fines will be applicable) and criminal immunity,[9] which is granted upon fulfilment of the agreement, as long as the applicant:

- is the first to apply for a leniency agreement (ie, CADE has no prior knowledge of the reported violation);
- ceases the anticompetitive conduct;
- fully and permanently cooperates with the investigation and the ensuing proceedings up until a final decision is rendered by the authority; and
- admits its participation in the illegal conduct and identifies other companies and individuals involved in the violation.

Additionally, it is essential that by the time the leniency application is requested, the authorities do not have sufficient evidence regarding the reported conduct. This is directly related to the 'winner-takes-all' approach: the applicants must report conduct about which CADE has no prior knowledge. Although there is no express concept of 'prior knowledge', it is usually understood that there is prior knowledge if there is an ongoing administrative proceeding with reasonable evidence of anticompetitive practices or if CADE already holds information with sufficient probative value to support the opening of an administrative proceeding. If the authorities are aware of the conduct by the time the application is requested, but do not have sufficient evidence for conviction, a fine reduction of from one-third to two-thirds is available to the applicant.

CADE also offers the possibility of a 'leniency plus' agreement: if a company or individual does not qualify for a leniency agreement in relation to a particular conduct that CADE already had prior knowledge of, they could report a second conduct – for instance, a cartel in another market – and obtain, in addition to all the benefits of a leniency agreement for this second conduct, a one-third or two-thirds reduction of the applicable penalties related to the first conduct.

Through the years, CADE's leniency programme has proven to be a very effective legal instrument in disclosing and deterring anticompetitive conduct, a fact that has been acknowledged by the OECD.[10] On the other hand, it has also been noted that there are some elements that may have been perceived as burdensome by some of the applicants: the OECD reported that CADE requires a higher level of cooperation from leniency applicants than the US or European authorities, and also that the Brazilian authority is very cautious about entering into leniency agreements – indeed, it has rejected the execution of agreements and, consequently, the initiation of investigations.[11]

9 Criminal immunity is applicable only to individuals, as Brazilian law provides no criminal liability to companies. Moreover, the immunity is only applicable to crimes against the economic order (ie, other offences, such as corruption, are excluded).

10 OECD Peer Reviews of Competition Law and Policy, Brazil (2019), footnote 7.

11 id.

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Cease-and-desist agreements

In addition to its leniency programme, the Brazilian authority also has a settlement procedure through which companies and individuals that were not the first to report an anticompetitive conduct can negotiate a settlement through a cease-and-desist agreement.

For cease-and-desist agreements, the applicants can also be granted administrative benefits, but no additional criminal prosecution benefit is included. In this regard, a cease-and-desist agreement can result in the suspension of CADE's investigation into the applicants of the settlement, as long as they: (i) pay a pecuniary contribution (which varies depending on how many defendants have settled with CADE in the case, and on the stage of the investigation); (ii) acknowledge their participation in the investigated conduct; (iii) cease the anticompetitive conduct; and (iv) cooperate with the investigation and the proceedings.

The pecuniary contribution is based on the expected fine that would be applicable for the anticompetitive conduct, and a discount is applied to this expected fine based on the following scale:

- the first applicant receives a discount of 30 per cent to 50 per cent;
- the second applicant receives a discount of 25 per cent to 40 per cent; and
- subsequent applicants receive a discount of up to 25 per cent.

Currently, one of the most controversial issues regarding cease-and-desist agreements is the definition of the expected fine over which the discount is applied. This issue involves both the delimitation of the company or economic group's revenue to be considered, and the exact percentage of the discount that would be applied.

Trends and recent decisions

Cooperation between national agencies for investigations and agreements

During the past few years, CADE has made collaboration with other public bodies and agencies one of its main priorities, focusing on establishing cooperation agreements and memoranda of understanding with different entities, including regulatory agencies (such as the National Institute of Industrial Property and the National Health Surveillance Agency), the Brazilian Central Bank and, specially, with the prosecutor's offices in different states.

This is because CADE views this cooperation as a means to increasing its efficiency in both preventing and prosecuting anticompetitive conduct, particularly cartels. There has been growing discussion, not only at CADE, but among all public agencies with leniency programmes, regarding the establishment of an 'inter-institutional agreement', to maintain an open conversation among these agencies and to make negotiations more efficient for all involved parties. These discussions are still in their early stages, but the authorities have signalled their intention to improve the dialogue between government bodies and to make the process of negotiating leniency agreements more accessible and straightforward.

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Cooperation among competitors in the pandemic scenario

In the extraordinary circumstances of the covid-19 pandemic, cooperation between competitors may benefit consumers in many ways.[12] Therefore, competition authorities have faced the difficult task of assessing such collaborations while remaining watchful for hardcore anticompetitive conduct that may arise in this context.

The first collaboration of competitors reviewed by CADE in the covid-19 scenario was the collaboration among Ambev, BRF, Coca-Cola, Mondelez, Nestlé and Pepsico, presented before the authority as a necessary measure to minimise the effects of the covid-19 crisis on the activities of small retailers.[13] Absent any guidelines on the matter at the time, CADE based its decision on the fact that the collaboration did not involve anticompetitive conduct at its core, and that the parties were taking all the precautions applicable to prevent eventual antitrust risks. Nonetheless, when authorising the collaboration, CADE highlighted that the agreement was an exceptional measure and emphasised that such exceptionality did not represent an antitrust immunity.

Following that, in July 2020, CADE issued an informative note on the collaboration among competitors in the pandemic scenario, where it emphasised that 'agreements among competitors for price fixing, market division and supply restriction will continue to be strongly repressed by the antitrust authority, as well as the exchange of sensitive competitive information among companies, in accordance with the competition law and the consolidated precedent of this Council'.[14]

Through the informative note, CADE settled its understanding on the matter: the crisis is not an excuse to engage in anticompetitive behaviour and a collaboration between competing companies will not have antitrust immunity in case it crosses the border between licit cooperation and collusion.

Methodology on cartel penalties

CADE's rules on fine calculation lack clarity. Indeed, BCL provisions on methodology rely on unclear criteria that have raised uncertainties, such as on what constitutes a 'field of economic activity' and about whether and how to calculate the 'advantage obtained as a result of the cartel conduct' and, absent objective criteria on the matter, CADE has engaged in complex calculations on a case-by-case basis.[15]

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12 OECD, 'Co-operation between competitors in the time of Covid-19' (2020). See: www.oecd.org/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf.

13 See http://en.cade.gov.br/cade-authorizes-collaboration-among-ambev-brf-coca-cola-mondelez-nestle-and-pepsico-due-to-the-new-coronavirus-crisis.

14 See http://en.cade.gov.br/cade-discloses-an-informative-note-on-the-collaboration-among-competitors-to-face-the-covid-19-crisis.

15 As per article 37(I) of the BCL, companies can be subject to fines ranging from 0.1 per cent to 20 per cent of the gross revenue registered by the company itself or by its economic group in the field of economic activity involved in the infringement, in the year before CADE's investigation was initiated. The penalty amount, however, cannot be lower than the financial benefit the company made from the infringement, whenever it is possible to calculate that benefit amount.

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In 2019, the OECD, in its Peer Review on Brazil's Competition Law and Policy, highlighted that such rules have proved difficult to apply in practice, which increases the cost and complexity of proceedings and the possibility of successful judicial challenges against decisions, and recommended that CADE should clarify the meaning of 'field of economic activity', and increase transparency by setting a procedure that relies on readily identifiable data and avoids having to engage in complicated calculations regarding the benefits derived from the cartel conduct.[16]

Following that, in July 2020, CADE released a preliminary guide on cartel penalty measurement for public consultation. The guide presents an overview of the methodology used by CADE's Tribunal to determine the appropriate penalty for cartel offences, based on the authority's case law and the sanctions imposed by the agency between January 2012 and July 2019.[17]

While the guidelines are not to be considered as a rule, the document is expected to mitigate the uncertainties resulting from the law's lack of objective criteria on methodology, as it provides more information on how CADE has determined sanctions and how the unclear criteria of the law are to be considered in the authority's decisions. The practical effects of the guidelines on the daily activities of the Brazilian antitrust society will be observed in the near future.

Structural remedies

In addition to fines and prohibition to participate in bid processes, CADE has also ordered divestiture as a sanction in one opportunity, when judging the *Cement* cartel case in 2014.[18] In this case, CADE found that the integration between cement and concrete plants, resulting from a number of past mergers and acquisitions in the market, was essential to the cartel functioning and served as a barrier to entry. In this sense, CADE ordered the cement companies, among other sanctions, to divest part of their concrete production capacity, and prohibited the condemned companies from carrying on joint operations in the cement sector or acquiring any assets in the concrete market for five years.[19]

While divestitures are more commonly used in merger cases, where assessing a market's dynamic and the effects of a restructure is crucial to the agency's decision, using structural remedies as a sanction in cartel cases raises uncertainties, mainly about CADE's legitimacy to interfere in a market structure that would be lawful in the absence of the cartel conduct, as emphasised by the OECD. [20] Indeed, the OECD has already recommended that CADE should avoid using structural remedies in cartel cases, and that it should clarify the conditions when structural remedies may be imposed.[21] In this sense, the matter is expected to be addressed by CADE in the near future.

16 OECD Peer Reviews of Competition Law and Policy, Brazil (2019), footnote 7.

17 See http://en.cade.gov.br/cade-releases-a-preliminary-version-of-the-guide-for-cartel-penalties.

18 Moreover, divestment obligations were also required in a cease-and-desist agreement negotiated in the context of the *Fuel Resale* case, in which the agreement provided for the divestment of several petrol stations in key points of the Federal District, aiming at reducing market concentration and allowing new market entries.

19 Administrative Proceeding No. 08012.011142/2006-79.

20 OECD Peer Reviews of Competition Law and Policy, Brazil (2019), footnote 7.

21 id.

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Recent decisions

During the past 12 months, CADE has rendered final decisions in 11 cartel cases, including high-profile proceedings and multimillion reais fines applied to companies and individuals involved in cartel behaviour. Among them, we highlight the following decisions, which raised over 563 million reais in fines.[22]

In July 2019, CADE's Tribunal issued a final decision in the *Subway* cartel case, one of the biggest cartel cases in Brazilian history.[23] Eleven companies, including Brazilian subsidiaries of major global transportation companies, and 42 individuals were fined approximately 535 million reais for rigging at least 26 public bids for subway construction between 1993 and 2013 in five states. The cartel leader, alone, was fined 128.6 million reais and was prohibited from participating in public bids for five years.[24]

In October 2019, after eight years of investigation, CADE rendered its decision in another bid-rigging case involving IT companies that were found to have engaged into a collusive agreement to rig 11 public bids, fix prices and allocate markets in the Federal District between 2005 and 2008.[25] The penalties applied to four companies and six individuals, and totalled 2.2 million reais.[26]

In April 2020, four companies and three individuals were fined 20.9 million reais for participating in a long-standing global cartel in the underground and submarine cable market with effects in Brazil, which included market division, client allocation and non-compete agreements.[27] The case, which had been under CADE investigation since 2010, was decided by majority vote, as one of the commissioners raised questions about the conduct's effect in Brazil – an opinion that was outvoted by the other members who found that emails exchanged among competitors expressly indicated that Brazil was part of the collusion and that the conduct caused damage to Brazilian consumers. Notwithstanding, the case was closed in favour of two companies due to lack of evidence of their involvement in the conduct, which is in line with a trend that has been observed in the Tribunal's recent decisions: convictions must be based on evidence of active participation by the defendant in the unlawful practice.

22 See 'CADE in Figures', footnote 8.

23 Administrative Proceeding No. 08700.004617/2013-41.

24 For additional Information on the *Subway* cartel, see www.globalcompetitionreview.com/article/1194962/cade-doles-out-eur1254-million-in-fines-for-subway-cartel and CADE's official press release at www.cade.gov.br/noticias/cade-multa-em-r-535-1-milhoes-cartel-de-trens-e-metros.

25 Administrative Proceeding No. 08012.004280/2012-40.

26 For additional information, see CADE's official press release at www.cade.gov.br/noticias/cade-condena-empresas-e-pessoas-fisicas-por-cartel-em-licitacoes-de-ti-no-df.

27 Administrative Proceeding No. 08012.003970/2010-10. See CADE's official press release at http://en.cade.gov.br/cade-applies-brl-20-9-million-in-fines-for-international-cartel-of-underground-and-submarine-cables.

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Finally, in June 2020, CADE imposed penalties of over 2.84 million reais on companies and individuals involved in a *Marine Fender* cartel.[28] This case originated from the investigation of another cartel, in the marine hose market, during which CADE conducted a dawn raid and found documents that indicated the existence of a different collusion in the marine fender market. This ultimately led to the conviction of two companies and four individuals.

The above cases show that the length of cartel investigations continues to be a challenge for CADE, as some cases remain open for around 10 years before CADE's Tribunal is able to issue a final decision. This, along with the methodology for penalty calculation, will be one of the main challenges that the Brazilian authority will have to face to continue its policy improvements during the coming years.

Private litigation

Regulatory framework for civil liability in cartel cases

In addition to penalties that may be imposed in the public field, cartel behaviour is also subject to private scrutiny and violators may be liable for damages. Article 47 of the BCL establishes that both companies and individuals have the right to file private civil actions against third parties to recover damages resulting from any conduct described under article 36 as a violation of the economic order – which includes cartel conduct.

Moreover, Law No. 7,347/1985 (the Brazilian Public Class Action Law) establishes that the Public Prosecutor's Office (the State's Attorney's Office) and private entities focused on the protection of free competition may initiate class actions aiming to redress damages originating from such offences.

Stand-alone actions are allowed in Brazil, which means that private proceedings can be brought regardless of the existence of a decision at the public level, and even before a public investigation is opened. However, although a CADE finding that a cartel conduct has occurred is not required for the initiation of a civil claim, it could be a trigger and source of evidence for civil proceedings. As per the BCL, CADE's decisions are considered orders that may be judicially enforced, allowing those harmed by antitrust infringements to use the administrative decision to seek redress for damages sustained.[29]

In terms of procedural formalities, there are two main requirements to commence a competition damages claim: legal interest (ie, judicial intervention is required to achieve the claimant's purpose of action, and the law allows the claimant to pursue such purpose by means of a claim); and legal standing (ie, the claimant is an injured party that has suffered damages and is entitled to seek redress).[30]

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28 Administrative Proceeding No. 08700.011474/2014-05.

29 Article 93 of the BCL.

30 Denise Junqueira and Maíra Rodrigues (2019). 'Brazil: Competition Litigation', *The Legal 500*, www.legal500.com/guides/chapter/brazil-competition-litigation/.

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Regarding damages claims for cartel conduct, it is necessary to show that the cartel offence occurred, that damage was sustained (actual loss or forfeited profits) and that there is causation between the damage and the infringement. There must be evidence supporting the existence of cartel conduct that resulted in specific and quantifiable damages suffered by the claimant.

The applicable standard of proof is the same as for most civil claims: preponderance of evidence, in which the proof must be clear and convincing, and must lead to a conclusion that the allegations raised are more probably true than not. Therefore, the plaintiff makes the original allegations in a complaint and bears the burden of proof. The defendants file a response denying the plaintiff's allegations, and the court may order that the burden shifts to them in some specific situations.[31]

The Brazilian framework for competition litigation does not require the existence of a direct consumer relationship between the individuals injured and the defendants, and thus, damage arising from indirect purchases and 'passing-on' is indemnified.[32]

Trends and challenges

Obtaining evidence

One of the main challenges in private competition damages actions is the significant difficulty faced by claimants in obtaining evidence to prove the existence of an anticompetitive conduct, and that they were harmed by such conduct, and, in particular, to quantify the damage suffered, which is a requirement of the compensation award.

This evidentiary burden can be significant, and, therefore, stand-alone private claims are unlikely to succeed without CADE's proceedings as a source of evidence. To facilitate injured parties' access to relevant information that may help them to assert their rights against the companies involved in a cartel offence, CADE has made efforts to promote private actions through the publication of detailed decisions, and to proactively inform potential injured parties.[33]

However, there is an ongoing debate on the possibility of obtaining evidence where a private competition claim is formulated in parallel to CADE's investigation. Currently, private claimants are only able to access case documents after a final decision is made available and subject to disclosure limitations.

Although successful leniency applicants are not exempt from liability in civil claims, there are restrictions on the availability of leniency evidence for private actions. These restrictions result from CADE's concern that granting access to such evidence may discourage parties to come forward as leniency applicants. To preserve the leniency programme, CADE has indicated that while an administrative investigation is ongoing, CADE can intervene in favour of protecting the confidentiality of leniency documents, in case a court orders a leniency applicant to disclose

31 id.

32 OECD Peer Reviews of Competition Law and Policy, Brazil (2019), footnote 7.

33 id.

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materials related to its application in a related civil proceeding, and, after finishing its investigation, CADE can intervene in civil proceedings to ensure that the disclosure of leniency material is reasonable, proportional and legitimately in relation to the claim.[34]

In 2018, CADE issued Resolution No. 21/2018, which provides for specific scenarios in which documents from CADE investigations may be disclosed to third parties interested in initiating private competition damages claims.

Moreover, CADE issued Ordinance No. 869/2019, defining procedures for document disclosure, complementing Resolution No. 21/2018.

The Ordinance establishes that:

- regarding administrative proceedings under the Administrative Tribunal's assessment, the Reporting Commissioner in the case will determine in its final decision which documents shall be disclosed;[35] the decision may be questioned by interested parties, including defendants and claimants;[36] and
- as regards administrative proceedings that are still under CADE's analysis or that occurred before Resolution No. 21/2018, access to documents should be exceptional and analysed on a case-by-case basis.[37]

Limitation period

The BCL does not define a particular limitation period for private competition damages claims and there is no settled case law on the matter. As a result, courts have applied the following limitation periods:

- three-year limitation period established by the Brazilian Civil Code applies to civil redress;[38]
- five-year limitation period defined by the Consumer Protection Code;[39] and
- 10-year general limitation period, applicable where no specific law establishes a shorter term.[40]

The point at which the limitation period is triggered is controversial; therefore, the starting point is open to a case-by-case interpretation.

There is currently a bill proposal aiming to address the challenges arising from the limitation period. The House of Representatives Commission for Constitution, Justice and Citizenship is currently assessing a proposed amendment to article 47 of the BCL under Bill No. 11,275/2018, which proposes a five-year limitation statute, counted from acknowledgment by the claimant of the infringement or damage suffered, which is presumed to occur when CADE issues a final decision on the case; and the suspension of the limitation period for civil claims when a CADE investigation or administrative proceeding is ongoing.

34 id.

35 Article 2 of Ordinance No. 869/2019.

36 id., article 4.

37 id., sections III and IV.

38 Article 206, paragraph 3(V) of the Brazilian Civil Code.

39 Article 27 of the Brazilian Consumer Protection Code.

40 Junqueira and Rodrigues, footnote 30.

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Arbitration

It is controversial whether harmed parties can dispute antitrust matters through arbitration. This is because, on one hand, anticompetitive conduct has the potential to harm society and thus inflict damage related to collective rights and free competition, and, on the other hand, anticompetitive conduct may also harm companies and individuals directly. While collective rights are inalienable rights that cannot be referred to arbitration, quantifiable damages suffered by companies and individuals may be subject to arbitration.[41]

The possibility of arbitration in competition matters is also under discussion in the context of Bill No. 11,275/2018, which proposes, as a requirement for settling investigations with CADE, that defendants will have to accept the submission of private claims disputes to arbitration, considering the mechanism celerity, if the claimant so desires.[42]

Conclusion

The following table presents the risks and benefits on negotiating different types of agreements with the authorities.

Level	Leniency agreement	Leniency plus	Cease-and-desist agreement	No agreement
Administrative	No fine (or fine reduction of between one-third and two-thirds if the authority was previously aware of the conduct being reported)	No fine for the second conduct, and a one-third reduction of the applicable penalty for the first conduct	Fine reduction by up to 50%	Possible conviction – fines and other applicable penalties
Criminal	Suspension of the statute of limitation and criminal immunity* (granted upon fulfilment of the agreement)	Suspension of the statute of limitation and criminal immunity* for the second conduct only (granted upon fulfilment of the agreement)	No exemption (but applicants can also attempt to settle with the criminal authorities)	Possible conviction – fines, prison and other applicable penalties
Civil	No exemption (but the amount paid in damages, when applicable, may be reduced from the administrative fine)			May be liable for double damages in a private claim

*Available for individuals committing crimes against the economic order only.

41 Yane Pitangueira Dantas, 'A Arbitragem como Meio Alternativo na Resolução de Demandas Indenizatórias Decorrentes da Prática de Cartéis e a Minuta de Resolução do CADE submetida à Consulta Pública 05/2016', *Revista de Direito da Concorrência*, Vol. 5, No. 1, May 2017, p. 241.

42 Proposed amendment to article 85 of the BCL, Bill No. 11,275/2018.

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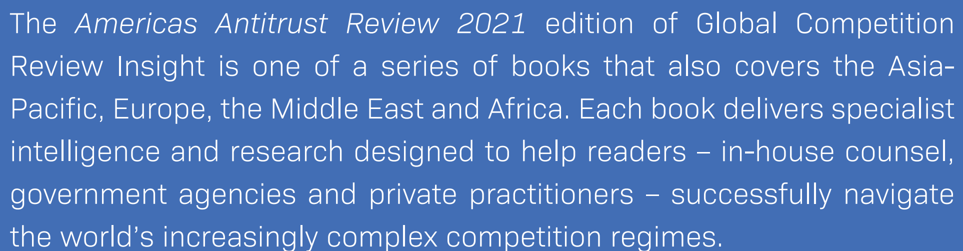

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