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I. INTRODUCTION

For the past two decades, leniency programs have been growingly adopted by antitrust authorities around the globe as one of the main tools in cartel prosecution. As seen in other jurisdictions, the Brazilian authorities have been striving to build a well-respected leniency program. The last couple of years suggest that the Brazilian competition authority—the Administrative Council for Economic Defense ("CADE")—in order to grant the benefits of the leniency program has been gradually more demanding regarding the need to collect strong evidence of the existence of a collusion, as well as proof of (potential) effects in the country.

Based on recent experience, the standard of what is considered acceptable to secure an agreement seems to be higher than it was in the past, when leniency agreements were accepted in any global cartel case under the presumption that it *could* have generated effects in Brazil. This new trend— only accepting leniency applications for cartels that are effectively proven to have effects in the Brazilian market—is clearly welcome from a policy standpoint.

II. HOW THE LENIENCY PROGRAM FUNCTIONS

The leniency program was launched in Brazil in the year 2000 and, albeit subject to minor changes, remains in force under the recent Antitrust Law, Law no. 12,529/2011 and respective regulations. CADE may execute leniency agreements in cartel cases and is represented for that purpose by its Superintendence General ("SG"), CADE's investigation division.[2]

A company that applies for leniency in Brazil may receive full administrative immunity or a fine reduction (varying from one- to two-thirds of the imposed penalty), plus full criminal immunity for individuals (in Brazil, only individuals are criminally prosecuted for cartel offenses). Full immunity is available if, at the time the leniency application is presented to CADE, the authority had no previous knowledge of the reported conduct and had not started any investigations. If there is an already ongoing investigation (which may be started by the authority spontaneously or pursuant to a third-party complaint), but at the time of the leniency application CADE did not have sufficient evidence to guarantee the conviction of the defendants, partial immunity can be available and can result in a reduction of the fines, as indicated above.

In both cases, individuals will not be criminally indicted and, once the obligations undertaken as a result of the leniency agreement have been fulfilled, any risk of penalties

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[2] Recently, Law no. 12,846/2013 brought the possibility of leniency agreement executions regarding corruption practices. The possibility is still at an early stage since it lacks important aspects of the antitrust leniency program, such as a well-defined authority responsible for receiving the agreement and confidentiality rules for the documents and information submitted.

(administrative and criminal) is excluded. It is important to highlight, however, that under no circumstance does the leniency agreement provide immunity for damage claims from third parties that may have been victims of the cartel.

In order to have a leniency agreement proposal accepted by CADE, some legal requirements must be met: the beneficiary must: (i) be the first to come forward and report the conduct; (ii) immediately cease its involvement in the practice; (iii) confess to its participation in the conduct; and (iv) cooperate with the whole investigation. Likewise, the SG must *not* have sufficient evidence to start the investigation without the beneficiary's proposal and, as a result of the cooperation, the SG must be able to identify other companies and individuals involved and receive sufficient evidence to convict them.

III. QUALIFYING EFFECTS IN THE NATIONAL MARKET

The first leniency agreement was executed in 2003, in a case involving a domestic bid-rigging case in Southern Brazil. Since then, the program has evolved considerably. In the beginning, perhaps due to a mindset of consolidating Brazil's place in the "leniency world map," several investigations were initiated based on leniency agreements that did not contain clear evidence of having an impact in Brazil. This may have been a result of the authorities' eagerness to build a reputation of active enforcement—but it had the downside of starting cases that were not very strong (at least with respect to the effects in Brazil). In some of these early cases, the Brazilian authorities adopted a very broad interpretation of what qualified as *effects* in the national market and even stated that they were opening the cases to *assess* the existence of effects.

As an example of CADE's experience, it is worth mentioning the *Vitamins' Case*[3]—one of the first and most paradigmatic precedents in Brazil regarding an international cartel investigation. Even though the case did not start with a leniency agreement, it is a good example of how CADE dealt with the effects discussion in the early days of the prosecution of international cartels in Brazil.

In the *Vitamins' Case*, the investigations were started based on public information made available by foreign antitrust authorities about their own investigations suggesting that the investigated cartel was worldwide in scope. Even though general references to Latin America were found in the documents made available by foreign authorities, the case records did not contain either specific references to the Brazilian market or to agreements or contacts among cartel members targeted at Brazil.

Regardless, the authorities assumed that the practice at hand would have effectively affected the Brazilian market by taking into account that: (i) there was virtually no local production of vitamins in Brazil; (ii) the investigated companies were responsible for a significant part of vitamins market in Brazil by means of imports by local subsidiaries; (iii) the companies had been convicted in other jurisdictions for engaging in a cartel with international scope; and (iv) according to the depositions taken from the local employees, the prices in Brazil were established by the companies' headquarters. No Brazilian employees were implicated, as CADE understood that they were not aware or involved in the practice, which was entirely conducted abroad.

[3] Administrative Proceeding 08012.004599/1999-18, closed on April 11, 2007.

According to recent statements from the CADE, however, this approach has changed over the past couple of years.[4] In fact, there has been no public information about cartel investigations being initiated in the last years on the basis of mere press releases issued abroad, as had happened with the following investigations: *Graphite Electrodes case,*[5] *LCD case,*[6] *DRAM case,*[7] and *Vitamins Case*. Likewise, following the same trend of requiring more nexus with Brazil prior to assuming an impact in Brazil by global cartels, the authority has been requesting more information from the applicants, including stronger and direct evidence of the cartel relating to Brazil. This shift in demand seems to be a natural transition and proves that the Brazilian antitrust authority is at a more developed stage.

The documents and evidence that must be presented by the applicant of a leniency agreement gain even more importance regarding international cartels. In order to sign a leniency agreement, CADE usually now requests direct evidence that the cartel produced effects in the Brazilian market. It does not mean, however, that the authority is trying to create difficulties for the execution of leniency agreements. On the contrary: The fact that CADE is demanding more information and evidence from leniency applicants suggests that the authority is being more careful when deciding whether start an investigation, requesting concrete evidence rather than circumstantial elements.

By being more cautious when accepting leniency applications, the authority is making sure they have stronger cases. Even though it may seem more difficult for companies to execute leniency agreements with CADE in the beginning, this means that leniency agreements will have a greater chance of being successful in the future.

In light of this change in approach, it seems clear that the Brazilian leniency program designed by the Brazilian Law is on the right track. The leniency program model should become even more successful to the extent the authority is cautious when executing the agreements.

In international cartel cases, CADE has also been claiming to drop leniencies when there is not a clear nexus between the conduct and effects in the Brazilian market. CADE seems to be more cautious when using information from other jurisdictions in international cartel cases, such as leniency agreements executed in other countries and decisions from other authorities. Even though it was previously possible to see leniency agreements being executed based merely on other countries' decisions, plea agreements, and other documents related to foreign jurisdictions, documents like these are no longer expected to be considered sufficient to start an investigation in Brazil. When considering a leniency application in Brazil, a company will need to provide evidence other than foreign leniency agreements and foreign decisions in order to demonstrate that the practice affected the Brazilian market.

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[4] Carlos J. E. Ragazzo, CADE's General Superintendent stated in April 2013 that "We are not going to have 200 cartel investigations anymore. The ones that we do [pursue] are going to have a very high probability of conviction and they will be very, very sturdy cases" (*See* A. Rego, *CADE redefining focus of cartel enforcement*, MLex, published on 8 Oct 13 | 20:11 GMT). The same article mentions that a spokesperson for CADE suggested that "[in respect to] international cases, CADE has sought to be more rigorous—that is, we have looked for cases in which the proof of the effect or the potential effect [of the cartel] is clear."

[5] Administrative Proceeding # 08012.009264/2002-71, initiated in May, 2009.

[6] Administrative Proceeding # 08012.011980/2008-12, initiated in December, 2009.

[7] Administrative Proceeding # 08012.005255/2010-11, initiated in June/2010.

An important example of how CADE has been dealing with evidence gathered though leniency agreements is the *Air Cargo* case,[8] the first decided case involving an international cartel in Brazil which investigation was started pursuant to a leniency agreement. The case started with the execution of a leniency agreement, and, in the context of cooperation, the beneficiary provided CADE not with only copies of leniency agreements and decisions from other jurisdictions, but also with alleged evidence that the cartel would have actually affected the Brazilian market. Even though the agreement was signed not very long after leniency agreements became acceptable in Brazil, it can be seen as a good example of CADE's recent approach when taking into account evidence for a cartel investigation.

The more cautious CADE gets with the evidence it collects before initiating an investigation (through a leniency agreement or not), the more the defendants seem to be willing to execute agreements to cooperate with the authorities and pay fines before the administrative proceeding is finally finished. In most cases, executing agreements with the defendants can be advantageous to the authority, since: (i) the agreement reduces the chances of having its decision contested in court; and (ii) the authority gathers more evidence of the conduct—as a result of mandatory collaboration—which may strengthen its final decision. That was seen in the above-mentioned *Air Cargo* case, which started with the execution of a leniency agreement and was followed by a defendant executing an agreement with CADE in which he confessed the practice and agreed to pay a considerate amount of money to CADE.

IV. CONCLUSION

Therefore, it is possible to say that CADE has been adopting a more cautious approach when reviewing applications for leniency agreements. In the early days of the leniency program in Brazil, CADE seemed to be more focused on developing a leniency program and on gaining recognition for the program rather than in executing agreements based on strong evidence of effects of the conduct in Brazil. By behaving that way, companies might have come to the perception that CADE was adopting an overly broad approach of effects of a supposedly illegal practice in Brazil and may have been influenced to go forward to disclose an illegal practice, even with not-so-clear effects in Brazil. By now giving signs in the opposite direction—i.e. having indicated a more demanding and cautious approach as regards evidence and standard of proof, CADE seems to be building a more solid and mature leniency program. The shift is especially important when international cartels are at stake.

These developments should not represent any additional burden on companies willing to blow the whistle, nor should they be construed as an indication that the program itself will be less successful. Conversely, the authorities seem to seek legal certainty and wish to drive their energy and sources to cartel cases that prove to have a negative effect in the Brazilian market. The more cautious and precise the authority is during the negotiation of a leniency agreement, the stronger the cases that are brought. In sum, the welcome change in CADE's behavior means that the authority is finally achieving a more mature stage in its policy development.

[8] Administrative Proceeding 08012.011027/2006-02, closed on August 28th, 2013.