

# Guidelines

## Cade's Antitrust Leniency Program

**Draft**



Ministry of Justice

Administrative Council for Economic Defense (CADE)

Draft

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**Guidelines: Cade's Antitrust Leniency Program**

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## FREQUENTLY ASKED QUESTIONS

### INTRODUCTION

8

### PART I. GENERAL ASPECTS OF THE ANTITRUST LENIENCY PROGRAM OF THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE)

9

1. What is the Antitrust Leniency Program of the Administrative Council for Economic Defense (CADE)? 9
2. To which violations does CADE's Leniency Agreement apply? 10
3. Is participating in a cartel an administrative or a criminal offense? 10
4. Who are the competent authorities to investigate and punish the participation in a cartel in the administrative and criminal spheres? 10
5. What penalties apply to participation in a cartel? 11
6. Why apply for CADE's Leniency Agreement? 12
7. Is it possible to apply for a Leniency Agreement regarding conducts occurring outside of Brazil? 13
8. How long has the Leniency Program existed in Brazil? 13
9. Did Law No. 12.529/2011 promote any legislative changes in CADE's Leniency Program? 14
10. Can a cartel leader apply for a Leniency Agreement? 14
11. What are the requirements to apply for CADE's Leniency Agreement? 15
12. How should the leniency applicant make a confession of wrongdoing? 15
13. Who can apply for a Leniency Agreement? 15
14. Does it make a difference if the leniency applicant is a company or an individual? 16
15. Is it possible to report on an alleged cartel even if the whistleblower has not participated in the offense to be reported? 16
16. Who coordinates CADE's Leniency Program? 16
17. What benefits are granted to an applicant who signs and fulfills a Leniency Agreement? 17
18. When are the benefits under a Leniency Agreement fully and partially granted? 18
19. When will the benefits under the Leniency Agreement be effectively granted? 18
20. To which crimes do the benefits granted to a leniency recipient apply? 19
21. Do the benefits granted under a Leniency Agreement extend to other administrative offenses? 19
22. Can the second company to inquire about a leniency application apply for any other type of benefits from CADE? 19
23. What are the differences between a Leniency Agreement and a Cease and Desist Agreement (TCC)? 19
24. What does an "cooperation agreement" ("acordo de colaboração premiada" in its Portuguese acronym) entail? 21

|  |           |
|--|-----------|
| 25. What is the relationship between CADE's Leniency Agreement and the Leniency Agreement set forth by Law No. 12.846/2013 ("Clean Company Act"/"Anticorruption Act")? | 21        |
| 26. Is there a Model Leniency Agreement?   | 23        |
| <b>PART II. PHASES OF NEGOTIATION OF CADE LENIENCY AGREEMENTS</b>  | <b>24</b> |
| 27. How is a Leniency Agreement negotiated with CADE?  | 24        |
| <b>PART II.I. FIRST PHASE: SECURING A "MARKER"</b>   | <b>25</b> |
| 28. What is a marker?  | 25        |
| 29. From whom at CADE's General Superintendence should a marker be requested?  | 25        |
| 30. What must be reported to CADE's General Superintendence in order to request a marker?  | 25        |
| 31. Must a request for a marker be accompanied by evidentiary documents of the reported conduct?   | 26        |
| 32. Why is it important to request a marker as soon as possible?   | 26        |
| 33. How does CADE's General Superintendence verify the availability of a marker?   | 26        |
| 34. How long does it take for CADE's General Superintendence to provide a response as to whether or not a marker is available to negotiate an Leniency Agreement?      | 27        |
| 35. What happens if the marker is available?   | 27        |
| 36. What happens if the marker is not available?   | 27        |
| 37. What happens if CADE's General Superintendence is already aware of the offense reported in the request for a marker?   | 28        |
| 38. Can a marker be amended?   | 28        |
| 39. Can the leniency applicant withdraw its leniency application?  | 29        |
| 40. What happens if the leniency applicant withdraws its leniency application?   | 29        |
| 41. Does securing a marker guarantee that a Leniency Agreement will be signed?   | 29        |
| 42. Who has access to the terms of a marker?   | 29        |
| 43. How long does the request for a marker remain in effect?   | 30        |
| 44. What are CADE's confidentiality procedures at Phase I (marker request)?  | 30        |
| <b>PART II.2. SECOND PHASE: SUBMISSION OF EVIDENTIARY INFORMATION AND DOCUMENTS OF THE OFFENSE REPORTED OR UNDER INVESTIGATION</b>                                     | <b>30</b> |
| 45. What is the submission of evidentiary information and documents of the offense reported or under investigation?  | 30        |
| 46. What kind of information must be provided by the leniency applicant?   | 31        |
| 47. Which documents must be provided by the leniency applicant?  | 33        |

|  |           |
|--|-----------|
| 48. What precautions should be taken by the leniency applicant when collecting electronic documents and hard copies?   | 33        |
| 49. How should the information and documents provided by the leniency applicant be presented to CADE's General Superintendence?  | 34        |
| 50. Can individuals be interviewed by CADE's General Superintendence?  | 35        |
| 51. If, in the course of the negotiation, the leniency applicant, in its internal investigation, finds evidence that the antitrust activity was broader than initially reported, can the negotiation be expanded as to include the newly discovered conduct? | 35        |
| 52. What is a History of Conduct?  | 36        |
| 53. What is the time limit for negotiating a Leniency Agreement?   | 36        |
| 54. Can a leniency application be rejected by CADE?  | 36        |
| 55. If a leniency application is withdrawn or rejected, what guarantees do leniency applicants have?   | 37        |
| 56. When is the negotiation of a Leniency Agreement finalized by CADE's General Superintendence, and the document signed?  | 37        |
| 57. What are CADE's confidentiality procedures in the phase of submission of evidentiary information and documents of the offense reported or under investigation?   | 38        |
| <b>PART II.3. THIRD PHASE: EXECUTION OF THE LENIENCY AGREEMENT</b>   | <b>39</b> |
| 58. What is necessary for the execution of the Leniency Agreement?   | 39        |
| 59. How does the state and/or federal Prosecution Service (MPs in its acronym is Portuguese) participate in the Leniency Agreement?  | 39        |
| 60. How and when are state and/or federal Prosecution Service contacted?   | 40        |
| 61. How is it determined which office of the Prosecution Service will act in a given Leniency Agreement?   | 41        |
| 62. Where is the Leniency Agreement signed?  | 41        |
| 63. Can a Leniency Agreement be entered into in bilingual form?  | 42        |
| 64. When must the leniency applicant hand over the hard copies of the evidentiary documents of the alleged conduct?  | 42        |
| 65. Which representation documents must be submitted by companies and individuals when signing the Leniency Agreement?   | 42        |
| 66. If the individuals decide not to sign the Leniency Agreement together with the company, will this hinder the execution of the agreement with CADE?   | 43        |
| 67. What does an addendum to the Leniency Agreement mean?  | 43        |
| 68. What can be done if a leniency applicant does not communicate in Portuguese?   | 44        |
| 69. Must individuals located outside of Brazil personally attend to sign the Leniency Agreement?   | 44        |
| 70. Must the leniency recipient be represented by an attorney or by an agent?  | 44        |
| 71. What terms and conditions are set forth in the Leniency Agreement?   | 44        |
| 72. Is there a Model Leniency Agreement?   | 46        |

|   |    |
|---|----|
| 73. What are CADE's confidentiality procedures in the Leniency Agreement execution phase? | 46 |
|---|----|

### **PART III. AFTER THE SIGNATURE OF THE LENIENCY AGREEMENT** **47**

|   |    |
|---|----|
| 74. What happens after the Leniency Agreement is signed?  | 47 |
| 75. What happens if the terms and conditions stipulated in the Leniency Agreement are not fulfilled?  | 48 |
| 76. When a Preliminary Investigation or an Administrative Proceeding is launched, what kind of information provided on the Leniency Agreement will be made public?                              | 48 |
| 77. When a search and seizure warrant or other court measure is carried out, what kind of information provided on the Leniency Agreement will be made public?                                   | 49 |
| 78. Does CADE share information on a Leniency Agreement with authorities of other countries?  | 49 |
| 79. Can the leniency recipient provide information and/or documents negotiated in connection with the Leniency Agreement to third parties, other governmental agencies, or foreign authorities? | 50 |
| 80. What should the leniency recipient do if, after signing the Leniency Agreement, new information or documents on the reported conduct are discovered?  | 50 |
| 81. When does CADE declare the fulfillment of the Leniency Agreement and when does the leniency recipient's duty to cooperate cease?  | 51 |
| 82. Can the leniency recipient be held liable in a civil action for damages?  | 51 |
| 83. Does the confidentiality of the information and documents submitted during the negotiation of the Leniency Agreement remain in effect after CADE's Tribunal issues a final decision?        | 51 |
| 84. What are CADE's confidentiality procedures after the signature of the Leniency Agreement?   | 52 |

### **PART IV. LENIENCY PLUS** **53**

|   |    |
|---|----|
| 85. What is Leniency Plus?  | 53 |
| 86. How does the request for a marker work in relation to Leniency Plus?  | 54 |
| 87. When does the leniency applicant receive the discount pursuant to Leniency Plus?  | 54 |
| 88. Is it possible to obtain discounts related to both the Cease and Desist Agreement and the Leniency Plus?  | 55 |
| 89. Is it possible to obtain discounts in two Leniency Plus agreements within a single administrative proceeding?                                   | 56 |
| 90. Is it possible to obtain Leniency Plus if the leniency applicant has previously signed a Leniency Agreement in another market with the SG/CADE? | 56 |

## INTRODUCTION

This FAQ on CADE's Leniency Program (Leniency Program) consolidates the best practices and procedures usually adopted during the negotiation of Leniency Agreements (Leniency Agreement) with the Administrative Council for Economic Defense (CADE in its acronym in Portuguese). Its objective is to provide an institutional framework for future negotiations and to serve as a reference for public-sector employees, attorneys, and society as a whole in proceedings involving this important activity in connection with the Brazilian competition law and policy for dismantling cartels, and prosecuting antitrust conspiracy.

It is important to note that this document is not binding and is not classified as a norm. The practices and procedures described in this FAQ may change at the discretion of CADE's General Superintendence (SG/CADE), depending on the circumstances of the case at hand. Nevertheless, a large portion of the subject matter of this FAQ comes directly from Law No. 12.529/2011 and CADE's Internal Statute (RICADE in its acronym in Portuguese), both of which are indeed binding.

The structure of this FAQ is based on the main phases for negotiating and entering into a Leniency Agreement, according to articles 86 and 87 of Law No. 12.529/2011 and 197 to 210 of Ricade):

- (I) General Aspects of CADE's Leniency Program (Questions 1 to 26)
- (II) Phases of negotiation of CADE's Leniency Agreements (Question 27)
  - (II.1.) First phase: securing a marker ("marker)" (Questions 28 to 44)
  - (II.2.) Second phase: submission of evidentiary information and documents proving the offense reported or under investigation (Questions 45 to 57)
  - (II.3.) Third phase: execution of the Leniency Agreement (Questions 58 to 73)
- (III) After signing the Leniency Agreement (Questions 74 to 84)
- (IV) Leniency Plus (Questions 85 to 90)



## **PART I. GENERAL ASPECTS OF THE ANTITRUST LENIENCY PROGRAM OF THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE)**

### **1. What is the Antitrust Leniency Program of the Administrative Council for Economic Defense (CADE)?**

O CADE's Leniency Program is a set of initiatives aimed at detecting, investigating, and punishing offenses against the economic order; informing and permanently orienting companies and citizens in general regarding the rights and guarantees set forth in articles 86 and 87 of Law No. 12.529/2011 and in articles 197 to 210 of Cade's Internal Statute (RICADE in its acronym in Portuguese); and incentivizing, orienting, and assisting leniency applicants to enter into CADE's Leniency Agreements (Leniency Agreements).

The Leniency Program allows companies and/or individuals currently involved or that were involved in a cartel or other antitrust conspiracy to apply for a Leniency Agreement with CADE by committing to cease the illegal conduct, report and confess the wrongdoing, and cooperate with the investigations by submitting information and documents relevant to the investigation.

In the administrative sphere, as long as applicants collaborate with the investigation and the result of such collaboration leads to the identification of others involved in the violation and to the collection of information and documents evidencing the offense reported or under investigation, the leniency recipient will avoid administrative fines (if CADE's General Superintendence does not have prior knowledge of the reported violation) or a reduction by one to two-thirds of the applicable administrative fines (if the SG/CADE already has prior knowledge of the reported violation) (art. 86, paragraph 4, of Law No. 12.529/2011 combined with art. 208, I and II, RICADE). Regarding "prior knowledge" (see question [18](#), below).

In the criminal sphere, the Leniency Agreement will grant protection from criminal conviction and prison terms with respect to the antitrust offenses set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to participation in a cartel, such as those set forth in the General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Once the Leniency Agreement has been fulfilled, the ability to sanction the abovementioned crimes is immediately extinguished (art. 87 of Law No. 12.529/2011 combined with art. 208, sole paragraph, RICADE) (see questions 17 a 19, below).

## **2. To which violations does CADE's Leniency Agreement apply?**

CADE's Leniency Agreement applies to violations set forth in article 36 of Law No. 12.529/2011, previously set forth in articles 20 and 21 of Law No. 8.884/1994. In most cases, Leniency Agreements are signed in cartel cases, i.e., when competing companies coordinate and agree for the purpose of, or with the potential to produce the following effects, even if not achieved (I) limiting, falsifying, or otherwise hindering free competition or free enterprise; (II) dominating a relevant market for goods or services; or (III) arbitrarily increasing profits (art. 36, introductory paragraph, I to III, of Law No. 12.529/2011).

The Leniency Agreement applies to, among other things, antitrust conspiracies set forth in article 36, paragraph 3, part I, subparagraphs "a", "b", "c" and "d" and part II of Law No. 12.529/2011, namely: (I) to agree to, set, manipulate, or collude with a competitor, in any manner, on (a) the prices of goods or services offered individually; (b) the production or trade of a restricted or limited quantity of goods or provision of a restricted or limited number, volume, or frequency of services; (c) the division of parts or segments of a current or potential market for goods or services, by means of, among other things, the division of customers, suppliers, regions, or periods; and/or (d) prices, conditions, advantages, or refraining from participating in a public bidding; and (II) to promote or influence uniform or concerted commercial conduct among competitors (as in the case of associations and syndicates, for example).

Note that, according to the introductory paragraph of article 36 of Law No. 12.529/2011 and the CADE's case law, cartel participation is considered "per se illegal". This means that it is not necessary to demonstrate the effects of a cartel on the market. It is sufficient that the collusive conduct has the potential to cause an adverse effect, even if not achieved. In addition, an antitrust violation exists regardless of whether the companies involved are at fault.

## **3. Is participating in a cartel an administrative or a criminal offense?**

Participation in a cartel is an illicit act both under administrative law (art. 36, paragraph 3, I, of Law No. 12.529/2011) and under criminal law (art. 4, II, of Law No. 8.137/1990).

## **4. Who are the competent authorities to investigate and punish the participation in a cartel in the administrative and criminal spheres?**

In the administrative sphere, CADE's General Superintendence has jurisdiction to investigate and initiate administrative proceedings regarding cartels and other antitrust conspiracy (art. 13, V, of Law No. 12.529/2011), and the plenary session of Cade's Tribunal has jurisdiction to issue a final decision (art. 9, III, of Law No. 12.529/2011).

Through the Leniency Agreement companies and/or individuals candidates for obtaining full immunity or a reduction of the applicable fine by Cade. Such benefits are granted definitively in the judgment of the administrative proceeding by the plenary session of Cade's Tribunal (art. 86, paragraph 4, of Law No. 12.529/2011) (see questions [17](#) a [19](#), below).

In the administrative sphere, CADE's General Superintendence has jurisdiction to investigate and initiate administrative proceedings regarding cartels and other antitrust conspiracy (art. 13, V, of Law No. 12.529/2011), and the plenary session of CADE's Tribunal has jurisdiction to issue a final decision (art. 9, III, of Law No. 12.529/2011).

Through the Leniency Agreement companies and/or individuals candidates for obtaining full immunity or a reduction of the applicable fine by CADE. Such benefits are granted definitively in the judgment of the administrative proceeding by the plenary session of CADE's Tribunal (art. 86, paragraph 4, of Law No. 12.529/2011) (see questions [17](#) a [19](#), below).

## 5. What penalties apply to participation in a cartel?

Participation in a cartel is an offense under both administrative and criminal law (see questions [3](#) e [4](#), above).

In the administrative sphere, according to article 37, parts I to III, of Law No. 12.529/2011, the monetary penalties (fines) applicable to antitrust violations are the following:

- I. Regarding companies, a fine of 0.1% to 20% of the gross revenues of the company, group, or conglomerate, earned in the last fiscal year before the initiation of the administrative proceeding, in the line of the business activity in which the violation occurred, which will never be lesser than the advantage obtained, when it is possible to estimate its value;
- II. in the case of individuals or legal entities governed by public or private law, as well as associations, and syndicates that do not carry out business activity, if it is impossible to use the criterion of the value of gross revenues, a fine of BRL50,000.00 to BRL2,000,000,000.00; and
- III. in the case of managers directly or indirectly responsible for the violation committed, if their fault or willful misconduct is proven, a fine of 1% to 20% of the one imposed on the company.

As set forth in article 38 of the same law, in addition to the fines, other penalties may be imposed separately or cumulatively in the administrative sphere, such as: (i) the requirement to publish the conviction decision in a newspaper of wide circulation; (ii) a prohibition on contracting with financial institutions and participating in biddings held by public bodies; (iii) a split up of the company or a divestiture of certain assets; (iv) a recommendation for a compulsory license to be granted for an intellectual property right; (v) a prohibition on granting an arrangement for payment of tax in installments; (vi) a prohibition on engaging in commerce, and/or any other act or measure as necessary to eliminate the effects harmful to the economic order.

In the criminal sphere, according to article 4, part II, of Law No. 8.137/1990 (Economic Crimes Act), committing a cartel-related crime subjects the individuals involved to the penalties of imprisonment for two to five years and a fine. According to article 12 of the same law, such penalty may be increased by one-third to one-half if the crime causes serious harm to society, is committed by a public-sector employee in the exercise of his or her duties, or is related to goods or services essential to life or health.

## 6. Why apply for CADE's Leniency Agreement?

Entering into a Leniency Agreement with CADE may provide significant benefits for the leniency recipients – companies and/or individuals (see questions [13](#) and [14](#), below) – in the administrative and criminal spheres (see questions [17](#) and [18](#), below). If no Leniency Agreement is signed, all companies and/or individuals that participate in the antitrust conspiracy may be convicted and fined in both the administrative and criminal spheres.

Those involved in such violations are subject to severe administrative sanctions (art. 37 of Law No. 12.529/2011), and, in the case of companies, the antitrust violation exists regardless of fault. Administrative punishment for such antitrust violations is consolidated on CADE's case law, both under the current Law No. 12.529/2011 and the previous legislation (Law No. 8.884/1994). CADE's Tribunal has been firm in punishing agreements between competitors with the objective of or potential to produce the effects, even if not realized, of (I) limiting, falsifying, or otherwise hindering free competition or free enterprise; (II) dominating a relevant market for goods or services; or (III) arbitrarily increasing profits. In addition, those involved can also be punished criminally for the violation, since participation in a cartel is also a crime set forth in article 4 of Law No. 8.137/1990 (see questions [3](#) to [5](#), above).

In addition, the participants in the antitrust conspiracy must keep in mind that, even though no Leniency Agreement may have been proposed, CADE may be aware of an illicit agreement among

competitors through many other sources (for example, representations of clients or third parties, news and information in the press, cooperation between antitrust authorities on investigations underway in other jurisdictions, ex officio investigations, etc.), or, furthermore, by means of other administrative measures (for example, search and seizure measures, inspections, requests for information, and the use of intelligence procedures to detect cartels participating in biddings), which represents yet another incentive to entering into a Leniency Agreement with CADE.

**7. Is it possible to apply for a Leniency Agreement regarding conducts occurring outside of Brazil?**

Yes. As set forth in article 2, introductory paragraph, of Law No. 12.529/2011, the Antitrust Act and CADE's Leniency Program apply to conduct committed wholly or in part within the Brazilian territory or even in another jurisdiction, as long as they produce or may produce effects in Brazil.

For entering into a Leniency Agreement regarding conducts which occurred outside of Brazil, the company and/or individual must demonstrate that the effects were felt or could have been felt in the Brazilian territory, thus establishing a connection between the anticompetitive conduct and such effects in Brazil.

**8. How long has the Leniency Program existed in Brazil?**

The benefit of leniency was introduced in Brazil by Law No. 10.149/2000, which amended Law No. 8.884/94 (arts. 35-B and C), with the objective of strengthening the activity of combatting antitrust violations. Under this law, the benefit of leniency was governed by the Ministry of Justice's Ordinances (Portarias in its acronym in Portuguese) No. 4/2006 (art. 61) and No. 456/2010 (art. 59).

Since 2003, the criminal prosecution of cartels has become a priority in Brazil, and Cade has been cooperating with the state and federal Prosecution Services and with the Federal Police to ensure that directors, managers, and employees of involved companies that do not sign Leniency Agreements are prosecuted for committing the crime of participation in a cartel, for which the prescribed penalty is two to five years of imprisonment and a fine (art. 4, II, of Law No. 8.137/1990, Economic Crimes Act).

With the advent of Law No. 12.529/2011, on May 29, 2012, the current Cade's Leniency Program was introduced, with a specific chapter in the law (Chapter VII, Title VI), whose rights and guarantees are set forth in its articles 86 and 87 and in articles 197 to 210 of the Ricade.

The first leniency applicant in Brazil appeared before the former Secretariat of Economic Law of the Ministry of Justice (SDE/MJ in its acronym in Portuguese) - whose functions were similar to those currently carried out by CADE's General Superintendence – in 2003, after two search and seizure warrants were carried out in that year, at which time the Secretariat had already earned a positive reputation in the business community regarding its ability to expose and investigate anticompetitive practices. Since then, CADE has perfected the institution of antitrust leniency in Brazil to make it more transparent, predictable, efficient, and secure.

Current data on the total number of Leniency Agreements signed from year to year with CADE can be accessed [here](#).

#### 9. Did Law No. 12.529/2011 promote any legislative changes in CADE's Leniency Program?

Yes. Law No. 12.529/2011, which instituted the current CADE's Leniency Program (Chapter VII, Title VI), promoted a few changes in the previous legislation (Law No. 8.884/1994), namely:

- I. alteration of the competent authority: under Law No. 8.884/1994, it was the Federal Government, through the SDE/MJ, which was competent to enter into Leniency Agreements. Under Law No. 12.529/2011, it is now CADE, through its General Superintendence;
- II. repealing the rule stating that the cartel leader could not propose a leniency agreement; and
- III. specification of the benefits of the Leniency Agreement in the criminal sphere: Law No. 12.529/2011 provides that execution of a Leniency Agreement leads to suspension of the limitation period and prevents the criminal prosecution of the agent benefitting from the leniency with regard to the crimes set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to participation in a cartel, such as those set forth in the General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Once the Leniency Agreement has been signed, the ability to sanction the above crimes is automatically extinguished, according to article 87 of Law No. 12.529/2011.

#### 10. Can a cartel leader apply for a Leniency Agreement?

Yes. Law No. 12.529/2011 eliminated the rule preventing a cartel leader from proposing a Leniency Agreement (see question [9](#), above). Thus, CADE's General Superintendence may enter into a Leniency Agreement with the cartel leader as long as the applicant meets the legal requirements (art. 86 of Law No. 12.529/2011 combined with art. 198 of the RICADE) (see question [11](#), below).

### **11. What are the requirements to apply for CADE's Leniency Agreement?**

Articles 86 of Law No. 12.529/2011 and 198 of the RICADE list the requirements for entering into a Leniency Agreement in Brazil. According to those articles:

- 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.

### **12. How should the leniency applicant make a confession of wrongdoing?**

The confession of wrongdoing can be made orally or in writing. However, 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.

### **13. Who can apply for a Leniency Agreement?**

According to article 86 of Law No. 12.529/2011, both companies and individuals involved or that have been involved in the antitrust violation can propose a Leniency Agreement, as long as they meet the requirements set forth in articles 86 of Law No. 12.529/2011 and 198 of the RICADE (see question [11](#), Above).

Negotiation of the Leniency Agreement with CADE's General Superintendence is normally conducted with the leniency applicant's legal representative. The leniency applicant should grant the attorney specific powers to negotiate and execute the Leniency Agreement with CADE and with the state and/or federal Prosecution Service.



**14. Does it make a difference if the leniency applicant is a company or an individual?**

Yes. If the leniency applicant is a company, the benefits of the agreement can be extended to its current and former directors, managers, and employees, and to companies of the same economic group, de facto and de jure, involved in the violation, as long as they cooperate with the investigations and sign the instrument together with the company (art. 86, paragraph 6, of Law No. 12.529/2011 combined with art. 198, paragraph 1, RICADE).

The individuals and companies of the same economic group can enter into the agreement together with the applicant company or in an addendum to the original Leniency Agreement when authorized by Cade, according to its discretion (art. 198, paragraph 2, RICADE). Companies and their directors, managers, and employees may be represented by the same or different legal representatives or attorneys.

However, if the leniency applicant is an individual and the agreement is signed without the participation its legal entity, the benefits will not be extend to the company with which the individual is or was associated (art. 86, paragraph 6, Law No. 12.529/2011 combined with art. 198, paragraph 3, RICADE). The justification for this is to increase the instability of the cartel, so that all participants involved, whether they are companies or individuals, still have a strong incentive to report the anticompetitive practice to CADE as soon as possible.

**15. Is it possible to report on an alleged cartel even if the whistleblower has not participated in the offense to be reported?**

Yes. If a whistleblower that did not participate in the violation becomes aware of the cartel or other antitrust conspiracy, he or she should notify CADE's General Superintendence as soon as possible. This notice may be in the form of a petition filed with CADE or through the "[Clique Denúncia](#)", a channel on CADE's website for reporting violations. It is important for the notice to be substantiated and accompanied by evidentiary information and documents of the antitrust offense when possible, in order to assist the investigation of the SG/Cade. This information is not a Leniency Agreement proposal, since this type of agreement applies only to cartel participants.

**16. Who coordinates Cade's Leniency Program?**

According to article 86 of Law No. 12.529/2011, the body responsible for negotiation and execution of Leniency Agreements is CADE's General Superintendence. 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 body 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 (see questions [59](#) to [61](#), below).

### **17. What benefits are granted to an applicant who signs and fulfills a Leniency Agreement?**

In the administrative sphere, entering into a Leniency Agreement candidates companies and/or individuals for obtaining full immunity or a reduction of the applicable fine by CADE. Such benefits are definitively granted in the judgment of the administrative proceeding by the plenary session of CADE's Tribunal (art. 86, paragraph 4, of Law No. 12.529/2011).

According to article 86, paragraph 4, of Law No. 12.529/2011 combined with article 208 of the RICADE, once CADE's Tribunal declare 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 (see question [18](#), below).

In the criminal sphere, entering into a Leniency Agreement leads to the suspension of the limitation periods and prevents the criminal prosecution of the agent benefitting from the leniency 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 General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Once the Leniency Agreement has been fulfilled, the ability to sanction the abovementioned crimes is automatically extinguished (article 87 of Law No. 12.529/2011).

## 18. When are the benefits under a Leniency Agreement fully and partially granted?

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 (Partial Leniency, see question [37](#), below) 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.

Although under the Brazilian law there is no express concept of “prior knowledge” of the conduct by CADE’s General Superintendence, prior knowledge is understood to be present only when, at the time of submission of the proposal of Leniency Agreement, there is an ongoing administrative proceeding with reasonable evidence of anticompetitive practices that is the object of the proposed Leniency Agreement. In this regard, information submitted through the “[Clique Denúncia](#)” channel that does not contain sufficient evidence to support the initiation of an administrative proceeding, news articles, or information on the existence of an investigation within another body of the public administration not yet investigated by CADE, among other situations, do not qualify as “prior knowledge” by CADE’s General Superintendence..

## 19. When will the benefits under the Leniency Agreement be effectively granted?

The benefits will be effectively granted upon declaration of fulfillment of the Leniency Agreement by CADE’s Tribunal, in the judgment of the respective administrative proceeding (art. 86, paragraph 4, I and II, of Law No. 12.529/2011).

**20. To which crimes do the benefits granted to a Leniency Applicant?**

Entering into a Leniency Agreement results, in the criminal sphere, in the suspension of the limitation periods and prevents the criminal prosecution of the agent benefitting from the leniency in connection with the crimes set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to participation in a cartel, such as those set forth in the General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Once the Leniency Agreement has been fulfilled, the ability to sanction the abovementioned crimes is automatically extinguished, according to article 87 of Law No. 12.529/2011. Thus, the benefits of the Leniency Agreement do not extend to crimes not directly related to participation in a cartel.

**21. Do the benefits granted under a Leniency Agreement extend to other administrative offenses?**

There is no law provision stating that the benefits granted under a Leniency Agreement result in extinguishment of the ability to sanction or in the reduction of the administrative penalties for other administrative illicit acts other than those set forth in Law No. 12.529/2011..

**22. Can the second company to inquire about a leniency application apply for any other type of benefit from CADE?**

Yes. The companies and/or individuals investigated for an antitrust conspiracy that do not qualify to enter into a Leniency Agreement (see question [11](#), above) may, in principle, propose a Cease and Desist Agreement (TCC) with CADE (art. 85 of Law No. 12.529/2011 combined with arts. 184 to 189, Ricade) (see question [23](#), below).

**23. What are the differences between a Leniency Agreement and a Cease and Desist Agreement (TCC)?**

The Leniency Agreement is available only to the first in to report the antitrust conspiracy to CADE (art. 86, paragraph 1, I of Law No. 12.529/2011) (see question [11](#), above) and may grant both administrative and criminal benefits (art. 86, paragraph 4, combined with art. 87 of Law No. 12.529/2011).

In turn, the TCC is accessible to all other persons investigated for anticompetitive conduct (art. 85 of Law No. 12.529/2011) and generates benefits only in the administrative sphere, without automatic benefits in the criminal sphere. 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; see question [88](#), below)
- 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.

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 an cooperation agreements with the Prosecution Service and/or the Federal Police (see question [24](#), *below*), then CADE's General Superintendence 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.

Note that, even if no Leniency Agreement has been entered into with CADE, it is possible that only the negotiation of a Cease and Desist Agreement (TCC) will be available to the company

and/or individuals, depending on whether or not the requirements for negotiation and execution of each of these types of agreement have been met (see question [11](#), above).

**24. What does an “cooperation agreement” (“acordo de colaboração premiada” in its acronym in Portuguese) entail?**

In Brazil, an “cooperation agreement” is provided in several special laws, such as Law No. 7.492/86 (on crimes against the Brazilian financial system, in art. 25, paragraph 2), Law No. 8.072/90 (on heinous crimes, in art. 8, sole paragraph), in Law No. 8.137/90 (tax crimes, economic crimes, and consumer-related crimes, art. 16, sole paragraph), in Law No. 9.613/1998 (on crimes involving the laundering and concealment of property, rights, and assets, in its art. 1, paragraph 5), in Law No. 9.807/1999 (on the organization and maintenance of special programs for the protection of threatened victims and witnesses, in art. 14), in Law No. 11.343/2006 (on crimes set forth in the Anti-Drugs Act, art. 41), in the Penal Code (art. 159), and in Law No. 12.850/2013 (on crimes of criminal organization, in art. 4).

The cooperation agreements, specifically within the scope of Law No. 12.850/2013, is an agreement in the criminal sphere that can be entered into with the individual informant who voluntarily collaborates with the investigation of the competent authority and with the criminal proceeding, which could result in the benefit of judicial pardon or a reduction of up to two-thirds of the prison sentence or substitution of imprisonment with a rights restricting sentence. In addition, it is a benefit that must be approved by a judge, upon request of the police chief, or the Prosecution Service, or the collaborator assisted by his attorney.

**25. What is the relationship between CADE’s Leniency Agreement and the Leniency Agreement set forth in Law No. 12.846/2013 (“Clean Company Act”/“Anticorruption Act”)?**

The Leniency Agreement set forth in Law No. 12.846/2013 (“Clean Company Act”/“Anticorruption Act”) benefits the companies responsible for acts that are injurious to Brazilian and foreign public administrations, as defined in article 5, and is entered into by the highest authority of each body or entity; in the sphere of the federal executive branch, the General Comptroller’s Office (CGU in its Portuguese acronym) is the competent body.

Only companies can apply for this type of leniency agreement, by fulfilling five conditions:

- I. it must be the first one to express interest in cooperating in the investigation of a specific injurious act, when such circumstance is relevant;

- II. it must have completely ceased its involvement in the offense as of the date of proposal of the agreement;
- III. it must admit its participation in the administrative violation;
- IV. it must fully and permanently cooperate with the investigations and the administrative proceeding and attend, at its own expense and whenever requested, in procedural acts, until their conclusion; and
- V. it must provide evidentiary information, documents, and elements of the administrative violation.

Once the leniency agreement set forth in Law No. 12.846/2013 has been fulfilled, the company may have the following benefits:

- I. exemption from the extraordinary publication of the administrative decision imposing the penalty;
- II. exemption from the prohibition on receiving incentives, subsidies, subventions, donations, or loans from public-sector bodies or entities and public-sector or government-controlled financial institutions;
- III. a reduction in the final amount of the applicable fine, subject to the set forth in art. 23; or
- IV. exemption or reduction of the administrative sanctions set forth in arts. 86 to 88 of Law No. 8.666, of 1993, or other rules governing biddings and contracts.

Note that if a company or an individual has participated in an illicit act concurrently involving the crimes of participation in a cartel and other illicit act, there is no pre-established legal rule regarding which body should be first approached by the applicant. If the applicant first approaches CADE's General Superintendence, then CADE may coordinate with the Prosecution Service, the CGU, and other investigative bodies, at the request of the antitrust leniency applicant. However, if the applicant first approaches the Prosecution Service, the CGU, and/or other bodies, then they may also seek out the SG/CADE to negotiate the Leniency Agreement, at the request of the proponent of the agreement.

Nevertheless, note that the negotiations of a leniency agreement set forth in Law No. 12.529/2011 and Law No. 12.846/2013 occur within the scope of different authorities and the negotiations are independent from each other. The negotiation of both leniency agreements therefore occur at the discretion of the competent authorities and do not depend on the agreements entered into with other authorities. Thus, even though CADE's General Superintendence can assist the leniency applicant in this interaction with the competent authority for investigation of other illicit acts, the negotiation and execution of any agreements will be at the discretion of the competent authorities.

## 26. Is there a Model Leniency Agreement?

Yes. A standard model of the Leniency Agreement can be accessed [here](#). Note that, as a rule, the standard wording of CADE's Leniency Agreement should be used to expedite the negotiations and maintain equal treatment regarding agreements. Requests for amendments by the leniency applicant should be exceptional and duly grounded in light of the circumstances of the case at hand. The SG/CADE also reserves the right to make changes to the standard model when specific circumstances so require.

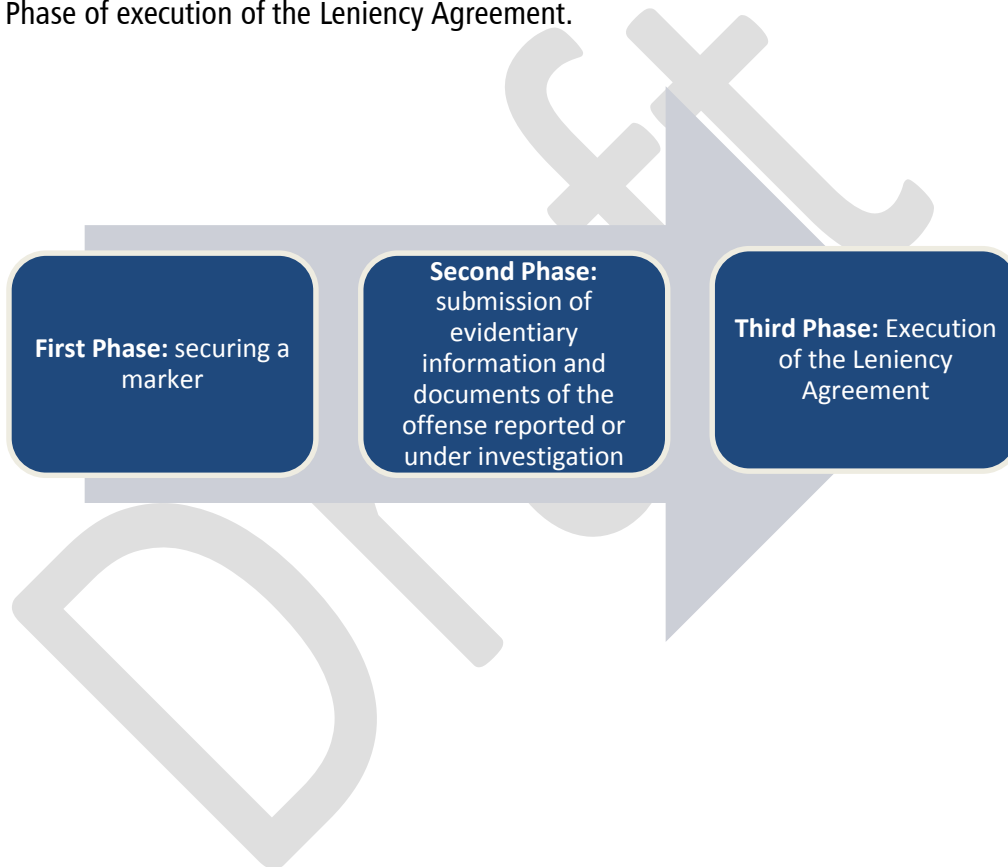
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## PART II. PHASES OF NEGOTIATION OF CADE LENIENCY AGREEMENTS

### 27. How is a Leniency Agreement negotiated with CADE?

Generally, negotiation of a Leniency Agreement occurs in three phases, which are analyzed in detail throughout this Guide:

- 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.





## **PARTE II.I. FIRST PHASE: SECURING A MARKER**

### **28. What is a marker?**

A request for a marker is the act whereby the leniency applicant contacts CADE's General Superintendence to communicate the interest in proposing a Leniency Agreement regarding a given antitrust conspiracy and thus be ensured that he is the first leniency applicant in relation to such conduct. Therefore, the applicant is in a race with its co-conspirators to be the first one to contact the antitrust authority to report the violation, and become a candidate for the benefits of the Leniency Agreement.

### **29. To whom at CADE's General Superintendence should a marker be requested?**

The request for a marker must be submitted to the General Superintendence's Chief of Staff, or, in his or her absence, to the Substitute General Superintendent at the telephone number +55 61 3221-8445. It is also possible to submit the request for a marker in person (at the address SEPN 515, Conjunto D, Lote 4, Ed. Carlos Taurisano, Brasília/DF) and in writing (by submitting an application), according to articles 199, introductory paragraph, and 200 of the RICADE. It is suggested that it be expressly stated that the call is meant to secure a marker to negotiate a Leniency Agreement.

The leniency applicant should not submit the marker request to any other CADE's employee, as such applications will not be considered valid. This measure aims mainly at ensuring the security of the Leniency Program.

### **30. What must be reported to CADE's General Superintendence in order to request a marker?**

According to article 199, paragraph 1, of the RICADE, and regardless of whether the application is made orally or in writing, the leniency applicant must submit the following information, even if partially, regarding the conduct to be reported:

- I. "Who?": a complete identification of the leniency applicant, as well as the identity of the other known perpetrators of the violation to be reported. Therefore, it is not possible to anonymously apply for a marker;
- II. "What?": the products and services affected by the reported violation;
- III. "When?": the estimated duration of the reported violation, when possible;

IV. "Where?": the geographic area affected by the violation. In the event of an international cartel, it must be stated that the conduct has at least the potential to generate effects in Brazil, according to art. 2, introductory paragraph, of Law No. 12.529/2011.

It is important to emphasize that the amount of information necessary to obtain the request for a marker may vary from case to case, since there will be circumstances in which CADE's General Superintendence will need more or less information to know whether the marker is available for the violation reported or under investigation.

**31. Must a request for a marker be accompanied by evidentiary documents of the reported conduct?**

Not necessarily. CADE's General Superintendence does not require that the request for a marker be accompanied by documents and/or evidence that show the existence of the reported conduct, since those will need to be presented in the phase of submission of evidentiary information and documents of the offense reported or under investigation (see [Part II.2.](#), below). In this initial phase, for securing a marker, the leniency applicant must be the first to seek out the SG/CADE and submit the information required by law (see question [30](#), above).

**32. Why is it important to request a marker as soon as possible?**

Time is of the essence in making a successful leniency application. CADE's General Superintendence enters into only one Leniency Agreement per antitrust conspiracy, so that the violators - whether they are companies or individuals - are in a race to be the first ones to apply for the benefits of the Leniency Program of CADE. Even if the leniency applicant does not have immediate access to all the information necessary for entering into a Leniency Agreement, it is recommended that the interested party contact the SG/CADE as soon as possible (see question [29](#), above), since another participant in the same violation could apply at any time, preventing other participants to secure a marker by only a matter of hours.

**33. How does CADE's General Superintendence verify the availability of a marker?**

After the receipt of a request for a marker, CADE's General Superintendence will internally verify whether a marker is available, by examining:

- I. whether there has been a prior request for a marker by another company or individual;
- II. whether there is a negotiation of a Leniency Agreement underway with another company or individual;

- III. whether it has prior knowledge of the conduct; if it does, the SG/CADE will verify whether it has sufficient evidence to ensure the conviction of the company or individual involved in the violation or whether it is possible to negotiate partial leniency (see question [37](#), below); and
- IV. whether a Leniency Agreement has been executed with another company or individual, with or without initiation of an investigation or administrative proceeding.

**34. How long does it take for CADE's General Superintendence to provide a response as to whether or not a marker is available to negotiate an Leniency Agreement?**

CADE's General Superintendence will verify the availability of a marker for negotiation of a Leniency Agreement within three (3) days (art. 199, paragraph 2, RICADE), but the reply is generally provided on the same day or on the day after the application is made.

**35. What happens if the marker is available?**

The first applicant to appear before CADE's General Superintendence to report a violation will obtain a declaration ("Marker Declaration") that attests that such applicant appeared on that date to submit information regarding anticompetitive practices performed by a given company and/or individual in the market, in the reported geographical area and period. Furthermore, the declaration certifies that the leniency applicant meets the requirements to negotiate a Leniency Agreement and indicates, if applicable, whether an investigation is already underway (see question [18](#), above). On the date the declaration is issued, a new meeting is scheduled to be held within 30 days so that the first Leniency Agreement proposal can be submitted to the SG/CADE by the leniency applicant. To access the Model Marker Declaration, click [here](#).

**36. What happens if the marker is not available?**

If the marker is not available, the application may, if the leniency applicant is interested, be inserted in a "waiting line" organized by SG/CADE in order of arrival (second, third, and fourth to arrive, for example). While the SG/CADE negotiates the Leniency Agreement with the first in, other leniency applicants do not know their exact position in line.

Being in a "waiting line" can be important for two reasons. First, because if the negotiation of the Leniency Agreement underway is rejected, then the next leniency applicant in line (2nd, 3rd, 4th, etc., in chronological order) will be invited to negotiate a new Leniency Agreement, and successively with the others in line. Second, because if the negotiation of the Leniency Agreement underway is accepted and the agreement is signed, the leniency applicants that are still in line

will have their marker requests automatically converted into applications for Cease and Desist Agreement (TCC) (see questions [22](#) and [23](#), above), in which case the proponents will be called, also in the order of the marker requests, to express their interest in negotiating a TCC and obtaining the resulting benefits, such as reduction of the monetary contribution owed, according to article 85 of Law No. 12.529/2011 and articles 184 to 189 of the RICADE. If the leniency applicant express interest in negotiating a TCC, then the request will be forwarded to the Office of the General Coordinator of the SG/CADE responsible for the case.

**37. What happens if CADE's General Superintendence is already aware of the offense reported in the request for a marker?**

If there is already an administrative proceeding open with reasonable indications of anticompetitive practices (see question [18](#), above), but the evidence is insufficient to ensure the conviction of the company and/or the individual when the Leniency Agreement is proposed, then a marker may also be granted, but only for partial leniency.

**38. Can a marker be amended?**

It is possible for the Marker Declaration to be amended. It is important that the information stated in the Marker Declaration be as complete as possible (see question [28](#), above). However, if new information and documents are discovered during the internal investigations conducted by the leniency applicant, then it will be possible to amend the Marker Declaration to include such newly discovered information and thus expand its scope. For example, the estimated period of the conduct or the geographic area affected can be changed, as can other information on the reported conduct.

The scope of the Marker Declaration can be expanded only if the requirements contained in articles 86 of Law No. 12.529/2011 and 198 of the RICADE are met (see question [11](#), above) and if the leniency applicant has not acted in bad faith or attempted to conceal or disguise the subsequently reported information. If there is new information – understood as information or documents not known or not available at the start of the negotiations – on the conduct already reported in the Leniency Agreement under negotiation (see question [51](#), below) or in a Leniency Agreement already executed (see question [80](#), below), then the Leniency Agreement should be supplemented (see question [28](#), below).

If the newly discovered information characterizes a new and different anticompetitive conduct, then the leniency applicant should submit a new application for a marker to CADE's General Superintendence, which will be evaluated separately (see question [51](#), below).

**39. Can the leniency applicant withdraw its leniency application?**

Yes. The leniency applicant can withdraw its leniency application at any time before it is signed (art. 205, RICADE) (see questions [40](#), [53](#) and [54](#), below).

**40. What happens if the leniency applicant withdraws its leniency application?**

If the applicant withdraws its leniency application – as in the case of rejection of the leniency application by CADE's General Superintendence (see questions [54](#) and [55](#), below) –, all documents submitted to CADE will be returned to the leniency applicant, all information submitted will be kept confidential, and CADE will not be permitted to share or use such information for any purpose, including for initiating investigations (art. 86, paragraph 9, of Law No. 12.529/2011).

In addition, withdrawal or rejection of a proposal does not lead to acknowledgement of any illegality or a confession of wrongdoing (art. 86, paragraph 10, of Law No. 12.529/2011).

If there are other leniency applicants in the waiting line, then SG/CADE will contact the next in line, so that a new negotiation can be initiated (see question [36](#), above).

**41. Does securing a marker guarantee that a Leniency Agreement will be signed?**

No. Securing a marker does not guarantee entering into a Leniency Agreement, because it depends on the fulfillment of all legal requirements (see question [11](#), above) and the conclusion of all phases of negotiation of the Leniency Agreement in CADE.

**42. Who has access to the terms of the marker?**

Access to the Marker Declaration and the information and documents submitted in connection with the negotiation of the Leniency Agreement – all of a confidential nature – is restricted to the General Superintendent, the Substitute General Superintendent, the General Superintendence's Chief of Staff, and his or her advisors responsible for conducting the negotiation of the Leniency Agreement. As a rule, no other CADE's employee has access to the leniency documents and information received.

#### **43. How long does the marker request remain in effect?**

In the first Marker Declaration, CADE's General Superintendence will indicate a period of up to 30 (thirty) days for the leniency applicant to submit the Leniency Agreement proposal (art. 199, paragraph 3, RICADE).

#### **44. What are CADE's confidentiality procedures at Phase II.1 (marker request)?**

A The confidentiality of the Leniency Agreement proposal is both a guarantee afforded to the leniency applicant by CADE's General Superintendence (art. 86, paragraph 9, of Law No. 12.529/2011 combined with art. 200, paragraphs 1 and 2, RICADE) and a duty of the leniency applicant, under penalty of hindering the progress of the investigations.

The SG/CADE follows a set of procedures to ensure confidentiality during the marker request phase, such as:

- I. access to the information on the marker request is restricted to the General Superintendent, the Substitute General Superintendent, the General Superintendence's Chief of Staff, and his or her advisors responsible for conducting the negotiation of the Leniency Agreement;
- II. the information annotated in the internal controls of the General Superintendence's Chief of Staff for analysis of the marker request is accessed only by the employees of the Office of SG's Chief of Staff;
- III. any documents submitted for the marker request are kept in a vault room, which is accessed only by the advisors of the General Superintendence's Chief of Staff;
- IV. submission and safekeeping of the documents and/or evidence for analysis by the SG/CADE may be coordinated on a case-by-case basis between the leniency applicant and the SG/CADE; and
- V. communication with the leniency applicant is made primarily orally.

### **PART II.2. SECOND PHASE: SUBMISSION OF EVIDENTIARY INFORMATION AND DOCUMENTS OF THE OFFENSE REPORTED OR UNDER INVESTIGATION**

#### **45. What is the submission of evidentiary information and documents of the offense reported or under investigation?**

The submission of information and documents evidencing the offense reported or under investigation represents the first Leniency Agreement proposal, which may be performed orally

or in writing (art. 200, RICADE). This information and these documents are submitted after securing a marker (see question [28](#), above), and the leniency applicant must state (arts. 201, 202, and 203, RICADE):

- I. the leniency applicant's complete identification;
- II. details of the alleged violation or under investigation;
- III. the identification of the other co-conspirators of the violation reported or under investigation;
- IV. the products or services affected;
- V. the geographic area affected;
- VI. the estimated duration of the violation reported or under investigation;
- VII. a description of the information and the documents that will be submitted upon execution of the Leniency Agreement;
- VIII. information on other proposals of Leniency Agreements concerning the same practice, submitted in other jurisdictions, as long as there is no prohibition on doing so by the foreign authority;
- IX. information on other proposals of Leniency Agreements concerning the same practice, submitted in other jurisdictions, as long as there is no prohibition on doing so by the foreign authority;
- X. that the leniency applicant has been advised to seek legal counsel;
- XI. that the leniency applicant is aware that failure to comply with the orders of CADE's General Superintendence will lead to the rejection of the Leniency Agreement proposal.

Hence, after securing the marker and submitting the initial proposal of the Leniency Agreement, the negotiation phase itself begins. During this period of negotiation, the leniency applicant must provide detailed information and documents concerning the reported practice (see questions [46](#) and [47](#), below), as detailed in the following section.

#### **46. What kind information must be provided by the leniency applicant?**

As a rule, at least the following information must be provided by the leniency applicant:

- I. a summary description of the violation reported or under investigation;
- II. identification of the leniency applicants – companies and/or individuals, as well as a detailed description of the participation of each of them;
- III. identification of the other participants of the violation reported or under investigation – companies and/or individuals, as well as a detailed description of the participation of each



- of them, also indicating, if possible, the hierarchy among such persons and changes in representation over the years;
- IV. identification of the competitors and clients in the affected market;
  - V. duration of the violation reported or under investigation;
  - VI. detailed description of the violation reported or under investigation – explanation of the objective of the anticompetitive conduct (for example, fixing of prices and/or commercial conditions, allocation of clients, and/or exchange of competitively sensitive information); the dynamics of the conduct (for example, explanation of the anticompetitive conduct by client affected, by bidding, by product, depending on how the agreements with the competitors took place); the dates and places of the meetings; the frequency and method of the communications; the organization of the cartel (for example, explaining the documents that served as a basis and/or supported the agreements made among competitors); monitoring and/or punishment mechanisms implemented by the cartel, etc.;
  - VII. description of the effects in the Brazilian territory, if the conduct is international – explanation of the direct or indirect effects of the violation in Brazil;
  - VIII. description of the market affected, with an explanation of the product or service involved in the anticompetitive conduct; and
  - IX. an indication of the existing evidentiary documents of the alleged violation.

The structure and amount of information and documents required by CADE's General Superintendence may change in a given case in order to describe the alleged conduct as clearly as possible.

In the initial negotiation phase, the leniency applicant must submit the information as completely as possible to CADE's General Superintendence, even if the leniency applicant does not immediately have all the information needed to perfect the Leniency Agreement proposal. For the Leniency Agreement proposal to be accepted by the SG/CADE, the information submitted by the leniency applicant must be considered sufficient. The leniency applicant has the duty to act in good faith and not concealing or disguising information or submitting false or misleading information.

The leniency applicant does not have the duty to report other criminal or administrative violations apart from the anticompetitive conduct – whether or not related to the antitrust offense that is the object of the Marker Declaration –, unless such information is necessary for the SG/CADE to understand the alleged reported. However, it should be noted that the benefits of the Leniency Agreement will only apply to the conduct duly reported to the SG/CADE and that are the object of the Leniency Agreement (see questions [17](#) to [19](#), *above*).



#### **47. Which documents must be provided by the leniency applicant?**

The leniency applicant must submit all documents that it has and considers suitable for evidencing the alleged conduct. The types of documents most commonly received by CADE's General Superintendence to evidence the antitrust conspiracy reported or under investigation are the following:

- I. bilateral e-mails between competitors;
- II. unilateral e-mails between individuals of the same company, describing the illegal arrangements between competitors;
- III. mailing between competitors;
- IV. unilateral letters between individuals of the same company, describing the illegal arrangements between competitors;
- V. exchange of electronic messages (SMS, WhatsApp, etc.);
- VI. agendas, handwritten annotations, notebooks, recordings;
- VII. recordings;
- VIII. Excel tables and spreadsheets;
- IX. proof of meetings (minutes, Outlook appointments, reservation of meeting rooms, hotel reservations, credit card bills, travel expenses statements, etc.);
- X. telephone bills;
- XI. competitors' business cards;
- XII. invitations to tender and award notices, etc.

Furthermore, CADE's General Superintendence may request, according to its discretion, interviews with the individual leniency applicants to obtain more information and details concerning the documents submitted and the facts reported to CADE (see question [50](#), below).

Failure to submit the minimum amount of documents needed to prove the alleged conduct may lead to rejection of the Leniency Agreement proposal by the SG/CADE, and this assessment is made on a case-by-case basis (see question [54](#), below).

#### **48. What precautions should be taken by the leniency applicant when collecting electronic documents and hard copies?**

To ensure that the electronic documents and the hard copies submitted by the leniency applicant have probative value, it is important to take technical precautions when obtaining the evidence. As a rule, the applicant must register the chain of custody of the electronic documents and the

hard copies to be submitted to CADE, i.e., the chronological history of the evidence, and provide specific information on those responsible for the collection.

In addition, for electronic documents, the leniency applicant must be able to describe the method of extracting the evidence, i.e.: a) identifying the devices (CPU, e-mail server, notebooks, and flash drives) from which the evidence was obtained and who were the owners/custodians/users of the equipment and/or the extracted files; b) identifying the procedures adopted and the equipment/software used to extract the evidence. Describe, for example, if a forensic image was made of the HD, detailing which type of image (AD1, E01, DD); if a write blocker was used, detailing which model; what hash was obtained from the image (MD5, SHA1); and the date and place of collection; c) identify the types of files extracted and the compatible software to open them, including the versions (for example, e-mail files, Lotus Notes, Outlook, database files); d) state other data relevant to the case. Furthermore, the leniency applicant should be able to describe the method of analysis and expert examination of the electronic evidence and explain which software was used and who performed the analysis.

In the case of e-mails, it should be submitted to CADE metadata on the header of each email, such as: From, To, Cc, Bcc, Subject, Date, Delivery Date, Received, Return-Path, Envelope-to, Message-ID, Mime-version, Content-type, etc.

It is noteworthy that the leniency applicant must preserve, whenever possible, the hard disks or the original equipment (from which the evidence was extracted) and/or its authenticated forensic image, preserved without alterations; and extract hash numbers from the original documents, since they may be requested by CADE's General Superintendence during the proceedings. It is possible to submit to Cade the original hard disks or equipment, whenever feasible.

The SG/CADE will evaluate on a case-by-case basis the precautions taken to ensure the authenticity of the documents.

#### **49. How should the information and documents provided by the leniency applicant be presented to CADE's General Superintendence?**

Communication between CADE's General Superintendence and the leniency applicants and/or their attorneys is primarily oral (in person or by telephone). If it is necessary to exchange e-mails between the SG/CADE and the attorneys, there is no mention of the name of the company and/or the individuals and market that are the objects of the negotiation of the Leniency Agreement, so as to maintain the confidentiality of the negotiation. More details about confidentiality procedures

adopted in the phase of submission of information and documents can be found in question [57](#), below.

In addition, the submission of evidentiary information and documents of the offense reported or under investigation is made through flash drives or hard copies and, at the discretion of the leniency applicant, may be encrypted. Any documents submitted are kept in vault rooms, which are accessed only by advisors of the Chief of Staff of the SG/CADE, and the submission and safekeeping of the documents and/or evidence for analysis by the SG/CADE may be arranged on a case-by-case basis between the leniency applicants and the SG/CADE.

**50. Can individuals be interviewed by CADE's General Superintendence?**

Yes. CADE's General Superintendence may request, according to criteria of convenience and opportunity, interviews with the individual leniency applicant to obtain more information and details concerning the documents submitted.

**51. If, in the course of the negotiation, the leniency applicant, in its internal investigation, finds evidence that the antitrust activity was broader than initially reported, can the negotiation be expanded to include the newly discovered conduct?**

It is important that the information stated in the Marker Declaration be as complete as possible (see questions [30](#) and [38](#), below). However, if new information and documents are found during the internal investigations conducted by the leniency applicant, then it will be possible to expand the scope of the negotiation to include such information. For example, the estimated date of the conduct or the geographic area affected can be changed, as can other information on the reported conduct.

However, the scope of the negotiation can be expanded only if the requirements contained in articles 86 of Law No. 12.529/2011 and 198 of the RICADE are met (see question 11, above) and if the leniency applicant has not acted in bad faith or attempted to conceal or disguise the subsequently reported information. If there is new information – understood as information or documents not known or not available at the start of the negotiations – on the conduct already reported in an executed Leniency Agreement (see question [80](#), below), then the Leniency Agreement should be supplemented.

If the newly discovered information characterize a new and different anticompetitive conduct, then the leniency applicant should submit to CADE's General Superintendence a new application for a marker, which will be evaluated separately (see question [28](#), below).

## 52. What is a History of Conduct?

The History of Conduct is a document drawn up by CADE's General Superintendence that contains a detailed description of the anticompetitive conduct, according to the understanding of the SG/CADE, based on the information and the documents submitted by the leniency applicant (see questions [45](#) and [46](#), above). This is a document prepared and signed by the SG/CADE, and it is not signed by the leniency applicant or by the applicant's attorneys.

## 53. What is the time limit for negotiating a Leniency Agreement?

As the information and documents are submitted by the leniency applicant, the negotiation period can be extended by means of "Meeting Terms" ("Termos de Reunião" in its Portuguese acronym) (art. 201, III and IV, RICADE), and the total period for negotiating a Leniency Agreement is six months or one year (art. 204, introductory paragraph, RICADE) (see question [53](#), below), as long as the leniency applicant demonstrates to be acting in good faith to submit all documents and information, and as long as there are extraordinary circumstances that prevent immediate clarification of the case at hand.

## 54. Can a leniency application be rejected by CADE?

Yes. 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 (see question [43](#), above);
- 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 (see question [53](#), above);
- 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.

**55. If a Leniency Agreement proposal is withdrawn or rejected, what guarantees do leniency applicants have?**

According to articles 86, paragraph 10, and 205, RICADE, in the event of rejection of the proposal by CADE's General Superintendent– or withdrawal by the leniency applicant (see questions [39](#) and [40](#), above) –, the leniency application will not be subject to disclosure, all documents will be returned, and the information and documents submitted by the leniency applicant during the negotiation will not be subject to use for any purposes by the authorities that had access to them. However, it is still possible for an investigation to be launched based on independent evidence that CADE's General Superintendence learned by other means, according to article 205, paragraph 4, RICADE.

If the Leniency Agreement proposal is rejected by the SG/CADE, it is possible for the leniency applicant to obtain a formal document entitled "Instrument of Rejection" ("Termo de Rejeição" in its Portuguese acronym), in which the SG/CADE will declare that the information and documents submitted by the leniency applicant were not able to prove the violation reported or under investigation, according to Law No. 12.529/2011. To access the model Instrument of Rejection, click here [aqui](#).

Moreover, in the event of rejection of the leniency application by the SG/CADE – or if the leniency applicant withdraws its application (see questions [39](#) and [40](#), above) –, if there are other leniency applicants in the waiting line, then the SG/CADE's Chief of Staff will contact the next applicant in line, so that a new negotiation can be initiated (see question [36](#), above).

**56. When is the negotiation of a Leniency Agreement finalized by CADE's General Superintendence and the document signed?**

The negotiation of the Leniency Agreement may be extended through a "Meeting Agreement" ("Termo de Reunião in its Portuguese acronym) (art. 201, III and IV, Ricade).

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 Substitute General Superintendent for analysis. The Substitute 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 (see [Parte II.3](#), below).

**57. What are CADE's confidentiality procedures in the phase of submission of evidentiary information and documents of the offense reported or under investigation (Phase II.2)?**

The confidentiality of the Leniency Agreement proposal is both a guarantee afforded to the leniency applicant by CADE's General Superintendence (art. 86, paragraph 9, of Law No. 12.529/2011 combined with art. 200, paragraphs 1 and 2, of the RICADE) and a duty of the leniency applicant, under penalty of hindering the progress of the investigations.

The SG/CADE follows a set of procedures to ensure confidentiality during the phase of submission of information and documents, such as:

- I. access to the information on the negotiation is restricted to the General Superintendent, the Substitute General Superintendent, the General Superintendence's Chief of Staff, and his or her advisors responsible for conducting the negotiation of the Leniency Agreement;
- II. the information submitted to the Chief of Staff of the SG/CADE is accessed only by the employees of that office;
- III. any documents submitted to the SG/CADE for analysis during the negotiation are kept in a vault room, which is accessed only by employees of the Chief of Staff of the SG/CADE;
- IV. submission and safekeeping of the documents and/or evidence for analysis by the SG/CADE may be coordinated on a case-by-case basis between the leniency applicants and the SG/CADE;
- V. communication with the leniency applicants is made primarily orally. If it is necessary to exchange emails between the SG/CADE and the attorneys, there is no mention of the name of the company and/or the individuals and/or market that are the objects of the negotiation of the Leniency Agreement, so as to maintain the confidentiality of the negotiation;
- VI. in the History of Conduct prepared by the SG/CADE (see question [52](#), above) there is no direct mention of the name of the company and/or the individuals as leniency recipients of the Leniency Agreement – they are identified as participants of the conduct, along with the other companies, and the individuals are identified by acronyms;
- VII. the company and/or the individuals that are leniency recipients are identified separately from the History of Conduct; and

- VIII. the employees of the Chief of Staff of the SG/CADE keep up-to-date reports on internal custody that record each step of the persons who have access to the information and documents da negotiation of the Leniency Agreement.

### **PART II.3. THIRD PHASE: EXECUTION OF THE LENIENCY AGREEMENT**

#### **58. What is necessary for the execution of the Leniency Agreement?**

After conclusion of the phase of submission of information and documents on the conduct reported or under investigation (see [Parte II.2](#) and question [56](#), above), the procedures for execution of the Leniency Agreement are initiated by both the leniency applicant and the SG/CADE.

For example, the leniency applicant must obtain certified copies of documents, sworn translations, and consular authentication of foreign documents and submit the Report of Certification of Electronic Documents. All leniency applicants must sign the Leniency Agreement, including the company and/or the individuals, or their respective legal representatives with specific powers for negotiating and entering into the Leniency Agreement (see question [62](#), below).

In this phase, the SG/CADE also initiates contact with the offices of the Prosecution Service ("Ministério Público" in its acronym in Portuguese) for submission of the Leniency Agreement (see questions [60](#) e [61](#), below).

#### **59. How does the state and/or federal Prosecution Services (MPs in its Portuguese acronym) participate in the Leniency Agreement?**

Although arts. 86 and 87 of Law No. 12.529/2011 do not expressly require the participation of the Prosecution Service for execution of an Leniency Agreement, CADE's consolidated experience shows that, as the exclusive holder of the right to bring criminal charges and initiate a public criminal action, the Prosecution Service should be permitted to participate, in light of the criminal repercussions of the leniency. Hence, the state and/or federal Prosecution Services can participate in the agreement as an interested agent, to confer greater legal security for the leniency recipients and facilitate the criminal investigation of the cartel (see questions [16](#), above and [60](#) and [61](#), below).



## 60. How and when are the state and/or federal Prosecution Services contacted?

In principle, after the conclusion of the phase of submission of information and documents on the conduct reported or under investigation (see [Parte II.2](#) and question [56](#), above), the SG/CADE initiates contact with the offices of the state and/or federal Prosecution Services (“MPs” in its Portuguese acronym) for submission of the case. This procedure aims to keep the Leniency Agreement proposal confidential, according to article 86, paragraph 9, of Law No. 12.529/2011, and to rationalize the negotiation process.

If relevant to the case, and in light of specific circumstances, the SG/CADE, the leniency applicant, and the state and/or federal Prosecution Services may, by mutual agreement, choose to initiate contact with the Prosecution Service in an initial stage of the negotiation of the Leniency Agreement.

Dealings with the offices of the Prosecution Service generally have three phases:

- I. determination of which office of the Prosecution Service will handle the case (see question [61](#), below), whether a state and/or federal office;
- II. notification of the offices of the Prosecution Service to schedule a meeting; in the notice, the SG/CADE states that it received information on the practice of the antitrust violations set forth in articles 36, paragraph 3, I, of Law No. 12.529/2011, that could be classified as crimes under article 4 of Law No. 8.137/90 and that the informer has expressed an interest in participating in the Leniency Program. The SG/CADE does not forward the information and the documents that are the object of the Leniency Agreement proposal, due to its confidential character. With this notice, the case is distributed internally within the competent state and/or federal office of the Prosecution Service for subsequent scheduling of a meeting with the federal and/or state prosecutor (see question [73](#), below); and
- III. a meeting is held with the offices of the Prosecution Service to present the case and determine the strategy for integrating the actions between the two entities.

As a third party to the agreement, the Prosecution Service may put forth questions, request changes, and request additions to the Leniency Agreement. However, such alteration requests by the Prosecution Service are generally intermediated by the SG/CADE, in light of the legal competence of the SG/CADE to enter into Leniency Agreements (art. 86 of Law No. 12.529/2011).

Since Law No. 12.529/2011 designates the SG/CADE as the competent authority to enter into Leniency Agreements, the Prosecution Service does not have access to the information and



documents negotiated with the proponent of a Leniency Agreement before it is signed (see question [64](#), below).

After a meeting is held with the offices of the Prosecution Service and any adjustments proposed by the federal and/or state prosecutor are made, the parties will validate the terms of the Leniency Agreement and a date will be set for its signing.

It should be noted that the parties may first approach the Prosecution Service and then seek out the SG/CADE to negotiate the Leniency Agreement regarding participation in the cartel, which is both a crime and an administrative offense (see questions [3](#) to [5](#), above). Negotiation of the Leniency Agreement, however, remains subject to the availability of the marker (see question [33](#), above) and fulfillment of the legal requirements (see question [11](#), above).

**61. How is it determined which office of the Prosecution Service will act in a given Leniency Agreement?**

Although CADE's General Superintendence may advise as to the which office of the Prosecution Service has jurisdiction over the matter at hand, the final decision regarding the choice is made by the leniency applicant, except in cases in which the choice leads to flagrant illegality. In addition, there must be consent from the Prosecution Service itself regarding its jurisdiction to sign the agreement, and the SG/CADE will follow the determinations of the proponent and the Prosecution Service.

As a rule, cases related to practices in a municipality or inserted in a single state are signed with the State Prosecution Service ("MPE" in its Portuguese acronym) – note that the MPE of São Paulo acts through its Special Group for Economic Offenses ("GEDEC" in its Portuguese acronym) –, while in cases related to antitrust crimes set forth in article 109, IV, of the Brazilian Constitution, cases of supraregional/national interest, and cases of interest of the federal government (involving, for example, federal funds) are executed with the Federal Prosecution Service ("MPF" in its Portuguese acronym) – note that the MPF in São Paulo acts through its Cartel Investigative Unit.

**62. Where is the Leniency Agreement signed?**

The Leniency Agreement can be signed at CADE's headquarters in Brasília, in the city in which the state and/or federal Prosecution Service that will act as interested third party in the case is located (see question [61](#), above) or in some other place agreed upon among the parties.

The leniency applicant, accompanied or represented by his attorney and in possession of the representation documents (see question [58](#), above), must appear on the date and place previously

designated for the signature of the Leniency Agreement, at which time CADE's representative(s) and the member of the intervening Prosecution Service's member will also attend.

**63. Can a Leniency Agreement be entered into in bilingual form?**

Yes. The Leniency Agreement can be signed in bilingual form (Portuguese and English), even if the cartel is not international. In the event of doubt, the version in Portuguese will prevail over the version in English. A public standard model of the Leniency Agreement can be accessed here [aqui](#).

**64. When must the leniency applicant hand over the hard copies of the evidentiary documents of the alleged conduct?**

The definitive delivery to the SG/CADE and to the Prosecution Service of the evidentiary documents of the reported conduct should only be made upon the signature of the Leniency Agreement. In the event of cancellation or rejection of the Leniency Agreement proposal, the SG/CADE ensures the confidentiality of the information and documents submitted (see questions [39](#) and [40](#), above, as well as [53](#) and [54](#), above, respectively).

**65. Which representation documents must be submitted by companies and individuals when signing the Leniency Agreement?**

For the execution of the Leniency Agreement, the companies and/or individuals must submit the following documents:

- I. a certified copy of the corporate documents that demonstrate the company's fulfillment of the legal and contractual requirements (for example, bylaws or articles of incorporation) and a certified copy of the ID ("RG" in its Portuguese acronym) and taxpayer card ("CPF" in its Portuguese acronym) of the company's legal representatives;
- II. a certified copy of the individuals' ID; and
- III. a proof of power of attorney document with notarized signatures granting specific powers for negotiating and signing the Leniency Agreement with CADE and the state and/or federal Prosecution Service.

**66. If the individuals decide not to sign the Leniency Agreement together with the company, will this hinder the execution of the agreement with CADE?**

No. If the leniency applicant is a company, the benefits of the agreement can be extended to its current or former directors, managers, and employees and to companies of the same economic group, de facto or de jure, involved in the violation, as long as they cooperate with the investigations and sign the agreement together with the company (art. 86, paragraph 6, of Law No. 12.529/2011 combined with art. 198, paragraph 1, RICADE) (see question [14](#), above).

The individuals and companies of the same economic group can enter into the agreement together with the company or in an addendum to the original Leniency Agreement when authorized by CADE, according to its discretion (art. 198, paragraph 2, RICADE). Companies and their directors, managers, and employees may be represented by the same or different attorneys.

If, however, the current and former directors, managers, and employees decide not to sign the Leniency Agreement together with the company, this will not prevent the execution of the agreement with the company. In this case, the benefits of the agreement (see question [17](#), above) do not extend to the individuals who do not sign it. Thus, it is highly recommended that the company explain to its current and former employees that they will obtain the benefits of the Leniency Agreement only if they sign the agreement with the company and cooperate with the investigations.

**67. What does an Addendum to the Leniency Agreement mean?**

An addendum to the Leniency Agreement means signing of an Addendum to the Leniency Agreement (“Aditivo ao Acordo de Leniência” in its Portuguese acronym) to include individuals to the original Leniency Agreement. If the leniency applicant is a company (see question [14](#), above), the benefits of the agreement can be extended to its current or former directors, managers, and employees and to companies of the same economic group, de facto or de jure, involved in the violation, as long as they cooperate with the investigations and sign the agreement together with the company (art. 86, paragraph 6, of Law No. 12.529/2011 combined with art. 198, paragraph 1, RICADE).

The individuals and companies of the same economic group can execute the agreement together with the company or by an Addendum to the original Leniency Agreement, when authorized by CADE, according to its discretion (art. 198, paragraph 2, RICADE). If the individuals are given the opportunity but decide not to sign the Leniency Agreement together with the company (see questions [14](#) and [66](#), above), signing an Addendum to the original Leniency Agreement becomes less probable.

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 (see question [11](#), above), 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. A Model of Adherence to the Leniency Agreement can be accessed here [aqui](#) – “Annex I to the Model Leniency Agreement.”

If the leniency recipient is an individual, then the benefits will not be extended to the company (art. 198, paragraph 3, RICADE), which will not be able to sign an Addendum to the Leniency Agreement signed by the individual (see question [14](#), above).

**68. What can be done if a leniency applicant does not communicate in Portuguese?**

It is recommended that individuals who do not communicate in Portuguese be represented by an attorney or an agent (see question [70](#), below) and may hire, at the individuals' own expense, a translator for the entire process of negotiation of the Leniency Agreement. On an exceptional basis, if an individual is not represented by a Brazilian attorney, CADE's General Superintendence may evaluate the situation in the case at hand.

**69. Must individuals located outside of Brazil personally attend to sign the Leniency Agreement?**

Personally attending to sign CADE's Leniency Agreement depends on the case at hand. As a rule, individuals outside of Brazil may be represented by a Brazilian attorney or agent (see question [70](#), below).

**70. Must the leniency recipients be represented by an attorney or by an agent?**

The company and/or individuals are encouraged to be accompanied by an attorney or agent with a document of power of attorney with notarized signatures granting specific powers for negotiating and signing the Leniency Agreement with CADE and the state and/or federal Prosecution Service (art. 203, II, RICADE).

**71. What terms and conditions are set forth in the Leniency Agreement?**

Once the legal conditions for entering into a Leniency Agreement have been met, the clauses listed in parts I to VIII of article 206, RICADE, must be stated in the agreement, namely:

- I. complete identification of the companies and individuals that will sign the Leniency Agreement and complete identification of the legal representative (including the name, corporate name, identity document, individual or corporate taxpayer number (CPF or CNPJ), complete address, telephone, fax, and email);
- II. identification of the legal representative with powers to receive notices during the administrative proceeding;
- III. fax and e-mail for receiving notices during the course of the administrative proceeding;
- IV. statement of facts related to the reported violation, identification of the actors, the products or services affected, the geographic area affected, and the duration of the violation reported or under investigation, according to the information and documents submitted by the leniency recipients – which information is normally presented in the document entitled History of Conduct, prepared by CADE's General Superintendence (see question [52](#), above);
- V. confession of wrongdoing by the leniency recipient;
- VI. declaration by the company and/or the individual leniency recipient that its involvement in the reported violation has ceased;
- VII. a list of all documents and information provided by the company and/or by the individual leniency recipient, for the purpose of evidencing the violation reported or under investigation;
- VIII. obligations of the company and/or individual leniency recipient:
  - a submission to the SG/CADE and to any other authorities intervening in the Leniency Agreement of any and all information, documents, or other materials in their possession, custody, or control, capable of evidencing the violation reported or under investigation;
  - submission to the SG/CADE and to any other authorities intervening in the Leniency Agreement of any and all substantial new information, documents, or other materials of which they become aware during the course of the investigations;
  - submission of any and all information, documents, or other materials related to the reported conduct in their possession, custody, or control, whenever requested by the SG/CADE and by any other authorities intervening in the Leniency Agreement in the course of the investigations;
  - they must fully and permanently cooperate with the investigations and the administrative proceeding in connection with the reported violation, to be conducted by the SG/CADE and any other authorities intervening in the Leniency Agreement;
  - they must appear, at their own expense, at all procedural acts, until a final decision is rendered by CADE on the reported violation;

- notification to the SG/CADE and to any other authorities intervening in the Leniency Agreement of any change in the data stated in the Leniency Agreement, including the personal identifications; and
  - to act with honesty, loyalty, and good faith during the fulfillment of these obligations;
- IX. a statement to the effect that nonfulfillment by the leniency recipient of the obligations set forth in the Leniency Agreement will result in loss of immunity, in addition to fines and other penalties;
- X. a statement by SG/CADE that the leniency recipient was the first to be qualified regarding the violation reported or under investigation, as the case may be;
- XI. a declaration by the SG/CADE that it did not have sufficient evidence to ensure the conviction of the leniency recipient for the reported violation when the Leniency Agreement was proposed;
- XII. declaration of the SG/CADE as to whether or not it had prior knowledge of the reported violation, at the time the Leniency Agreement was proposed; and
- XIII. other obligations that, in light of the circumstances of the case at hand, are considered necessary.

## 72. Is there a Model Leniency Agreement?

Yes. A Model Leniency Agreement can be accessed [here](#). Note that, as a rule, the standard wording of the Leniency Agreement should be used to expedite the negotiations and maintain equal treatment regarding agreements. Requests for amendments by the leniency applicant should be exceptional and duly grounded in light of circumstances of the case at hand. The SG/CADE also reserves the right to make changes to the standard model when specific circumstances so require.

## 73. What are Cade's confidentiality procedures in the Leniency Agreement execution phase (Phase II.3)?

The confidentiality of the Leniency Agreement proposal is both a guarantee afforded to the leniency applicant by CADE's General Superintendence (art. 86, paragraph 9, of Law No. 12.529/2011 combined with art. 200, paragraphs 1 and 2, Ricade) and a duty of the leniency applicant, under penalty of hindering the progress of the investigations.

The SG/CADE follows a set of procedures to ensure confidentiality during the phase of execution of the Leniency Agreement, such as:

- I. when notifying the offices of the Prosecution Service (MP) to schedule a meeting, the SG/CADE states that it received information on the practice of the antitrust violations set forth in articles 36, paragraph 3, I, of Law No. 12.529/2011, that could be classified as crimes under article 4 of Law No. 8.137/90 and that the informer has expressed an interest in participating in the Leniency Program. The SG/CADE does not forward the information and the documents that are the object of the Leniency Agreement proposal, due to its confidential character. With this notice, the case is distributed internally within the competent state or federal office of the Prosecution Service for subsequent scheduling of a meeting with the state and/or federal prosecutor (see question [60](#), above);
- II. upon submission of the Leniency Agreement proposal to the representative of the Prosecution Service, an "Instrument of Receipt" ("Termo de Recebimento" in its Portuguese acronym) is signed attesting that the state and/or federal prosecutor is aware of the confidentiality of the information to which he or she has had access to (art. 86, paragraphs 6 combined with 9, or Law 12.529/2011);
- III. in the interaction of the SG/CADE with external bodies, traceable versions of documents are provided;
- IV. if it is necessary to apply for a search and seizure order, the petition from CADE's Office of the Chief-Attorney ("ProCADE" in its acronym in Portuguese) does not make directly mention the name of the company as a leniency recipient; it is identified as a participant in the conduct, as the other companies, and the individuals are identified by initials; the company and the individual leniency recipient are identified in a document separate from the History of Conduct, prepared by SG/CADE (see question [52](#), above); and
- V. upon execution of the final versions, all preliminary documents are shredded and disposed of.

### **PART III. AFTER THE EXECUTION OF THE LENIENCY AGREEMENT**

#### **74. What happens after the Leniency Agreement is signed?**

After signing the Leniency Agreement, CADE may initiate an investigation or administrative proceeding to investigate the arrangement among competitors reported in the Leniency Agreement and carry out other investigative measures, such as searches and seizures and/or inspections, requests for information, and intelligence procedures, to detect cartels in biddings (see question [77](#), below).

In this scenario, throughout the entire process, the leniency recipients must fully and permanently cooperate with the investigations and the administrative proceeding, and appear, at their own



expense, whenever requested, in all procedural acts, until their conclusion (art. 86 of Law No. 12.529/2011 and 198 combined with art. 206, I to VIII, RICADE).

**75. What happens if the terms and conditions stipulated in the Leniency Agreement are not fulfilled?**

If the terms and conditions stipulated in the Leniency Agreement (see question [71](#), above) are not fulfilled, the leniency recipient responsible for the noncompliance will lose his respective benefits, in addition to the fines and other applicable penalties (art. 206, paragraph 1, IX, RICADE). This will happen, for example, if the leniency recipient ceases to cooperate with CADE or submits false information.

**76. When a Preliminary Investigation or an Administrative Proceeding is launched, what kind of information provided on the Leniency Agreement will be made public?**

As a rule, the contents of the Leniency Agreement and all its related documents are confidential and will not be disclosed, even after a preliminary investigation or an administrative proceeding is opened by CADE, except in the case of a court order or by a express authorization of the leniency recipients. As a rule, the identity of the leniency recipients will be treated as confidential and not publicly released until the final judgment by CADE of the administrative proceeding related to the violation reported.

The defendants in the administrative proceeding opened in connection with the Leniency Agreement will be prohibited to disclose information and/or documents to third parties, other government bodies, or foreign authorities. Those defendants, i.e., the companies and individuals investigated for the reported violation, will have access to the identity of the leniency recipients and other information and documents of the Leniency Agreement. Access to such information, however, must be used strictly in light of due process principles and defendants' contradictory rights in the administrative proceeding underway at CADE (art. 207, paragraph 2, I, Ricade).

If it becomes necessary to release or share confidential information, by order of a court or any other nontransferable legal obligation, then the leniency recipient will previously notify the SG/CADE – or be informed by the SG/CADE – of the need to disclose the information, and access will be granted exclusively to the addressee of the court order and/or to the holder of the nontransferable legal prerogative, thus keeping the information restricted from the general public.

In specific situations, it is still possible for the leniency recipients to waive the confidentiality of their identity and/or the content of the Leniency Agreement and/or their documents and other



attached materials, wholly or in part, if so agreed among the leniency recipient, CADE, and the state and/or federal Prosecution Service, in the interest of the leniency recipients or the investigation. However, CADE will not require the leniency recipients to waive their guarantee of confidentiality if they wish to keep it.

CADE's General Superintendence follows a set of procedures aiming at ensuring confidentiality after the execution of the Leniency Agreement and when opening a preliminary investigation or an administrative proceeding (as in question [84](#), below).

**77. When a search and seizure warrant or other court measure is carried out, what kind of information provided on the Leniency Agreement will be made public?**

The Leniency Agreement and the information contained in its documents may support a request to the courts for a search and seizure warrant, as well as other court measures, by CADE's General Superintendence and/or the competent criminal authorities, according to Law No. 12.529/11. When a request is submitted to a court, the SG/CADE and/or the competent criminal authorities will seek to protect the confidential information and documents submitted by the leniency recipients and will request the courts to safeguard their confidentiality within the scope of the lawsuit.

The SG/CADE follows a set of procedures to ensure confidentiality also after signing a Leniency Agreement (see question [84](#), below).

**78. Does CADE share information on a Leniency Agreement with authorities of other countries?**

No. 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).

In the context of international cartels, in situations in which the Leniency Agreement proposal is made in multiple jurisdictions, the waiver can fulfill the interests of the leniency applicant, since such procedure aims at avoiding the duplication of information to be generated by them and to

fulfill the interests of the antitrust authorities, thus allowing for expedited investigations and international coordination of procedures.

This sharing of information, however, must be previously agreed upon by both the leniency recipient and CADE's General Superintendence. In addition, the SG/CADE does not disclose information or documents in connection with a Leniency Agreement at the request of a foreign judge or authority, which do not have competent jurisdiction in Brazil.

**79. Can the leniency recipient provide the information and/or documents negotiated in connection with the Leniency Agreement to third parties, other government agencies, or foreign authorities?**

No. The confidentiality protection of the Leniency Agreement is also a duty of the leniency recipient, which has the obligation to cooperate and cannot compromise the secrecy of the investigations (art. 206, paragraph 1, VIII, "d", and art. 207, paragraph 2, II, RICADE, combined with art. 86, paragraph 9 of Law No. 12.529/2011), unless otherwise expressly agreed upon with CADE's General Superintendence.

Those represented in the administrative proceeding initiated in connection with the Leniency Agreement are also prohibited from disclosing information and/or documents to third parties, other governmental entities, or foreign authorities. The defendants, i.e., the companies and individuals investigated for the reported violation, will have access to the identity of the leniency recipients and other information and documents of the Leniency Agreement. Access to such information, however, must be used strictly in light of due process principles and defendants' contradictory rights in the administrative proceeding underway at CADE (art. 207, paragraph 2, I, RICADE).

**80. What should the leniency recipient do if, after signing the Leniency Agreement, new information or documents on the reported conduct are discovered?**

Even after signing the Leniency Agreement, the leniency recipient has the duty to report to CADE's General Superintendence any new information and documents referring to the reported conduct (art. 206, paragraph 1, VIII, "d", RICADE).

Supplementation of the information tends to benefit the progress of the investigations and will not give cause to allegations of breaching of the obligations of the leniency recipient if the leniency recipient has not tried to conceal the information subsequently reported – understood as

information or documents unknown or not available at the beginning of the negotiations. This does not happen, however, if the leniency recipient conceals documents that were already available at the time of the leniency application or submits inconsistent information on the same fact, which could lead to noncompliance with the Leniency Agreement.

If the newly discovered information characterizes a separate conspiracy, then the applicant of the Leniency Agreement should submit to CADE's General Superintendence a new application for obtaining a marker, which will be evaluated separately (see question [28](#), above).

**81. When does CADE declare the fulfillment of the Leniency Agreement and when does the leniency recipient's duty to cooperate cease??**

The Leniency Agreement is considered to have been fulfilled and the duty of the leniency recipient to cooperate with CADE ceases after judgment of the administrative proceeding by CADE's Tribunal, at which time fulfillment of all obligations of the leniency recipient will be certified and the benefits of the Leniency Agreement will be conferred (art. 87 of Law No. 12.529/2011 combined with art. 208, RICADE). If the administrative proceeding is split into individual parts, the leniency recipients must continue to cooperate with the investigations.

**82. Can the leniency recipient be held liable in a civil action for damages?**

Yes. Those harmed by the anticompetitive conduct can file a lawsuit to defend their individual or individual homogenous rights to obtain an order to cease antitrust violations, and to receive damages, regardless of the preliminary investigation or administrative proceeding, which will not be stayed because of the filing of a lawsuit (art. 47 of Law No. 12.529/2011).

Therefore, the law does not exempt the leniency recipient from being held liable in a civil damage action.

CADE's General Superintendence does not require the leniency recipient to indemnify the parties harmed by the reported conduct as a requirement for entering into a Leniency Agreement.

**83. Does the confidentiality of the information and documents submitted during the negotiation of the Leniency Agreement remain in effect after CADE's Tribunal issues a final decision?**

O CADE's General Superintendence follows its set of procedures even after the plenary session of CADE's Tribunal issues its final decision on the administrative proceeding: the final decision on the administrative proceeding makes the identity of the leniency recipient public, at which time

essential information for understanding and solving the case may also be disclosed. However, even after judgment by the Tribunal, CADE will use its best efforts to maintain the confidentiality of the documents and information submitted voluntarily by the leniency recipient.

Hence, with respect to interested third parties (for example, clients and consumers), as a general rule, CADE does not grant access to the information provided in connection with the Leniency Agreement to third parties that claim to have been harmed by the reported conduct, except by a national court order.

#### **84. What are Cade's confidentiality procedures after signature of the Leniency Agreement?**

As a rule, the contents of the Leniency Agreement and all its related documents are restricted and will not be released to the public both during the initiation of a preliminary investigation or an administrative proceeding and in the case of a search and seizure warrant (see questions [74](#) and [77](#), above).

CADE's General Superintendence follows a set of procedures aiming at ensuring confidentiality after signing the Leniency Agreement and upon initiation of the preliminary investigation or administrative proceeding, such as:

- I. the possibility of not publishing the information that the case originated from a Leniency Agreement;
- II. the order for initiation of the administrative proceeding, when published in the Federal Official Gazette ("DOU" in its Portuguese acronym), as a rule, does not contain the names of the individuals and the attorneys in the case, but only the names of the legal entities involved, in alphabetic order;
- III. the confidential information and documents related to the Leniency Agreement remain in restricted files in the electronic system of CADE ("SEI" in its Portuguese acronym), and there is only one separate public record;
- IV. the information related to the Leniency Agreement is labeled and/or highlighted as being of restricted access in the Technical Notes; and
- V. in interaction with external bodies, traceable versions of documents are provided.

Furthermore, if it is necessary to apply for a search and seizure order, other confidentiality measures are adopted, such as: (i) a request for the maximum level of confidentiality available in the Brazilian court system; (ii) a personal request by CADE's Chief-Attorney Office (PROCADE) to the assigning judge and the judge assigned to the case and a specific alert as to the confidentiality of the Leniency Agreement; (iii) there is no direct mention of the name of the company and/or the

individuals as leniency recipients; the person is identified as a participant in the conduct, as the other companies, and the individuals are identified by acronyms; (iv) the leniency recipients are identified in a document separate from the History of Conduct, prepared by the SG/CADE (see question [52](#), above); and (v) proactive action by the PROCADE at the courts, in the event of appeals, after implementation of the measure.

## **PART IV. LENIENCY PLUS**

### **85. What is Leniency Plus?**

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

This institution is consistent with CADE's higher objective of combatting illegality, specifically cartels, given that the collaboration by the company and/or the individuals allows information and documents regarding different anticompetitive conduct to be obtained.

If, for example, company Alfa is investigated for anticompetitive conduct in market A and negotiation of a Leniency Agreement is not available (see question [36](#), above), it can report to the SG/CADE another collective antitrust violation in market B, of which the SG/CADE had no prior knowledge (see question [18](#), above), and obtain, in addition to all the benefits of the Leniency Agreement in relation to market B (see question [17](#), above), a reduction of one-third of the applicable penalty in market A under investigation, as long as it cooperates with the investigations.

Hence, with regard to the new violation reported (New Leniency Agreement), once the legal requirements have been met (see question [11](#), above), the leniency applicant will receive all the benefits of the Leniency Agreement (art. 86, paragraph 1, and art. 86, paragraph 4, I and II, of Law No. 12.529/2011). With regard to the violation already under investigation by the SG/CADE (proceeding with the Original Leniency Agreement), the leniency applicant may benefit from a

reduction of one-third of the applicable penalty (leniency plus), to the extent it cooperates with the investigations.

#### **86. How does the request for a marker relates to Leniency Plus?**

The request for a marker in reference to Leniency Plus is made in the same manner as indicated above ("[Part II.1 Request for a marker](#)"), the leniency applicant states that, in addition to a marker for the New Leniency Agreement in a new market, the leniency applicant also intends to receive the benefits of Leniency Plus for the market in which the leniency applicant is already being investigated – indicating the respective administrative proceeding (proceeding with the Original Leniency Agreement).

A CADE's General Superintendence will certify that the company is potentially eligible for the benefit of Leniency Plus if it meets the legal requirements (art. 86, paragraphs 7 and 8, of Law No. 12.529/2011), so that SG/CADE can make a timely decision on the information submitted, in observance of the guarantees of confidentiality set forth in art. 86, paragraph 10, of Law No. 12.529/2011.

Note that, if the leniency applicant seeks the benefit of Leniency Plus, the request for a marker must be submitted to the SG/CADE before the administrative proceeding in relation to the market already under investigation (proceeding with Original Leniency Agreement) is sent to CADE's Tribunal for judgment.

Note that, if the leniency applicant seeks the benefit of Leniency Plus, the request for a marker must be submitted to the SG/CADE before the administrative proceeding in relation to the market already under investigation (proceeding with Original Leniency Agreement) is sent to CADE's Tribunal for judgment.

#### **87. When does the leniency applicant receive the discount pursuant to Leniency Plus?**

As a rule, the reduction of one-third of the penalty that would be imposed due to the antitrust violation in the market under investigation will be applied when CADE reaches a decision on the administrative proceeding in relation to the second conduct reported (New Leniency Agreement), at which time the fulfillment of the Leniency Agreement in the new market will be verified by the CADE's Tribunal so that the benefits for the conduct already under investigation can be granted (proceeding with Original Leniency Agreement).

If, however, the leniency applicant enters into a Cease and Desist Agreement (TCC) (see question [23](#), above) together with the New Leniency Agreement and benefits from Leniency Plus, the benefit may be applied ab initio, under a clause that, if the new Leniency Agreement is breached, the leniency applicant will lose the benefits not only under this New Agreement but also under Leniency Plus in the market under investigation (see question [89](#), below). In this event, the discount under Leniency Plus will no longer apply and will be charged to the company and/or individual that breached the agreement.

**88. Is it possible to obtain discounts related to both the Cease and Desist Agreement (TCC) and Leniency Plus?**

Yes. If a leniency recipient in a new and separate conspiracy chooses to enter into a Cease and Desist Agreement (TCC) (see questions [23](#) and [88](#) above) in relation to the conduct already under investigation, it will be possible to obtain the benefits of both Leniency Plus and the Cease and Desist Agreement in the conspiracy that the applicant couldn't secure a marker, at the discretion of the SG/CADE.

The two discounts are applied one after the other (i.e., first under Leniency Plus and then under the TCC) and not cumulatively (i.e., the two discounts are not simply added together). Cumulative application could provide an excessive benefit to a company and/or individual that participated in a cartel in various markets and potentially reduce the dissuading effect of the conduct and discouraging the submission of new proposals for Leniency Agreements due to the amplification of the benefit under the TCC.

Subsequent application (i.e., first the discount under Leniency Plus is applied and then the discount under the TCC) is based on the interpretation extracted from legislation and maintains consistency between the maximum amount of discounts under Leniency Plus and the TCC compared with the case of partial leniency (see question [18](#), above).

In the same example presented in question [85](#), above, if a company investigated in market A wishes to enter into a TCC in this proceeding and also report to the SG/CADE another antitrust violation in market B, of which the SG/CADE had no prior knowledge, the Alfa company may, in case A, receive the discount under Leniency Plus (one-third of the applicable penalty) and then, subsequently but not cumulatively, receive the discount under the TCC. Since the negotiation of the TCC entails discount ranges (see question [23](#), above), the subsequent application of Leniency Plus with TCC might result in the following parameters for discounts on the expected fine:

- the first proponent of a TCC with Leniency Plus: from 53.33% to 66.67%;



- the second proponent of a TCC with Leniency Plus: from 50% to 60%;
- for all other proponents of a TCC with Leniency Plus: up to 50%.

**89. Is it possible to obtain discounts in two Leniency Plus arrangements within a single administrative proceeding?**

No. The benefit of Leniency Plus is applied only once in a single administrative proceeding. The company or individual obtains a reduction of one-third of the applicable penalty in relation to a given cartel in which the person participated, for having supplied information regarding another cartel about which CADE's General Superintendence had no prior knowledge (art. 209 of the RICADE combined with art. 86, paragraph 7 and paragraph 8, of Law No. 12.529/2011) (see question [18](#), above).

If the company reports two new and distinct antitrust conspiracy, this does not qualify it for more than one Leniency Plus in the same administrative proceeding. In this case, the leniency applicant will receive the benefits of a new Leniency Agreement in connection with a new reported violation and without a second additional discount in the investigation of a cartel underway. If, however, the company submits a Leniency Agreement proposal in relation to two new anticompetitive conduct and is already being investigated in two different administrative proceedings, it is possible that in each administrative proceeding it will obtain a discount under one Leniency Plus originating from a new cartel about which the SG/CADE had no prior knowledge.

**90. Is it possible to obtain Leniency Plus if the leniency applicant has previously signed a Leniency Agreement in another market with the SG/CADE?**

No. Leniency Plus is a benefit granted to a company or individual that does not qualify, in the course of the investigation or administrative proceeding underway, to enter into a Leniency Agreement, and therefore provides information on another cartel about which CADE's General Superintendence had no prior knowledge (art. 209 of the RICADE combined with art. 86, paragraph 9, of Law No. 12.529/2011) (see question [18](#), above). Accordingly, if the company and/or individual previously entered into a Leniency Agreement in one market and is later represented in another administrative proceeding in another market, such person will not be eligible for the benefit under Leniency Plus, since it will not bring any new information to CADE, being only eligible to enter into a TCC (see questions [23](#) and [36](#), above).