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INTERFACE BETWEEN THE BRAZILIAN ANTITRUST, ANTI-CORRUPTION, AND CRIMINAL ORGANIZATION LAWS: THE LENIENCY AGREEMENTS

Diaulas Costa Ribeiro, Néfi Cordeiro** & Denis Alves Guimarães****

ABSTRACT

Since the enactment of the new Anti-corruption Law, the interaction between the antitrust and anti-corruption leniency regimes has attracted the attention of policy makers. More recently, the emergence of Operation Car Wash (“operação lava jato”), one of the biggest corruption scandals of all time, has established a need to more closely analyze the criminal leniency regime under the Criminal Organization Law. Following an introduction, section two of this paper summarizes the recent history of the cooperation between different authorities involved in cartel enforcement. Section three further explores the roles and features of the main authorities discussed in this paper. Section four addresses administrative antitrust, administrative anti-corruption, and criminal infringements related to bid rigging practices. Likewise, section five addresses the main administrative antitrust, administrative and judicial anti-corruption, and criminal penalties that can be imposed by administrative and judicial authorities prosecuting a bid rigging practice. Section six addresses the most significant challenges brought by the interface between administrative antitrust, administrative anti-corruption, and criminal legislation: the issues related to the enforcement of the leniency agreements. The conclusion reinforces the importance of the anti-trust, anti-corruption, and criminal authorities working together to reach the best practices that could lead to an optimum enforcement of the three leniency regimes.

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I. INTRODUCTION

BY examining the interface between the Antitrust Law (Law 12,529 of 2011), the Anti-Corruption Law (Law 12,846 of 2013), and the Organized Crime Law (Law 12,850 of 2013), this paper aims to compare three legal regimes: the administrative antitrust, anti-corruption, and the criminal leniency agreements, and to identify the similarities and the main conflicting provisions that create enforcement challenges for such regimes.

Since the enactment of the new Anti-Corruption Law that was, to a significant extent, inspired by the Antitrust Law, the interaction between the antitrust and the anti-corruption leniency regimes has attracted the attention of policy makers. A good example of such policy concern can be seen in the following extract of a book edited by the antitrust agency's leading officials:

[T]he new Anti-corruption Law . . . completes the Brazilian competition legal framework and will work hand-in-hand with the latter, for instance, in cartel cases A reciprocal fertilization exists between these two fields but their effective dialogue for efficient and practical results depends on the techniques used to build a common language.¹

More recently, the emergence of Operation Car Wash (*operação lava jato*) as one of the biggest corruption scandals of all time has called attention to the interface between the antitrust and anti-corruption leniency regimes.² Importantly, the scandal brought attention to the criminal leniency regime of the Criminal Organization Law.³ This is evidenced by the fact that the Federal Public Prosecution Office (MPF) and the Administrative Council for Economic Defense (CADE), an antitrust agency, have focused on the interaction between the three leniency regimes.⁴ A federal prosecutor in a CADE/MPF joint event presented the following chart:⁵

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1. Nitish Monebhurrn, *Fighting Corruption and Promoting Competition in Brazil, in INTERNATIONAL COOPERATION AND COMPETITION ENFORCEMENT: BRAZILIAN AND EUROPEAN EXPERIENCES FROM THE ENFORCERS' PERSPECTIVES* 81-90, 82 (Vinicius Marques de Carvalho et al. eds., 2014).
 2. See Brian Nicholson, 'Brazil's Operation Car Wash', INT'L BAR ASS'N. (Apr. 8, 2015), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7960b146-65c4-4fc2-bb6a-c6fbb434cd16> (visited Dec. 13, 2015).
 3. *Id.*
 4. *Id.*
 5. Rodrigo de Grandis, Prosecutor of the Anti-Cartel Group of the Federal Public Prosecution Office in São Paulo, Presentation at the Federal Public Prosecution Office's seminar on the interface between the antitrust leniency program and the Anti-corruption Law leniency (June 29, 2015).

Administrative antitrust leniency Law 12,529 of 2011. ⁶	Administrative anti-corruption leniency Law 12,846 of 2013. ⁷	Criminal leniency Law 12,850 of 2013. ⁸
Signatory authority according to the law		
CADE's General Superintendence ⁹	Office of the Comptroller General (CGU) ¹⁰	Police Chief Investigator or Public Prosecution Office ¹¹
Applicant		
The 1st legal entity or individuals (no 1st one requirement) ¹²	The first legal entity ¹³	No 1st one requirement ¹⁴ Note: However, only the 1st one can obtain full immunity
Beneficiary		
Legal entities and individuals ¹⁵	Legal entities only ¹⁶	Individuals only ¹⁷

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6. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
 7. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).
 8. Lei No. 12.850, de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).
 9. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
 10. The Office of the Comptroller General (GCU) is the signatory authority according to the law when the corrupt practice may have harmed a federal government body. The authority is different when the practice harms state and local government bodies. In the latter cases, the signatory authority is defined by state and local regulations of the Anti-Corruption Law 12,846 of 2013. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).
 11. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).
 12. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
 13. Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).
 14. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).
 15. Lei No. 12.529, de 30 de Novembro de 2011, art. 31, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
 16. Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).
 17. Lei No. 12.850, de 2 de Agosto de 2013, art. 1, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

Benefits		
<p>Administrative (legal entities and individuals)</p> <p>Fine immunity when the alleged violation was unknown to the authority¹⁸</p> <p>1/3 to 2/3 fine reduction when the alleged violation was already being investigated by the authority¹⁹</p> <p>Criminal (individuals) Full immunity in respect to: Law 8,137 of 1990 (cartel as a criminal offense)²¹ Law 8,666 of 1993 (bid rigging as a criminal offense)²² Criminal Code (cartel as a criminal association)</p>	<p>Administrative (legal entities)</p> <p>[not available]</p> <p>Up to 2/3 fine reduction + Immunity from the penalty of prohibition of receiving incentives, subsidies, grants, donations or loans from the government²⁰</p>	<p>Criminal (individuals) Full immunity (only the 1st one) Or Up to 2/3 reduction in imprisonment time (or replacement for alternative penalty)²³</p>

The chart above suggests there are inconsistencies between the three legal regimes. As anticipated, when there is a cartel—more specifically, a bid rigging—all these regimes may become applicable.

In crimes involving a cartel violation, the offenders have the choice of seeking a leniency agreement, but they also have the choice of defending themselves until the end of an administrative and/or criminal proceeding without considering applying for leniency.²⁴ Several offenders, indeed, consider such a possibility. But, they do not know where to start their application or whether they should apply for all regimes.

It is clear that each type of leniency agreement incentivizes offenders to provide information to the authority—information that may be highly useful in order to uncover possible infringement crimes and prosecute other offenders.²⁵ Thus, the underlying policy reason of such legal regimes is to deter infringements.

18. Lei No. 12.529, de 30 de Novembro de 2011, art. 86 § 4(I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

19. *Id.* at art. 86, §4(II).

20. Lei No. 8.137, de 27 de Dezembro de 1990, DIÁRIO OFICIAL UNIÃO [D.O.U.] de 28.12.1990 (Braz.).

21. Lei No. 8.666, de 21 de Junho de 1993, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

22. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

23. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

24. *See Grandis, supra* note 5.

25. SECRETARIAT OF ECONOMIC LAW ET AL., FIGHTING CARTELS: BRAZIL'S LENIENCY PROGRAM 17 (3d ed. 2009), available at <http://www.cade.gov.br/acesso-a-in>

But by comparing such incentives, it is evident they do not align exactly. That is, it is difficult to lead the execution on the regime in accordance with the three different kinds of agreements. This may lead the authorities involved in each kind of prosecution to different positions in terms of the level of evidence presented, which ultimately leads to different holdings regarding the same violation.²⁶

Given some limitations on information shared between the authorities, the different level of evidence possessed by each one could undermine the possibility of full enforcement of the two administrative legislations (antitrust and anti-corruption), as well as the criminal one (therefore decreasing deterrence).²⁷ In the worst scenario, this could also interrupt the cooperation between the authorities, as authorities would be competing between themselves with the aim of guaranteeing full enforcement of their own jurisdictions.

Before addressing the leniency agreements, in order to make this paper accessible to a public wider than antitrust and anti-corruption specialists, the next section addresses the recent history between the different authorities involved in cartel enforcement, including antitrust law enforcement, criminal prosecutors, police, the Office of the Comptroller General (CGU), an anti-corruption agency, and the Federal Court of Auditors (TCU). In this context, the use of deterrence tools and measures adopted to enhance the fight against bid rigging will also be addressed.

II. AUTHORITY'S COOPERATION

A. LEGAL COOPERATION AND COOPERATION AGREEMENTS

In terms of cooperation amongst authorities, there seem to be two kinds of cooperation: (i) legal cooperation, when cooperation or interaction is imposed or established in the laws that regulate the powers of the agencies; and (ii) cooperation agreements, when cooperation is established by the agencies through agreements.²⁸

There is legal cooperation between the antitrust authority, criminal prosecutors, and the police in order to request judicial authorization and to conduct dawn raids. Legal cooperation can be enhanced through cooperation agreements, and such was the case with these authorities. A cooperation agreement, for instance, is the one executed between CADE and the CGU, as detailed below.²⁹

formacao/publicacoes-institucionais/documentos-da-antiga-lei/
brazil_leniencia_program_brochure.pdf.

26. Marcelo Calliari & Denis Alves Guimaraes, *Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation*, 25 ANTITRUST 67, 68 (2011).

27. See *id.* at 67.

28. See Marcio de Oliveria Junior, *Brazil: Administrative Council for Economic Defence*, GRCI (Aug. 30, 2016), <http://globalcompetitionreview.com/chapter/1068704/brazil-administrative-council-for-economic-defence>

29. Acordo de cooperação no. 02.2014, de 22 de Janeiro de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.02.2014 (Braz.).

B. DETERRENCE TOOLS

In 2000, the Brazilian antitrust authority “started to use more aggressive means of investigating cartels,” including dawn raids and wiretapping, as well as leniency agreements.³⁰ “Nevertheless, [adopting] new tools, such as dawn raids, in a system that had not been used [before] was. . . far from trivial.”³¹ “First, dawn raids have to be authorized by the courts,” and then the antitrust authority has to gather—in the file of the investigations—“enough. . . evidence to convince judges that such an aggressive measure” was in fact necessary.³² In cases in which “there was an absence of, or scarce documentary evidence,” the authority “had to rely on witness statements.”³³

“Once the warrant has been issued, the practical part of the task has to be faced.”³⁴ “To conduct dawn raids [the antitrust authority] also had to establish cooperation with criminal prosecutors and with the police.”³⁵ This was difficult because cooperation between a government agency, the public prosecution, and the police, with the aim of deterring cartels, was entirely new to the authorities.³⁶

“Whistleblowers have been an important source of information” through which CADE is becoming aware of cartel activities.³⁷ CADE’s extensive effort to spread information “on its work of cartel enforcement . . . progressively increased the number of reports.”³⁸

C. FOCUS ON BID RIGGING

“Bid rigging, perceived as a particularly prevalent type of antitrust violation in Brazil and a particularly pernicious one in terms of its negative impact on society, [has] received special attention.”³⁹ In 2008, a government agency was responsible for conducting antitrust investigations.⁴⁰ The Secretariat of Economic Law of the Ministry of Justice (SDE) “issued a booklet called ‘Fighting Bid-rigging,’⁴¹ and in 2009, issued guidelines on analyzing possible” anticompetitive arrangements in bid rigging agreements (SDE Ordinance n. 51 of July 3, 2009).⁴² Also, it seemed like the cooperation between the antitrust authority, the public prosecution, and the police was not sufficient to properly fight bid rigging.⁴³

30. Marcelo Calliari & Denis Alves Guimarães, *Brazil: Toward a Mature Cartel Enforcement Jurisdiction?*, in *COMPETITION LAW IN THE BRICS COUNTRIES* 19 (Adrian Emch et al. eds., 2012).

31. *Id.*

32. *Id.*

33. Calliari & Guimaraes, *supra* note 26, at 68.

34. Calliari & Guimaraes, *supra* note 30.

35. Calliari & Guimaraes, *supra* note 26, at 68.

36. Calliari & Guimaraes, *supra* note 30, at 20.

37. *Id.*

38. *Id.*

39. Calliari & Guimaraes, *supra* note 26, at 68.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

“In 2010, the federal government decided that a broader initiative,” the National Strategy of Anti-Corruption and Money Laundry (ENCCLA), which involved “approximately eighty different authorities from around the country, would focus on this issue,” including CGU and TCU.⁴⁴ “This joint group. . . was charged with” analyzing and proposing solutions to the risks of violations in biddings and contracts of public works.⁴⁵

In the same book edited by CADE’s leading officials quoted above, Monebhurrin addressed the institutional cooperation between CADE and CGU:

The cooperation indeed aims at fighting any form of active or passive corruption in public procurement in order to allocate the State’s scarce resources towards productive ends. . . . Such acts of corruption whereby one private entity obtains illegal advantages or privileges in exchange of money transferred or payments of any other nature made to the public administration are not isolated ones and require a tentacular institutional intervention. The scourge is a national one and does not only pertain to the micro level; but also for this reason, the question is of a Federal nature and importance – , and depends on the active participation of Federal organs.

The cooperation agreement therefore provides for the creation and adoption of specific and tailored mechanisms and techniques to strengthen the dialogue between the anti-corruption authority (The Comptroller General) and the Competition Authority which are expected to act preventively and repressively. . . .

Mutual education is what is expected from the concerned authorities in their anti-corruption and competition promotion task. . . .

Consequently, the Competition Authority is expected to transfer any relevant information on potential fraudulent activities obtained during its administrative procedures to the Secretary for the Prevention of Corruption and for Strategic Information of the Comptroller General’s office; the Secretary must accordingly reciprocate when it is made aware of useful data on competition and corruption. In a similar logic, both authorities have accepted to offer technical assistance to each other and to provide technical advice in given cases which are of their potential mutual interest. They can, for such purposes, require that an expert from the other authority be present during specific audiences. Both authorities can also decide to set up joint working groups . . . in order to investigate violations. . . .⁴⁶

Therefore, it is evident that CADE’s role is to coordinate with CGU when facing bid-rigging cases that, apart from an alleged antitrust violation, may also include an anti-corruption violation. This was publicly stated by CADE’s President in his interview during the 63rd Antitrust

44. *Id.*

45. *Id.*

46. Monebhurrin, *supra* note 1, at 86.

Law Spring Meeting on April 17, 2015, in Washington D.C.⁴⁷

Cooperation with the criminal authorities, such as public prosecutors, is much more advanced than in the anti-corruption agency.⁴⁸ Nevertheless, the anti-corruption agency is also evolving, which can be seen with the attention received from private sector specialists.⁴⁹

III. AUTHORITIES

A. PUBLIC PROSECUTION OFFICE AND CARTEL ENFORCEMENT

“Perhaps one of the most visible results of [CADE’s] initiatives has been the growing . . . involvement of the public prosecutors [concerning] cartel matters.”⁵⁰ In spite of that, it is clear the initiatives face huge challenges:

[A]s the public prosecutors become aware of the importance of fighting cartels and have already started to do it . . . an enormous field for their continuous work is now open. The reason for this is that no matter how much the . . . government will be willing to invest in cartel enforcement from the administrative point of view, these resources will never get close to the magnitude of the ones available to the public prosecutors for criminal cartel enforcement.⁵¹

It is evident that the vast structure of public prosecution (especially the federal structure, which is much better equipped than the state prosecutors’ offices, whose sizes and resources vary between different states) is devoted to fight several criminal and civil violations besides the competition crimes. Consequently, its continuing level of priority to cartels is linked to the future relationship between public prosecutors and CADE, CGU, and TCU, especially in light of the developments of the Operation Car Wash, in which all these institutions play an important role.⁵² Nevertheless, “the fact is that a huge field for cartel criminal enforcement is already open, and given that public prosecutors are able to launch criminal investigations throughout the whole country independently from” CADE’s General Superintendence (SG)— CADE’s investigative branch— the results of this growing activity are “widely uncertain” and can be conducted “without a specialized antitrust authority to assist with the investigation.”⁵³

Cartel criminal enforcement can benefit from the Public Prosecution Office’s independence, which can allow them to prosecute “offenders linked to strong political, economic, and social agents; “public prosecu-

47. See IBRAC Eventos, *Painel 1 – 21.o Seminário Internacional de Defesa da Concorrência – IBRAC*, YOUTUBE (Oct.17, 2015), https://www.youtube.com/watch?v=SEI_LeqtzvE.

48. See *id.*

49. See *id.*

50. Calliari & Guimaraes, *supra* note 30, at 21; Calliari & Guimaraes, *supra* note 26, at 68.

51. Calliari & Guimaraes, *supra* note 30, at 21.

52. See *id.*

53. Calliari & Guimaraes, *supra* note 26, at 68.

tors are experienced in fighting corruption and white collar crimes, [violations] that are similar. . .to cartels.”⁵⁴

“It is certainly true that public prosecutors” deliver a great contribution “to both criminal and administrative cartel enforcement by” taking antitrust enforcement to parts of the country and to a number of cases in which the antitrust agencies cannot perform on their own.⁵⁵ But in the scenario of a widespread decentralized cartel criminal enforcement throughout Brazil, the importance that a specialized antitrust body can coordinate all this work should not be underestimated.⁵⁶

The Anti-Cartel Group of the Federal Public Prosecution Office in Sao Paulo (the state branch of a federal body) and GEDEC, which belongs to the State of Sao Paulo Public Prosecution Office (a state body), are two of the public prosecution’s specialized groups.⁵⁷ Both “have been supporting [SG] in the negotiation of leniency agreements and [assuring] that the individuals who executed the agreements will not be subject to criminal cartel investigations (which could only be launched by public prosecutors).”⁵⁸ These groups have developed in a very positive way; for example, the groups use competition law specialists within the very large structure of public prosecution offices, which leads “to a greater accumulation of knowledge and experience in the area and more efficient training of [the relevant] staff.”⁵⁹

B. THE ADMINISTRATIVE AUTHORITIES: ANTITRUST AND ANTI-CORRUPTION

Cartel administrative enforcement is entirely performed by CADE, which is comprised of the investigative branch, the SG, and the Tribunal.⁶⁰ CADE is an independent agency because both investigation and decision processes are made by independent authorities. For example, the officials must be appointed by the President of the Republic and approved by the Senate for a given term: four years for the Commissioners of the Tribunal and two years for the SG—the latter can be appointed to a second term.⁶¹ They cannot be removed from office by a Presidential order—this would only happen in the case of resignation or misconduct proven in the scope of an administrative proceeding.⁶² Such independence assures a significant level of protection against political interference.

54. *Id.* at 69.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See SECRETARIAT OF ECONOMIC LAW ET AL., FIGHTING CARTELS: BRAZIL’S LENIENCY PROGRAM, *supra* note 25, at 5.

61. Lei No. 12.529, de 30 de Novembro de 2011, art. 6, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

62. *Id.*

Monebhurrún made a broad assessment on the institutional structure related to the enforcement of the Anti-Corruption Law:

The Brazilian Competition Authority does not, in itself, have jurisdiction for corruption matters. This is institutionally normal: a competition authority is specialized in competition questions and is expected to deliver learned opinions within this ambit.

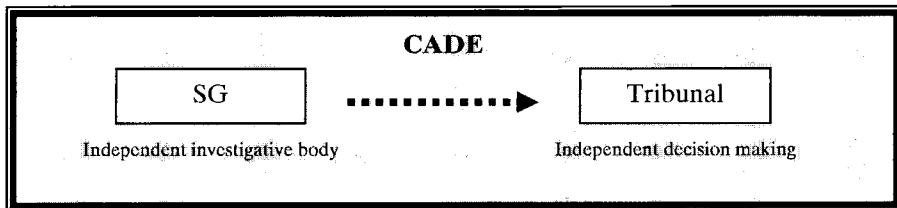
Corruption and anti-corruption issues fall under the competence of other public bodies, the main ones being the Comptroller General (Controladoria Geral da União – CGU), the Federal Court of Auditors (Tribunal de Contas da União – TCU), and the . . . national and federal Public Prosecutors; the Ministry of Planning is also engaged in combating corruption.

The Comptroller General controls and audits the expenses of the Federal Executive; it acts as the Brazilian anti-corruption agency. The Federal Court of Auditors is responsible for the auditing of the public administration's accounts; it supervises the public treasury. The Ministry of Planning organizes the information technology system for public procurement and have, accordingly, developed software tools to better detect potential shades of corruption acts during public bidding processes.⁶³

In spite of the existence of this broad scenario, in the administrative scope, CGU is similar to CADE because the former is the highest federal administrative authority with the power to investigate and convict administrative infringements stated by the Anti-Corruption Law and the only one at the federal level with the power to execute leniency agreements.⁶⁴ But unlike the Antitrust Law, the Anti-Corruption Law did not create an independent institutional structure to enforce its provisions; that is, the CGU Minister is directly subordinated to the President of the Republic and can be freely appointed and removed from office at any time.⁶⁵ Evidently, such institutional structure faces a significant risk of political interference.

Administrative Cartel Enforcement Structure

Law 12,529 of 2011 (after May 2012)⁶⁶



63. Monebhurrún, *supra* note 1, at 84.

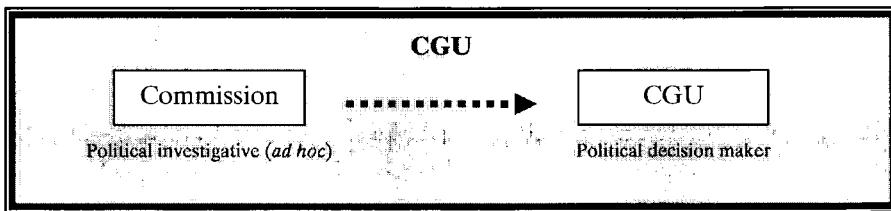
64. *See id.*

65. *See id.*

66. *See* Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

Administrative Anti-Corruption Enforcement Structure

Law 12,846 of 2013⁶⁷ and Presidential Decree 8,420 of 2015⁶⁸



Thus, the figures above represent the whole structure of CADE and CGU and the main bodies in charge of investigating and deciding the cases—the former is mainly comprised by the independent bodies SG (investigation) and Tribunal (decision),⁶⁹ while the latter (in what concerns the Anti-Corruption Law enforcement) is formed by an investigative ad hoc commission appointed by the CGU Minister, with the CGU Minister himself acting as decision maker.⁷⁰ Therefore, in the case of CGU, the figure indicates that both the Commission and the Minister act as political investigators and decision makers, respectively.

Notably, the Anti-Corruption Law itself does not state the creation of a commission to conduct the investigation to be decided by the CGU Minister—it was established by the Regulating Presidential Decree 8,420 of 2015.⁷¹ Such commissions should be created not only when (i) the infringement is investigated by the highest federal administrative authority regarding the enforcement of the Anti-Corruption Law (CGU), but also when (ii) the federal administrative authority conducting the investigation is another Ministry, or (iii) the authority is the head of a body not subordinated to any Ministry—this would be the case of independent agencies, such as CADE.⁷²

In fact, the Anti-Corruption Law sets the second and third conditions as the general rules because the law is enforceable by any public body possibly harmed by acts of corruption.⁷³ But the first condition is very important because CGU has (a) concurrent power to launch investigations on acts of corruption possibly carried out against anybody of the Federal Executive (Article 8, section 2 of the law); (b) exclusive power to request that an investigation being conducted by another federal body is

67. Lei No. 12.846, de 1 de Agosto de 2013, arts. 6 & 20, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

68. See Decreto No. 8.420, de 18 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.03.2015 (Braz.).

69. See Lei No. 12.529, de 30 de Novembro de 2011, art. 13, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

70. See Lei No. 12.846, de 1 de Agosto de 2013, art. 8, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

71. Decreto No. 8.420, de 18 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.03.2015 (Braz.).

72. See *id.*

73. See *id.*

withdrawn from such body and sent to its own analysis for review (Article 8, section 2 of the law); and (c) exclusive power to investigate acts of corruption that may have harmed a foreign public administration (Article 9 of the law).⁷⁴

Thus, there is no doubt that CGU is the most important body responsible for enforcing the Anti-Corruption Law. Besides the powers described above, as a Brazilian anti-corruption agency, CGU has several powers that are not related to the enforcement of the Anti-Corruption Law 12,846 of 2013. Rather, these powers are related to the enforcement of other laws, which directly or indirectly involve the prevention against acts of corruption.⁷⁵ CGU also has the power to execute the leniency agreements established in Law 12,846 of 2013.⁷⁶

IV. INFRINGEMENTS

As discussed in the introduction of this paper, bid rigging is an antitrust violation that can frequently occur in combination with the payment of bribes to a public official in exchange for some facilitation of the collusion.

In fact, Law 12,846 of 2013 also defines bid rigging as an anti-corruption offense regardless of the presence of bribes; that is, payment of bribes constitutes a different infringement.⁷⁷

The chart below compares provisions of the Antitrust, the Anti-Corruption, and Criminal laws. The chart will show that these statutes have very similar definitions regarding the fields of violations. The concurrent prohibitions are under Article 36, Section 3 of Law 12,529 of 2011; Article 5, Section 4 of Law 12,846 of 2013; Article 4, Sections 1 and 2 of the Criminal Law; and Articles 90 and 288 of the Criminal Law. Bid rigging as antitrust, anti-corruption, and criminal offense:

74. *Id.*

75. *See id.*

76. Lei No. 12.846, de 1 de Agosto de 2013, art. 5(IV), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

77. *Id.*

Law 12,529 of 2011 ⁷⁸	Law 12,846 of 2013 ⁷⁹	Criminal Law
<p>Article 36. The acts under which any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved:</p> <p>I – to limit, restrain or in any way injure free competition or free initiative;</p> <p>II – to control the relevant market of goods or services;</p> <p>III – to arbitrarily increase profits; and</p> <p>IV – to exercise a dominant position abusively.⁸⁰</p>	<p>Article 5. “For the purposes of this Act, there shall be considered harmful to the Brazilian and foreign public administration any and all acts practiced by the legal entities mentioned in the <u>sole paragraph</u> of article 1 [see below] against the Brazilian or foreign public state; the principles that govern public administration; or international commitments undertaken by Brazil, as follows:⁸¹</p>	<p>Law 8,137 of 1990 (Economic Crimes Law) Article 4. The following practices are crimes against the economic order.⁸²</p> <p>Law 8,666 of 1993 (Public Procurement Law) Article 90.⁸³</p> <p>Criminal Code (Decreto-Lei 2,848 of 1940) Article 288.⁸⁴</p>

78. See Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

79. See Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

80. Lei No. 12.529, de 30 de Novembro de 2011, art. 36 § 3, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

81. Lei No. 12.846, de 1 de Agosto de 2013, art. 1, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

82. Lei No. 8.137, de 27 de Dezembro de 1990, art. 4, DIÁRIO OFICIAL UNIÃO [D.O.U.] de 28.12.1990 (Braz.).

83. Lei No. 8.666, de 21 de Junho de 1993, art. 90, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

84. Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, art. 288, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.1940 (Braz.).

<p>Section 3 The following acts, among others, to the extent to which they conform to the principles set forth in the <i>caput</i> of this article and its clauses, shall characterize violations of the economic order:</p> <p>I – to agree, join, manipulate or adjust with competitors, in any way:</p> <p>a) the prices of goods or services individually offered;</p> <p>b) the production or sale of a restricted or limited amount of goods or the provision of a limited or restricted number, volume or frequency of services;</p> <p>c) the division of parts or segments of a potential or current market of goods or services by means of, among others, the allocation of customers, suppliers, regions or time periods;</p> <p>d) prices, conditions, privileges or refusal to participate in public bidding;</p> <p>II – to promote, obtain or influence the adoption of uniform or agreed business practices among competitors.⁸⁵</p>	<p>IV – in what concerns public bids and contracts [resulting thereof]:</p> <p>a) to frustrate or defraud, by means of collusion or any other expedient, the competitive nature of a public bid;</p> <p>b) to prevent, hinder or defraud the performance of any act within the scope of a public bid;</p> <p>c) to remove or seek the removal of a bidder, by means of a fraud or by offering advantage of any kind;</p> <p>d) to defraud a public bid or the contract resulting thereof.⁸⁶</p>	<p>I – to abuse of market power, to dominate the market or eliminate, fully or partially, competition by means of any form of adjustment or agreement among companies;</p> <p>II – to undertake agreement, adjustment or alliance among suppliers, with the aim of:</p> <p>a) artificially fixing prices or quantities sold or produced;</p> <p>b) establishing regional control of a market by a company or group of companies;</p> <p>c) controlling network of distributors or suppliers harming competition.⁸⁷</p> <p>Article 90. To frustrate or defraud, by means of adjustment, combination or any other expedient, the competitive feature of a bid, with the aim of obtaining, for itself or any other, advantage as a result of winning the bid.⁸⁸</p> <p>Article 288. To undertake an association of 3 (three) or more persons with the specific aim of committing crimes.⁸⁹</p>
<p>Article 35. The prosecution of infringements against the economic order does not exclude the punishment of other practices deemed illegal by other laws.⁹⁰</p>	<p>Article 29. The provisions of this Act do not exclude the powers held by the Administrative Council for Economic Defense (CADE), by the Ministry of Justice and by the Ministry of Finance to investigate and decide on facts that may constitute a violation of the economic order.⁹¹</p>	<p>[No corresponding provision]</p>

85. Lei No. 12.529, de 30 de Novembro de 2011, art. 36 § 3, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

86. Lei No. 12.846, de 1 de Agosto de 2013, art. 5(IV), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

87. Lei No. 8.137, de 27 de Dezembro de 1990, art.4(I) – (II), DIÁRIO OFICIAL UNIÃO [D.O.U.] de 28.12.1990 (Braz.).

88. Lei No. 8.666, de 21 de Junho de 1993, art. 90, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

89. Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, art. 288, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.1940 (Braz.).

90. Lei No. 12.529, de 30 de Novembro de 2011, art. 35, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

91. Lei No. 12.846, de 1 de Agosto de 2013, art. 29, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

The table above clearly shows an overlap between the Antitrust, the Anti-Corruption, and Criminal laws in regards to infringements. Pursuant to Article 36, Section 3 of Law 12,529 of 2011; Article 5, Section 4 of Law 12,846 of 2013; Article 4, Sections 1 and 2 of the Criminal Law; and Articles 90 and 288 of the Criminal Law, the government can launch investigations and, possibly, convict a bid rigging practice. This is specified under Article 36, Section 3(I)(d) of Law 12,529 of 2011; Article 5, Section 4(a) of Law 12,846 of 2013; and Article 90. Thus, there is no doubt that, in principle, both CADE and CGU can impose penalties on the same bid rigging practice, setting aside the criminal penalties that can be imposed by the Judiciary.⁹²

Article 29 of the Anti-Corruption Law is a provision designed to avoid double jeopardy.⁹³ It clearly states that both CADE and CGU have the power to convict a bid rigging practice implies that the same practice can, in theory, be punished twice by such authorities.⁹⁴

The fact that the Anti-Corruption Law expressly recognizes the powers of CADE to investigate and convict an antitrust infringement does not eliminate the possibility of *bis in idem*. Even so, it is reasonable to assume that if both bodies can investigate a given practice (bid rigging), they should coordinate in order to mitigate overlaps and to increase synergies.⁹⁵ Such should raise the following considerations:

- a) The overlap is positive because it theoretically increases the chances that a possible illegal practice is investigated and may be punished.⁹⁶ In practice, one of the two authorities may be willing to investigate while the other may not. This is particularly good in an institutional scenario like the Brazilian government, in which one of the authorities is independent, while the other is directly subordinated to the political power (the President of the Republic) and easily affected by political influence.⁹⁷

92. According to current CADE's Commissioner Silveira, the so called "Grande Stevens" precedent of the European Court of Human Rights may set a new standard for the twofold system present in many countries, which allows administrative and criminal sanctions for a given illegal practice. See Paulo Burnier da Silveira, *O direito administrativo sancionador e o princípio non bis in idem na UE: uma releitura a partir do caso "Grande Stevens" e os impactos na defesa da concorrência* [The Administrative Penalty Law and the Non Bis In Dem Principle in the EU: A Re-reading of the 'Grande Stevens' case and the Impact on Competition], 4 REVISTA DE DEFESA DA CONCORRÊNCIA 5, 7-8 p. 2 (2014) (Braz.).

93. Lei No. 12.846, de 1 de Agosto de 2013, art. 29, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

94. *Id.*

95. The nature of this problem is exactly the same of the one faced in the scope of the interaction between the Brazilian antitrust and regulatory authorities. See Denis Alves Guimarães, *Regulatory Policy Round Table: A Dialogue between Telecommunications and Antitrust Authorities*, in COMMUNICATIONS AND COMPETITION LAW: KEY ISSUES IN THE TELECOMS, MEDIA AND TECHNOLOGY SECTORS 397 – 411, (Fabrizio Cugia et al. eds., 2015).

96. *See id.*

97. *See id.* at 398-99.

- b) If both authorities are willing to investigate the violation, they should coordinate to carry out possible simultaneous investigations efficiently and with synergies.⁹⁸ This would involve information sharing, including evidence gathered in the files. Thus, it would be possible to reach the same fact findings at the end of the investigations, which could allow both bodies to issue separate decisions without *bis in idem*. There could still be two convictions, but the penalties imposed should be agreed between CADE and CGU so that the sum of the penalties equals to the maximum penalty to be issued according to one of the laws—the Antitrust or the Anti-Corruption laws.

Notably, this possibility would require information and file sharing, which is not currently required by law. But this requirement was mentioned in the CADE/CGU Cooperation Agreement Number 02/2014.⁹⁹

In addition, it should be noted that the issuance of two convictions—one by CADE and the other by CGU—with a sum of the penalties not exceeding the maximum penalty established by law, would be a very complex task. As it will be discussed in the next section, the penalties are somehow similar, but different in detail. This would matter when the authorities decide fines and penalties.

V. PENALTIES

As discussed in the previous section, the penalties imposed by the Antitrust and Anti-Corruption Laws are quite similar. But there are differences in respect to several details that could, for instance, represent a challenge for the authorities in case they decide to cooperate in the scope of investigating and making decisions.

The similarities and differences can be seen more clearly in a comparative chart as the one below:

Antitrust, anti-corruption and criminal (main) penalties [Table 1]

Law 12,529 of 2011 ¹⁰⁰	Law 12,846 of 2013 ¹⁰¹	Criminal Law ¹⁰²
Art. 37. A violation of the economic order subjects one to the following penalties:	Art. 6. In the administrative sphere, the following sanctions shall be applied to legal entities held accountable for the harmful acts described in this Act:	Law 8,137 of 1990 (Economic Crimes Law) Art. 4. [see chart above]; I – [see chart above];

98. *See id.* at 400.

99. Decreto no. 02.2014, de 22 de janeiro de 2014, DIÁRIO OFICIAL DE UNIÃO [D.O.U.] de 06.02.2014 (Braz.).

100. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

101. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

102. *See infra* Table 2.

I – in the case of a company, a fine of one tenth (0.1%) to twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof;

[See comment below on article 47]

II – in the case of other individuals or public or private legal entities, as well as any associations of persons or de facto or de jure legal entities, even if temporary, incorporated or unincorporated, which do not perform business activity, not being possible to use the gross sales criteria, the fine will be between fifty thousand reais (R\$ 50,000.00) to two billion reais (R\$ 2,000,000,000.00);

III – if the administrator is directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, a fine of one-percent (1%) to twenty-percent (20%) of that applied to the company, in the case set forth in Item I of the caput of this article, or to legal entities, in the cases set forth in item II of the caput of this article.

I – a fine in an amount ranging from 0.1% (one tenth percent) to 20% (twenty percent) of the gross revenues earned in the financial year preceding the financial year in which the administrative proceeding was commenced, excluding taxes, which penalty fine shall never be less than the advantage obtained, whenever such advantage may be estimated (. . .)

§ 3 The imposition of the sanctions set forth in this Article does not, in any event, exclude the obligation to fully repair the damages caused.

§ 4 In the case of item I of the caput, if it is not possible to adopt the criterion of the value of the legal entity's gross revenue, the fine shall range from R\$ 6,000.00 (six thousand reais) to R\$ 60,000,000.00 (sixty million reais)¹⁰⁶

[No corresponding provision, because the anti-corruption law only establishes administrative liability on companies]¹⁰⁷

II – [see chart above]:
a) [see chart above];
b) [see chart above];
c) [see chart above].

Penalty – imprisonment (reclusão), from 2 (two) to 5 (five) years and fine.¹¹³

Law 8,666 of 1993 (Public Procurement Law)

Art. 90. [see chart above]:

Penalty – imprisonment (detenção), from 2 (two) to 4 (four) years, and fine.¹¹⁴

Criminal Code (Decreto-Lei 2,848 of 1940)

Art. 288. [see chart above]:

Penalty – imprisonment (reclusão), from 1 (one) to 3 (three) years.¹¹⁵

Sole paragraph. The penalty is increased up to fifty percent if the association is armed or if children or teenagers take part in the association.

103. Lei No. 12.529, de 30 de Novembro de 2011, art. 37(I) – (III), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
104. Lei No. 12.529, de 30 de Novembro de 2011, art. 38, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
105. Lei No. 12.529, de 30 de Novembro de 2011, art. 45(I) – (VII), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).
106. Lei No. 12.846, de 1 de Agosto de 2013, art. 6(I) § 3-4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).
107. *Id.*

§ 1 In case of recurrence, the fines shall be doubled.¹⁰³

Art. 38. Without prejudice to the penalties set forth in Article 37 of this Law, when so required according to the seriousness of the facts or public interest, one or more of the following penalties may be imposed:

II – ineligibility for official financing and for participating in biddings when the objective is acquisitions, divestitures, performance of works and services, provision of public services, in the federal, state, municipal and Federal District public administration, as well as in indirect administration entities, for a term of not less than 5 (five) years;
IV – recommendation to the respective public agencies so that:

(. . .)
b) the violator be denied installment payment of federal taxes owned by him, or that tax incentives or public subsidies be cancelled, in full or in part;

[See article 17, V, of the Presidential Decree 8,420 of 2015]

Art. 19. Upon occurrence of the acts described in article 5 [harmful acts against the Brazilian and foreign public administration] of this Act, the Federal Union, the states, the Federal District (Brasília) and the municipalities, through their respective Public Attorneys or legal representation agencies, or equivalent, as well as the Public Ministry Office (Ministério Público) may bring action with the purpose of having the following sanctions applied to infringing legal entities:

IV – prohibition of receiving incentives, subsidies, grants, donations or loans from public agencies or entities and public financial institutions or from financial institutions controlled by the government, for a minimum period of 1 (one) and a maximum period of 5 (five) years;¹⁰⁸

Law 8,666 of 1993 – Public Procurement Law¹⁰⁹:

Art. 88. The penalties established in items III [temporary suspension of the right of participating in bids and prohibition of contracting with government, for a period not longer than 2 years] and IV [one is declared noncompliant for participating in bids or contracting with the government] of the preceding article may be also applied over the companies or individuals that, in the scope of the contracts regulated by this Law:

II – have practiced illegal acts with the aim of frustrating the objectives of the bid;

108. Lei No. 12.846, de 1 de Agosto de 2013, art. 19(IV), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

109. Lei No. 8.666, de 21 de Junho de 1993, art. 88, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

110. Lei No. 8.666, de 21 de Junho de 1993, art. 88, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

<p>V – the company divestiture, transfer or corporate control, sale of assets or partial interruption of activity;</p>	<p>III – demonstrate to be noncompliant for contracting with the government due to the practice of illegal acts.¹¹⁰ Art. 19. (. . .); II – partial suspension or interdiction of the legal entity’s activities;</p>
<p>VI – the wrongdoer be prohibited from carrying on trade on its own behalf or as representative of legal entity for a period of five (5) years; and¹⁰⁴</p>	<p>III – compulsory dissolution of the legal entity;¹¹¹</p>
<p>Art. 45. In the application of the penalties set forth in this Law, the following shall be taken into consideration: I – the seriousness of the violation; II – the good faith of the transgressor; III – the advantage obtained or envisaged by the violator; IV – whether the violation was consummated or not; V – the degree of injury or threatened injury to free competition, the national economy, consumers, or third parties; VI – the negative economic effects produced in the market; VII – the economic status of the transgressor; and¹⁰⁵</p>	<p>Art. 7. The following aspects shall be taken into account in the application of the sanctions: I – the seriousness of the infraction; II – the advantage obtained or pursued by the offender; III – whether or not the infraction was completed; IV – the level of harm or of the risk of harm; V – the negative effect caused by the infraction; VI – the financial situation of the offender VII – the cooperation of the legal entity in the investigation of the infraction;</p>
<p>VIII – any recurrence</p>	<p>[See article 17, V, of the Presidential Decree 8,420 of 2015]</p>
<p>[No corresponding provision]</p>	<p>VIII – the existence of internal integrity mechanisms and procedures, auditing and encouragement to whistleblowing, as well as the effective implementation of codes of ethics and conduct within the legal person;</p>

111. Lei No. 12.846, de 1 de Agosto de 2013, art. 19, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

112. Lei No. 12.846, de 1 de Agosto de 2013, art. 7(I) – (IX), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

113. Lei No. 8.137, de 27 de Dezembro de 1990, art. 4(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.12.1990 (Braz.).

114. Lei No. 8.666, de 21 de Junho de 1993, art. 90, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.07.1994 (Braz.).

[No corresponding provision]	IX – the value of the contracts between the legal entity and the harmed public agency or entity, and	
[No corresponding provision, but CADE issued its Guidelines on Competition Compliance Programs]	Sole paragraph. The parameters of evaluation of mechanisms and procedures provided for in item VIII of the <i>caput</i> shall be set forth in a Decree to be issued by the Federal Government. ¹¹²	

A. ADMINISTRATIVE FINES ON COMPANIES WITH SALES

Article 37(I) of the Antitrust Law and Article 6(I) of the Anti-Corruption Law set the range of administrative fines that can be imposed when a company is convicted.¹¹⁶ Both penalties range from one-tenth of a percent to twenty percent of the gross sales of the offender (excluding taxes) from the last fiscal year prior to the launching of the administrative proceeding.¹¹⁷

Even so, there are some significant differences amongst the two penalties. Under the Antitrust Law, the fine imposed on the offender may apply to only one company that is being investigated in the administrative proceeding, or can apply only to the gross sales of the whole group or conglomerate.¹¹⁸ Under the Anti-Corruption Law, there is no regulation on whether a single company or the whole group should be fined.¹¹⁹ Article 6(I) should be interpreted as if it had the same wording of Article 37(I) of the Antitrust Law on company, group, or conglomerate, for two main reasons:

- a) Article 4, section 2, of the Anti-Corruption Law states:

“The parent companies, subsidiaries, affiliates or co-members of a consortium, within the scope of the respective contract, will be jointly and severally liable for the practice of the acts described in this Act, being such liability limited to the payment of penalty fines and full compensation of the damages caused.”¹²⁰
- b) Article 16, section 5 of the Anti-Corruption Law states: “The effects of the leniency agreements to be extended to the legal entities of the same economic group, in fact and in law, subject to such legal entities also signing the agreement becoming bound by the condi-

115. Decreto No. 2.848, de 7 de Dezembro de 1940, art. 288, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.1940 (Braz.).

116. See Lei No. 12.529, Article 37(I), de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see also Lei No. 12.846, Article 6(I), de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

117. *Id.*

118. See Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

119. See Lei No. 12.846, Article 6(I), de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

120. *Id.* art. 4 § 2.

tions set forth therein.”¹²¹

The above-mentioned provisions reflect an economic logic intended to punish or benefit economically related entities involved in the practice. There is not a formalistic ratio designed to focus on a particular legal entity.

Another difference exists in the concept of gross sales. It is well known that the “field of the business activity in which the violation occurred”¹²² is a Brazilian alternative formula that ended up being approved by Congress in substitution for the traditional criterion of the relevant market.¹²³ Regarding the interface between the Antitrust and Anti-Corruption laws, it is important to recognize that the Antitrust Law generally applies the fines to a specific portion of the gross sales of the company, group, or conglomerate, but not to the total gross sales of the entity. This is not applicable to the Anti-Corruption Law because there is not an antitrust or relevant market discussion in anti-corruption cases, and there has never been an idea of restricting the fine to a given portion of the gross sales of the entity so that the fines apply over total gross sales.

**B. ADMINISTRATIVE FINES ON ENTITIES WITHOUT SALES AND
EMPLOYEES OF THE COMPANIES OR ENTITIES;
ADMINISTRATIVE FINES ON ADMINISTRATORS
OR MANAGERS OF COMPANIES**

Article 37(II) of the Antitrust Law and Article 6, section 4, of the Anti-Corruption Law set the range of the administrative fines that can be imposed when there is a conviction of an entity that does not perform business activities and, consequently, does not undertake sales (the concept of *gross sales* is inapplicable).¹²⁴ Under the Antitrust Law, a fine applied to these entities ranges from fifty thousand reais (R\$ 50,000.00) to two billion reais (R\$ 2,000,000,000.00), while under the Anti-Corruption Law, it ranges from six thousand reais (R\$ 6,000.00) to sixty million reais (R\$ 60,000,000.00).¹²⁵ The reason for the difference is a matter of legislative drafting—the bill that became the Anti-Corruption Law established the range because it was the same range in force in the Antitrust Law at that time. The range was updated after the new Antitrust Law was enacted,

121. *Id.* art. 16 § 5.

122. Lei No. 12.529, de 30 de Novembro de 2011, art. 37(I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

123. See Denis Alves Guimarães & Daniel Oliveira Andreoli, *Comentários ao artigo 37 – multas por infração da ordem econômica (Comments on the article 37 – antitrust fines)*, in *COMENTÁRIOS A NOVA LEI DE DEFESA DA CONCORRÊNCIA (COMMENTS ON THE NEW BRAZILIAN ANTITRUST LAW)* 150 – 171, 153 (E.C. Anders et al. eds., 2012).

124. See Lei No. 12.529, de 30 de Novembro de 2011, art. 37(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 6 § 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

125. See Lei No. 12.529, de 30 de Novembro de 2011, art. 37(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 6 § 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

but the same change has not been undertaken in the Anti-Corruption Law.¹²⁶

Still with respect to Article 37(II) of the Antitrust Law, in addition to being applicable to all entities that do not undertake sales (the concept of gross sales is inapplicable), it is also applicable to the individuals that are not targeted by Article 37(III).¹²⁷ Moreover, the Article applies to the employees of companies undertaking sales and employees of all types of entities not undertaking sales.¹²⁸ Therefore, under the Antitrust Law, mere employees without the power of making decisions, but able to concur with an anticompetitive practice, are punishable and the fines have the same range as the ones applicable to the entities that do not perform sales.¹²⁹

Conversely, Article 37(III) of the Antitrust Law targets administrators or managers that are directly or indirectly responsible for the infringement, when negligence or willful misconduct is proven.¹³⁰ The fines range from one percent to twenty percent of the fine applied to the company according to Article 37(I) (in the presence of sales or entity) and Article 37(II) (in the absence of sales).¹³¹

Finally, in regards to penalties applicable to individuals, a major difference exists between the Antitrust and Anti-Corruption laws. While the former establishes fines applicable to administrators, managers, and mere employees, the latter does not set any fines applicable to individuals.¹³² It is understood that the Anti-Corruption Law “provides for the administrative and civil proceedings aiming at holding legal entities accountable for the practice of acts against the Brazilian or foreign public administration. . . .”¹³³ Even so, it is undeniable that at least one individual must act so that a company can infringe the law.

C. OTHER PENALTIES: ADMINISTRATIVE ANTITRUST AND JUDICIAL ANTI-CORRUPTION; JUDICIARY ANTITRUST ENFORCEMENT; AND PUBLIC PROSECUTION OFFICE’S OVERSIGHT OF ADMINISTRATIVE ANTI-CORRUPTION ENFORCEMENT

It is justifiable to compare Article 38 of the Antitrust Law and Article 19 of the Anti-Corruption because the former establishes administrative

126. See Lei No. 10.149, de 21 de Dezembro de 2000, art. 35, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 22.12.2000 (Braz.); see Lei No. 8.884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1990 (Braz.); see Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

127. See Lei No. 12.529, de 30 de Novembro de 2011, art. 37(II)-(III), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

128. See *id.*

129. See *id.*

130. *Id.* at art. 37(III).

131. *Id.* at art. 37(I) – (III).

132. See Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

133. See *id.*

penalties, while the latter establishes judicial penalties.¹³⁴ Indeed, all penalties established by the Antitrust Law are administrative and may be applied by CADE.¹³⁵ Meanwhile, the Anti-Corruption Law sets administrative penalties that can be imposed by federal (CGU having a concurrent power in this case), state, and local highest authorities (that may have suffered injuries through the practices forbidden by the Law in Article 5).¹³⁶ The Anti-Corruption Law also sets judicial penalties that can be imposed upon the request of the Federal Government, the States and the Federal District, the Municipalities (also because of possible injuries suffered as a result of the practices forbidden by Article 5).¹³⁷ Federal or state Public Prosecution Offices can prosecute offenders that may have injured the public administration within their jurisdiction.¹³⁸

Upon analyzing Article 38 of the Antitrust Law and Article 19 of the Anti-Corruption Law, the list below shows that antitrust administrative penalties imposed by CADE are similar to anti-corruption judicial penalties:

- a) Article 38(II) and (IV)(b) of the Antitrust Law,¹³⁹ *vis-à-vis* Article 19 (IV) of the Anti-Corruption Law,¹⁴⁰ and Article 88(II) and (III) of the Public Procurement Law (which the Anti-Corruption Law references)¹⁴¹ all regulate penalties. This includes suspension of the right of participating in bids and denial of access to credit from public financial institutions and agencies, and to public incentives and subsidies;¹⁴²
- b) Article 38(V) of the Antitrust Law, *vis-à-vis* Article 19(II) of the Anti-Corruption Law, regulates penalties such as partial suspension of the activities or transference of the corporate control;¹⁴³ and
- c) Article 38(VI) of the Antitrust Law, *vis-a-vis* Article 1(III) of Anti-Corruption, regulates penalties such as full termination of

134. See Lei No. 12.529, de 30 de Novembro de 2011, art. 38, Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); see also Lei No. 12.846, de 1 de Agosto de 2013, art. 19, Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.)

135. See *id.*

136. See *id.*

137. See *id.*

138. See Lei No. 12.529, de 30 de Novembro de 2011, art. 38, Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 19, Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.).

139. Lei No. 12.529, de 30 de Novembro de 2011, art. 38(II), (IV)(b), Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.)

140. Lei No. 12.846, de 1 de Agosto de 2013, art. 19(IV), Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.).

141. Lei No. 8.666, de 21 de Junho de 1993, art. 88, Diário Oficial da União [D.O.U.] de 06.07.1994 (Braz.)

142. See Lei No. 12.529, de 30 de Novembro de 2011, art. 38(II), (IV)(b), Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 19(IV), Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.); see Lei No. 8.666, de 21 de Junho de 1993, art. 88 (II) – (III), Diário Oficial da União [D.O.U.] de 06.07.1994 (Braz.)

143. Lei No. 12.529, de 30 de Novembro de 2011, art. 38(V), Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); Lei No. 12.846, de 1 de Agosto de 2013, art. 19(II), Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.)

activities.¹⁴⁴

It is important to clarify that the Judiciary is not excluded from the enforcement of the Antitrust Law, but this can happen in the following situations:

- a) First, according to Article 47 of the Antitrust Law, injured parties can request a judicial order to cease respective anticompetitive practices, and to obtain compensation for the damages.¹⁴⁵ Although the possibility of judicial action before CADE's decision is explicitly provided by the law, it is not common because judges prefer to have access to the decision of the specialized administrative tribunal.
- b) Additionally, a party in an administrative proceeding before CADE can appeal to the Judiciary with respect to any CADE decision.¹⁴⁶

In both cases, it should be noted that an antitrust matter before the Judiciary is handled by a single generalist judge and not by any judge¹⁴⁷ of the State or Federal courts, the Superior Court of Justice (STJ), or the Supreme Court of Justice (STF), who decides constitutional matters only.

Besides Article 38 of the Antitrust Law and Article 19 of the Anti-Corruption Law, another important provision of the Anti-Corruption Law should be addressed. Article 20 establishes that the Public Prosecution Office, in addition to the power to request the enforcement of judicial penalties, can request the Judiciary to enforce the administrative penalties set forth in Article 6, provided that the administrative authorities fail to enforce them.¹⁴⁸

A judicial decision about such failure or omission does not seem to be simple. Specifically, the law seems to explicitly attribute to the Public Prosecution Office a huge power to oversee the administrative enforcement of the Anti-Corruption Law, and the Judiciary only has the discretion to decide whether there has been a failure or omission.¹⁴⁹ On the one hand, this power attributed to the Public Prosecution Office can increase the chances of effective enforcement of the Anti-Corruption Law. On the other hand, it may also open a door for excessive oversight and intrusion at the federal, state, and local governments levels to enforce the Law.

144. Lei No. 12.529, de 30 de Novembro de 2011, art. 38, Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.); Lei No. 12.846, de 1 de Agosto de 2013, art. 1, Diário Oficial da União [D.O.U.] de 02.08.2013 (Braz.)

145. Lei No. 12.529, de 30 de Novembro de 2011, art. 47, Diário Oficial da União [D.O.U.] de 01.12.2011 (Braz.).

146. *Id.* at art. 65.

147. Seminar on "the challenges of legalization of antitrust, regulation and international trade," CTR. FOR ECON. & SOC. RIGHTS STUDIES (Nov. 12-13), <http://www.migalhas.com.br/Eventos/18,MI229077,51045-Os+desafios+da+judicializacao+da+defesa+da+concorrenca+da+regulacao> (last visited Nov. 22, 2015).

148. Lei No. 12.846, de 1 de Agosto de 2013, art. 20, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

149. *Id.* at art. 15, 20.

D. PARAMETERS FOR SETTING THE ADMINISTRATIVE FINES WITHIN THE BROAD LEGAL RANGES

Finally, Article 45 of the Antitrust Law and Article 7 of the Anti-Corruption Law establish the parameters, within the broad ranges provided by the laws, of how authorities should set the actual fines.¹⁵⁰

While these Articles are quite similar, it is interesting how the Anti-Corruption Law, through the issuance of its regulating Presidential Decree 8,420 of 2015, went far beyond the fines imposed by the Antitrust regulation. In the Antitrust regulation, there is not any administrative regulation made by CADE regarding criteria to set the fines, and thus, parties have to rely on case law.¹⁵¹

As shown in the chart above, the legal criterion to set Antitrust and Anti-Corruption fines are quite simple and do not provide significant guidance for the authorities. The exception is the novelty brought by the Anti-Corruption Law: the possibility of reducing fines as a result of the existence of effective compliance programs.¹⁵²

VI. LENIENCY AGREEMENTS

After discussing the cooperation between the authorities involved in cartel enforcement, the core roles and features of the Public Prosecution Office, CADE, CGU, the administrative antitrust, anti-corruption, and criminal infringements and penalties related to the practice of bid rigging, this section focuses on what seems to be the biggest challenges to a harmonious enforcement of the three leniency regimes.

A. THE RISE AND GROWTH OF ANTITRUST LENIENCY AGREEMENTS

Antitrust leniency agreements were incorporated into the Brazilian legal system through a legislative amendment to the former Antitrust Law (Law 8,884 of 1994) in 2000.¹⁵³ The first agreement was signed in 2003.¹⁵⁴

Section two of this paper mentions that whistleblowing has been an important means of gathering the necessary evidence to support a request for a search and seizure warrant. Frequently, the evidence gathered through leniency agreements can also be grounds for the issuance of warrants—although there are some cases in which the leniency beneficiaries provide authorities with sufficient proof to the extent that the authority

150. See Lei No. 12.529, de 30 de Novembro de 2011, art. 45, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 7, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

151. See Decreto No. 8.420, de 18 de Março de 2015, art. 15, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.03.2015 (Braz.).

152. See Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

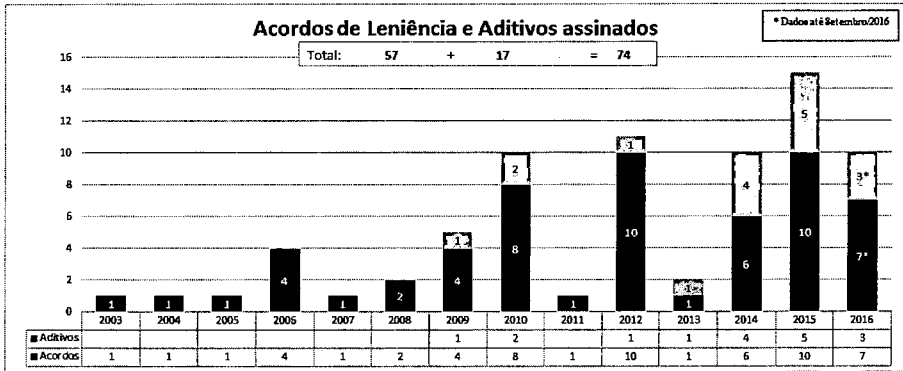
153. See Lei No. 12.846, de 1 de Agosto de 2013, art. 16(II), §2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.); see also, Portaria CGU No. 909, de 7 de Abril de 2015, DIÁRIO OFICIAL DA UNIÃO, publicado 13.7.2016 (Braz.).

154. See Calliari & Guimaraes, *supra* note 26, at 68-69.

no longer needs to conduct raids.¹⁵⁵

Notably, leniency has progressively gained importance as one of the main cartel deterrence tools.¹⁵⁶ The thirteen years since the first leniency agreement can be divided into three phases. The first phase was an initial slow learning curve from 2003 to 2006, but was extremely important in building the foundation for the “impressive growth of the leniency program from 2007 to 2010,” which was the second phase.¹⁵⁷ The third phase included the consolidation of the leniency program from 2011 to 2016, which incorporated the enactment of the new Antitrust Law and the maintenance of the leniency program as a core Antitrust policy.¹⁵⁸ This occurred even before this policy faced competition. CADE, by taking important measures, successfully enforced this new law.¹⁵⁹

Seven agreements were executed in the first phase, eighteen in the second, and forty-nine in the third, which included both the original leniency agreements (*acordos de leniência*) and their amendments¹⁶⁰ (*aditivos*), as shown in the chart below.¹⁶¹



It is important to note that the Brazilian leniency program has achieved significant international recognition, with several of the seventy-four agreements already being executed in relation to international cartels.¹⁶²

155. *See id.*
 156. *See id.* at 68-69.
 157. *See id.* at 69.
 158. *See Balanço 2015*, CADE (Jan. 2016), <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/balanco-2015.pdf>.
 159. Calliari & Guimaraes, *supra* note 26, at 68.
 160. An amendment to a previous leniency agreement is allowed by CADE when the applicant brings new information about the practice previously reported. CADE may agree with amending the original agreement if the “new information” (it may be an old information not previously disclosed) is relevant to make any correction to the course of the investigation, and the applicant presents a plausible justification for not having informed CADE about the new information at the time that the original leniency agreement was being negotiated.
 161. *Balanço 2015*, *supra* note 158.
 162. *See Calliari & Guimaraes*, *supra* note 26, at 68.

“Although the first leniency agreement was executed in 2003,” in January 2006 the first regulation on the matter was issued, SDE Ordinance Number 4 of January 5.¹⁶³ This development, built on “the difficulties faced in the first few years, [certainly] had a crucial role in improving the program and making it more attractive to potential applicants.”¹⁶⁴ “Based on the experience gained since then, as well as [through] the intensive exchanges” held with agencies from different jurisdictions, in March 2010, the Ministry of Justice (MJ) issued a new ordinance (Ordinance Number 456 of March 15) with a new leniency regulation that has “significant advances in terms of transparency and certainty.”¹⁶⁵

Other expected changes to the leniency program finally came into force with the approval of the new Antitrust Law.¹⁶⁶ A great change in the new law is the clarity and security on the effects of leniency.¹⁶⁷ It also clarifies the punishment of the individuals involved in cartel activities defined in the Economic Crimes Law (Lie No. 8,137 of 1990), the bid rigging violations in the Public Procurement Law (Lie No. 8,666 of 1993), and the criminal association offense in the Criminal Code (*Decreto-Lei* No. 2,848 of 1940).¹⁶⁸

More importantly, leniency is also becoming a core bid rigging deterrence tool.¹⁶⁹ It is important that CADE continues to diligently invest in fighting bid rigging not only as a means of strengthening cooperation with other governmental entities that have more experience in the field, such as CGU and TCU.¹⁷⁰ CADE should also advocate widely about the importance of the leniency program because it constitutes a low cost, but high benefit monitoring tool. Fortunately, such advocacy also includes a close exchange of information between the three main institutions enforcing their respective leniency regimes.

B. THE ADMINISTRATIVE ANTI-CORRUPTION LENIENCY AGREEMENT CREATED BY THE LAW 12,846 OF 2013

As mentioned above, Monebhurrun also addressed the antitrust heritage sought by the Anti-Corruption Law regarding the leniency agreements:

The influence of competition law in the drafting of the anti-corruption law is worthy and interesting in that it confirms the dialogue between the two fields. Indeed, the 2013 anti-corruption law enables public bodies to enter into leniency agreements with private entities responsible for anti-corruption acts provided for in the said statute. Like in competition law proceedings, the anti-corruption legal re-

163. *Id.* at 69.

164. *Id.*

165. *Id.*

166. *Id.* at 69-70.

167. *Id.* at 70.

168. *Id.*

169. *Id.* at 69.

170. *Id.* at 68.

gime enables private companies to collaborate with the public administration to help identify other companies involved in a given corruption case and to readily obtain information and documents proving the illicit act. The leniency agreements has to fulfill some conditions to be effective: the private entity must take the initiative of the collaboration and express an initial interest for such a procedure; the private entity must stop any involvement in the illicit act as soon as a leniency agreement is proposed; it must admit its participation in the illicit enterprise and accept a complete and permanent collaboration with the investigators, ready to participate in all proceedings at its own expense as long as they last. Abiding to the leniency agreement can reduce the fine due to be paid by the participant and enable him to continue benefitting from public subsidies. A legal tool – the leniency program –, originally pertaining to the competition law sphere, has thus been used as a model and its logic and spirit have been efficiently transported to the anti-corruption field where they are expected to be enforced for a double positive effect: combating corruption and protecting competition. It appears as an extension of competition law in another related law field and the logic here is a complementary and not a conflicting one.¹⁷¹

While CADE has executed seventy-four leniency agreements (fifty-seven original ones and seventeen amendments) from 2003 to October 2015, CGU has signed only one since the enactment of Law No. 12,846 of 2013.¹⁷²

CGU faces a unique opportunity, but at the same time, a threat to its capability to effectively enforce the new Anti-Corruption Law. The Law regulates the administration and assemblage of an internal CGU structure to enforce regulations during situations like the rise and development of Operation Car Wash.¹⁷³ The CGU is a task force led by the Public Prosecution Office and the Federal Police to dismantle the biggest Brazilian corruption scandal of all time.¹⁷⁴ The scandal was about a public procurement promoted by the state oil company Petrobras, in which the bidders were construction companies, and the accusations alleged the existence of bid rigging and bribery.¹⁷⁵ This case is significant due to its economic importance and the fact that it involves several important Brazilian politicians.¹⁷⁶ Inevitably, this leads to huge pressure for CGU, which is not a politically independent body because it includes the Public Prosecution Office and CADE task force led by the Public Prosecution

171. See Monebhurrin, *Fighting Corruption*, *supra* note 1, at 84.

172. See *Balanço 2015*, *supra* note 158.

173. See Lei No. 12.846, de 1 de Agosto de 2013, art. 8, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.); see also, Brian Nicholson, 'Brazil's Operation Car Wash', INT'L BAR ASS'N. (Apr. 8, 2015), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7960b146-65c4-4fc2-bb6a-c6fbb434cd16> (visited Dec. 13, 2015).

174. See Nicholson, *supra* note 2.

175. See *id.*

176. See *id.*

Office and the Federal Police.¹⁷⁷

Currently, CGU is investigating twenty-nine companies in the scope of Operation Car Wash, and six of these companies have declared their interest in executing a leniency agreement in Law No. 12,846 of 2013.¹⁷⁸

Notably, CADE took more than two years to execute its first leniency agreement after the enactment of the leniency program in 2000 through Law No. 10,149,¹⁷⁹ which incorporated Articles 35(B) and 35(C) into the Antitrust Law that was in force at the time, Law No. 8,884 of 1994.¹⁸⁰ Thus, it is always useful to remember that the main point of the comparison is to demonstrate how the Brazilian legal system can benefit from the exchange of experiences between CADE, CGU, and the Public Prosecution Office.

C. THE CRIMINAL LENIENCY AGREEMENTS

While CADE and CGU have been developing their experiences in executing leniency agreements under what can be called *single regulations* (antitrust under the consecutive Law No. 8,884 of 1994 and Law No. 12,529 of 2011; anti-corruption under the Law No. 12,846 of 2013), the criminal leniency agreements were incorporated into the Brazilian legal system long before then.¹⁸¹

Initially, confessions in the scope of criminal proceedings only constituted evidence against the party making the confession.¹⁸² But, this standard started to be replaced by one that permitted the admission of assertions by a party against himself as evidence.¹⁸³ That being said, assertions of the same party against others involved in criminal activity were also admitted.¹⁸⁴ At that time, benefits were not granted to the party reporting the violations because of the identification of other

177. See Lei No. 12.846, de 1 de Agosto de 2013, art. 8, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.). (There is not a public body totally immune from political pressure. The comment above refers to the fact that the structures of the Public Prosecution Office and CADE count on some important institutional guarantees against political interference).

178. "A empresa deve reparar integralmente o dano que causou", *frisa ministro da CGU*, CGU.GOV.BR (Oct. 19, 2015, 12:15), <http://www.cgu.gov.br/noticias/2015/10/a-empresa-deve-reparar-integralmente-o-dano-que-causou-frisa-ministro-da-cgu>.

179. Maria Beauchamp Salomi, *O Acordo De Leniência E Seus Reflexos Penais* (2012) (unpublished Master's dissertation, University of São Paulo) (on file with author).

180. See Lei No. 10.149, de 21 de Dezembro de 2000, art. 35, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 22.12.2000 (Braz.); see Lei No. 8.884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1990 (Braz.); see Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

181. E.g. Néfi Cordeiro, *Delação Premiada Na Legislação Brasileira [Rewarded Delation in the Brazilian Laws]*, 37 *REVISTA DA AJURISF* 273, 275 (2010).

182. See Irving Marc Shikasho Nagima, *Of Confession in Criminal Procedural Law*, *direitoNet* (Aug. 12, 2012), <https://translate.google.com/translate?hl=en&sl=pt&u=http://www.direitonet.com.br/artigos/exibir/7428/Da-confissao-no-direito-processual-penal&prev=search>.

183. See Cordeiro, *supra* note 181.

184. See *id.*

criminals.¹⁸⁵ Rather, only confessions about the acts practiced by the party were taken into account as a mitigating factor for the purpose of setting the criminal penalty.¹⁸⁶

Later, more specifically in the 1990s, different laws started regulating criminal leniency agreements similarly to the Criminal Organization Law (Law No. 12,850 of 2013), including the possibility of granting benefits to the leniency applicant as a consequence of identifying other criminals and producing evidence against them.¹⁸⁷

Discussing the early ages of the criminal leniency agreements in Brazil, the scope of this paper is limited to the comparison between the newest leniency regimes, the administrative Antitrust, Anti-Corruption, and Criminal Organization laws (Law No. 12,850 of 2013).

Taking into account only Operation Car Wash, seventy criminal leniency agreements have already been executed.¹⁸⁸ While these agreements concern investigations on the same kind of infringements investigated by CADE and CGU, the Public Prosecution Office and the Police Chief Investigators have the power to execute leniency agreements to a much broader range of criminal infringements rather than just antitrust and anti-corruption violations.¹⁸⁹ Thus, it is not a surprise if their numbers in general (agreements executed) are much more than the ones handled by CADE and CGU. But the fact that seventy agreements have been executed in the context of a single investigation (Car Wash) is indeed impressive.¹⁹⁰

The direct comparison between the legal provisions in the three regimes is once again very useful to identify their similarities and differences, and what can facilitate the understanding of the opportunities and challenges faced by enforcers and applicants, so that the regimes altogether offer adequate incentives for the parties involved. If this is achieved, the society will benefit from an increased level of deterrence when it comes to the practice of bid rigging.

185. *See id.*

186. *See id.*

187. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

188. *See Resultados da Operação Lava Jato [Results of Operation Lava Jato]*, MPF, <http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros1> (last visited Nov. 17, 2016).

189. *See Cartel Settlements*, INT'L COMPETITION NETWORK (Apr. 2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>

190. *See Resultados da Operação Lava Jato*, *supra* note 188.

Antitrust, Anti-Corruption, and Criminal Leniency Regimes [Table 2]

Law 12,529 of 2011 ¹⁹¹	Law 12,846 of 2013 ¹⁹²	Law 12,850 of 2013 ¹⁹³
<p>Article 86. CADE, by means of the General Superintendence, may enter into leniency agreements, and may terminate any punitive action of the public administration or reduce one (1) to two-thirds (2/3) of the applicable penalty, under the terms of this article, with individuals or legal entities that cause violations of the economic order, provided that they effectively cooperate with the investigations and administrative proceedings resulting from such cooperation, including.¹⁹⁴</p> <p>I – the identification of other persons involved in the violation; and</p>	<p>Article 16. The maximum authority of each agency or public entity may enter into leniency agreements with the legal entities held accountable under this Act that effectively cooperate with the investigations and the administrative proceeding, and such cooperation results in.²⁰⁸</p> <p>Section 10 The General Controller of the Federal Union (<i>Controladoria-Geral da União - CGU</i>) is the agency empowered to enter into leniency agreements in the Federal Executive Power sphere, as well as in the case of harmful acts against a foreign public administration.²⁰⁹</p> <p>Article 16 (. . .): I – the identification of others involved in the infraction, should that be the case; and</p>	<p>Article 4. Upon request of the parties, the judge can grant the pardon, or reduce the penalty of imprisonment in up to 2/3 (two-thirds), or replace it for one merely restricting other rights, if the applicant assists the authorities effectively and voluntarily in the scope of the investigation and of the criminal proceeding, provided that such assistance leads to one or more of the following results:²²²</p> <p>Section 2 Considering the relevance of the collaboration, the Public Prosecution Office, at any time, and the Police Chief Investigator, in the files of the police investigation with the opinion of the Public Prosecution Office, may request that the judge grants the pardon to the applicant, even if such benefit has not been negotiated in the initial proposal (. . .)²²³</p> <p>Article 4 (. . .): I – the identification of the other co-authors and participants of the criminal organization and of the criminal infringements undertaken by them;²²⁴</p>

191. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

192. Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

193. Lei No. 12.850, de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

194. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

195. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

196. *Id.* at art. 86 § 1.

197. *Id.*

198. Lei No. 12.529, de 30 de Novembro de 2011, art. 86(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

199. *Id.* at art. 86(IV).

<p>II – the obtaining of information and documents proving the reported or investigated violation.¹⁹⁵</p>	<p>II – the prompt gathering of information and documents proving the tort under investigation.²¹⁰</p>	<p>Section 16 There will not be a condemnatory decision issued exclusively on the basis of the depositions of the applicant²²⁵</p>
<p>Section 1 The agreement referred to in the <i>caput</i> of this article may only be executed if the following requirements are cumulatively fulfilled:¹⁹⁶</p>	<p>Section 1 The agreements mentioned in the <i>caput</i> can only be executed if cumulatively fulfilled the following requirements:²¹¹</p>	<p>Section 4 In the same hypotheses of the <i>caput</i>, the Public Prosecution Office may decline to accuse the applicant in the scope of a criminal proceeding, provided that the applicant:²²⁶</p>
<p>[identical provision has been in force upon the former Antitrust Law]</p>	<p>[no corresponding provision]</p>	<p>I – is not the leader of the criminal organization;²²⁷</p>
<p>I – the company is the first to be qualified in relation to the reported or investigated violation;¹⁹⁷</p>	<p>I – the legal entity shall be the first one to manifest its interest in cooperating with the investigation of the tort;²¹²</p>	<p>II – is the first to carry out effective assistance according to the terms of this article.²²⁸</p>
<p>II – the company completely ceases its involvement in the reported or investigated violation, as of the date the agreement is proposed;¹⁹⁸</p>	<p>II – the legal entity completely ceases its involvement in the investigated infraction from the date on which the agreement is proposed;²¹³</p>	<p>[no corresponding provision]</p>
<p>III – the General Superintendence does not have sufficient evidence to guarantee the conviction of the company or individual at the time the agreement is proposed; and</p>	<p>[no corresponding provision]</p>	<p>[no corresponding provision]</p>

200. *Id.* at art. 86(IV).

201. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

202. *Id.*

203. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

204. *Id.*

205. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

206. *Id.*

207. Lei No. 12.529, de 30 de Novembro de 2011, art. 87, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

208. Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

209. *Id.* at art. 16 § 10.

210. Lei No. 12.846, de 1 de Agosto de 2013, art. 16(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

211. *Id.* at art. 16 § 1.

<p>IV – the company confesses to having participated in the tort and fully and permanently cooperates with the investigations and the administrative proceeding, appearing, at its own expense, whenever required, at all procedural acts, until the conclusion thereof.¹⁹⁹</p>	<p>III – the legal entity admits its involvement in the tort and fully cooperates with the investigations and administrative proceeding, appearing, whenever requested, at its own expenses, in all procedural acts, until the conclusion thereof.²¹⁴</p>	<p>Section 12 Even if benefited from pardon or not accused in the scope of a criminal proceeding, the applicant may have to provide his deposition before the judge, upon request of the parties or by judicial order.²²⁹</p>
<p>Section 2 In relation to individuals they may enter into leniency agreements provided that requirements II, III, and IV of Section 1 hereof are complied with.²⁰⁰</p>	<p>[no corresponding provision]</p>	<p>Section 14 In his depositions, and in the presence of his lawyer, the applicant will decline the right to remain in silence and will be subject to the legal obligation of telling the truth.²³⁰</p>
<p>Section 3 The leniency agreement entered into with Cade, by means of the General Superintendence, shall set forth the conditions necessary to guarantee effective cooperation and a useful result from the proceeding.²⁰¹</p>	<p>Section 4 The leniency agreements shall set forth the required conditions to ensure the effectiveness of the cooperation and the useful outcome of the proceeding.²¹⁵</p>	<p>[as a general rule, criminal provisions concern only individuals]</p>
<p>Section 4 The Tribunal shall, upon the judgment of the administrative proceeding, once compliance with the agreements is verified:</p>	<p>[no corresponding provision]</p>	<p>Article 6. The leniency agreement will be written and shall include: (. . .)²³¹</p>
		<p>[The judge attests to the legality of the leniency agreement after its negotiation between the Chief of the Police (with opinion of the Public Prosecution Office) or the Public Prosecution Office and the applicant and his lawyer – Article 4, Section 7]</p>

212. *Id.* at art. 16.

213. Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

214. *Id.* at art. 16(III).

215. Lei No. 12.846, de 1 de Agosto de 2013, art. 16 § 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

216. *Id.* at art. 16 § 2.

217. Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

218. *Id.* at art. 17.

219. *Id.* at art. 17 § 6.

<p>I – terminate the punitive action of the public administration in favor of the transgressor, if the settlement proposal has been submitted to the General Superintendence without prior knowledge of the notified violation; or</p>	<p>[no corresponding provision]</p>	<p>[pardon – Article 4, caput]</p>
<p>II – in the other cases, reduce the applicable penalties from one (1) to two-thirds (2/3), observing what is set forth in Article 45 of this Law, also considering the classification of the penalty with the effective cooperation provided and the transgressor's good faith in the complying with the leniency agreement.²⁰²</p>	<p>Section 2 The execution of the leniency agreement shall exempt the legal entity from the sanctions set forth in Item II of Article 6 and in Section IV of Article 19 hereof and shall reduce by 2/3 (two-thirds) the value of the applicable penalty fine.²¹⁶</p>	<p>[reduction in the penalty of imprisonment in up to 2/3 (two thirds) – Article 4, caput]</p>
<p>Section 6 The effects of the leniency agreement shall be extended to companies of the same group, de facto or de jure, and to their directors, administrators, or employees involved in the violation, provided they enter into it jointly, respecting the imposed conditions.²⁰³</p>	<p>Section 5 The effects of the leniency agreement shall be extended to the legal entities of the same economic group, in fact and in law, subject to such legal entities also signing the agreement, becoming bound by the conditions set forth therein.²¹⁷</p>	<p>[only applies to individuals]</p>
<p>Section 7 The company or individual that does not obtain, during the investigation or administrative proceeding, qualification to enter into the agreement referred to in this article may, with the General Superintendence, enter into a leniency agreement related to another violation of which Cade does not have prior knowledge, until the case is submitted to trial.</p>	<p>Article 17. The public administration may also enter into leniency agreement with the legal entity responsible for the practice of torts described in Law 8,666 of 1993, with a view to exemption or mitigation of administrative sanctions set forth in Articles 86 and 88 thereof.²¹⁸</p>	<p>[No corresponding provision]</p>

220. *Id.* at art. 17 § 7.

221. *Id.* at art. 17 § 3.

222. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

223. *Id.* at art. 4 § 2.

224. *Id.* at art. 4(I).

Section 8 Under the terms of Section 7 of this article, the transgressor shall benefit from a reduction of one-third (1/3) of the penalty applicable to him in that case, without prejudice to obtaining the benefits mentioned in Item I of Section 4 of this article for a new reported violation.²⁰⁴

Section 9 The agreement proposal referred to in this article is considered confidential, except in the interest of the investigations and the administrative proceeding.²⁰⁵

Section 10 The rejection of the proposed leniency agreement, of which no disclosure shall be made, shall not be considered a confession as to the facts or recognition of the wrongfulness of the conduct under analysis.²⁰⁶

Article 87. For crimes against the economic order, as defined by Law 8,137 of 1990, and other crimes directly related to cartel conduct, such as defined by Law 8,666 of 1993, and the ones defined in article 288 of Decree-Law 2,848 of 1940 – Penal Code, the execution of a leniency agreement under this law requires the suspension of the statute

Section 6 Proposals regarding execution of leniency agreements shall only become public after the execution of such agreements, except in the interest of investigations and the administrative proceeding.²¹⁹

Section 7 Non-acceptance of a proposal regarding execution of a leniency agreement shall not be construed as recognition of the practice of the investigated tort.²²⁰

Section 3 A leniency agreement does not relieve the legal entity from the obligation to fully repair the damages caused.²²¹

Article 7.
Section 3 The leniency agreement is no longer confidential as soon as the judge decides to launch the criminal proceeding upon request of the Public Prosecution Office, still applying the provisions of Article 5.²³²

Section 10 If parties withdraw the proposal, the self-incriminatory evidence brought by the applicant will not be exclusively used against him.²³³

Article 4. (. . .) [*demanded results*]:
IV – full or partial recovery of the product or advantage sought through the criminal infringements practiced by the criminal organization.²³⁴

225. Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

226. *Id.* at art. 4 § 4.

227. *Id.* at art. 4(I).

228. *Id.* at art. 4(II).

229. Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 12., DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

230. *Id.* at art. 4 § 14.

231. Lei No. 12.850, de 2 de Agosto de 2013, art. 6(I)–(V). DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

232. Lei No. 12.850, de 2 de Agosto de 2013, art. 7 § 5. DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

233. *Id.* at art. 7 § 10.

<p>of limitations and prevents denunciation from being offered in relation to the leniency beneficiary.</p> <p>Sole paragraph. Once the leniency agreement has been complied with by the agent, the punishments for the crimes set forth in the <i>caput</i> of this article shall automatically cease.²⁰⁷</p>		
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Having related the administrative antitrust and anti-corruption with the criminal provisions, it is now useful to identify their similarities, and more importantly, to focus on the main challenges caused by inconsistencies amongst the provisions.

D. AUTHORITIES WITH POWER TO EXECUTE THE LENIENCY AGREEMENTS: CHINESE WALLS AND INDEPENDENCE

I. SG and CADE

Article 86; Article 16, Section 10; and Article 4, Section 2, respectively, of the Antitrust, Anti-Corruption, and Criminal Organization Laws grant the authorities the power of executing the leniency agreements.²³⁵

As already discussed, in antitrust cases, the investigative branch of CADE is the controlling authority.²³⁶ The President of CADE has always emphasized that the Tribunal (where CADE's President holds a seat) and the SG are separate independent bodies within CADE.²³⁷ The President of CADE's Tribunal and the SG are independently appointed to their terms by the President of the Republic, and both names have to be approved by the Senate.²³⁸

a. Chinese Wall and Independence

The separation of the investigative and the decision-making bodies is important, and can be likened to creating a Chinese Wall in the scope of the negotiation of leniency agreements. The leniency applicant must be sure that the information being exposed to the authorities during the ne-

234. *Id.* at art. 4.

235. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art 16 §10, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.); see Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.); Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.); see Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

236. Calliari & Guimaraes, *supra* note 26, at 68.

237. See *Our History*, CADE (Mar. 23, 2016), <http://en.cade.gov.br/topics/about-us/our-history>

238. See *Competition Law and Policy in Brazil*, OECD (2010), available at <https://www.oecd.org/daf/competition/45154362.pdf>.

gotiation process will not be in any way shared with the decision-makers (CADE's Commissioners) in case the applicant and the SG do not reach an agreement. The possibility that an agreement will not be reached is the underlying rationale of the other provisions pointed out in the chart above: Article 86, section 10; Article 16, section 7; and Article 4, section 10 of the Antitrust, Anti-Corruption, and Criminal Organization Laws, respectively. If the laws provided differently, they would not ensure a good incentive for the negotiation of the agreements because potential applicants would fear the possibility that the authorities would end up using evidence brought by the applicants without granting them any corresponding benefits.

2. CGU

According to Article 16 *caput* of the Anti-Corruption Law, the responsibility for the execution of leniency agreements is the maximum authority of each agency or public entity, and this concerns any entity belonging to the Legislative, Executive, or Judiciary branches at either federal, state, or local levels.²³⁹ Law Number 12,846 of 2013 has a national reach, as the law is applicable to the three levels of the Brazilian federation.²⁴⁰ Thus, at state and local levels, it would not be possible to draw a parallel between the three leniency regimes.

Notably, Article 16, section 10 of the Anti-Corruption Law establishes that, at the federal level, CGU is the only body with the power to execute administrative anti-corruption leniency agreements.²⁴¹ CGU is also the only body with the power to execute the agreements concerning practices that may have harmed a foreign public administration.²⁴²

Unlike the Antitrust Law, the Anti-Corruption Law does not differentiate investigative and decision-making bodies in the context of negotiations of leniency agreements.²⁴³ Provisions related to the investigation were only mentioned in the Regulating Presidential Decree 8,420 of 2015 and the CGU Ordinance Number 910, of April 7, 2015.²⁴⁴ The CGU Ordinance states that the CGU Executive-Secretary appoints a commis-

239. Lei No. 12.846, de 1 de Agosto de 2013, art. 16 § 10, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

240. See Lei No. 12.846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

241. Lei No.12.846, de 1 de Agosto de 2013, art. 16 § 10, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

242. *Id.*

243. See *id.* at art. 16.

244. Regarding the federal administrative regulation of Law No. 12.846 of 2013, see Decreto No. 8.420, de 18 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.03.2015 (Braz.); see also Instrução Normativa No. 2, de 7 de Abril de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 8.04.2015 (Braz.) (discussing national registries of uncompliant and suspended companies (CEIS) and penalized companies (CNEP)); see also Instrução Normativa No. 1, de 7 de Abril de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.4.2015 (Braz.) (discussing concepts of gross sales and taxes).

sion with the aim to carry out the investigations.²⁴⁵

a. Chinese Wall and Independence

Notably, such institutional difference, at least theoretically, is not related to the demand of the existence of a Chinese Wall between investigative and decision making bodies. Similar to the Antitrust Law, Article 16, section 7 of the Anti-Corruption Law demands that if the parties (authority and applicant) fail to reach an agreement, evidence brought by the applicant to the authority in the negotiation process cannot be used by the latter to make a regular case (without leniency) against the former applicant.²⁴⁶

3. *Public Prosecution Office and Police*

In the criminal leniency regime (Article 4, section 2), the applicant can negotiate an agreement with the Public Prosecution Office or with a Police Chief Investigator, depending on the case.²⁴⁷

The Police conduct criminal investigations and send their reports to a Public Prosecution Office, which can then recommend that a judge should open a criminal proceeding that may result in a conviction. Public Prosecution Offices, can also conduct their own investigations.

When a leniency agreement is negotiated between an applicant and a Police Chief Investigator, a Public Prosecution Office will always have the obligation to issue an opinion about the agreement.

a. Chinese Wall and Independence

The demand of a Chinese Wall between the Police Chief Investigator or Public Prosecution Office and a judge, as already mentioned, is stated in Article 4, section 10 of the Criminal Organization Law,²⁴⁸ and has the same rationale as the corresponding provisions in the Antitrust and Anti-Corruption laws. It should be noted that the Police and the Public Prosecution Offices have different structures than CADE and CGU.

The Police and the Public Prosecution Offices are giant structures responsible for investigating and prosecuting any criminal offense throughout the whole country, and not just antitrust and anti-corruption crimes.²⁴⁹ Police Chief Investigators and Public Prosecutors are not appointed or approved by Executive and Legislative political authorities. Yet, the power to execute criminal leniency agreements is not only in the

245. See Instrução Normativa No. 2, de 7 de Abril de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 8.04.2015 (Braz.) (discussing national registries of uncompliant and suspended companies (CEIS) and penalized companies (CNEP)).

246. See Lei No. 12.846, de 1 de Agosto de 2013, art. 16 § 7, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

247. See Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

248. See *id.* at art. 4 § 10.

249. See Lei No. 12.850, de 2 de Agosto de 2013, art. 4, Diário Oficial da União [D.O.U.] de 05.08.2013 (Braz.).

hands of the General Director of the Federal Police or of the Attorney General of the Public Prosecution Office (their maximum authorities), but entry-level Police Chief Investigators or Public Prosecutors can also work on negotiations and execute leniency agreements.²⁵⁰

This means that the level of decentralization of the decision power is much greater in the criminal leniency agreements than in the antitrust and anti-corruption contexts. As already mentioned in section 3, this feature implies both advantages and disadvantages. Although the level of independence from the political power is much better, when it comes to antitrust and anti-corruption criminal offenses, it is not easy to coordinate all the work that needs to be developed by the Police and the Public Prosecution Office with the work carried out by specialized bodies like CADE and CGU. This is especially true in respect to the coordination of antitrust, anti-corruption, and criminal leniency agreements.

E. APPLICANTS AND BENEFITS OF THE LENIENCY AGREEMENTS

Article 86 of the Antitrust Law regulates both legal entities and individuals; meanwhile, Article 16 of the Anti-Corruption Law only regulates legal entities.²⁵¹ The provisions that follow address what the laws state with respect to liability, infringements, and penalties.

Similarly, Article 86, section 6 and Article 16, section 5 establish that antitrust and anti-corruption leniency agreements executed by a legal entity also benefit all other entities belonging to the same group, provided that the other entities also sign the agreement.²⁵² This concept reflects an economic rationale intended to punish or benefit the ones responsible for the practices, and not a formalistic standard designed to focus on a particular legal entity. But while the Antitrust Law extends the benefits to directors, administrators and employees of a legal entity, the Anti-Corruption Law does not have the same benefits because its intent is to impose liability only on legal entities.

As a general rule, criminal law only applies to individuals, so naturally they are the only ones entitled to execute leniency agreements with the criminal authorities.

Article 86 of the Antitrust Law and Article 4 of the Criminal Organization Law set the benefits that may be reached by the leniency applicants.²⁵³ Article 86 states benefits ranging from full immunity (full leniency) to a fine reduction between one-third and two-thirds of the fine

250. *See id.*

251. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

252. *See* Lei No. 12.529, de 30 de Novembro de 2011, art. 86 § 6, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); *see* Lei No. 12.846, de 1 de Agosto de 2013, art. 16, §5 DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

253. *See* Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); *see* Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

that could be applied in the absence of the agreement (partial leniency).²⁵⁴ A full leniency may be granted when the applicant reports to the authority the existence of a totally new violation, which was not being previously investigated in any way. The partial leniency applies when the applicant aggregates his report with an existing investigation being carried out by the authority.

Similarly, in the scope of the Criminal Organization Law, the agreement can grant to the applicant either a pardon, a reduction in the penalty of imprisonment of up to two thirds, or the substitution of the penalty of imprisonment for one merely restricting other rights of the applicant.²⁵⁵

The benefits granted by the anti-corruption leniency agreement are stated in Article 16, section 2.²⁵⁶ Unlike the antitrust and criminal leniency agreements, there is no possibility of full immunity.²⁵⁷ The fine reduction can reach two-thirds of the applicable fine, regardless of the previous existence of an investigation being carried out by the authority on the reported practice.²⁵⁸

Another benefit of leniency agreements is the legal provisions dealing with confidentiality. Article 86, section 9 of the Antitrust Law grants confidentiality to the leniency applicant for a period of time longer than both the one assured by Article 16, Section 6 of the Anti-Corruption Law and Article 7, Section 3 of the Criminal Organization Law.²⁵⁹ The Antitrust Law, if considered jointly with Article 207 of CADE's Internal Regulation, allows the identity of the applicant to remain confidential until the CADE Tribunal reaches a final decision on the case. The Anti-Corruption and the Criminal Organization laws, respectively, assure confidentiality until (i) the execution of the agreement, and (ii) the launching of a criminal proceeding upon request of the Public Prosecution Office.²⁶⁰

Notably, there is a disclaimer in both the Antitrust and Anti-Corruption laws stating that confidentiality is assured "except in the interest of the investigations and the administrative proceeding."²⁶¹ In the two anti-trust leniency agreements executed in connection with Operation Car Wash, not only has the identity of the applicants been put in the public

254. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

255. See Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

256. Lei No. 12.846, de 1 de Agosto de 2013, art. 16 § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

257. See *id.*

258. See *id.*

259. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86 § 9, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.850, de 2 de Agosto de 2013, art. 7 § 3, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

260. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86 § 9, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see also Lei No. 12.850, de 2 de Agosto de 2013, art. 7 § 3, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

261. See *id.*

domain, but also the content of public versions of the history of conduct.²⁶²

F. LENIENCY AGREEMENT REQUIREMENTS

Articles 86(I), 16(I), and 4(I) of the Antitrust, Anti-Corruption, and Criminal Organization laws, respectively, demand that the leniency applicants identify other persons or entities involved in the practices.²⁶³

Article 86(II) of the Antitrust Law and Article 16(II) of the Anti-Corruption Law require that the applicants provide to the authorities information and documents capable of proving the infringement.²⁶⁴ Similarly, Article 4, section 16 of the Criminal Organization Law states that a condemnatory decision cannot be solely based on the assertions made in the deposition of the applicant.²⁶⁵

Notably, Article 4, section 4 of the Criminal Organization Law states that the leniency applicant cannot be the leader of the criminal organization.²⁶⁶ There is no equivalent provision in the Antitrust and Anti-Corruption laws. But the former Antitrust Law that was enforced until May 2012 contained the same provision.²⁶⁷ During the legislative process to reform the Antitrust Law, there were debates on whether the provision should be incorporated in the law. An argument in favor of the provision's revocation was that, in practice, it is very difficult to identify the actual leader of a cartel organization, and this is the argument that prevailed. Thus, Law Number 12,529 of 2011 removed the prohibition that a potential cartel leader cannot apply for a leniency agreement.²⁶⁸ Some practitioners understand that this is one of the main changes made in the leniency program by the new law.²⁶⁹

262. See CADE Signs Leniency Agreement in the Scope of "Operation Car Wash", CADE (Mar. 20, 2015, 10:00 AM), <http://en.cade.gov.br/press-releases/cade-signs-leniency-agreement-in-the-scope-of-201coperation-car-wash201d>; see also CADE Signs Leniency Agreement in Cartel in Public Bidding of Angra 3 Nuclear Power Plant, CADE (July 31, 2015, 9:00 AM), <http://en.cade.gov.br/press-releases/cade-signs-leniency-agreement-in-cartel-in-public-bidding-of-angra-3-nuclear-power-plant>.

263. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86(I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 16(I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.); see Lei No. 12.850, de 2 de Agosto de 2013, art. 4(I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

264. See Lei No. 12.529, de 30 de Novembro de 2011, art. 86(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); see Lei No. 12.846, de 1 de Agosto de 2013, art. 16(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

265. Lei No. 12.850, de 2 de Agosto de 2013, art. 4 § 6, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

266. See *id.* art. 4 § 4.

267. Lei No. 8.884, de 11 de Junho de 1994, art. 35 § 1, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1990 (Braz.).

268. See Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

269. Marcelo Calliari, Daniel Andreoli & Marcio Bueno, *Chapter XII: Leniency Agreements in Brazil*, in OVERVIEW OF COMPETITION LAW IN BRAZIL 315, 317 (Cristianne Zarzur, Krisztian Katona & Mariana Villela eds., 2015), available at <http://>

Article 86, section 1(II) of the Antitrust Law and Article 16, section 1(II) of the Anti-Corruption Law explicitly demand that the applicant must completely cease his participation in the reported violation.²⁷⁰

Article 86, section 1(III) of the Antitrust Law explicitly requires that the SG cannot have sufficient evidence to guarantee a conviction in the event that it decides to execute a leniency agreement.²⁷¹ This means that leniency should not be understood as an instrument to reduce a possible burden on the offenders, but rather as a tool designed to create an environment of instability among the violators, creating an incentive in the sense that the offenders will benefit by reporting the violation. In other words, the SG goal should be to obtain enough evidence to convict the other parties involved in the infringement.

Article 86, section 1(IV) of the Antitrust Law; Article 16, section 1(III) of the Anti-Corruption Law; and Articles 4, 12, and 14 of the Criminal Organization Law have similar provisions that require the applicant to continuously and effectively cooperate with the authorities until the end of the proceedings.²⁷²

Article 86, section 3 of the Antitrust Law; Article 16, section 4 of the Anti-Corruption Law; and Article 6 of the Criminal Organization Law establish that the leniency agreements have to be made in writing and contain detailed provisions about the cooperation and its results.²⁷³

1. *The “First in” Requirement*

Article 86, section 1(I) of the Antitrust Law and Article 16, section 1(I) of the Anti-Corruption Law require the applicant to be the first one to report the violation (*first in* requirement).²⁷⁴ This should mean that only one leniency filing is available. In antitrust cases, only one leniency filing is available and it can be either full or partial, while in anti-corruption cases there could be only one leniency undertaking of the type available and although full immunity does not exist, the fine reduction can reach up to two-thirds.²⁷⁵

Article 4, section 4 (II) of the Criminal Organization Law states that the Public Prosecution Office can only decline to criminally prosecute the leniency applicant if the applicant was the first one to apply for

www.levysalomao.com.br/files/publicacao/anexo/20150701170804_artigo---anti-cartel-enforcement-in-brazil---status-quo-and-trends---amp-e-mta.pdf.

270. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.); Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

271. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

272. *See supra* Table 2.

273. *See id.*

274. Lei No. 12.529, de 30 de Novembro de 2011, art. 86, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

275. *Id.*

leniency.²⁷⁶

Notably, the benefits available to the applicant in the criminal leniency are either a pardon, a reduction in the penalty of imprisonment of up to two-thirds, or a substitution of the penalty of imprisonment for mere restrictions on other rights of the applicant.²⁷⁷ The best benefit available is the pardon, which means the Public Prosecution Office declines to prosecute the applicant and the applicant is not punished in any way.

Thus, Article 4, section 4(II) is the greatest benefit provided by the Criminal Organization Law (the pardon), and is only available for the first leniency applicant. Other applicants can also reach an agreement, but they will not get full immunity, regardless of how useful the collaboration proves to be.

a. The Anti-Corruption Law First in Issue

Having clarified that multiple leniencies are available in the criminal sphere, even though only the pardons offer absolute immunity, this paper will now address subtle differences between the regulation of the Antitrust and Anti-Corruption leniencies. It was stated above that in the antitrust case *there is only one* leniency undertaking, while in the anti-corruption case *there could be only one*. The reason for this difference is not shown in the provisions of Article 86, section 1(I) and Article 16, section 1(I) (regarding *first in*). Rather, it is the subtle addition of Article 16(I) of the Anti-Corruption Law (“the identification of others involved in the infraction”) in relation to Article 86(I) of the Antitrust Law (“the identification of other [persons] involved in the violation”) that highlights the difference.²⁷⁸

Such addition should only mean that while the Antitrust leniency only applies to cartel cases, the Anti-Corruption leniency applies to any practice prohibited in Article 5 of the Law Number 12,846 of 2013.²⁷⁹ This Article prohibits the practice of bid-rigging that, like any other cartel practice, can only be carried out when a group of bidders agree to implement the illegal practice. Thus, leniency in such cases undoubtedly has the aim of creating instability among the cartel members, so that they have the incentive to report the violation to the authorities.²⁸⁰

On the other hand, Article 5 of the Anti-Corruption Law also prohibits other practices that, unlike with cartels, can be performed by a single offender.²⁸¹ Thus, if this single offender engages in executing a leniency agreement, it would not be obliged to identify others involved in the prac-

276. Lei No. 12.850, de 2 de Agosto de 2013, art. 4, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.).

277. *Id.*

278. Lei No. 12.529, de 30 de Novembro de 2011, art. 86 (I), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

279. Lei No. 12.846, de 1 de Agosto de 2013, art. 5, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

280. *Id.*

281. *Id.*

tice (Article 16(I)), for the very reason that it is the only offender.²⁸² This is the explanation for the expression relating to Article 16(I): if there is only one offender, there is no need to identify others involved in the practice.²⁸³ Therefore, it creates a difference between the (i) anti-corruption infringement of bid-rigging (multiple offenders) and (ii) anti-corruption infringement carried out by a single offender. In both cases, Article 16, section 1(I) (*first in* requirement) should apply because in (i) the underlying policy reason for leniency in cartel cases is to create instability, promote a race among the cartelists, and make the *first in* facilitate the prosecution of the other offenders, or, in (ii) the policy reason is to save resources by closing the investigation as soon as possible while charging a partial fine from the single offender,²⁸⁴ meaning the applicant will always be the *first in*.

But in the course of the process of regulating the Law Number 12,846 of 2013 (in the context of Operation Car Wash, as already seen), an idea came up that disregards the rationale explained above: the execution of more than one leniency agreement in a case where there are multiple offenders (the case of cartels, more specifically, bid rigging concerning the Anti-Corruption Law) is possible. Thus, the Presidential Decree 8,420 of 2015 codified in Article 30(I) states that “a legal entity wishing to enter into a leniency agreement shall be the first to express an interest in cooperating for the determination of a specific harmful act, when this circumstance is relevant.”²⁸⁵ This wording opens the door for the execution of two or more leniency agreements in the same bid-rigging case.

Notably, this scenario is consistent with the information available about the CGU investigation regarding the scope of Operation Car Wash (section 6.2 of this paper). Currently, there are twenty-nine companies under investigation, and six of these companies have declared their interest in executing a leniency agreement.²⁸⁶

2. Requirements with Respect to Individual Applicants

Article 86, section 2 of the Antitrust Law states that the requirements for the execution of a leniency agreement are the same for legal entities and individuals (Article 86, section 1(II), (III) and (IV)), with the exception of the *first in* under Article 86, section 1(I).²⁸⁷ This means that,

282. *Id.*

283. *Id.* at art. 16(I).

284. See Lei No. 12.846, de 1 de Agosto de 2013, art. 16, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.). It should be noted that in this case the nature of the anti-corruption leniency agreement becomes essentially the same as the settlement agreement.

285. See Decreto No. 8.420, de 18 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.03.2015 (Braz.).

286. “A empresa deve reparar integralmente o dano que causou”, frisa ministro da CGU, CGU.GOV.BR (Oct. 19, 2015, 12:15), <http://www.cgu.gov.br/noticias/2015/10/a-empresa-deve-reparar-integralmente-o-dano-que-causou-frisa-ministro-da-cgu>.

287. Lei No. 12.529, de 30 de Novembro de 2011, art. 86 § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

according to the strict provisions of the law, the individual applicant does not have to be the first one to apply for leniency; a second leniency (a second individual applicant) is also admitted.²⁸⁸ This is because the law only admits two kinds of leniency: full and partial. Full leniency occurs when the authority did not know about the violation, and the partial leniency occurs when the authority was already conducting an investigation on a same practice. When conducting an investigation in a particular case, if the SG needs more evidence to convict the offenders, the SG could execute only two leniencies with individual applicants: a full leniency followed by a partial one. In case there is a third individual willing to collaborate with the investigations, the next option available would be the execution of a settlement agreement, according to Article 85 of the Law Number 12,529 of 2011 and Articles 179–196 of CADE’s Internal Regulation.

Settlement agreements are also available for legal entities in cases where there is a second applicant and other entities are still willing to collaborate when a leniency agreement is no longer available (the first applicant has already executed his full or partial leniency).

The Anti-Corruption Law does not have any provision on the *first in* requirement concerning individuals because it is not intended to prosecute individuals, but only legal entities. The Criminal Organization Law is only applicable to individuals. Thus, all its provisions should be understood in this context.

G. LENIENCY AGREEMENTS AND THE ROLE OF DECISION-MAKING AUTHORITIES

While CADE’s SG is the body responsible for negotiating and executing leniency agreements, the Antitrust Law sets a limited role for a tribunal. Under Article 86, section 4, at the end of the administrative proceeding, the tribunal should examine whether the applicant has duly carried out the agreement.²⁸⁹ In that case, if there is no contradiction to the tribunal’s decision at the time, the Commissioners will (i) declare the extinction of the administrative proceeding in relation to the applicant when a full leniency has been executed (section 4(I)), or (ii) reduce the applicable fine between one-third and two-thirds when a partial leniency has been executed (section 4(II)).²⁹⁰

The role of the Judiciary in enforcing criminal leniency agreements is similar to the one played by CADE’s Tribunal in respect to the Antitrust agreements, but there is a significant difference in terms of timing. While CADE’s Tribunal attests the applicant’s compliance at the moment of its final decision on the case, a judge has to homologate a criminal leniency right after its execution between the applicant and the public prosecutor or police chief investigator.

288. *Id.*

289. *Id.* at art. 86 § 4.

290. *Id.*

The anti-corruption leniency differs in a significant way from the anti-trust and criminal cases. In the antitrust and criminal cases, the decision-making authorities, the ones that have to attest compliance with or homologate the agreement, are (i) politically independent from any other authority (CADE's Commissioners have temporary terms and judges hold permanent appointments) and, more specifically, (ii) do not have a hierarchical relationship with the authorities responsible for the negotiation and execution of the leniency agreements.²⁹¹

Such features are not available in anti-corruption cases. Although Law Number 12,846 of 2013 did not bring any provision in this sense, its regulation of Presidential Decree 8,420 of 2015 (by means of its Article 39) and mainly the CGU Ordinance Number 910, of April 7, 2015 (Articles 28, 29(I), 30(VI), and 37) created a system in which the applicant presents its proposal to the CGU Executive-Secretary.²⁹² Under this system, the CGU Executive-Secretary appoints a negotiating commission comprised of at least two public servants who hold permanent appointments.²⁹³ The Commission then returns a final report to the CGU Executive-Secretary, and then the final decision on the leniency agreement is made by the CGU Minister.²⁹⁴

As discussed in section 3 of this paper, the CGU Minister is directly subordinate to the President of the Republic, who does not hold a term, but rather, can be freely removed from Office by the President at any time. This political relationship also exists inside CGU: the Minister as its head, and the Executive-Secretary, who is directly subordinate to the Minister, is the second highest CGU authority. The Executive Secretary appoints and supervises (Article 29(II) of the Ordinance) the Commission.²⁹⁵ It is obvious that this institutional structure is inferior to the ones concerning the antitrust and criminal leniency agreements.

291. *See supra* Table 2.

292. Portaria No. 910, de 7 de Abril de 2015, art. 28-30, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.04.2015 (Braz.).

293. *See id.*

294. *See id.*

295. Portaria No. 910, de 7 de Abril de 2015, art. 29(II), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.04.2015 (Braz.). Going further on the regulation, Article 29 IV establishes that the CGU Executive-Secretary "shall adopt the necessary measures for compliance with the TCU norms," *See* TCU Normative Instruction n. 74 (Feb. 11, 2015) <https://contas.tcu.gov.br/juris/Web/Juris/ConsultarTextual2/Normativos.faces?anoDocumento=2015&numeroDocumento=74&situacao=todasSituacoes>. The sole paragraph of Article 29, by its turn, establishes that the CGU Executive-Secretary can request that a public servant or employee of the body or entity harmed by the corrupt practice is appointed to be part of the Commission negotiating the leniency agreement. That could be the case, for instance, of Petrobras taking a seat in the Commission appointed to negotiate a leniency agreement with a construction company in the scope of Operation Car Wash. There is not a similar provision in CADE's Internal Regulation concerning the antitrust leniency agreements.

H. LENIENCY PLUS AND BENEFITS RELATED TO REPORTING PRACTICES ALSO PROHIBITED BY THE PUBLIC PROCUREMENT LAW

Article 86, section 7 and 8 of the Antitrust Law regulates the leniency plus. Leniency plus is available when an applicant does not succeed in executing an agreement related to a given illegal practice, but does succeed in reporting another illegal practice unknown to the authority. In this case, the benefits sought by the applicant are: (i) a one-third reduction in the fine due for the commitment of the first practice (unsuccessful leniency application), and (ii) full immunity concerning the second practice (successful leniency application). CADE has executed the first case of leniency plus in the context of Operation Car Wash.²⁹⁶

In contrast, the Anti-Corruption Law does not establish a leniency plus and can not do it in the same way because it does not grant full immunity for any applicant. But it is important to note that by means of its Article 17, it is also possible to execute anti-corruption leniency agreements related to practices forbidden by the Public Procurement Law (Law Number 8,666 of 1993).²⁹⁷ Benefits granted by such leniency can be (i) mitigation of the penalties set by Articles 8688 of the Law Number 8,666, or (ii) full immunity concerning the same penalties—something the Anti-Corruption Law does not grant even for its own penalties. This is especially important because Article 87 (III) and (IV) of the Public Procurement Law establish the penalties on the temporary suspension of the right to participate in bids and prohibits contracting with the government for a period not longer than two years, in addition to declaring one noncompliant for participating in bids or contracting with the government, as already discussed in section 5 of this paper.

VII. CRIMINAL IMMUNITY FOR THE INDIVIDUALS APPLYING FOR ANTITRUST LENIENCY AND THE LACK OF CRIMINAL PROTECTION IN THE ANTI-CORRUPTION LAW

When it comes to Antitrust and Anti-Corruption penalties, it is normal to immediately think about fines. Due to the prohibition of participating in public bids, fines are usually the main concern for companies involved in the illegal practices. In addition, it should be considered that companies are the main users of the antitrust leniency program because they should have, and often do have, the appropriate structure and resources to implement compliance programs with the aim of detecting possible breaches of the law.

296. See CADE Signs Leniency Agreement in the Scope of "Operation Car Wash", *supra* note 217.

297. Lei No. 12.846, de 1 de Agosto de 2013, art. 17, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 02.08.2013 (Braz.).

On the other hand, individuals can also be convicted by Antitrust practices and may execute leniency agreements, jointly with (most common) or separately from the companies for which they work or used to work. When executing such agreements, individuals confess their participation in the practices and produce evidence against themselves, so their criminal immunity, granted by Article 87 of the Antitrust Law, can be understood as even more important than their immunity against fines.

Consequently, the problem is the possibility of criminal immunity not being granted under the Anti-Corruption Law context. This is one of the biggest disincentives for the execution of anti-corruption leniency agreements. The Anti-Corruption Law does not set penalties on individuals because the law was intended to deter corrupt practices undertaken by companies, but there is no doubt that when a company negotiates a leniency agreement, it is providing authorities evidence of corrupt acts performed by individuals. Thus, in case an agreement is reached, evidence corroborating at least one individual can support a criminal prosecution. It should be understood that this is one of the main reasons no anti-corruption leniency agreement has been executed since the law has been in force.

The main point of contention between the Antitrust and the Anti-Corruption Laws is the lack of criminal immunity for individuals by an anti-corruption leniency agreement. This essentially reduces the incentives for simultaneous²⁹⁸ or consecutive executions of antitrust, anti-corruption, and criminal leniency agreements. Importantly, there is a notable difference between Article 87 of the Antitrust; Article 16, section 3 of the Anti-Corruption; and Article 4 of the Criminal Organization Law.

Article 87 of the Antitrust Law states that leniency may assure criminal immunity for cartel practices defined by the Economic Crimes Law (Law Number 8,137 of 1990), and other cartel related practices, such as the ones defined by the Public Procurement Law (Law Number 8,666 of 1993) and the Criminal Code (*Decreto-Lei* 2,848 of 1940).²⁹⁹ This should be understood as meaning that the execution of a leniency agreement with CADE should (i) not only criminally immunize the applicant against the penalties established by the Economic Crimes Law, the Public Procurement Law, and the Criminal Code, but also (ii) criminally immunize

298. Practitioners have been questioning the antitrust, anti-corruption and criminal authorities about the possibility of a single leniency application before such authorities, so that their clients could be able to rapidly and certainly gather antitrust, anti-corruption and criminal leniency benefits, while the authorities could also rapidly and certainly strengthen their cases against the other defendants. The authorities admit having engaged in a dialogue for such purpose, but until now such possibility is not real (IBRAC, 2015a). This means that lawyers have to set their particular defense strategies on a case by case basis, that is, in a given case it might be better to go first to the antitrust, or the anti-corruption, or even to the criminal authorities, depending on which authority supposedly is conducting the more advanced investigation or can offer the more important benefits to the applicants (for instance: fine immunity, criminal immunity, etc.).

299. Lei No. 12.529, de 30 de Novembro de 2011, art. 87, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.12.2011 (Braz.).

the applicant against any other criminal infringement related to the cartel practice reported in such leniency agreement.³⁰⁰

But, according to Martinez and Araujo, “[a]lthough the law generally refers to ‘*crimes directly related to the cartel activity, such as the ones listed in Law 8,666/93 and Article 288 of Brazil’s Civil Code*’, some prosecutors have already stated that a leniency letter signed with CADE may only protect leniency recipients from criminal conviction regarding the offenses explicitly mentioned by the law.”³⁰¹ It should be noted that leniency criminal immunity is only possible because the Public Prosecution Office executes the agreements jointly with CADE, as prosecutors are the only authorities with the power to request judges to open criminal proceedings.³⁰²

As already seen, the Anti-Corruption Law does not grant the possibility of criminal immunity. Article 16, section 3 (Anti-Corruption) explicitly states that the anti-corruption leniency does not eliminate the obligation of the applicant to fully repair the damages caused by the practice. The Antitrust Law does not include such a provision, but even so it is certain that leniency does not offer benefits related to the reparation of damages. Thus, antitrust civil liability remains even in the presence of a leniency agreement.

Article 4(IV) of the Criminal Organization Law incorporates a provision related to Article 16, section 3 of the Anti-Corruption Law: one of the alternative results that has to be sought by the authorities through leniency applicants’ cooperation is the full or partial recovery of the prod-

300. *See id.* The rationale behind the “such as” provision is to ensure the greatest criminal protection to the applicant, and thus to provide a powerful incentive for the execution of an antitrust leniency agreement.

301. Ana Paula Martinez & Mariana Tavares de Araujo, *Chapter IX: Anti-Cartel Enforcement in Brazil: Status Quo & Trends*, in *OVERVIEW OF COMPETITION LAW IN BRAZIL* 257, 272 (Cristianne Zarzur, Krisztian Katona & Mariana Villela eds., 2015), available at http://www.levysalomao.com.br/files/publicacao/anexo/20150701170804_artigo—anti-cartel-enforcement-in-brazil—status-quo-and-trends—amp-e-mta.pdf.

302. *See id.*; A bill proposing changes to the anti-corruption law (PLS 105 of 2015) has been presented by the Senator who reported the bill that ended becoming the Law 12,846 of 2013. After being analyzed and modified by the Senate, PLS 105 of 2015 was sent to the analysis of the House of Representatives on November 16, 2015. This bill is still under debate in the House of Representatives, where it is identified as PL 3636 of 2015. *See Projectos de Lei e Outra Proposições: PL 3636/2015, CÂMARA DOS DEPUTADOS*, <http://www.camara.gov.br/proposicoesWeb/fichade-tramitacao?idProposicao=2055350> (last visited on Nov. 20, 2016). It is not possible to state that this bill will be approved and change the current anti-corruption law. Nevertheless, the following changes being proposed are worth to mention: *i*) the creation of an anti-corruption full leniency, and; *ii*) criminal immunity for individuals executing anti-corruption leniency agreements, provided that the Public Prosecution Office agrees with this benefit on a case by case basis. A final relevant note: in December 2015, the Presidency of the Republic issued the polemical Provisional Measure 703 of 2015, with the aim of accelerating several changes seen as important by the Federal Administration, but in May 2016 such Provisional Measure was rejected by the Congress, since its mandatory confirmation by the Legislative Branch did not take place.

uct or advantage obtained by means of the practices carried out by the criminal organization.

VIII. CONCLUSION

The analysis provided in this paper is in no way exhaustive. Rather, the conclusion only aims to reinforce the importance of having the antitrust, anti-corruption, and criminal authorities working together to reach the best practices for optimum enforcement of the three leniency regimes. Notably, such authorities are already working together. The practitioners and their significant expertise represent a great contribution to this process. Congress can also perform a decisive role in solving this complex issue by requiring a balance between the incentives for the execution of the three kinds of leniency agreements. This can result in a possible construction of best practices and effective enforcement of the laws.

Finally, in spite of all the technicalities involved in this issue, it is important that civil society finds a way to keep tight surveillance over this matter. Although several obstacles still prevent the effective enforcement of the three leniency regimes, there remains great opportunity to improve the legal tools in the context of a political crisis.

Case Note

