

A decorative graphic in the top right corner featuring a white, angular shape that overlaps a portion of a vintage-style map, with a green triangle above it.

## CADE issues a new regulation to foster private antitrust enforcement in Brazil

The Brazilian Competition Authority, or the Administrative Council for Economic Defense (CADE), has issued a resolution providing specific procedures and rules to be considered by private plaintiffs aiming to obtain access to evidence held by the CADE that may be necessary or useful to support follow-on damage claims resulting from anti-competitive conduct, such as cartel activity (Resolution No. 21/2018, from 12 September 2018).

Under the new rule, the affected parties may have access to certain documents and information that were provided to the CADE by the applicant as part of a leniency agreement, settlement agreements (in Portuguese, "Termos de Compromisso de Cessação – TCCs") or dawn raids.

Although the CADE does not directly assist private plaintiffs pursuing damages claims, the CADE sees civil lawsuits brought by private plaintiffs as a crucial deterrent to potential violations of the antitrust laws and as a way to compensate the victims. Therefore, private claims act as a supplementary tool in the fight against anti-competitive behavior.

The existence of an ongoing cartel investigation and, in particular, of a conviction imposed by the CADE constitutes "prima facie evidence" of an infringement of the antitrust laws and entitles the affected parties to seek compensation for the damages caused (e.g., overprice).<sup>1</sup> Accordingly, obtaining documents and information held by the CADE is important to support private claims. This is particularly relevant in Brazil because there is no "civil discovery" that allows private plaintiffs to obtain data and documents directly from the cartel participants.

In its assessment of whether information or documents should be made available to any third party, the CADE will take into account the current stage of the antitrust investigation. From the beginning of the negotiation of the leniency agreement until its conclusion, all documents related to the proposal or that are relevant to the investigation will be kept unavailable to third parties. During the "fact-finding stage," third parties will have access only to nonconfidential versions of the technical note that initiates the investigation and the technical note that concludes the investigation. Finally, most of the confidential documents and information related to leniency and settlement agreements and dawn raids will be made public after the CADE's tribunal issues its final decision on a case.

However, there are exceptions to this resolution; certain documents will not be available to third parties, even after the CADE's final decision. The following documents, for example, will remain

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<sup>1</sup> The Intergovernmental Economic Organisation (OCDE) presumes that there is a 10 percent to 20 percent overcharge that results from cartel conduct.

confidential: confidential versions of the "History of Conduct" (also called "Corporate Statement")<sup>2</sup> and its annexes, trade secrets, competitively sensitive information, documents with confidentiality protected under any regulation, and materials provided by an applicant in an unsuccessful leniency or settlement negotiation. On the other hand, the Public Prosecutor's Office, which takes part in negotiating leniency agreements, will have full access to the documents and information concerning the conduct under investigation and may use these to support civil and criminal lawsuits, provided that the confidentiality is maintained.<sup>3</sup>

Access to the confidential documents mentioned above will only be granted to third parties in exceptional circumstances, such as

- when the access is authorized by law or court order;
- when confidentiality is waived by the party that provided the information and the CADE approves the disclosure of the information; or
- as a result of a cooperation between the CADE and a foreign authority (and only if the party that provided the information agrees with the disclosure).

The resolution also establishes that the CADE's tribunal and the CADE's general superintendence may apply a discount to the fines or pecuniary contribution to be paid by the applicant of a settlement agreement or a convicted party if the company can demonstrate that it has already indemnified the affected party.

The new rule is an important measure to ensure more predictability and transparency regarding which materials and information are available to private plaintiffs aiming to seek compensation for damages caused by anti-competitive conduct in Brazil. Private claims are still very incipient in Brazil and the new resolution aims to encourage private enforcers to seek damages for any damages resulting from anticompetitive behavior.

Should you require more information, please contact us.

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<sup>2</sup> This is a document prepared by CADE's general superintendence based on self-incriminatory information and documents voluntarily provided by applicants in a leniency agreement or settlement agreement

<sup>3</sup> Brazilian law provides for criminal, administrative, and civil sanctions for the improper disclosure of confidential information to third parties.

## Contacts



**Isabel Costa Carvalho**  
Partner, São Paulo  
T +55 11 3074 3501  
[isabel.carvalho@hoganlovells.com](mailto:isabel.carvalho@hoganlovells.com)



**Kathryn (Katie) Hellings**  
Partner, Washington, D.C.  
T +1 202 637 5483  
[kathryn.hellings@hoganlovells.com](mailto:kathryn.hellings@hoganlovells.com)

**Rafael Szmid**  
Senior Associate, São Paulo  
T +55 11 3074 3506  
[rafael.szmid@hlconsultorialtda.com.br](mailto:rafael.szmid@hlconsultorialtda.com.br)

**[www.hoganlovells.com](http://www.hoganlovells.com)**

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