

**Question A – National Report – Brazil**  
**Transactional Resolutions Under The Competition Law**

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## 1. Introduction

*Please provide an introduction on the development of transactional institutions in your country along with trends in the use of such procedures.*

Transactional institutions for administrative and criminal investigations have been in place in Brazil, in a modern form, since the beginning of the 1990s. Ever since, the use of such instruments by the authorities (prosecutors, Government, agencies etc.) has grown and became regarded as a valuable tool for law enforcement. Nonetheless, because of the country's legal tradition, many practitioners still see transactional institutions as deviations from the 'public interest' and the 'rule of law', although this opinion is becoming much less common than it was in the past.

*Are transactional resolutions in your country limited to competition law proceedings? Are they present in other areas (e.g., administrative or criminal proceedings)? If so, do these proceedings influence transactional proceedings under competition law? Are they viewed as elements of the administration of justice?*

Transactional resolutions are not limited to competition law proceedings; they were actually initially adopted to solve, prior to the beginning of litigation, environmental, consumer and public interest matters (collective redress, for example) by public prosecutors in a timely and cost-effective fashion for both the Government and private parties (what became known as "*Termos de Ajustamento de Conduta*").

Criminal transactions – emulating some types of "plea bargaining" arrangements existing in other jurisdictions – are also acceptable in Brazil for less serious crimes and other misdemeanors (*transação penal*), if prosecutor, Court and defendant agree to the terms of the alternative sanctions that can be imposed to criminals.

Enforcement of competition law in Brazil still is in its essence based on the central enforcement by the competent Federal Government agency (the CADE, or *Conselho Administrativo de Defesa Econômica*, or simply the Authority), but there is a palpable tendency for the dissemination of competition-related judicial claims, because of (i) the criminal prosecution of local, small cartels (which is the only competition infringement in Brazil that is also considered a crime), (ii) direct damages claims for competition infringements by harmed parties, or (iii) collective follow-up claims for damages by public prosecutors.

In this context, transactional proceedings set out in the competition law – which basically

correspond to (i) leniency applications, (ii) settlements and (iii) negotiated merger remedies – and are all adopted by the CADE, the central governmental agency, may directly impact the involved parties in both criminal and civil proceedings, and *vice-versa*.

As such, considering a leniency application, for instance, criminal amnesty is also provided for by the Competition Law if a leniency agreement is executed and implemented before the proposition of the criminal suit by the prosecutor in charge of the matter. Also for leniency, the admission of an infringement to the competition authority could facilitate civil claims and so on.

*What are the arguments put forward by competition authorities in favour of such procedures? What are the arguments for and against put forward by other stakeholders regarding such procedures? What is your opinion?*

The arguments put forward by competition authorities are basically related to the effectiveness of the enforcement of the law, regarding the speed of the procedure, and the rational use of the Authority's resources. In certain cases, the Authority has defended transactional resolutions, such as settlements in cartel cases, on the basis that such procedures (i) protect consumers interests; (ii) the Authority may benefit from the settler's cooperation, facilitating the investigations; and (iv) less public resources and time are spent on the investigation.

On the other hand, arguments against similar transactional procedures are that: (i) transactional procedures may lead to violations, especially to procedural rights (*ne bis in idem*, impartial judge, right against self-incrimination and presumption of innocence); and (ii) in case of leniency, there is no guarantee that the informer will not be prosecuted or subjected to sanctions from other authorities.

*Do transactional procedures reduce the duration of the investigative procedures (i.e., the duration of transactional procedures versus the duration of infringement decisions)?*

Transactional procedures reduce the duration of the investigative procedures quite significantly, especially because an infringement decision in Brazil can take four to five years at the administrative level (*i.e.*, without considering possible appeals to Courts etc.), while the discussions of settlements are usually concluded in less than six months and sometimes under two months. Furthermore, in case of settlements and leniency applications, the Authority require the parties to collaborate with the investigation, so this can substantially speed up the fact-finding phase of the investigative procedure.

## ***2. Transactional resolution of agreements and the abuse of dominance***

## 2.1. Overview of transactional procedures

*What types of transactional resolutions exist in your country (e.g., commitments, transactions, settlements, leniencies, amicable agreements, plea bargains, consent decrees, consent orders, etc.)? Are they available for both agreements and the abuse of dominant positions or only for one type of restriction of competition?*

The transaction resolutions that exist under Brazilian competition law are leniency (Articles 86 and 87 of Law No. 12,529/11 and Articles 197 to 210 of Resolution CADE No. 1); settlements (Articles 85 of Law No. 12,529/11 and 179 to 196 of Resolution CADE No. 1); negotiated merger remedies (Articles 61 of Law No. 12,529/11 and 125 of Resolution CADE No. 1), as well as criminal transactions that are applicable to less serious crimes and other misdemeanors.

Although there is no legal exception, leniency agreements apply exclusively to hard core cartel infringements or similar “horizontal” violations, where settlements are available to parties being investigated for both horizontal conduct and abuse of dominance conducts.

*Do transactional resolutions imply acknowledgment of guilt and/or liability? Does the agreement or final decision include finding of infringement or liability for infringement? Do decisions or agreements reflect a solution without including a finding for the infringement?*

Leniency applications require confession of the infringement (i.e., of the facts that consist in the unlawful conduct) as a legal pre-requisite; in settlements in cartel cases, the Authority has adopted the policy of requiring express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct.

In both of those cases, the agreements themselves and the decisions providing the reasoning for entering into such agreements include a section on the finding of the infringement or the corresponding liability.

Settlement in unilateral conduct cases may or may not include acknowledgment of the liability, depending on the circumstances of the case (mainly the stage of the investigation in which the settlement occurs), but they are generally silent about this, resulting only in the decision to stop or modify the conduct under investigation and the (also optional) payment of a certain contribution in substitution to the applicable administrative fine.

*Do transactional procedures are conditional upon the company assisting authorities in investigating (i) the company misconduct or (ii) the other parties' misconduct?*

In leniency agreements, the beneficiary of the leniency benefits must, as a requirement for the leniency to be admissible, assist the Authority in the investigation of its own misconduct and of the other parties' misconduct. Settlements, on the other hand, are more flexible, but generally in cartel procedures the defendant willing to settle is requested to cooperate with the investigations, particularly if the fact-finding phase is still in progress.

Cooperation and assistance, in this context, are generally interpreted by the Authority very broadly, and may involve the submission of evidence, declarations, technical assistance, interpretation of documents seized etc.

*At which stage of the proceedings are transactional solutions made available? Is there a difference dependent upon the phase of the procedure (i.e., whether an amicable solution is available, and what are the consequences for companies)? Are there time limitations for the initiation of an amicable solution (i.e., a stage at which the parties may no longer suggest a negotiated procedure)?*

Leniency (and “leniency plus” applications) are, by definition, limited to situations in which the Authority either (a) has not initiated an investigation, in which case the beneficiary then receives full immunity in exchange for being the first one to come forward against the infringement, or (b) has started a formal inquiry, about the same or about a related market, but has not yet gathered sufficient evidence about the infringement, in which case the beneficiary has a right to receive a reduction in the fines.

Settlements may be entered into, however, at any moment during a formal investigation until the hearing of the case is initiated. The reduction in the applicable penalties tends to be higher the sooner a proposal is made during the procedure, and according to the level and (mostly in cartel cases) relevance of the cooperation of the defendant with the outcome of the investigation.

*What is the subject matter of a transactional resolution? What kind of conduct requirement includes transactional resolutions (e.g., cease and desist of a conduct, duty to supply, change of terms and conditions or non-discriminatory terms)? Are there cases in which transactional resolutions impose far-reaching regulations of conduct (i.e., regulatory measures)?*

A successful leniency application results in an agreement between the party and the Authority, through which the former provides information and documents that allows the latter to assist the Authority in its cartel investigations. If this agreement is duly performed, the informer will obtain full criminal amnesty as well as full immunity from fines and other penalties, or, at least, have a reduction in the applicable fines. The typical leniency agreement will contain provisions (i) determining the informer will cease its

participation in the conduct, (ii) a confession the unlawful conduct, and (iii) commitments for full cooperation with the Authority throughout the completion of the investigation, including the submission of a detailed history of the events that provide a background to the unlawful conduct. Once the investigation is finished and the finding of an infringement is confirmed, the performance of the agreement by the beneficiary is confirmed by the Authority.

Settlement agreements, in cartel cases, are becoming increasingly more similar to leniency agreements, except that (i) they are available for any defendant at any time during the proceeding and (ii) they do not result in any type of immunity or amnesty. Generally, in those cases, the agreement contains (i) the express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct, (ii) the commitment to completely cease its involvement in the conduct, (iii) commitments regarding cooperation with the investigations, which may vary from case to case, and (iv) the amount of the “contribution” to be paid by the defendant. Also, there is no criminal immunity (and, as such, the confession in the context of the administrative settlement may have serious implications for individuals).

In abuse of dominance cases, settlements generally result in an agreement that contains all commitments necessary for ceasing the defendant’s conduct or its effects or, depending on the case, modifying the conduct in order to eliminate possible anticompetitive effects. Under certain circumstances, the defendant in this type of case may also need to pay an amount as a “contribution” (a discounted fine) and, depending of the moment in which the settlement is made, to confess the unlawful conduct.

*Does bargaining involve different alleged infringements (i.e., objections)? Are there cases in which authorities are ready to reduce or abandon some objections in exchange of the settlement or a change of behaviour in relation to another conduct (e.g., alleged illegal agreements and alleged abusive conduct)?*

The Authority does not have powers under Brazilian law to negotiate or bargain different types of infringements in exchange for one another, and this is even more stringent in cartel cases. As a result, settlements are circumscribed to a specific investigation and infringement.

*Is it possible to negotiate the fine? What type of procedures allow for a reduction of or the total immunity of the fine and under what conditions?*

As a consequence of the leniency agreement, the leniency applicant may receive total immunity from the fines.

A party entering into a settlement in the context of a cartel investigation is required to pay an amount (defined as a “contribution”), which cannot be lower than the minimum fine provided for by the law. For this type of case, the Authority has a specific regulation which defines the applicable reduction in the level of the fines, according to the level of collaboration the defendant can offer to the investigation (the more evidence one can produce, the higher the discount in the fine) and the moment the defendant submits the settlement (first-comers may receive up to a 50% discount, whereas the last ones not more than 25%).

In unilateral/abuse of dominance cases, the negotiating process is much more intense, as the Law does not require the payment of any type of amount for a settlement, and the Authority has discretion to require such payment on a case-by-case basis.

*Are different transactional procedures complementary or alternative? What are the criteria for competition authorities in choosing one or another? What influence have companies on that decision?*

From a policy perspective, it seems that leniency agreements and settlements are complementary tools for pursuing cartel cases, and it seems that a large number of leniency agreements (starting new investigations) tend to result in a large number of settlements, if the incentives are set forth correctly. As a result, companies can influence that decision only when they qualify for leniency.

In unilateral/abuse of dominance cases, settlements are the only choice available, and the commitments included therein are highly specific to the facts of the infringement being investigated.

*Do transactional resolutions include damages to third parties? In what manner are third parties involved with transactional resolutions? In what manner can third parties be impacted by transactional resolutions?*

Usually transactional resolutions with the competition authority do not include discussions regarding damages to third parties; these, as a matter of fact, have very little room to participate in the negotiation of settlements with the Authority.

In any case, in cartel cases third parties that may have been victims of a cartel benefit from leniency applications and settlement to the extent these contain confessions of unlawful behaviour, which may theoretically facilitate the filing of private damage claims (even before the competition authority actually issues a decision on the infringement).

*To what kinds of risk are parties exposed in relation to interests of third parties (e.g., complainants and competitors)? Are transactional procedures exposed to a greater or lower risk of hijacking of the procedure by interests of other parties (e.g. complainants, contractors, and/or competitors?) By contrast, are interests of third parties sacrificed in view of reaching a transactional resolution?*

From the perspective of third parties, transactional resolutions (either in cartel, unilateral or merger cases) actually tend to benefit the parties pursuing possible claims, as third parties may use the acknowledgement of the violation in leniency or settlement agreements as evidence in such private litigation. In very few cases the Authority has submitted the product of a negotiation (*i.e.*, market test) for comments of affected third parties (competitors, customers, suppliers etc.), as it generally believes it has gathered all relevant information (notably in unilateral and merger cases) for assess the effects of the settlement in the course of its previous investigation.

*If no transactional proceedings exist in your country, are there other ways for companies to influence the content of the measures or the magnitude of the fine imposed upon them by the decision?*

Not applicable.

### **2.1.1. Discretion of competition authorities and/or judges during proceedings**

*Who may take the initiative to propose a negotiated outcome: the competition authorities or the parties? May companies express their readiness to achieve a negotiated solution?*

As a general policy, the Authority always emphasizes it is open to discuss settlements and, especially, leniency agreements. However, pursuant to the applicable rules, parties interested in the settlement are required to formalize their intent to initiate settlement discussions in a specific request.

*What is the discretion of competition authorities in deciding whether to start a negotiated procedure with companies (e.g., whether to propose a negotiated procedure and whether to accept a party's proposal to initiate a negotiated procedure)? For each type of procedure, what criteria guide such authorities in their choice to proceed by a negotiated procedure?*

The Authority has ample discretion to negotiate (or accept to negotiate) when it believes there are sufficient grounds to accept a settlement application and whether a settlement is convenient to benefit the public interest. As a result, other than adherence to the requirements established by law or set out in the Authority's own regulations, it is free to



assess if a transactional resolution is a good decision for a certain investigation and the timing regarding the settlement.

*Are the parties afforded the right to a negotiated proceeding? How do such authorities respect the principle of equal treatment of the companies in this choice?*

Courts have upheld the view that investigated parties do not have a right to a settlement, and that the law is clear that the decision to negotiate a settlement is under the Authority's discretion, in view of the public interest and of the interests protected by the Competition Law. As a result, the Authority has to adequately justify its decision to settle - in view of the public interest - in each individual case and, consequently, treat parties according to the principle of isonomy.

Although a similar rationale is applicable to leniency applications, there is no Court ruling on the Authority's powers to reject a leniency proposal; considering, however, the effects of a rejected application and the very strict requirements for a leniency agreement to be valid (including the confession of an infringement of which the Authority is not even aware of), in our view the Authority has much less discretion to reject a leniency application than it has to reject a settlement in an on-going investigation.

*How do discussions occur? Who submits the first draft of the settlement, undertakings, and/or commitments? If the draft is submitted by competition authorities, to what extent can companies propose amendments?*

Parties interested in any transactional resolution with the competition authority are required to formalize their intent to settle in a specific request, which must contain an initial draft of the proposed agreement. In cases of leniency, the process is not straightforward, as the Authority generally requires access to evidence before entering into a leniency agreement, and sometimes the leniency application itself is preceded by a simple marker (which ensures a party that it is the first-comer), but the initiative is always upon the parties.

The negotiation process for the submitted drafts – mostly in unilateral conduct cases – is straightforward and parties have room to discuss changes to the Authority's drafts if they have good arguments for their changes.

*What is the discretion of competition authorities in determining whether to accept a company's undertakings and/or commitments? What criteria, if any, do competition authorities use in deciding to reject or accept such proposals? To what extent do parties have the right to a negotiated outcome?*

The competition authority has ample discretion to accept or reject commitments in settlement proceedings, and, as discussed above, probably much less room to reject leniency applications (given the stricter legal requirements for the latter).

In settlement procedures, following a negotiation period, the Authority makes a decision about the convenience of the settlement that relies in an assessment of (i) the level of protection of the public interest and of competition (*i.e.*, the effectiveness of the commitment or undertaking to cease the anticompetitive effects under investigations), (ii) the deterrence effects of the settlement (over the settling party and third parties), (iii) its impact in the Authority's ability to enforce the law in the future and (iv) the usefulness of the collaboration (if applicable) for the investigation.

*To what extent do such authorities respect the principle of equal treatment of the companies? How is the principle of proportionality and of adequacy of competition law intervention followed?*

By force of constitutional principles the Authority (as any other governmental authority in Brazil) must interpret and apply the law so as to apply the principle of equal treatment (isonomy). As such, in its decision about a certain settlement, the Authority has to treat companies equally, even in the context of a settlement.

The principle of proportionality and adequacy of the intervention is considered when the Authority negotiates and accepts commitments regarding the merits of the conduct, and this element, among others, is factored in the Authority's decision.

### **2.1.2. Nature of the legal act concluding, approving, and/or making binding the settlement**

*Who concludes the amicable settlement with the parties: the investigative body, the decision making authority, or a judge?*

*For two-tier systems:*

*Does the agreement between the investigative body and the company need to be approved by a decision-making body or a judge?*

*Does the agreement between the investigative body and the company bind the decision-making body or the judge? What is the discretion of the decision-making body or the judge (i) to reject or accept the agreement, (ii) to approve it partially, and (iii) to amend and/or conclude another agreement?*

The main authority enforcing competition law in Brazil, as mentioned, is the CADE. Within the CADE, there are two different bodies: the Superintendence General (SG), which has investigative powers in infringement cases, and the Board (Tribunal) of the CADE, comprised of six Commissioners and the Chairman.

As a matter of principle of the enforcement of the Law, the Board of CADE always concludes transactional resolutions, even if the Authority's own investigative body has participated of or led the negotiation process.

In case the of leniency agreements, however, the agreement is entered into by party and the investigative body. Even though the investigative body may enter into leniency agreements without any type of interference from the Board of the CADE, the administrative immunity or fine reduction has to be confirmed by the Board of the CADE at the end of the case. In other words, the Competition Law does not make the signing of the agreement dependent upon the Board's approval. When receiving the investigation, however, the Board will review compliance of the party with the agreement; if it is found that the party somehow violated the leniency agreement (for instance, by withholding evidence or rejecting to cooperate with the investigations), the applicant will no longer be eligible for the leniency benefits.

*What is the legal nature of the (i) agreement concluded with authorities and (ii) of the act approving (i.e., homologating) the agreement between the investigative body and the companies? Is it a unilateral decision, a public-law contract, or a court ruling? What are the legal effects of such act in regards to its enforcement?*

The agreement concluded with the Authority is a public-law contract in what relates to its performance (e.g., whether the party or the Authority complied or not with their respective obligations). The decision adopting such agreement, however, is a unilateral administrative decision, which embodies the full legal effects of such acts in view of third parties, including courts, as would be the case for a non-transactional resolution.

*How the agreement is contained in the final decision; is it included in the operative part or in the motivation of the decision?*

It is contained in the operative part of the decision (usually as an exhibit to the decision itself), and the reasons supporting the agreement and its public-interest benefits exposed in the motivation section of the decision.

*For each of these questions, you may wish to discuss the advantages and disadvantages for parties (addressees and interested third parties).*

### 2.1.3. *Legal consequences for the parties*

*Does the agreement, the operative part, or the motivation part of agreement or final decision include:*

- *finding of infringement and/or liability for past behaviour?*
- *modification or regulation of future conduct?*
- *sanctions?*
- *waiver of the right to appeal?*
- *other contents having a legal or reputational impact on parties?*

The answer varies according to the type of transactional resolution under review.

In leniency procedures, all of the relevant provisions regarding the leniency program, legal requirements etc. are set out in the agreement itself, and the (operative part) of the final decision of the Authority generally only contains, if applicable, confirmation of the party's full performance of the agreement.

In settlement procedures, the characteristics of the decision and of the agreement have varied greatly over time, but generally the agreement itself contains, as applicable, provisions regarding the liability for past behaviour (i.e., confession of the conduct), modification of future conduct, sanctions and waiver of the right to appeal, as well as any other measures the Authority believe applicable for the case at hand. The operative part of the decision adopting the agreement, in turn, confirms these obligations from the settling party.

*What are the legal sanctions in the case of non-compliance with the transactional resolution?*

The sanctions in case of non-compliance with the transactional resolutions are:

- (A) For Leniency: in case of non-compliance, the lenient will lose the benefits agreed upon with the investigative body and will be prohibited to celebrate a new agreement for three years;
- (B) For Settlements: the investigation of the party for the underlying infringement is resumed, the party has to pay an additional fine (set out on a case by case basis in the settlement agreement itself), and may be required to perform specific obligations (in unilateral conduct cases) through a Court order;
- (C) Settlement on merger control: the failure (without good cause) to comply with performance commitments may cause the approval for the merger to be revoked, followed by opening of an administrative proceeding for the adoption of the applicable measures.

*What is the status of the agreement or the act (i.e., decision) approving the transactional solution before the civil judge?*

*To what extent is such act binding for the judge, in particular:*

- to what extent are findings of facts binding to the civil court or considered as proven by the plaintiff, and if they are not binding, do they reverse the burden of proof in civil proceedings;*
- to what extent is the qualification of facts binding for the court (e.g., the definition of the relevant market and calculation of market shares, finding of an agreement or of a dominant position), and if it not binding, to what extent does it assist the plaintiff;*
- to what extent is a finding of infringement and/or liability (e.g., finding of an illegal agreement or of an abusive conduct) binding to the court?*

From the perspectives of a Civil Court and third parties, it is an administrative act like any other, following the same principles and producing the same legal effects. As such, unless there is an explicit challenge to the administrative decision itself which is able to suspend (at least temporary) its effects, the findings (including confessions) of facts or of liability bind the Courts entirely, as administrative acts in Brazil have a presumption of legitimacy, are coercive and, most importantly, self applicable.

However, if a third party objects or challenge the decision adopted by the Authority (which may or may not incorporate an agreement, such as a leniency or a settlement) before the Courts, the matter is controversial and far from settled. A part of the literature and of the precedents consider that the decision of the competition authority is discretionary and involves a “highly technical” subject, so the Courts would be able only to analyze the strictly legal aspects of the Authority’s decision that incorporated a transactional resolution. Therefore, all findings of facts would bind the Courts, although the finding of infringement or liability could – depending on the circumstance – be subject to an analysis of legality and the limit of the competence of the Authority. On the other hand, a part of the literature and of the precedents consider that the Courts have the duty to review any acts of the Government (“*inafastabilidade da tutela jurisdiccional*”) in their full contents, so a Court may find itself not bound by any aspect of the administrative decision.

## 2.2 *Fundamental and procedural rights of the parties*

*This section aim to assess the conditions, acts, conducts, and omissions that interfere or infringe upon the rights of the parties (e.g., the rights of defence of the company under investigation and the rights of other affected parties). Authors are free to organize this section as they see fit by discussing the rights below for each type of national transactional procedure.*

*In general, what are the main risks for parties' rights during transactional procedures? What conditions, circumstances, and conduct bear greater risks?*

Not all types of transactional resolutions with the Authority bear the same risks. For instance, while settlements are relatively risk-free (the ultimate downside is basically having the proposal rejected by the Authority), in leniency agreements whistleblowers are not protected against private damages claims, after being granted immunity from competition authority.

*What conditions, circumstances, and conduct indirectly or directly increase pressure on companies? Do competition authorities have a large discretion of (i) pleas they can raise against companies (without full proof) or (ii) the level of fine applicable to the alleged infringement? What conditions, circumstances, and conduct constitute unjustifiable pressure on companies?*

The Authority can only start investigations if they properly motivate its decision to pursue a case, and the maximum fine applicable is set forth by the Competition Law itself, so it is very rare for the Brazilian Authority – at least until now – to increase pressure on a certain company for a settlement if the Authority lacks facts to support the beginning of a formal investigation. If a party is confident the assessment of the Authority is wrong about facts or liability, it can defend itself in the administrative level and further Challenge an unfavourable decision before Courts.

In some cartel investigations – especially those started by means of a leniency agreement – officials may suggest a settlement is in order for that specific case, but it is very rare to have them pushing excessively towards a settlement.

*What conditions, circumstances, and conduct increase incentives for companies to accept the benefits of a transactional resolution?*

There is not an abstract and general condition or circumstance that renders a transactional resolution more interesting for the parties to an investigation; these are generally case and

fact specific. However, the consistently high level of fines imposed by the Authority, coupled with its reasonably good track record in winning Court challenges and the threat of criminal prosecutions (for cartels), often emphasizes that potential reductions in fines (in cases of leniency applications and settlements) are enough incentives for the companies.

*What conditions, circumstances, and conduct penalise companies that choose to exercise their constitutional rights and reward those that refrain from invoking such rights?*

The fact that the Authority's decisions are public and may be challenged in Courts, coupled with the applicable legal mechanisms result in companies not being penalised in some way for enforcing their constitutional rights.

*Do national transactional procedures (described above in 2.1) involve a burden on, or involve surrendering or waiving, constitutional and other procedural rights, either directly or indirectly?*

No, not even indirectly. Ultimately, it is the party's decision to settle, and given the legal mechanisms in place, the current transaction procedures do not put a burden on defendants' constitutional rights.

*What are alternatives to transactional resolutions that put a lesser burden on constitutional and other procedural rights?*

Not applicable.

### **2.2.1. Right against self-incrimination and presumption of innocence**

*In what type of competition law investigations do parties have the right against self-incrimination and the presumption of innocence? What is the scope of such rights, and what is the impact on competition law proceedings? Are procedures having an impact on such rights separate from other procedures (e.g., criminal versus administrative procedures)?*

Parties have the right against self-incrimination and the presumption of innocence in all types of investigations (under competition law or otherwise) in Brazil.

The presumption of innocence is recognized as a general principle of law in which one is considered innocent until proven guilty. Consequently, the burden of proof is on the one who prosecutes. Closely connected with the presumption of innocence is the privilege of non-incrimination: the fairness of the proceedings requires that information about one's own conduct be protected against forced disclosure at any stage of the investigation. Thus, parties have the right to limit information it provides to competition authorities.

Both procedural principles aim to protect parties and their rights against the Government. In investigation of competition law infringements (either at the administrative or the criminal levels), these rights are ensured and Courts are specially used to interfere when these rights are put in risk.

*What encompasses the duty to cooperate with authorities in your jurisdiction? Is the scope of such a duty the same in normal proceedings and in proceedings involving a possible transactional resolution of the case?*

The duty to cooperate with authorities in Brazilian jurisdiction encompasses answering questions and providing relevant information about the object of the investigation; not changing or destroying documents which may contain relevant information for the investigation; not providing wrong information; not violating the secrecy of investigations.

In some aspects, such duties differ from those related to transactional resolution proceedings in competition law. It happens because in such cases, parties assume certain obligations in exchange for immunity or reduction on penalties (the higher the cooperation, the higher the discount). As a consequence, they may have to cooperate more closely with authorities, especially because, in some cases, parties may have to provide enough evidence to support the allegations.

For instance, parties may have to cooperate with the identification of others involved on the violation and they might have to obtain information and documents proving the reported or investigated violation. The scope in cooperating with authorities between normal proceedings and in those involving transactional resolution is that in the first one there is a regular obligation to cooperate with law enforcement. In case of transactional resolution, by the applicant's cooperation, the Authority aim to spend less time and public resources on investigations. Also, parties have to provide information as a consequence of the agreement entered into with the Authority

*Is there a formal or informal obligation for parties and their representatives that require response to all questions submitted by competition authorities, even though these questions risk incriminating the company or the representatives (i.e., natural persons) themselves?*

There is a formal duty to provide the Authority with any type of data or information it may require, under any type of procedure (investigation of conduct or merger control). A party can refuse to provide specific data or information if it believes that will incriminate natural persons of a crime, but it is generally understood that a party cannot refuse to



provide raw data about its market activities or past behaviour.

In case of transactional procedures, such as leniency and settlement agreements in case of cartels, parties and their representatives are required to respond to any questions submitted by competition authorities, as they adopted a commitment between parties and authorities to fully cooperate with authorities by confessing to have participated in the infringement.

*Is there a formal or informal obligation for parties in submitting spontaneously and actively all kinds of documents or evidence material that would prove (i) their participation in a competition law infringement, (ii) the participation of their employees and directors, and (iii) the participation of other companies in a competition law infringement?*

As a result of the right against self-incrimination and the presumption of innocence principle, parties are not expected nor required to submit material documents or evidence that could prove their participation in an infringement.

*What impact do transactional procedures have on the right to protect communication with lawyers (i.e., legal privilege)?*

None. Legal privilege may be waived by the party, following the attorneys consent, in view of its interest in obtaining a more favourable outcome for its negotiation of a settlement or leniency application, but of course the Authority cannot require a party to waive to such right.

*Is there a formal or informal obligation for parties to acknowledge guilt or liability or that an infringement of competition has occurred to benefit from a transactional resolution procedure?*

This only takes place in cartel cases. As mentioned, leniency applications require confession of the infringement (i.e., of the facts that consist in the unlawful conduct) as a legal pre-requisite; in settlements in cartel cases, the Authority has adopted the policy of requiring express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct.

*Do transactional procedures involve a formal or informal waiver of the right against self-incrimination and presumption of innocence? Under what conditions is such a waiver compatible with parties' rights?*

In cartel cases, as mentioned, parties to a leniency agreement or settlement are required to confess the infringement or the liability, so there is actually a formal waiver of the right

against self-incrimination and presumption of innocence. Such a waiver is compatible with the parties' right to extent that they are voluntarily submitting to such transactional resolutions with a view to benefiting mainly from reduced fines; the fact that a party is acting on its own (*sponte propria*) renders these conditions compatible with the parties' own rights.

*At what moment does the procedure become transactional? Is this decision revocable or irrevocable?*

The procedure becomes transactional the moment the Authority enters into a formal agreement with the interested party (the investigative body, in leniency cases, or the Board of the CADE, in all other settlements). Such a decision is revocable only if the Authority based its decision in incorrect information or was obtained through fraud.

*If the Authority or the company decides not to continue with a transactional resolution, can authorities make use of documents, statements, and declarations of companies made or submitted during the discussions? Can parties object to the use of such documents and statements? Is there any safeguard in place to ensure that statements from companies during the transactional discussion cannot be used against them in the case that such negotiations fail (e.g., communications made on a 'without prejudice' basis)?*

If one of the parties (Authority or Defendant) decide not to continue with a transactional resolution, it is not allowed to make use of documents, statements and declarations submitted during negotiations.

In leniency cases, there are safeguards in place to ensure that statements during negotiations do not affect the parties negatively in the future, in case negotiations fail, such as a firewall within the investigative authority (a single division handles all incoming leniency applications, and this unit does not communicate with the other investigators) and the fact that the documents are only submitted in their full content once the Authority decides to enter in the agreement; the Authority has also been open, in the past, to adopt other safeguards on a case-by-case basis.

In settlement negotiations, safeguards are mostly related to the fact that the negotiations are conducted by officials not involved in the investigations, but it is mostly up to the party to use caution to negotiate without disclosing more information than necessary to obtain the Authority's agreement.

*How do transactional procedures impact the burden and standard of proof? Does the progress of the procedure or outcome put a strong incentive on parties (i) not to object to evidence material or*

*allegations raised against them, and/or (ii) to actively accept the fact and pleas even though the investigation by a competition authority has not submitted proof or evidence of an infringement?  
What preconditions and what circumstances strengthen this incentive?*

There is no clear legal impact on burden and standard of proof in connection to transactional procedures under the Brazilian competition law.

On one hand, of course the more advanced the investigations are, the more the Authority is expected to have produced material evidence of the infringement at hand (as, except for cartel investigations initiated by leniency agreements, information is largely asymmetrical); as such, as the investigation progresses, in a typical case a settlement becomes less relevant for the Authority (as its chances of a solid finding for an infringement is higher) over time and may become more relevant for the settling party (as it may entail a reduction in the amount of the fines). So, if the party believes the investigation carried out by the Authority is weak, it has less incentives to proposal a settlement; however, if the party knows beforehand an infringement took place, a settlement proposal made sooner is likely to result in larger discounts in the applicable fines.

On the other hand, , if the Authority, because of a transactional resolution, has obtained material evidence of an infringement, naturally the burden and standard of proof of the remaining infringers is increased, so the less likely they are to object to evidence material and allegations.

*What kinds of procedural or other types of safeguards are appropriate or necessary to guarantee the rights of parties?*

### 2.2.2. *Right of the parties to know the case against them (statement of objections)*

*In what forms are companies concerns, including facts and allegations against them communicated (e.g., verbally in a meeting or in a written document)? Do parties have the right to receive a written communication regarding objections?*

To initiate an investigation of a competition infringement, the Authority (through the investigative body) has to produce a written report stating the pieces of information that it considers relevant as an indication of a possible infringement; the decision to open an investigation is made public through the publication of a notice in the Official Journal. The report supporting the decision to open the case summarizes the facts that are under investigation and the possible legal infringements, so Parties can submit their defences and views on them.

Following the conclusion of its investigations, the investigative body of the Authority submits to the Board of CADE a detailed opinion regarding the infringement (confirming its existence or not), which could be deemed to correspond to the “statement of objections”, for the Board to issue its final administrative decision on the matter. Parties may, at any time of the proceeding, reply or object to the allegations made by the investigative authority or propose a settlement.

*Do parties receive a written document (e.g., a statement of objections or draft decision) that states the facts, allegations, liabilities and responsibilities, and fines? If so, at what moment do they receive such documentation: before or after the negotiation with competition authorities?*

Both the report initiating an investigation and the investigative body opinion, of course with varying levels of detail and supporting documentation/evidence, must contain a description of the facts involved, allegations, theories of harm and liabilities of the different investigated parties. Information about the level of fines, however, is not available until the final decision from the Board of the CADE.

Parties may submit their proposal for a settlement at any time during the investigation, before a final decision is adopted.

*Does such a document reflect the discussion with competition authorities as well as various solutions suggested by the parties themselves (e.g., commitments or undertakings)?*

No. The “statement of objections” (SG’s opinion on the infringement) usually contains

only the report on the infringement itself; however, if any other party already settled the case, this report will reference to it and contain any additional information or evidence brought by this party.

*What conditions, circumstances, and conduct indirectly or directly: increase pressure on companies and encroach on their right to know the case against them; induce parties to make concessions that exceed what is necessary to eliminate anticompetitive conduct or what can be attributed to such parties*

Not applicable, as discussed above.

*Is a waiver to obtain a written document stating the case against them, including the facts, pleas, liabilities, and/or the level of fine (e.g., a preliminary analysis or a statement of objection), a precondition to initiating or concluding a transactional solution?*

Not applicable, as discussed above.

*Are the benefits of a transactional procedure certain and predictable for the companies before committing to a transactional resolution? Can authorities or governmental bodies commit to a binding document that the final decision approving the negotiated solution would include only the measures committed by undertakings and no other conduct?*

In the case of leniency, of course it is certain and predictable, as the leniency programme is said to be key for the Authority's investigation of cartel behaviour.

The benefits of a settlement, despite not being certain, are reasonably predictable for the companies involved before they commit to a definite resolution, but only after the Party formally submits its proposal for a settlement. The Authority, however, cannot commit that a negotiated settlement will actually be adopted by the Board of CADE before the actual decision is adopted, although generally there are clear, albeit informal, indication of whether that will happen or not.

*In case of fines, is the level of fine sufficiently predictable to companies? Are the level of the fine (i.e., minimum and maximum) and the percentage of the reduction known or predictable to companies before the companies commit to a certain conduct or before acknowledging liability? After companies undertake to commit to a certain conduct or to acknowledge liability, is the level of fine still left to the discretion of authorities?*

Even though the Authority has been putting a lot of effort into turning the negotiations increasingly clear and predictable as to the level of fines, reaching a settlement with the

CADE on this point, however, is still a quite complex and somehow erratic procedure.

Pursuant to the current competition law, a company<sup>2</sup> liable for an infringement is subject to a fine ranging from 0.1 to 20% of the gross turnover excluding taxes (pre-tax revenues) of the “company, group or conglomerate” in the “sector of activity” (ramo de atividade) of the infringement, for the year prior to the formal initiation of the investigation. This fine cannot be lower than the gain obtained from the violation, if this is assessable, and it may be doubled in case of recidivism. For cartel cases, for instance, the CADE has been very aggressive in the imposition of fines, tending to push for the highest fines allowed by the law, or up to 20 percent.

As discussed above, a party entering into a settlement in the context of a cartel investigation, is required to pay an amount (defined as a “contribution”), which cannot be lower than the minimum fine provided for by the law. For this type of case, the Authority has a specific regulation which defines the applicable reduction in the level of the fines, according to the level of collaboration the defendant can offer to the investigation (the more evidence one can produce, the higher the discount in the fine) and the moment the defendant submits the settlement (first-comers may receive up to a 50% discount, whereas the last ones not more than 25%).

This regulation was adopted in early 2014 to ensure predictability in cartel cases, but there is still a lot of uncertainty as to the exact application of these rules, and even more so in unilateral investigations.

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<sup>2</sup> There are other ancillary penalties applicable to companies (such as (a) publication of a summary of the decision in the newspapers; (b) the prohibition to enter into contracts with public banks; (c) the prohibition to take part in public bids or to enter into agreements with the government, for a minimum of five years; (d) the inclusion of the violator in a list of consumer offenders; (e) the recommendation for the compulsory licensing of patents held by the offender; (f) the recommendation for public authorities not to grant, or to revoke if already granted, tax payment schedules, public subsidies, or tax incentives; (g) the spin-off, transfer of control, sale of assets, or any other measure necessary for the complete cessation of the illicit behavior and its effects), as well as fines and other penalties for individuals, trade associations and other entities.

**2.2.3. Right to be heard and access to file**

*What are the rights of parties (i.e., addressees) in transactional procedures? At what moment do the parties have the right to access the full file?*

Parties to transactional procedures are offered the exact same rights as parties that are willing to litigate the case further. Access to full files is a requirement for the adequate defence even at early stages of an investigation, and the decision to settle should not affect that.

*Is a waiver to the right to be heard or a waiver to the right of access to file a precondition to the proceedings and conclusion of a transactional solution?*

Not applicable.

#### **2.2.4. Right to an equal treatment**

*Do transactional procedures pose the risk of unequal treatment of companies in equal situations (e.g., companies concerned by the same procedure or companies concerned by different procedures)? What circumstances, conditions, and/or conduct increase this risk?*

Transactional procedures do not pose risks of unequal treatment of companies in equal situation. Although leniency and settlement agreements may concede total or partial immunity on penalties and reduce fines, the law and regulations states clear and objectives criteria for negotiations and benefits.

*What procedures or other safeguards can be implemented to reduce the risk of unequal treatment?*

None.

#### **2.2.5. Right to an impartial judge**

*Are transactional resolutions approved or ratified by an impartial authority or judge?*

As CADE combines both bodies (an investigative and a decision-making body) transactional procedures are not approved or ratified by an impartial authority or judge, although the Board of the CADE acts in a largely independent form from the investigative body and vice-versa.

*Does the procedure involve a body, authority, or judge different from the investigative body that negotiated the transactional solution? If not, how is the right to an impartial judge and jurisdiction satisfied?*

In settlement cases, the transactional procedure will involve different officials to negotiate and adjudicate the resolution, which work as checks and balances that emulate an impartial authority. The investigative body may negotiate with parties, but the settlement is adopted by the Board of the CADE. In addition to that, most of the literature and commentators hold that as long as judicial review is available, the right of an impartial judge and jurisdiction is not denied from parties.



### 2.2.6. *Right to trial*

*What are the rights of appeal of defendant companies (i.e., addressees)?*

Parties found liable for an infringement can challenge the Authority's decision before Courts in its full extent (i.e., both facts and law).

*Is the waiver of the right to trial admissible, and if so, under what conditions?*

The waiver of the right to trial is not admissible in Brazil, due to the constitutional right of the effective judicial protection (*inafastabilidade da tutela jurisdiccional*). Parties, however, may agree to not challenge the use of certain documents obtained during searches.

*Regarding the effectiveness of the access to court, what can be challenged by addressees and on what grounds?*

As mentioned, a part of the literature and of the precedents consider that the decision of the competition authority is discretionary and involves a "highly technical" subject, so the Courts would be able only to analyze the strictly formal aspects of the Authority's decision that incorporated a transactional resolution. Therefore, all findings of facts would bind the Courts, although the finding of infringement or liability could – depending on the circumstance – be subject to an analysis of legality and the limit of the competence of the Authority. On the other hand, a part of the literature and of the precedents consider that the Courts have the duty to review any acts of the Government ("*inafastabilidade da tutela jurisdiccional*") in their full contents, so a Court may find itself not bound by any aspect of the administrative decision.

*In the case of appeal, does the appeal jurisdiction exercise full jurisdiction over transactional decisions?*

In case of appeal, it is possible that a Court exercise its full jurisdiction over a transactional decision, as a consequence of the effective judicial protection principle (*inafastabilidade da tutela jurisdiccional*). Naturally, Courts will refrain from reviewing appeals brought by parties that entered into settlements with the Authority, unless a serious offense by the Authority (e.g., fraud) is raised.

### 2.2.7. *Ne bis in idem*

*Does the principle ne bis in idem apply to transactional resolutions of competition law proceedings? If so, under what conditions? What is the scope of immunity?*

The *ne bis in idem* principle applies indistinctively to transaction resolutions and decisions in competition law proceedings. The application of this principle, however, is limited to the facts and the legal rules under which the decision was adopted (*i.e.*, the fact that a company was found liable for a cartel infringement does not prevent its clients from seeking reparation for the damages caused by the conduct or the prosecution of the individuals liable for the cartel crime)>

*If a company concludes a transaction with an authority or governmental body, are (i) individuals from this company and/or (ii) group companies' immune from prosecution for the same facts?*

That depends on the exact circumstances of the case and the type of transaction entered into with the CADE (either leniency or settlement). Leniency agreements, in general, usually are drafted so as to extend the leniency benefits the individuals involved in the conduct and to other group companies; settlements, on the other hand, not necessarily involve individuals or affiliated companies, but there is nothing preventing the settlements from actually protecting those.

#### **2.2.8. Other issues and rights**

*You may wish to discuss whether and to what extent other procedural or legal rights are affected by transactional proceedings in your jurisdiction. You may also wish to allude to the safeguards needed to protect parties' rights.*

None.

### **2.3. Rights of Third Parties**

#### **2.3. Right to be heard and access to file**

*Do third parties (e.g., complainants, competitors, and/or contactors) have access to a confidential version of the written document communicating the case against the defendant company?*

Third parties have access to full copies of the case records at any time during an investigation, but they cannot have access to information and documents deemed to be confidential. Access to confidential documents and information is granted only to the investigated parties themselves.

*What are the rights of third parties or complainants in transactional procedures (i.e., the right to be heard and access to file)?*

Third parties have rights to access files and to submit complains, information and commentary that they deem relevant for the Authority's investigation. The Authority, however, can refuse to receive information or commentary that is not relevant for the investigation.

#### **2.3.1. Right to trial**

*What are the rights of interested third parties (co-contractors or competitors) or complainants? Can complainants and interested parties challenge settlements, amicable agreements, or the decisions approving transactional resolutions, and if so, under what conditions?*

Third parties have full rights to appeal from a decision before Courts, challenging whichever part of the procedure, including any type of transactional resolution, fails to comply with the competition law and the public interest.

*Regarding the effectiveness of the access to court, what can be challenged by third parties and on what grounds?*

See Section 2.2.6 above; the same rights and understandings that apply to defendants are applicable to third parties and vice-versa.

#### **2.3.4. Other issues and rights**

*You may wish to discuss whether and to what extent other procedural or legal rights are affected by*

*transactional proceedings in your jurisdiction. You may also wish to allude to the safeguards needed to protect parties' rights.*

None.

*To what extents are taken into account the rights and commercial interests of third parties (e.g., co-contractors or suppliers)?*

Commercial interests from third parties are taken into account by the competition authority in transactional resolutions to the extent they may be relevant to assess the effects of the conduct itself, or the resolution being adopted, over competition (most importantly in unilateral cases).

*To what extent are taken into account the interests of third parties to use transactional resolutions in follow-on private actions, allowing them to receive compensation or secure disgorgement of profits resulting from competition law infringements?*

Although follow-on private claims are not the focus of the Authority's decision practice and although this type of claim is still uncommon, in several opportunities the Authority has emphasized its concern about making sure that the leniency programs and related settlements in cartel cases do create incentives for them.

### *2.3.5. Principle of legitimate expectation and of good faith*

*To what extent must competition authorities and other governmental bodies respect principles of good administration, of legitimate expectations, and of good faith during transactional proceedings? What do these principles imply in the case of transactional resolutions (i.e., for competition authorities and for addressees and interested third parties)?*

Good administration, legitimate expectations, and good faith are general principles of the Public Administration in Brazil and must be always adopted by competition authorities and other administrative bodies. Those principles bind competition authorities when settling agreements or negotiating with parties. In case of transactional resolutions, the Authority's decision to accept or reject a proposal should be reasonably predictable and justified (i.e., motivated).

*What kind of binding effect do communications of officials to companies during negotiations have? What is the binding effect of such communications on the body approving the amicable settlement? If no binding effect exists, what kind of legal or moral effect do communications from competition*

*authorities have during negotiations?*

Communications from officials to companies during negotiations are not binding upon the Authority, but they do provide substantial guidance (even if not subject to hard rules) for the parties' expectations, on the basis of the moral commitment and the repercussions for deviating from the promised behavior; it is uncommon to find a divergence between the official communication and the decision on the settlement itself.

*What safeguards should be adopted to induce authorities to comply with these principles? Should meetings and negotiations be recorded and made available to the participants of that meeting? What kind(s) of safeguards should parties use in their communications to officials (e.g., disclosure or communication on a 'without prejudice' basis)?*

No particular safeguard needs to be adopted, else the procedures would become extremely bureaucratic.

*What kind of conduct, circumstances, and conditions may constitute unfair, improper, or unreasonable conduct in relation to the principle of good administration, good faith, or legitimate expectation, by (i) competition authorities or other governmental bodies, (ii) parties (addressees), and/or (iii) interested third parties (e.g., complainants, contractors, and/or competitors)?*

The unofficial disclosure of sensitive information by the participants in the negotiation proceedings, or the communication of knowingly false information about the case or the expected result of the settlement, could be deemed sufficient to constitute unfair conduct of the parties during the negotiation period.

*What kind of (unrecorded) pressure may governmental bodies and competition authorities use in order to induce parties to accept an amicable settlement?*

Not applicable.

*Are the following conduct compatible with the good administration of justice and the abovementioned principles: threats, pressure, use of exaggerated allegations and/or objections, excessive fines, delays in dealing with the complaint, use of unreasonable behaviour (e.g., irritation, resentment, and verbal coercion), or requests for collaboration that exceed what is necessary to settle the case?*

*Are transactional procedures exposed to a greater or lower risk of noncompliance in relation to the abovementioned principles? If so, why and to what extent?*

Of course they are not compatible and, thankfully, not adopted or widespread until now during negotiations in Brazil. Competition authorities should not adopt contradictory conducts, or change their understandings without a reasonable reason, with respect to the good faith and *nemini licet venire contra factum proprium*. Their acting should be motivated and impartial, avoiding personal interests of authorities. Parties should also respect these principles, by acting according standards of loyalty and morality normally expected. They should avoid conducts that may counter authority and other party's legitimate expectations. In case of third parties, they should cooperate with the procedure and the findings. As consequence, they should avoid act in bad faith and excessive intervention in the process, in order to threat parties or procrastinate the procedure.

Competition authorities should act observing the strict legality (Article 2 of Law 9,784/99) and follow the principles of good faith and legitimate expectations, as others settled in Article 37 of the Federal Constitution. However, it is also important to stress that public administration has a broad leeway. As consequence, to define whether a conduct is abusive or not the supervision of the administrative acts of the Government should be done by an analysis of efficiency and opportunity. In case of a claim of abuse of authority, it is important to analyze the alleged conducts under the principles and rules explained above. If the answer results in a positive conclusion, these acts should be revoked. Also, officials may be subject to sanctions in criminal, civil and administrative spheres.

Not more or less than non-transactional resolutions.

### ***2.3.6. Confidentiality and publicity of the transactional solutions***

*Are corporate statements, minutes of hearings or meetings, and any other documents submitted by companies during the negotiated procedure by companies confidential toward interested parties, complainants, or possible claimants in private actions?*

*Are decisions or settlements made public, either in part or in their entirety? What are the advantages and disadvantages of publicity policy for parties, third parties, and the public in your jurisdiction?*

The disclosure of transactional resolution materials held by competition authorities has recently been under the spot light. On the one hand, these documents could greatly help cartel victims to prove the damage and the causation link when filing damage actions against cartelists. On the other hand, future cartelists could be deterred from applying for leniency since damage actions could be brought as a result of the information submitted by themselves. Neither the current legislation nor the case law have attained yet to

sufficiently clarify how to deal with this clash of interests; as a result, judicial decisions are split, and some of them granted access to documents submitted by companies during the negotiated procedure, some of them denied.

*What other issues are raised regarding transactional procedures?*

The disclosure of information by competition authorities in transactional procedures can jeopardize leniency programs as a whole, once it (i) can seriously undermine incentive of the applicant due to higher risk of private actions; (ii) in case of leniency, increase the disadvantage and risk liability of leniency applicants in comparison to other cartel members; (iii) might compromise the right against self-incrimination, which is an essential principle in Brazilian constitutional. By contrast, it also involves issues related to the right of third parties to be compensated when injured, once eventual restrictions to access of information may represent an obstacle to private enforcement.

In transactional resolutions, a final decision or agreement between parties and the competition authority is made public; confidential information is restricted to parties themselves. The advantages of a publicity policy for parties, thirds, and the public in Brazil are: facilitate the control of the administrative acts; and to render the principle of the access to information effective. On the other hand, publicity policy may jeopardize transactional resolutions, regarding that the disclosure of information may reduce applicants' interest in applying to such programs.

### **3. Merger control**

*Are remedies (e.g., divestments, access remedies, compulsory licensing, behavioural remedies, etc.) possible in merger control proceedings? What role(s) do remedies and undertakings in your jurisdiction play? To what extent are such remedies negotiated between notifying parties and competition authorities?*

Remedies are possible under Brazilian merger control proceedings, being preferable than an outright prohibition if they are sufficient to eliminate the potential negative effects of a certain transaction on competition. Examples of admissible remedies in merger control proceedings are: (i) the sale of assets or a group of assets that constitutes a business activity; (ii) the spinoff of the company; (iii) to transfer corporate control; (iv) maintenance of accounting or legal division of activities; and (v) compulsory licensing of intellectual property rights. Parties are allowed to negotiate with the Authority if they formally submit their interest in doing so up until the deadline for their reply to the investigative body opinion that suggests either the prohibition of the proposed transaction or the imposition of remedies.

### 3.1. Negotiation of remedies

*Are parties allowed to submit modifications or changes (i.e., remedies) to their transaction(s)? Who submits and drafts the proposals?*

Parties are allowed to submit modifications or changes to their transactions at any time, and it is incumbent upon them to do that, although officials may also informally suggest modifications to the deal if they believe these are necessary.

*Is there a difference between remedies or undertakings submitted at the first stage and those submitted at the second stage of the procedure, if any? Who takes the initiative to submit undertakings? Do parties have the right to submit undertakings? Can authorities suggest or require certain measures from notifying parties?*

There is no difference among phase I and phase II remedies proposal, but the initiative to make a formal proposal is incumbent upon the notifying parties, who have the right to do so. The Authority may impose remedies as a condition for clearing a transaction in its final decision, although it will usually prefer to suggest these informally and work on a transactional resolution.

*What is the discretion of competition authorities to accept or reject such proposals?*

The Authority has full discretion to accept or reject remedies proposal made by the parties, as long as it formally justifies its position in view of the legal requirements and the public interest.

*In what form do communicated objections to notifying parties arrive (i.e., verbally or written)? Are notifying parties notified of a statement of objection before discussing any kind of remedies to their transaction?*

Objections are made by the Authority in a written statement, at least once (in the investigative body opinion) before a final decision is issued. Informal discussions, however, can be held – and are welcome – at any stage of the proceedings.

*What is the role of competitors and other interested parties in defining remedies?*

Although the Authority does not have the obligation of consulting third parties for the definition of remedies, it may – and has done more so recently – have informal or formal contacts with competitors, suppliers etc. to “market test” a possible solution or alternatives.



*Do notifying parties have the right to be heard?*

Yes, formally, through briefs, studies, meetings etc. at any time of the proceeding before a decision is issued.

*Do third parties have access to file and the right to be heard?*

Third parties – who may need to be qualified as such, at the initial part of a merger case – have rights to access files (but not to information and documents deemed to be confidential) and to submit complains, information and commentary that they deem relevant for the Authority's review of the case. The Authority, however, can refuse to receive information or commentary that is not relevant for the investigation.

*Does the acceptable undertaking (i.e., remedies) by authorities precondition (i.e., imply) the waiver of any kind of rights by notifying parties (e.g., the right to be heard, the right to access to file, and the right to trial)?*

No.

*What kind of pressure may competition authorities exert (e.g., delays in granting authorisation and/or excessive objections)?*

Both the delays for authorization or the threat of excessive objections or even prohibition may be used for a better set of remedies from the notifying parties, although this strategy is never explicitly adopted.

*Is there any risk of hijacking of the procedure by third parties (e.g., competitors and suppliers)?  
What safeguards are in place to avoid or reduce such risks?*

It is fairly common to have third parties trying to benefit from a merger case in order to protect their own commercial interests (as opposed to competition), but the Authority has been trying to limit these interventions whenever they fall outside CADE's jurisdiction.

### **3.2. Enforcement of remedies**

*How is the enforcement of merger remedies ensured?*

The enforcement of merger remedies is ensured by audits to verify if the remedies have been complied with, and, generally speaking, the burden of proof lies with the notifying parties. They should regularly provide documents to competition authorities able to prove their compliance with the agreement.

*Do notifying parties risk fines or the withdrawal of authorisation in the case of noncompliance?*

Yes, it is an express provision of all merger control decisions adopted through settlements that non-compliance with the remedies results in the Authority's rejection of the deal.

*Can third parties (e.g., competitors and suppliers) require the enforcement of remedies?*

Yes, if they have grounds to show that the remedies have not been or are not being complied with by the notifying parties, by submitting evidence of their point of view.

*To what extent do negotiation procedures differ in the case of merger remedies from transactional procedure and in the case of agreements and abuse of dominance? What differs in view of (i) the rights of defence of notifying parties (i.e., addressees) and (ii) the right of third parties?*

The most notable difference in the negotiation procedures in merger remedies and abuse of dominance case is that merger remedies are directly negotiated with the officials responsible for issuing a decision. In addition, officials in negotiations of merger remedies tend to be more open and constructive, although procedurally there is not much difference. Rights of addressees and third parties are similar in both procedures.

#### 4. *Impact on transactional outcome and on market intervention*

*What conditions, circumstances, and conduct encourage transactional resolutions that result in (i) the abandonment of efficient conduct that does not infringe upon competition law (i.e., over intervention) or (ii) the continuance of inefficient conduct infringing upon competition law (i.e., under intervention)?*

This is highly case-specific and, so until now, it is not possible to identify *ex ante* what conditions circumstances or conduct result in those type I and II errors.

*Under what circumstances do transactional resolutions weaken the deterrent effects of competition law?*

*Under what circumstances do transactional resolutions increase the unpredictability of competition law?*

Transactional resolutions may weaken the deterrent effects of competition law by mitigating sanctions, as a consequence of the negotiations between authorities and parties. Further, the strategy of competition authorities to increase success of transactional resolutions may lead to a less harsh punishment than the competition law normally provides.

The higher the number of transactional resolutions, the lower the number of Court challenges; as a result, Courts do not have the opportunity to issue precedents guiding the interpretation of the law for both the parties and the Authority, what tends to perpetuate the Authority's view of the applicable rules, increasing the unpredictability of the competition law, both on the merits and regarding fines, what is somewhat worsened by the ample discretion granted by the law to the Authority.

#### 5. *Conclusion and recommendations*

*You are invited to conclude on the main finding in your jurisdiction and to recommend safeguards that would improve the transactional resolution of antitrust proceedings in your jurisdiction.*

The fight against cartels, including international cartels, became a reality during the last ten years, with a number of investigations having been initiated by means of leniency agreements. In practice, companies that consider applying for immunity in mature jurisdictions have been gradually including Brazil in their "check-list", as the threat of high fines and the risk of criminal prosecution of individuals has become real. As the perception of actual enforcement increases, the number of defendants that consider

entering into settlement agreements has started to grow to some extent, especially after the new CADE enacted a regulation in early 2013 aiming to bring more predictability to settlement negotiations.

Transaction resolutions have developed substantially over the past few years, thus allowing the Authority to effectively bring the Brazilian business community's attention to its records. The changes made overtime to the law and the Authority's' efforts to focus on anti-competitive conduct investigations and competition advocacy are important, as this has been leading the business community to devote more attention to antitrust matters.

The long cartel investigating proceedings in Brazil<sup>3</sup>, coupled with the possibility of having the Court reverse the decision taken by CADE, still leads some parties to litigate, rather than to settle. Aiming to shorten the investigations and make their results more effective, CADE has been working to develop an appropriate settlement procedure that can become a win-win option for both the defendants and the Authority.

Mature authorities have already stated that increasing awareness on deterrence and punishment fosters leniency programs, and, consequently, competition. For these reasons, the continuity of the anti-cartel enforcement strategy, coupled with the ability to maintain the level of enforcement without having decisions overruled by the judiciary, are key elements to maintain and increase the perception of an effective antitrust enforcement. A clear, transparent and predictable settlement policy is fully desirable to foster settlements, rather than defenses and disputes that may result in long standing investigations in administrative and judicial spheres. For such purpose, however, it is crucial that enforcement and deterrence be credible and that settlements not transactional resolution programs.

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<sup>3</sup> Cartel investigations in Brazil may still last four to six years, if not more, before the administrative authority, plus five to seven years before the Courts.