ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2014

7th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm AS
Affleck Greene McMurtry LLP
Allende & Brea
Attorneys at law Borenius Ltd
Brigard & Urrutia Abogados
Chrysses Demetriades & Co. LLC
Crowell & Moring
Debarliev, Dameski & Kelesoska
DLA Piper Nederland N.V.
Drew & Napier LLC
ELIG, Attorneys-at-Law
Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co
Georgiev, Todorov & Co.
Hausfeld LLP
Khaitan & Co, Advocates
King & Wood Mallesons
King & Wood Mallesons SJ Berwin
KLEYR GRASSO ASSOCIES
Koutalidis Law Firm
Legance – Avvocati Associati
Magalhães e Dias – Advocacia
Minter Ellison Rudd Watts
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Nagashima Ohno & Tsunematsu
Odvetniki Šelih & partnerji, o.p., d.o.o.
Pachiu & Associates
Preslmayr Rechtsanwälte OG
Schellenberg Wittmer Ltd
Skadden, Arps, Slate, Meagher & Flom LLP
Sysouev, Bondar, Khrapoutski
Szecskay Attorneys at Law
Webber Wentzel
Yoon & Yang LLC

CDR Commercial Dispute Resolution
GLG Global Legal Group

The International Comparative Legal Guide to: Cartels & Leniency 2014

GLG
Global Legal Group

Contributing Editors
Simon Holmes and Philipp Girardet, King & Wood Mallesons SJ Berwin

Account Managers
Beth Bassett, Maksim Dolgusev, Robert Hopgood, Dror Levy, Maria Lopez, Mahmoud Nedjai, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager
Toni Wyatt

Sub Editor
Nicholas Catlin

Editors
Beatriz Arroyo
Gemma Bridge

Senior Editor
Suzie Kidd

Global Head of Sales
Simon Lemos

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
December 2013

ISBN 978-1-908070-81-4
ISSN 1756-1027

Strategic Partners

General Chapters:

1 **Settlement of Cartel Cases: The EU Experience** – Simon Holmes & Philipp Girardet, King & Wood Mallesons SJ Berwin 1

2 **The European Commission's Proposed Directive On Private Antitrust Damages: A Balanced Approach** – Ingrid Vandenborre & Thorsten C. Goetz, Skadden, Arps, Slate, Meagher & Flom LLP 8

Country Question and Answer Chapters:

3	**Argentina**	Allende & Brea: Julián Peña	12
4	**Australia**	King & Wood Mallesons: Sharon Henrick & Wayne Leach	18
5	**Austria**	Preslmayr Rechtsanwälte OG: Dieter Hauck & Esther Sowka-Hold	25
6	**Belarus**	Sysouev, Bondar, Khrapoutski: Alexander Bondar & Elena Lokshina	33
7	**Belgium**	Crowell & Moring: Thomas De Meese	39
8	**Brazil**	Magalhães e Dias – Advocacia: Carlos Francisco de Magalhães & Gabriel Nogueira Dias	45
9	**Bulgaria**	Georgiev, Todorov & Co.: Ilian Beslemeshki	51
10	**Canada**	Affleck Greene McMurtry LLP: W. Michael G. Osborne & Michael Binetti	57
11	**China**	King & Wood Mallesons: Susan Ning & Hazel Yin	64
12	**Colombia**	Brigard & Urrutia Abogados: Alejandro García de Brigard	73
13	**Cyprus**	Chrysses Demetriades & Co. LLC: Alexandros Economou & Michaela Hadjihambi	78
14	**European Union**	King & Wood Mallesons SJ Berwin: Elaine Gibson-Bolton & Simon Holmes	85
15	**Finland**	Attorneys at law Borenius Ltd: Ilkka Aalto-Setälä & Eeva-Riitta Mäkelä	96
16	**France**	King & Wood Mallesons SJ Berwin: Natasha Tardif & Delphine Cohen-Hadjian	103
17	**Germany**	King & Wood Mallesons SJ Berwin: Tilman Siebert & Dr. Kathrin Lübbe-Späth	111
18	**Greece**	Koutalidis Law Firm: Stamatis Drakakakis	119
19	**Hungary**	Szecskay Attorneys at Law: Dr. Anikó Keller & Dr. Miklós Boronkay	125
20	**India**	Khaitan & Co, Advocates: Avaantika Kakkar & Sagardeep Rathi	134
21	**Israel**	Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co: Eytan Epstein & Mazor Matzkevich	140
22	**Italy**	Legance – Avvocati Associati: Vito Auricchio & Stefania Amoruso	147
23	**Japan**	Nagashima Ohno & Tsunematsu: Eriko Watanabe	156
24	**Korea**	Yoon & Yang LLC: Paul S. Rhee & Sinsung (Sean) Yun	163
25	**Luxembourg**	KLEYR GRASSO ASSOCIES: Gabriel Bleser	171
26	**Macedonia**	Debarliev, Dameski & Kelesoska: Dragan Dameski & Jasmina Ilieva Jovanovik	176
27	**Netherlands**	DLA Piper Nederland N.V.: Martijn van Wanroij & Firda Pasaribu	182
28	**New Zealand**	Minter Ellison Rudd Watts: Oliver Meech & Nicko Waymouth	189
29	**Norway**	Advokatfirmaet Wiersholm AS: Anders Ryssdal & Catherine Sandvig	196
30	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, R.L.: Inês Gouveia & Luís do Nascimento Ferreira	202
31	**Romania**	Pachiu & Associates: Remus Ene & Adelina Somoiag	212
32	**Singapore**	Drew & Napier LLC: Lim Chong Kin & Ng Ee-Kia	218
33	**Slovenia**	Odvetniki Šelih & partnerji, o.p., d.o.o.: Nataša Pipan Nahtigal & Tjaša Lahovnik	224
34	**South Africa**	Webber Wentzel: Nkonzo Hlatshwayo & Shawn van der Meulen	231
35	**Spain**	King & Wood Mallesons SJ Berwin: Ramón García-Gallardo & Manuel Bermúdez Caballero	237
36	**Switzerland**	Schellenberg Wittmer Ltd: David Mamane & Dr. Jürg Borer	250
37	**Turkey**	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır	257
38	**United Kingdom**	King & Wood Mallesons SJ Berwin: Simon Holmes & Philipp Girardet	265
39	**USA**	Hausfeld LLP: Brent W. Landau & Brian A. Ratner	277

Brazil

Carlos Francisco de Magalhães

Magalhães e Dias – Advocacia

Gabriel Nogueira Dias

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The term 'cartel' is not strictly defined by the Brazilian Antitrust Law (Law 12.529/11), which has been in force since May 29, 2012. However, the same law establishes, as a competitive violation, the collusion between competitors to determine prices and conditions or divide markets and clients regarding the commerce of products or services (*see question 1.2 below*). In Brazil, cartels can be prosecuted criminally and administratively. They can also imply civil law suits. Concerning criminal procedures, cartels are punishable with two to five years' imprisonment and fines; in administrative procedures, only fines can be imposed, both to natural and legal persons. In case of a private suit, indemnification depends on the existence of damage.

1.2 What are the specific substantive provisions for the cartel prohibition?

Brazil's Antitrust Law (Law 12.529/11) establishes (and prohibits) the following practices (*article* 36(3)) as illegal agreements (cartels):

(i) setting or offering in any way – in collusion with competitors – prices and conditions for the sale of specific products or services;

(ii) obtaining or otherwise procuring the adoption of uniform or concerted business practices among competitors; and

(iii) apportioning markets for finished or semi-finished products or services, or for supplying sources of raw materials or intermediary products.

Cartels are also considered a crime and are prosecuted in the Judicial Courts. The prohibition in this case is provided by Law 8.137/90, *article* 4, I. and II.

Cartels can also be considered as a civil violation – allowing for the recovery of damages – the same as any other anticompetitive conduct established under the Brazilian Antitrust Law.

1.3 Who enforces the cartel prohibition?

Currently, in the administrative field, the cartel prohibition is enforced by the Administrative Council of Economic Defence (*Conselho Administrativo de Defesa Econômica – CADE*), which is formed by a General Superintendence, a Department of Economic Studies, and an Administrative Tribunal.

In the criminal field, the cartel prohibition is enforced by the State and by the Federal Prosecutions Offices.

Criminal and administrative authorities act jointly in many cartel investigations, sharing information and evidences.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

According to the Brazilian Antitrust Law, the General Superintendence is in charge of the investigation, and may conduct preliminary investigations *ex officio* or upon reasonable request in writing of interested parties. After the conclusion of preliminary investigations (administrative investigation preparatory procedure), within thirty days, the General Superintendent orders the inception of the corresponding administrative proceeding or its dismissal, subject to appeal to the General Superintendent himself (*articles* 66(3) and 66(4), Law 12.529/11).

Within up to ten (10) business days as of the closing date of the administrative investigation, the General Superintendent shall decide to initiate or dismiss the administrative proceeding (*article* 67, Law 12.529/11).

The Administrative Tribunal may, upon demand of a Commissioner and according to a reasoned decision, call up the administrative investigation or administrative investigation preparatory procedure dismissed by the General Superintendence (*article* 67(1), Law 12.529/11).

Once the administrative investigation has been called up, the Reporting Commissioner shall have thirty (30) business days to confirm the dismissal decision of the General Superintendence, or transform the administrative investigation in an administrative proceeding (*article* 67(2), Law 12.529/11).

Defendants shall be summoned to file a defence and specifies the evidence to be produced within thirty days (*article* 70, Law 12.529/11). Upon conclusion of discovery, defendants will be summoned to present their final arguments within fifteen business days, after which the case shall be submitted to trial (*articles* 76 and 77, Law 12.529/11).

The CADE's decision shall be published within five (5) business days in the Federal Official Gazette. Upon failure to comply with the decision, in full or in part, such fact shall be informed to the President of the Administrative Tribunal, who shall determine that the Attorney General's Office of CADE arranges for its legal enforcement before Judicial Courts (*articles* 79 and 81, Law 12.529/11). The CADE has no deadline to adjudge the case, although Brazilian procedural rules establish a limitation period according to which after three years without any relevant diligence related to the investigation, the CADE is prevented

from rendering judgment (*article* 1(1), Law 9.873/99).

No special criminal prosecution is provided by law, but, according to general Criminal Procedure rules, the main steps are: (i) inception of a criminal investigation; (ii) indictment by the Public Prosecutor; (iii) inception of the legal procedure; and (iv) conviction or acquittal of the individuals involved in such illegal practice. The investigation under criminal field is carried-out as any other, for other types of crimes.

1.5 Are there any sector-specific offences or exemptions?

There are no formal sector-specific offences or exemptions in Brazil.

1.6 Is cartel conduct outside Brazil covered by the prohibition?

Yes, but only if it affects the Brazilian market (*article* 2, Law 12.529/11).

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes*	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority, i.e. the judiciary system.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The investigatory powers always depend on the specific terms of the warrant that authorises such investigation.

2.3 Are there general surveillance powers (e.g. bugging)?

Both antitrust authorities and the State or Federal Prosecution Offices may record telephone conversations or telecommunications, but only under previous judicial authorisation.

2.4 Are there any other significant powers of investigation?

According to Law 12.529/11, the General Superintendence has a very wide range of investigatory powers, including the right to:

- Request information, documents, and data from respondents and third parties.
- Carry out inspections at the companies' premises.
- Request judicial authorisation to: record telephone conversations or telecommunications, and seize objects, documents and electronic files from respondents' offices and plants (*article* 13, VI, d, Law 12.529/11).

The investigatory powers concerning criminal procedures are, similar to those above-mentioned, only carried out by the judiciary branch.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business or residential premises are carried out by the General Superintendence officials and the Police. Those searches shall be limited to the terms of the Search and Seizure Warrant, issued by a judge of the judiciary branch.

2.6 Is in-house legal advice protected by the rules of privilege?

No. In-house counsel does not have any privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The most important limitation is the mandatory authorisation from the judiciary branch to allow the Police to record telephone conversations or telecommunications and seize objects, documents and electronic files from respondents' offices and plants. Otherwise, antitrust authorities are free to hear witnesses, or request documents or any information.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes. Obstruction or non-cooperation with the authorities regarding questions or the exhibition of documents is punishable with daily fines from BRL 5,000 (about US$ 2,463), which can be increased by up to twenty (20) times; from BRL 500 (about US$ 246.30) to BRL 15,000 (about US$ 7,389) for each absence; the prevention, obstruction or otherwise hindrance of the performance of inspection authorised by the Administrative Tribunal shall subject the inspected party to a fine of BRL 20,000 (about US$ 9,852) to BRL 400,000 (about US$ 197,044); and the deceitfulness or falsity of information, documents or statements made by any person to CADE shall be punishable with a fine from BRL 5,000 (about US$ 2,463) to BRL 5,000,000 (about US$ 2,463,054). Fines vary according to the economic situation of the offender. The CADE has already imposed fines on companies that did not cooperate with administrative procedures, and it has increased the fines fiercely over the past few years.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to the Brazilian Antitrust Law, the sanction is an administrative fine from 0.1% to 20% of the gross domestic revenue – including taxes – in the last financial year, for the business affected by the practice (*article* 37, Law 12.529/11). The fine must not be less than the advantage obtained with the underlying violation, if assessable. In the event of default, the administrative decision is judicially enforceable.

For any other third parties (whether individuals or public and private legal entities and their associates, including independent contractors with or without legal identity that do not engage in business activities), administrative fines vary from BRL 50,000 (about US$ 24,630) to BRL 2,000,000,000 (about US$ 985,221,674) (if it is not feasible to use a revenue fine). In the event of default, the administrative decision is judicially enforceable.

Moreover, the CADE can impose the following penalties:

- An order to publish a summary of the decision in a newspaper.
- A prohibition to participate in public bids.
- A restriction on public entities' funding.
- Divestment orders, such as orders to sell assets and dissolve the undertaking.

The continuity of prohibited practices is punishable with daily fines from BRL 5,000 (about US$ 2,463), that can be increased 50 times.

3.2 What are the sanctions for individuals?

For each manager directly or indirectly liable for a company violation, the sanction is an additional personal administrative fine that varies from 1% to 20% of the corporate fine. In order to impose fines to managers, it is necessary to prove fault or deceit.

If it is not possible to use the gross sales criteria to punish companies and, indirectly, individuals, the fine will vary from BRL 50,000 (about US$ 24,630) to BRL 2,000,000,000 (about US$ 985,221,674) (*article* 37, II, and III, Law 12.529/11).

Individuals who participate in cartels are also punishable by a specific criminal procedure with two to five years' imprisonment and fines (*article* 4, Law 8.137/90).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The financial capacity of the companies is considered by authorities when a fine is applied. This is because fines are a percentage imposed over the last year's gross revenue of the company (with taxes), in the field of the business activity in which the violation occurred. There is no specific provision establishing the possibility of reducing a fine on the basis of financial hardship or on inability to pay grounds.

3.4 What are the applicable limitation periods?

If an investigation is carried out with regard to illegal conducts, there is no term for the authorities to conclude it. As mentioned above, however, Brazilian rules establish a prescriptive term that lapses after three years without any relevant diligence related to the investigation, and, after that term, the CADE cannot render any judgment.

According to recent CADE case law and a decision from the Superior Tribunal of Justice, the limitation period for the imposition of sanctions for cartel conducts when no procedure has been initiated to investigate the illegal practice is considered as being five years, according to Law 9,783/99. However, if the illegal conduct is simultaneously being investigated in the criminal field, then the limitation period is of twelve years (*article* 46(4), Law 12.529/11).

In the event of continuity of such illegal practices, which effects extend on the market for a long time, there is no term for the investigation and related imposition of sanctions.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The Brazilian Law is silent about this subject.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Labour case law in Brazil recognises the possibility of reimbursement of the employer when he is held liable for damage caused to a third party by a malicious act of an employee. However, in Brazilian antitrust case law, there are no relevant precedents yet in this sense.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

It is possible to obtain a leniency agreement from the antitrust authorities. A leniency agreement gives immunity regarding administrative fines and prevents the inception of a criminal investigation regarding all crimes directly related to the cartel (*articles* 86(4) and 87, Law 12.529/11).

The General Superintendence may enter into leniency agreements that extinguish the administrative action or reduce, from one to two-thirds, the applicable penalty against individuals and corporations that violate the economic order insofar as they effectively cooperate with the investigations and the administrative procedure, and that such cooperation results (*article* 86, Law 12.529/11) in the identification of other co-offenders and the gathering of information and documents that evidence the notified or investigated violation.

The Brazilian Antitrust Law establishes the following requirements for the execution of leniency agreements (*article* 86(1) Law 12.529/11): (i) the individual or corporation has to be the first to qualify with regard to the notified or investigated violation; (ii) the individual or corporation has to completely cease and desist being involved in the notified or investigated violation as from the date of proposal of the agreement; (iii) the General Superintendence does not have sufficient evidence to warrant a judgment against the individual or corporation upon the proposal of the agreement; and (iv) the individual or corporation acknowledges having participated in the violation, offers full and permanent cooperation with the investigations and the administrative procedure, and appears, at its own expenses, to all procedural acts until their end, whenever summoned.

The leniency agreement will determine the necessary conditions to warrant effective cooperation and useful results to the procedure. The execution of the leniency agreement is not subject to the CADE's approval; nonetheless, upon rendering its administrative decision and ascertaining the compliance with the terms of the

agreement, the Council shall: (i) determine the extinction of the administrative procedure on behalf of the offender in the event that the proposal was presented to the Superintendence before such agency had any previous knowledge of the notified violation; or (ii) in all other situations, reduce from one to two-thirds the applicable sanctions and grade such sanctions, taking into account the offender's effective cooperation and good faith in the compliance with the leniency agreement.

The effects of the leniency agreement are extendible to employees, or any other natural person related to the company, involved in the violation, as long as they execute the respective agreement jointly with the company.

In the criminal area, there is the so-called "rewarded cooperation", whereby one of the criminal offenders may have its sentence reduced from one to two-thirds whenever such voluntary cooperation leads to the clarification of facts and the authorship of unlawful practices (*article* 6, Law 9.034/95).

It is important to understand that such instruments are carried out and should be agreed in the two different spheres, administrative and criminal, to cover the persecution on the practices.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. The Regulation 01/2012 of CADE provides a "marker system". According to such system, a Leniency Agreement may be proposed orally or in writing. The proposal shall be made to the Superintendent General that will transcribe the Term in one single instrument, as witnessed by an official of the General Superintendence, which may contain, among other things, the Proponent's full qualification, a summary of the facts known by the Proponent regarding the investigation (including its involvement and co-authors' identities), and the date, place and time to present documents, information or oral explanations. If requested by the Proponent, the declaration may contain only the date and time, and the products or services affected by the cartel. The Term that guarantees the first position for the Proponent will indicate the term of 30 days to the Proponent who presents a full proposal of leniency to the General Superintendence.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The proposal may be presented orally or in writing. However, to conclude a leniency agreement, the execution of a formal and confidential document with the Superintendence is required to establish the necessary conditions under which the agreement will be made and guarantee the cooperation of the company with the investigation. The application must be in writing and be presented to the Superintendence in a sealed envelope. The rejection of the application by the Superintendence neither shall imply admission of guilt regarding the findings of fact, nor shall acknowledgment of the unlawful conduct under examination be disclosed.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The application is always confidential. A rare exception is made when it is important for the investigation that the leniency agreement is not kept confidential. There is no rule regarding the disclosure of leniency documents to private litigants.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

This decision is submitted with a subjective criterion. The Brazilian Antitrust Law provides that a leniency agreement is possible only if the lenient company can provide sufficient information to conclude the cartel investigation. When authorities already have enough proof of the illegal conduct, the leniency is not applicable.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, there is a 'leniency plus' policy. An applicant that does not qualify for leniency for the initial matter under investigation, but discloses a second cartel that authorities are not aware of, and meets the leniency programme requirements, will receive leniency for the second offence and a one-third reduction in fine with respect to the first offence.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. Individuals can report cartel conducts independently of their employer. Brazilian law also establishes a leniency programme for individuals. For requirements of the agreement, see question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no equivalent to the plea bargaining in Brazil. However the CADE may, in any administrative procedure and at any step of the investigation, enter into a cease and desist commitment with the investigated company regarding the investigated practices whenever, upon a judgment of convenience and opportunity, it decides such commitment addresses the interests protected by law (*article* 85, Law 12.529/11). The commitment constitutes solely a judgment debt. The proposal to sign a cease and desist agreement is only possible one time during the investigation (*article* 85(4), Law 12.529/11). This is a new rule that allegedly encourages positive negotiations of cease and desist commitments.

The administrative procedure is suspended while the commitment is being complied with and it is dismissed at the end of the established term if all the conditions were met. The suspension of the procedure regards solely the party that executed the commitment, and follows its regular course for all the other parties under investigation (*article* 85(9) and (10) Law 12.529/11).

The cease and desist agreement must be approved by the CADE to be effective. Since May 2007, parties under a cartel investigation are allowed to have the administrative process suspended by executing a cease and desist agreement and paying a monetary contribution to a Fund for Diffuse Right Defence.

According to Regulation 1/2012 of CADE, in those cases in which there is already a leniency agreement signed by the General Superintendence, the cease and desist agreement will necessarily

count with the assumption of fault by the applicant. In cases in which there is no previous leniency agreement signed, the assumption of fault will be decided by the Administrative Tribunal.

7 Appeal Process

7.1 What is the appeal process?

According to Law 12.529/11, the CADE's decisions are subject to full judicial review by the federal courts (article 5, Federal Constitution). There is no deadline to request judicial review, but appeals can only be filed by the main parties to the original decision.

In the criminal field, the appeal is similar to any other judicial procedures.

7.2 Does an appeal suspend a company's requirement to pay the fine?

An appeal may suspend, with an injunction, a company's requirement to pay the fine until a final decision is reached about the case. According to the Brazilian antitrust law, however, it is necessary to present a guarantee for the debt in order to avoid an execution suit by the CADE (*article* 98, Law 12.529/11).

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, according to the Civil Procedure Code, the judge, on its own initiative or when requested by the parties, can determine the cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

It is possible to claim indemnification related to damages resulting from any illegal conduct. Third parties can file indemnity claims for losses suffered as a result of a prohibited agreement or practice (article 47, Law 12.529/11). The Civil Procedure Code and the Civil Law Code provide specific procedures and rules for the inception of a lawsuit. The evidence of anti-competitive agreements or practices established in the administrative procedure can be used in private litigation. However, in every civil damages action, it is necessary to demonstrate the illicit fact (despite the previous administrative decision), harm and the chain of causation between the first two elements. There is no substantial Brazilian case law yet in such actions regarding antitrust infringements. However, we cannot affirm that there are differences regarding a follow on or a stand alone action.

8.2 Do your procedural rules allow for class action or representative claims?

Public class actions are possible and must be started under Consumer Protection and Criminal laws by the State or Federal Prosecution Offices.

8.3 What are the applicable limitation periods?

The limitation period is of five years prescribed in the Civil Code, if not suspended or tolled.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

There has been no case law about the issue until now.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no specific rules for civil damages follow-on claims in cartel cases. The cost rules applicable are the ones prescribed in the Civil Procedure Code.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

In Brazil, indemnity claims related to losses suffered as a result of cartel conduct are not usual. Notwithstanding, there has been noticeable interest in the subject and an increased number of indemnity claims in the latter years. However, the number of civil damages actions in Brazil is not substantial yet and there is no definitive decision about actions of this type.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Brazil has a new Antitrust Law in force since May 29, 2012. This law provided a significant restructuring of the Brazilian antitrust system. Regarding cartels and leniency, however, there were only a few relevant changes as indicated in this chapter. Even with the new antitrust framework we understand that the CADE will continue to focus on anti-competitive practices (especially cartels).

There are expectations regarding any imminent statutory changes or developments regarding cartels, leniency, and cartel damages claims.

9.2 Please mention any other issues of particular interest in Brazil not covered by the above.

In November 2007, Magalhães e Dias – Advocacia conducted the first cease and desist agreement in a cartel case (Lafarge case in the cement sector). We were also responsible for other sound cases that were settled with a cease and desist agreement with CADE, such as:

- Defence of one of the major Brazilian tobacco distributors' interests regarding exclusive merchandising and exclusive product exposition.
- Defence of the largest Brazilian beverages producers' interests on notorious "One Liter Returnable Bottles case", a strong discussion regarding intellectual property and antitrust on the beer market.
- Defence of one of the major Brazilian electrical energy companies' interests, to be the first able to win an injunction before the Judiciary determining CADE to sign a *cease and desist agreement*.

- Defence of one of the major Brazilian mobile networks' interests regarding Internet Service Providers and the Policy of Free Access to the internet.

Regarding Antitrust Issues, our law firm also led the following cartel cases:

- Defence of one of the major Brazilian meatpackers in a cartel investigation concerning meat sales. This was an important case involving the most important Brazilian Meatpackers.
- Defence of an important Brazilian company in a cartel investigation concerning orange juice sales. This is an important case involving one of Brazil's major orange juice producers.

To prevent antitrust issues, we also provide regular and full assistance to several companies. Another important area of our work is the creation of compliance programmes for our clients to prevent the practice of anticompetitive activities.

Carlos Francisco de Magalhães

Magalhães e Dias - Advocacia
Rua Armando Penteado, 304, Pacaembu
01242-010 - São Paulo
Brazil

Tel: *+55 11 3829 4411*
Fax: *+55 11 3825 8695*
Email: *cfm@magalhaesedias.com.br*
URL: *www.magalhaesedias.com.br*

Carlos Francisco de Magalhães is the founding partner of Magalhães e Dias - Advocacia. He is the idealiser and founder of IBRAC (Brazilian Institute of Competition, Consumption and International Trade Studies).
Considered an expert in competition law, Mr. Magalhães has been the author of several studies, articles and opinions on competition law published in specialised magazines and journals since 1970. He was also a member of several government committees which prepared amendments to the Brazil Competition Defense Act, particularly the bill that originated most of the current statutory provisions. He also drafted the provisions on infringements and submission of economic concentrations.
Languages: Portuguese, English and French.

Gabriel Nogueira Dias

Magalhães e Dias - Advocacia
Rua Armando Penteado, 304, Pacaembu
01242-010 - São Paulo
Brazil

Tel: *+55 11 3829 4411*
Fax: *+55 11 3825 8695*
Email: *gnd@magalhaesedias.com.br*
URL: *www.magalhaesedias.com.br*

Gabriel Nogueira Dias represents the new generation of Magalhães e Dias - Advocacia. He is a chairman at IBRAC (Brazilian Institute of Competition, Consumption and International Trade Studies) and a member of the ABA (American Bar Association).
Prior to joining Magalhães e Dias, Mr. Dias was the advisor to the Presidency of the Brazilian antitrust authority, being directly responsible for the development of new Resolutions and opinions during his tenure.
Mr. Dias is a frequent writer and speaker on antitrust, competition policy and theory of law topics, being the author of several articles and the awarded book "*Rechtspositivismus und Rechtstheorie - Das Verhältnis beider im Werke Hans Kelsens*", published by the German publisher Mohr Siebeck.
He has a LL.B. from the Law School of the University of São Paulo (Universidade de São Paulo - USP), Brazil, and LL.M. and LL.D. titles by the Law School of Bonn (Rechts Fakultät Rheinische Friedrich-Wilhelms-Universität Bonn), Germany.
Languages: Portuguese, English, German, Italian and Spanish.

MAGALHÃES E DIAS ADVOCACIA

MAGALHÃES E DIAS - ADVOCACIA is the largest and oldest law firm specialised in Economic Law in Brazil. Founded in 1980 as Carlos Francisco de Magalhães - Advocacia, it has been Brazil's leading law firm specialised in Economic Law ever since.

The firm has extensive experience in Competition/Antitrust Law, Consumer Law, Commercial Defence, Unfair Competition and Intellectual Property.

In Competition Law, the firm has the largest antitrust team in Brazil and has provided specialised consulting services on most of Brazil's key competition cases for the past decades.

It also develops consulting services on prevention of anti-competition practices, aiding the most prominent companies in the Brazilian market to establish suitable compliance programmes, and assists its clients defining commercial and advertisement campaigns, drafting agreements and providing essential legal services on Economic Law.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media and Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk