REVIEW OF LENIENCY PROGRAMS IN THE BRICS COUNTRIES

by BRICS Competition Authorities Working Group on Cartels

Federal Antimonopoly Service

competitioncommission south africa

भारतीय प्रतिस्पर्धा आयोग
Competition Commission of India

中国国家市场监督管理总局
State Administration for Market Regulation, PRC

Review of leniency programs in the BRICS countries

CONTENT

REPUBLIC OF BRAZIL

Mr. Alexandre Cordeiro Macedo, President of the Administrative Council for Economic Defense (CADE)

Dear colleagues,

International cartel investigations are essentially cross-jurisdictional initiatives that unavoidably involve many competition authorities, which is the reason why an in-depth and comprehensive shared understanding is needed to deal with the challenges brought in by such intricate investigations.

A sound leniency program has to be effective and practical to properly assist in the detection and investigation of cartels. It must have specific enforcement performance targets and must be reliable for it to thrive sustainably. Furthermore, applicants and enforcers must fulfil their commitments for the benefits of a leniency program to be adequately reaped.

As we all know that cartel investigations continue to evolve in Brazil and globally, the BRICS' Competition Authorities must stay alert to new technology and any other elements that may affect the incentive structure of the leniency program to the detriment of trust between participants and the authority and, ultimately, of the enforcement of the law.

Leniency programs must involve three key factors: a) fear of detection; b) consistent enforcement policies; and c) sanctions. Fear of detection is directly connected to how enforcement policies are built. To deal with cartel investigations, we have strong, lasting and fruitful institutional relationships with federal and state law enforcement agencies, and Competition Authorities from different jurisdictions, including those from BRICS. Administrative, criminal and civil sanctions established in Brazilian laws function as huge incentives for companies engaged in cartels to apply for leniency.

Moreover, a result-yielding leniency program in the detection and investigation of cartels must be predictable and transparent. Predictability and transparency have to be interrelated to the criteria and policies defining how the country's leniency program works not just in theory but in practice. The Brazilian Competition Authority has provided for this predictability and transparency by offering online access to different

materials (such as guidelines, for instance) answering many of the most persistent questions raised by applicants. We have also made available online models of our leniency agreement and related documents for prospective applicants. This material was deliberately written in an accessible and non-specialist language to ensure it is understandable not only by the antitrust community. As stated above, mutual trust is essential for a leniency program to thrive sustainably. The community must indeed trust the program. We do our best to put into practice what is established in the guidelines, but they cannot anticipate every possible issue. Therefore, we are committed to explaining how the guidelines are adapted to atypical circumstances. That way, we safeguard and promote the longevity and success of our program.

Leniency programs may also come across challenges due to cross-border enforcement issues. The increased costs of coming forward and engaging in cooperation in multiple jurisdictions may curb cartel investigations. To overcome this hurdle, we are always dedicated to fostering teamwork with Competition Authorities abroad, to better implement leniency programs and deter, detect, investigate and prosecute cartels.

A major and notable contribution, the lengthy and comprehensive Review of Leniency Programs in the BRICS Countries, a praiseworthy endeavour of the Russian Federation, with consistent and up-to-date information on leniency programs related to cartels, is unquestionably another step towards strengthening cooperation among our Competition Authorities. Common and different features are accurately identified listed in a single and easy-to-access document, helping to foster cooperation and establish concrete solutions to the challenges we all face. The Review is undoubtedly set to become a reference for international cartel enforcement.

Brazil is strongly committed to its state-of-the-art leniency program, a tool of utmost importance in our cartel investigations and we now have this document that will assist us in improving cross-jurisdictional operations when it comes to implementing leniency programs in the detection and investigation of cartels by BRICS Competition Authorities. I hope this is just one of many initiatives by the BRICS countries aimed at improving our leniency programs for cartel detection and investigation.

RUSSIAN FEDERATION

Mr. Maxim Shaskolsky, Head of the Federal Antimonopoly Service (FAS Russia)

Dear Colleagues,

Cartels are recognized as one of the most dangerous forms of restricting competition all around the world. They undermine the foundations of a market economy, cause significant harm to state budget, and are often concluded in socially significant and strategically important sectors of the economy.

BRICS Competition Authorities pay great attention to fight against cartels and steadily expand cooperation in this area. One of the effective mechanisms for detecting cartels is leniency program that encourages participants of an anticompetitive agreement to report their activities and provide a competition authority with evidence of a cartel in exchange for fine reduction or full exemption from liability. A competition authority obtains data about the cartel from its direct participant, assesses duration and scope of the anticompetitive agreement in order to take effective measures and disclose it as soon as possible.

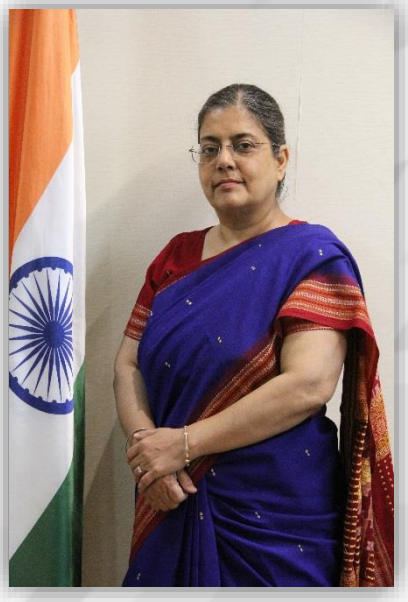
Summarizing the practices of using leniency program by the BRICS Competition Authorities and raising public awareness of its benefits allows to effectively combat cartels and improve competition law enforcement practices in the BRICS space.

While preparing the Review, we have done a great job collecting and analyzing information on leniency program in BRICS, as well as specifics of its application in our counties. I express my confidence that the data reflected in the Review will become a practical guide in the field of combating cartels.

REPUBLIC OF INDIA

Mrs. Ravneet Kaur, Chairperson of the Competition commission of India (CCI)

Dear Colleagues,



It is our pleasure to announce the release of Report on "Review of leniency programs in the BRICS countries". This report serves as a comprehensive guide to the leniency programs and policies of BRICS competition authorities.

As competition authorities, we must be prepared and have necessary tools foridentifying and breaking cartels and bid rigging, the most pernicious form of anti-competitive behaviour in the market(s), with a focus on protecting free competition and ultimately benefitting consumers. This is not only our vision and mission but also our biggest challenge.

We all know, leniency programs play a crucial role in the fight against cartels and bid rigging. Understanding of such programs is also essential for businesses to avail benefits available thereunder; and to stay competition compliant. With this high-quality work product in hand, we hope to provide our stakeholders with a valuable resource that will enable them to navigate the features of the leniency programs of BRICS countries.

In this context, international cooperation plays a key role in fostering dialogue and exchange of experience among agencies around the world. The report is a wonderful example of international cooperation in the form of learning and experience sharing among BRICS competition authorities.

I am sure that the report will become a ready reckoner not only for BRICS competition authorities but also for all the stakeholders of the competition law fraternity. I encourage stakeholders to take advantage of this resource and familiarize themselves with the leniency regimes implemented by BRICS competition authorities. By doing so, we can continue to promote fair competition and uphold the principles of free and open markets.

I compliment and congratulate the colleagues of the BRICS competition authorities who have contributed in putting together such a valuable resource.

Namaskar!

PEOPLE'S REPUBLIC OF CHINA

Madame Gan Lin, Vice Minister of the State Administration for Market Regulation (SAMR), Commissioner of the State Anti-Monopoly Bureau, People's Republic of China

Dear colleagues,

Horizontal monopoly agreements (cartels) severely exclude and restrict competition and are one of the most damaging behaviours in the economy in terms of fair competition in the market. China's anti-monopoly law enforcement authority has always attached importance to the enforcement of horizontal monopoly agreement cases. In 2022, 16 cases of monopoly agreements were investigated and handled nationwide (12 of which involved horizontal monopoly agreements, accounting for 75%), effectively maintaining a level playing field and promoting high-quality economic development.

Monopoly agreements are usually highly concealed. The leniency program can prompt agreement internal members to proactively expose illegal acts and provide core evidence that the anti-monopoly law enforcement authorities find difficult to obtain, which is conducive to early detection of monopolistic conducts, saving administrative enforcement costs, enhancing enforcement efficiency, timely and effective maintenance of fair competition in the market and protection of consumer interests.

In 2008, the *Anti-Monopoly Law of the People's Republic of China* was promulgated and implemented, which clearly provides for a leniency program. Since then, China's anti-monopoly law enforcement authority has continued to improve institutional arrangements to create a more fair, open and transparent competitive market environment. In 2019, the State Administration for Market Regulation (SAMR) formulated and promulgated the *Interim Provisions on the Prohibition of Monopoly Agreements*, which provides further clarity on the "material evidence" in the application of the leniency program and the extent to which penalties can be mitigated or waived. In the same year, the Anti-Monopoly Committee of the State Council formulated the *Guidelines for the Application of the Leniency Program in Horizontal Monopoly Agreement Cases* to further refine the conditions for the application of the leniency program. Recently, SAMR has just introduced the revised *Provisions on the Prohibition of Monopoly Agreements*, which further refines the leniency application and

determination procedures,and provides clearer and more explicit guidelines for undertakings and law enforcement authorities.

As Chinese President Xi Jinping pointed out, ‘As long as we hoist high the sail of mutual benefit and win-win and keep a steady hand on the tiller of solidarity and cooperation, we will break waves and steer the giant ship of BRICS countries toward a brighter future!’. For a long time, BRICS countries have continually strengthened practical cooperation in the field of competition policy and anti-monopoly, shared experiences on topics such as combating cross-border cartels, food safety, fair competition in the pharmaceutical and automotive markets, and achieving fruitful results. The *Review of Leniency Programs in the BRICS Countries*, which brings together the latest achievements and best practices in the field of BRICS leniency programs, will play an important role in deepening international cooperation on anti-monopoly among BRICS countries, enhancing the influence of BRICS countries in the field of global competition and maintaining a level playing field in global markets.

REPUBLIC OF SOUTH AFRICA

Ms. Doris Tshepe, Commissioner of the Competition Commission of South Africa (CCSA)

Dear colleagues,

Leniency Programs are considered the most effective tools to detect and prosecute cartels. While this joint report provides market participants with a bird's eye view of the Leniency Program in BRICS countries, it is also certain that competition agencies in all BRICS countries will greatly benefit from each other's knowledge and experiences. In a nutshell, the report demonstrates that BRICS countries have committed themselves to work together and deepen cooperation into cartel investigation and that competition agencies within BRICS group are proactively taking steps to combat cartels.

Introduction

The issue of combating cartels is a priority area of work of competition authorities around the world. It is widely recognized that many cartels are uncovered because of leniency applications. Leniency programs have been adopted by many jurisdictions to detect and punish cartel participants/members. Accordingly, cartel members are facing increased risk of detection, thereby leading to more successful prosecutions of cartels including international ones.

In the context of globalization and digitalization of the economy, it is more than essential to have proper and efficient leniency programs across the globe for combating cartels and this call for development of updated and improved methods for detecting and busting cartels both at the national and global levels.

At the national level, competition authorities develop a set of legal and investigative tools designed to bust cross-border cartels, and thus, eliminating their negative consequences for national economies.

One of the most important and effective tools for identifying and busting cross-border cartels is leniency program. Effective leniency programs provide participants in anticompetitive agreements/cartel with an opportunity to come forward to voluntarily submit information to the competition authority about an anticompetitive agreement/cartel or participation in concerted actions, and receive full or partial exemption from administrative liability/penalties/sanctions.

For many antimonopoly authorities, leniency programs are one of the most important tools for detecting cartels. According to the data of OECD Secretariat Survey on the application of the OECD Recommendations on effective actions against hard-core cartels, the number of cartels revealed with the use of leniency is between 45 and 55% in countries such as Canada, Chile, Germany, Korea and New Zealand, 80% in the EU and 90% in the US.

The BRICS countries are no exception and at the national level develop, improve and apply leniency programs for cartel investigations.

For companies and their individuals, a leniency program brings significant advantages, since, by collaborating with the competition authority in the investigation of a cartel, they may benefit from full immunity or up to 100 percent reduction of the fine.

Conditions generally prescribed by the competition authorities for an effective leniency program:

- Leniency programs work best when they provide a clear and reliable promise of amnesty to come forward.
- Leniency program indicates in clear terms all the conditions for seeking the benefits of leniency

- The risk of tough penalties provides the incentive for a conspirator to come forward and seek leniency.

The continued co-operation of the conspirator / leniency applicant genuinely, fully, continuously and expeditiously in the prosecution is a necessary condition for leniency. In order to increase the transparency of national leniency programs in the BRICS countries and increase the effectiveness of their implementation, a draft document has been prepared.

This document contains general provisions of the leniency programs in each of the BRICS countries, including those related to the protection of confidential information, as well as describes possible ways to bring the leniency programs in the BRICS countries closer together through increased international cooperation.

During preparation of this document, the existing relevant developments of the International Competition Network[1] and Organization for Economic Cooperation and Development[2] were taken into account.

This document is a guide for BRICS Competition Authorities, and business communities on issues related to leniency programs in Brazil, Russia, India, China and South Africa.

Recent cases

Brazil

From 2015 to 2022, 33 leniency agreements were signed in the context of the "Car Wash Operation" the largest anti-corruption and anti-cartel scheme operation in Brazilian history. The Car Wash Operation involved all spheres (administrative, judicial and legislative) of the Brazilian governmental structure. During this period, a further 32 leniency agreements outside the context of the Car Wash Operation were also signed.

In the last years, the following investigations, based on leniency agreements, reached a final decision in Brazil:

- Cartel in the international air and ocean freight market (*Administrative Proceeding No. 08012.001183/2009-08*).
- Cartel in the domestic and international market for spark plugs (*Administrative Proceeding No. 08700.005789/2014-13*).
- Cartel in the domestic and international market for automotive clutch (*Administrative Proceeding No. 08700.000949/2015-19*).
- Cartel in the national and international bearing market, specifically in the supply of parts for the IAM (Independent Aftermarket) and OEM (Original Equipment

[1] https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf
[2] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452

Manufacturer) markets, in the automotive and industrial segments (*Administrative Proceeding NO. 08012.005324/2012-59*).

- Cartel in the domestic market for automotive parts (engine pistons, bearings, cylinder liners, liners, pins, connecting rods, ring carriers, sealing rings and gaskets, and engine piston rings (jointly and/or separately)), in the independent aftermarket (IAM) and/or the original parts market (OEM) (*Administrative Proceeding No. 08700.006065/2017-30*).
- Cartel in private bids of Telemar and Telefonica, in the electronic components market for telecommunications (*Administrative Proceeding No. 08700.000066/2016-90*).

Russia

Over the last decade, the number of leniency applications filed with the FAS Russia has been increasing significantly. Compared with the 19 applications made in 2010, the FAS Russia received 146 leniency applications in 2020.

Notable recent cases in which Russia's leniency program was applied include:

- A cartel case in 2019 concerning construction procurement valued at over RUB5.6 billion *(The FAS Russia Decision dated February 22, 2019 in case No. 1-11-152/00-22-18; upheld by Resolution of the Ninth Commercial Appellate Court No. 09AP-27013/2020 dated October 26, 2020*).
- A cartel case in 2019 concerning coal supplies for power producers in Russia's Far East. The alleged cartel covered several public tenders for an amount in excess of RUB4 billion. *(The FAS Russia Decision dated December 16, 2019 in case No. 22/01/11-167/2019*).
- A cartel case in 2018 concerning the procurement of forensic equipment for the Ministry of Internal Affairs and the Russian Federal Centre of Forensic Science of the Ministry of Justice. The cartel was identified by, *inter alia*, with the help of a leniency applicant (*The FAS Russia Decision dated January 24, 2018; upheld by Resolution of the Ninth Commercial Appellate Court No. 09AP-49459/2018 dated October 16, 2018 in case No. A40-88709/2018*).

India

The summary of some of recently decided cases are as follows:

- **Paper Manufacturers Cartel** (*Suo Motu Case No. 05 of 2016*)

  This case was initiated by the Commission on the basis of information received during an investigation of another case about a concerted action of price

manipulation by 20 paper manufacturers and the association. In this matter, one of the party filed an application for a lesser penalty and accepted the existence of a cartel among the manufacturers and admitted that it had participated in meetings where commercially sensitive information was discussed. Subsequently, in its analysis the Commission agreed with the Investigation, and held ten undertakings/enterprises and the association to be in contravention of section 3(3)(a) of the Competition Act, 2002 (Act). Accordingly, the Commission imposed a penalty of ₹ 5 lakh each on the ten entities and the leniency applicant was granted a 100% reduction in penalty. Apart from this, the association was also penalized with monetary penalty of ₹ 2.5 lakh. The Commission also issued a cease-and-desist order against the contravening entities.

- **Beer Cartel** *(Suo Motu-Case No.06 of 2017)*
  Crown Beers India Private and SAB Miller India, both ultimately under the umbrella of Anheuser Busch InBev SA/NV (AB InBev) were the first to apply for leniency for their involvement in a cartel relating to the production, marketing, distribution and sale of beer in India from 2005 to 2017. AB InBev also submitted that a cartel with two other beer manufacturers namely, Carlsberg India Private Limited (CIPL) and United Breweries Limited (UBL) allegedly implemented through the common platform of the All India Brewers' Association (AIBA). Subsequently, CIPL and UBL also filed for leniency. In this matter, search and seizure operations were conducted on the premises of the parties. The investigation revealed that three companies were engaged in the co-ordination of prices, limiting supplies and allocating markets in certain states. Accordingly, the Commission passed a cease-and-desist order against the parties for the anti-competitive conduct. Giving the benefit of reduction in penalty under the provisions of Section 46 of the Act of 100% to AB InBev and its individuals, 40% to UBL and its individuals and 20% to CIPL and its individuals, the Commission directed UBL and CIPL to pay penalties to the tune of approx. INR 750 crores INR 111 crores, respectively. The Commission also issued a cease-and-desist order against the contravening entities.

- **Bid rigging in tender floated by Leading Bank** *(Suo Motu Case No. 02 of 2020)*
  The case was taken up by the Commission on *suo motu* basis upon receipt of a complaint alleging bid rigging and cartelization in a tender floated by SBI Infra Management Solutions Pvt. Ltd. (SBIIMS) for the supply and installation of new signage/replacement of existing signage. The Commission based on Investigation

Report and other material available on record, including the lesser penalty application filed by one of the party, noted that there were e-mail communications, containing worksheets showing auction sequence, exchanged between the parties in relation to the impugned tender. The Commission held seven parties and their certain individuals to be guilty of contravention of the provisions of Act. Considering that most of the parties were MSMEs and due to the ongoing Pandemic (COVID-19), the Commission took a lenient view while levying monetary penalties and decided to impose penalty upon the parties and their individuals at 1% of their respective average turnover and average incomes respectively and also granted a reduction in penalty by 90% to the leniency applicant and its individuals. Accordingly, monetary penalties in the range of around ₹ 6 lakh to ₹ 52 lakh was payable by parties. The Commission also issued a cease-and-desist order against the contravening entities.

- **Cartelisation by Maritime transport companies** (*Suo Motu Case No. 10 of 2014*)

  The case was initiated by the Commission *suo motu*, on the basis of an application filed by Nippon Yusen Kabushiki Kaisha (NYK Line). Subsequently, Mitsui O.S.K. Lines Ltd. ('MOL') and Nissan Motor Car Carrier Company ('NMCC') also filed lesser penalty applications before Commission regarding cartelization in the provision of maritime motor vehicle transport services to automobile Original Equipment Manufacturers (OEMs) for various trade routes. The Commission, on the basis of material available on record, found that there was an agreement between NYK Line, Kawasaki Kisen Kaisha Ltd. (K-Line), MOL and NMCC with the objective of enforcement of "Respect Rule", which implied avoiding competition with each other and protecting the business of incumbent carrier with the respective OEM. The Commission held four opposite parties, *i.e.*, NYK Line, K-Line, MOL and NMCC, guilty of contravention of the provisions of Section 3 of the Act and imposed penalty 5% of the relevant turnover for each year of continuance of cartel. As three companies filed lesser penalty applications, the Commission gave benefit of reduction in penalty by 100% to NYK Line, 50% to MOL and 30% to NMCC and accordingly, directed K-Line, MOL and NMCC to pay penalties to the tune of approx. ₹ 24.23 crores, ₹ 10.12 crores and ₹ 28.69 crores, respectively. The Commission also issued a cease-and-desist order against the contravening entities.

- **Cartel by Kraft Paper Manufacturers** (*Case No 24 of 2017*)
  This case was initiated on the basis of information filed by three federations/associations of corrugated box manufacturers. During the course of investigation, out of 119 parties 31 parties filed applications for lesser penalty over a period of time. Based on the evidence collected during investigation and those provided by the leniency applicants, such as minutes of Meetings, e–mail communications, WhatsApp messages etc. the Commission found the opposite parties to be engaged in anti-competitive conduct of price fixing and output restriction. Considering the peculiarities of the case and fallout of COVID 19, the Commission refrained from imposing monetary penalties and issued a cease-and-desist order against the contravening entities.

The detailed orders in respect of the above cases can be accessed from the website of the Commission www.cci.gov.in.

China:

The most significant development to the leniency program is the Leniency Guidelines published by SAMR in 2020.

A cartel case was announced by the Hunan Administration for Market Regulation (Hunan AMR) in 2020, which involved the leniency program. Hunan Zhongmin Gas (Zhongmin) and its rival Huaihua Railway Economic Technology Development (Huaihua Railway) had reached and implemented a monopoly agreement to divide the bottled liquefied petroleum gas (LPG) filling market. Hunan AMR imposed a fine on Zhongmin of about CNY1.76 million (3% of its 2018 turnover) and granted full immunity to Huaihua Railway, according to the penalty decisions published by SAMR (*www.samr.gov.cn/fldj/tzgg/xzcf/202007/t20200702_319339.html*). Huaihua Railway was granted full immunity from fines because it was the first to voluntarily report the division of the distribution area, providing important evidence that played a key role in determining the content, method, and implementation of the concerned monopoly agreement.

South Africa:

The first version of the Corporate Leniency Policy was published in May 2008. A revised version was published in March 2012. Since its initial adoption in May 2008, the Corporate Leniency Policy has arguably been the Commission's most successful enforcement tool in uncovering and prosecuting cartels.

The Corporate Leniency Policy has successfully been applied in a high number of cartel investigations across a range of industries, including high- and low-profile investigations. Industries that have seen notable high-profile investigations and prosecutions involving the successful application of the Corporate Leniency Policy include:

- Pre-cast concrete.
- Bread manufacturing.
- Construction.
- Wheat and maize milling.
- Cement.

Section 1. Leniency programs in the BRICS countries

This section contains information covering the specifics of applying leniency programs in the BRICS countries. In addition, this section provides information from the competent authorities responsible for providing leniency programs in the BRICS countries; reviews the scope of the program; clarifies the conditions for applying for the program; and describes the procedure for applying for participation in the program and withdrawing the application within each individual jurisdiction.

(As part of the preparation of this document, the FAS Russia circulated a questionnaire to the competition authorities of the BRICS countries to provide up-to-date information. Some information pieces in this section have been taken from open sources, including official websites of BRICS competition authorities, and can be updated).

1.1. Leniency program in Brazil

1.1.1. Applicable laws and guidelines

Applicable laws and guidelines In Brazil, the leniency program is regulated by Law No. 12 529/2011 (Competition Law), recently amended by Law No. 14 470/2022, and observed by the Administrative Council for Economic Defense (CADE). Recently, CADE updated the Guidelines for Antitrust Leniency Program (https://cdn.cade.gov.br/Portal/acesso-a-informacao/participacao-social/contribuicoes-da-sociedade/outras-contribuicoes-concluidas/guidelines-cades-antitrust-leniency-program.pdf) and released the Guidelines about parameters for submitting evidence in leniency applications[3].

1.1.2. Competent authority

In accordance with the Competition Law, CADE is the competent administrative authority for the promotion and enforcement of competition in Brazil. A leniency agreement is signed between the General Superintendence of CADE[4], together with the Prosecutor's Office and the applicant. The CADE General Superintendence has the authority to grant exemptions under the leniency program.

[3] https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Parameters-for-submitting-evidence-in-leniency-applications-Atualizado.pdf

[4] The General Superintendence's responsibilities are to investigate and to instruct cases. It is commanded by the General Superintendent, who has a two-year term, which can be renewed once.
http://en.cade.gov.br/about-us/general-superintendence

1.1.3. Scope of the program

The leniency program applies to violations contained in article 36 of the Competition Law. Most of the violations relate to cartels and other crimes related to cartel behavior, such as bid rigging.

1.1.4. Conditions for granting leniency

Conditions for granting full exemption from liability

A leniency agreement may grant a party the exemption from administrative and criminal sanctions.

To do this, the applicant must:

- be the first collusion participant to report the violation;
- have willingness to cooperate with the regulatory body;
- confess the wrongdoing;
- cease its participation in the violation reported or under investigation;
- assist in the identification of the others involved in the violation and in the collection of evidentiary information and documents of the offense reported or under investigation.

Sliding scale of leniency

CADE provides full exemption from administrative and criminal liability only to the first applicant. Therefore, the sliding scale does not apply to the first applicant.

However, the degree of exemption from liability may vary depending on whether CADE was aware of the illegal activity prior to entering into the agreement. In such case, the applicant is granted a partial exemption from liability for one-third to two-thirds of the applicable fine.

A motion for leniency will only be accepted if, by the time it is submitted, the authorities do not have sufficient evidence to convict the collusion participants. In addition, granting an exemption from liability depends on the effectiveness of the applicant's cooperation with the antimonopoly authority during the entire administrative proceeding.

Other members of the cartel may become subsequent applicants for other kind of agreement. The agreement between CADE and subsequent applicants is called the TCC (Cease and Desist Agreement for cartel cases). In this case, there is a sliding scale for mitigating administrative liability.

The amount of penalty reduction granted depends on:

- the procedural timing of the cooperation (e.g., if it is proposed before the General Superintendence or before the Tribunal).[5];

[5] The CADE Tribunal is a competition court in Brazil.
http://en.cade.gov.br/about-us/administrative-court-economic-defense

- whether it was the first, second, third and subsequent applicant;
- the scope and usefulness of the cooperation.

Thus, the discount rate for subsequent applicants can vary from 15% to 50%.

Conditions for granting leniency to individuals

In accordance with article 86 of the Competition Law, the leniency program is available to both companies and individuals. Full exemption from both administrative and criminal liability is available to current and former directors, managers and employees of any company involved in the alleged wrongdoing, if they sign the leniency agreement together with the company and commit to cooperate with the investigation of the relevant wrongdoing.

In the event, that the company has not offered CADE a leniency agreement, its former and current employees can still do so. However, in this case, the company will not be subject to the exemptions provided for in the leniency agreement.

In addition, the exemptions will cease to apply to the individual applicant himself, if he does not cooperate with the body investigating the offense after signing the agreement.

In both cases (companies or individuals), if the conditions are not fulfilled, the leniency recipient responsible for the noncompliance will lose his respective benefits, and be submitted to the fines and other applicable penalties.

Exemption from criminal liability of the company and / or its employees

As soon as the CADE Tribunal declares compliance with the leniency agreement, penalties are immediately terminated as follows:

- cartel behavior, as provided for by Law No. 8137/1990 (Economic crimes Act);
- other cartel-related crimes, set out in various laws, such as Law No. 14.133/2021 (General Procurement Act) and Law No. 2848/1940 (Criminal Code).

Former and current directors, employees, and managers of the applicant company will only be exempt from administrative / criminal liability if they have signed the leniency agreement together with the company or an addendum to the original agreement, with the permission of CADE and the Prosecutor's Office. This addendum will be subject to a convenience and opportunity criteria.

Directors, managers and employees who have not signed the leniency agreement can be held liable both by CADE and in criminal proceedings.

Regarding cartel damages, the recently approved Law No 14 470/2022 guarantees that applicants will only be responsible for compensating damages they caused, while non-collaborating companies need to compensate double damages.

1.1.5. Submitting an application

The company and / or individual employee can apply independently or through their legal representative. Individuals and companies of the same economic group can only

benefit from the terms of the agreement if they have signed it together with the applicant company.

An application for leniency can be made through the online platform Click Leniency (https://leniencia.cade.gov.br/), telephone or e-mail.

The application form can be found here: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guia-recomendacoes-probatorias-para-proposta-de-acordo-de-leniencia-com-o-Cade.pdf.

Based on the information given by the applicant, the General Superintendence assesses the request and, if the marker is available, issues a declaration confirming that the applicant meets the requirements for negotiating a leniency agreement.

The "marker" system allows the applicant to deepen their internal investigation before submitting the application and provides a guaranteed place "in the queue" for leniency. The marker also indicates, whether the alleged violation is already being investigated.

Evidence provided by the applicant

The applicant must provide the following information:

- detailed information about all known violators (including themselves) and information about the participation of each of them in anti-competitive activities;
- information about the violation, the affected market, as well as the products, services and geographical region affected by the conduct.

As well as such evidentiary documents as:

- exchange of mails, e-mail messages via text and / or voice dialing, or other written communication between competitors or between persons of the same company describing illegal agreements between competitors;
- daily notes, notebooks, handwritten annotations, notes, and spreadsheets. Invitations to bid and announcements of contract awards;
- Meeting management (Outlook meetings, conference room reservations, hotel room reservations, credit card bills, and travel expense reports), and so on.
- information on proposals to mitigate liability in other jurisdictions for the same anti-competitive practices.

Recently, CADE published a new Guide, presenting parameters regarding evidences and documents that leniency applicants shall submit to the Brazilian antitrust authority[6].

Stages of the leniency program

The leniency program is divided on the three main stages:

1. request for a marker;

[6] English version: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Parameters-for-submitting-evidence-in-leniency-applications-Atualizado.pdf

2. submission by the applicant of an application for leniency, presentation of evidentiary documents and necessary information;
3. execution phase, submission of additional information and documents related to anti-competitive behavior, such as certified translations of foreign documents. At this stage, it is also possible for the Prosecutor's Office to participate as a third party to the agreement, which may request changes or additions to the leniency agreement. Subsequently, the parties concerned must confirm the terms of the agreement and sign it at the CADE headquarters (or at another location specified by the parties). At this stage, evidence documents must be finally provided.

Recipients of leniency after signing the said agreement must continuously cooperate with the investigation until it is completed.

The Prosecutor's Office may or may not participate in stage 3, since its participation is not explicitly required by articles 86 and 87 of the Law No. 12.529/2011. However, in light of the criminal consequences of the cartel, the prosecutor's office is usually invited to participate in the conclusion of agreements as a third party, which provides greater legal security for recipients of leniency.

1.1.6. Revocation of the application for leniency

An applicant for leniency may withdraw their application at any time prior to signing the agreement. The revocation is not illegal and is not classified as an admission of wrongdoing.

CADE can also reject the applicant's proposal in case it considers the information and evidences presented are insufficient or, when it comes to international cartel cases, in case the applicant fails to demonstrate effects in the Brazilian market.

If there is a waiting list for applicants, the next applicant in line will be invited to negotiate a new leniency agreement.

CADE cannot initiate an investigation based on documents and information provided in the context of withdrawn (or rejected) leniency negotiations. All the above documents will be returned to the applicant.

However, applicants for leniency, whose agreements are not fulfilled after signing the agreement, lose all the benefits provided under the program, and can be brought to administrative / criminal liability

1.1.7. Possibility of a third party to file a claim for subsequent damages against the applicant

The leniency applicant is not exempted by law from follow-on actions for cartel damages.

Regarding cartel damages, the recently approved Law No 14 470/2022 guarantees that applicants will only be responsible for compensating damages they caused, while non-collaborating companies need to compensate double damages.

1.1.8. Privacy Policy

The access and publicity restriction must comply with CADE's Resolution No. 21 of September 18, 2018.

The content of the Leniency Agreement, of the "History of Conduct" elaborated by the SG/Cade, and of all documents and other materials attached are of restricted access and will not be disclosed to the public, even after an eventual initiation of administrative inquiry to investigate violations to the economic order or of administrative proceedings for the imposition of administrative penalties for violations to the economic order by the Brazilian competition authorities and/or the initiation of a criminal > proceeding by the Prosecutor's Office.

The exceptional granting of access to the such documents may occur in the following cases:

I – legal express permission;

II – specific judicial order;

III – express authorization of the Signatories, provided that there is CADE's consent certifying the absence of harm to the investigation; or IV – international legal cooperation, provided for in articles 26 and 27 of the Civil Procedure Code, upon authorization from CADE and authorization of the Signatories, provided that there is no harm to the investigation.

Unless otherwise provided by the Signatories endorsed by CADE, the identity of the Signatories will be treated as of restricted access to the public until the final judgment by CADE of a possible administrative proceeding for the imposition of administrative penalties for violations to the economic order, related to the Reported violation.

After the initiation of an administrative inquiry for the investigation of violations to the economic order or of administrative proceedings for the imposition of administrative penalties for violations to the economic order, any information documents or other additional materials provided by the Signatories under the terms of the Leniency Agreement shall be treated by SG-CADE as of restricted access, as long as such information and documents fulfill the requirements for restricted access set forth in Article 52 of CADE's Internal Statute, or if the disclosure of such information or documents may reveal the identities of the Signatories to the general public before CADE's final decision on the matter.

The offer of leniency, the identity of the applicant and other documents are automatically considered confidential until the final decision of the Tribunal is made

(paragraph 9, article 86 of the 2011 law and CADE Resolution No. 21 of 2018). Recently, there have been changes in the confidentiality provisions of TCC agreements, leniency agreements, and other related documents.

Resolution No. 21 stipulates that all documents and information (with one exception, see below) submitted by the leniency applicant in the course of cooperation with CADE, will be published at the stage of execution of the procedure.

A new leniency program document containing detailed information about the behavior, violators, market, products, customers, as well as a list of evidentiary information and documents is not subject to publication.

Information disclosure rules

Leniency agreements and documents provided during negotiations may serve as a justification for requesting a search warrant from the courts (article 13, VI (d) of the Competition Law[7]).

Although there are no provisions for a disclosure request made after the information is submitted to the administrative antitrust authorities, internal statements made to criminal authorities may lead to compartmentalized and limited disclosure of information to foreign agencies executed by the federal police, Department of Asset Recovery of the Ministry of Justice through the system of international legal cooperation, whenever and wherever necessary to notify the defendant for defense.

Brazilian courts can request information from foreign agencies. The availability of such information depends on the existence of a bilateral cooperation agreement between the parties or an international agreement providing for the exchange of information.

1.1.9. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

In case of violation of confidentiality rights, criminal liability is stipulated by Article 325 of Law No. 2848/1940 (Criminal Code), and administrative liability is stipulated by Article 44 of Law No. 12529/2011 (Competition Law)

1.1.10. Complaints about the cartel

Individuals who are not involved in an offense can notify CADE of a cartel or other anti-competitive behavior through a special form[8] available on the SG / CADE website or by email.

If possible, informants should attach evidentiary information about a potential anti-competitive offense to the notification.

[7] Competition Law of the Federative Republic of Brazil https://www.oecd.org/daf/competition/45154401.pdf

[8] http://en.cade.gov.br/topics/leniency-program

Protecting informants

CADE´s General Superintendence approved an ordinance (Portaria 292/2019) to guarantee the preservation of informant´s identity during the investigation. Also, the communication channel on the CADE website is anonymous, so the identity of the informant will not be disclosed. Currently, there is no provision for remuneration of informants.

According to the law, informants are not entitled to any protection. However, the communication channel on the CADE website is anonymous, so the identity of the informant will not be disclosed. Currently, there is no provision for remuneration of informants

1.2. Leniency program in Russia

1.2.1. Applicable laws and guidelines

In the Russian Federation, the leniency program is regulated by the Code of Administrative Offences of the Russian Federation No. 195-FZ of 30.12.2001 (Article 14.32), Criminal Code of the Russian Federation No. 63-FZ of 13.06.1996 (Article 178), Article 44.1 of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition" (hereinafter - the Law on Protection of Competition) "The procedure for filing an application by an economic entity for the conclusion of an agreement restricting competition or for the implementation by it of concerted actions restricting competition in order to mitigate administrative liability or release from administrative liability provided for by the legislation of the Russian Federation on administrative offenses", Order of the FAS Russia of 21.08.2019 No. 1118/19 "On additional measures to enforce the notes to Article 14.32 of the Code of Administrative Offenses of the Russian Federation", Order of the FAS Russia of 19.07.2019 No. "On administrative offenses in the central office of the FAS Russia", Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of June 30, 2008 No. 30 (as amended on 03/04/2021) "On some issues arising in connection with the application of antimonopoly legislation by arbitration courts"

1.2.2. Competent authority

The competent authority responsible for making decisions on granting leniency is Federal Antimonopoly Service (FAS Russia), a federal executive body whose activities are managed by the Government Of the Russian Federation. Currently, regional offices of the FAS Russia carry out antimonopoly control in the regions of the Russian Federation. Administrative responsibility is stipulated by Article 14.32 of the Code of Administrative Offences of the Russian Federation. The bodies responsible for the

release under the leniency provision in accordance with Article 178 of the Criminal Code of the Russian Federation are law enforcement agencies.

1.2.3. Scope of the program

Leniency program is possible for violations provided for by parts 1-4 of Article 11, Article 11.1, Article 16, paragraph 1 of Part 1 of Article 17 of the Law on Protection of Competition, liability for which is stipulated in parts 1-4, 6 and 7 of Article 14.32 of the Code of Administrative Offences of the Russian Federation, and applies only to individuals (a group of persons determined in accordance with the antimonopoly legislation of the Russian Federation).

The leniency program does not apply to federal executive authorities, state authorities of the constituent entities of the Russian Federation, local self-government bodies, other bodies or organizations performing the functions of these bodies, as well as state extra-budgetary funds.

1.2.4. Submitting an application

If a company or individual employee is aware of the fact of cartel collusion, one can report it to the FAS Russia by sending an anonymous letter to the agency's email address (delo@fas.gov.ru), or by leaving a request on the official website[9].

For applications submitted within the framework of a note to Article 14.32 of the Code of Administrative Offences of the Russian Federation, there is a special procedure enshrined in the Order of the FAS Russia of August 21, 2019 No. 1118/19 "On additional measures to enforce the note to Article 14.32 of the Code of Administrative Offenses of the Russian Federation". In addition, we note that it is necessary to separate the "messages about the cartel", which can be submitted anonymously and via the hotline and considered in accordance with Article 44 of the Law on Protection of Competition or in the manner prescribed by the Federal Law of 02.05.2006 No. 59-FZ "On the procedure for considering applications from citizens of the Russian Federation", from leniency applications.

Messages received via the hotline will be registered as an official request to the FAS Russia and considered in accordance with the procedure established by Federal Law of 02.05.2006 No. 59-FZ "On the procedure for considering appeals from citizens of the Russian Federation".

1.2.5. Conditions for granting leniency

When resolving the issue whether at the time of the person's leniency application the antimonopoly authority did not have the relevant information and documents on the committed administrative offense, the courts should take into account that such a condition is met if the application took place before the announcement of the decision

[9] https://fas.gov.ru

of the antimonopoly commission the body that established the fact of violation of the antimonopoly legislation of the Russian Federation (part 2 of article 49 of the Law on Protection of Competition), which was the reason for initiating an administrative offense case (part 1.1 of article 28.1 of the Code of Administrative Offences of the Russian Federation).

Exemption from administrative liability

It is necessary to distinguish the exemption from administrative liability provided for in paragraphs 2-7 of part 1 of Article 4.2 of the Code of Administrative Offences of the Russian Federation (circumstances mitigating administrative liability), part 3 of Article 14.32 of the Code of Administrative Offences of the Russian Federation from mitigation of liability within the framework of note 5 to Article 14.32 of the Code of Administrative Offences of the Russian Federation.

So, for committing an administrative offense provided for in parts 1-4 , 6 and 7 of Article 14.32 of the Code of Administrative Offences of the Russian Federation, an administrative fine on a legal entity is imposed in the amount of the minimum amount of an administrative fine stipulated for the commission of this administrative offense, if such a legal entity (a group of persons determined in accordance with the antimonopoly legislation of the Russian Federation) voluntarily declared to the federal antimonopoly body or its regional office that it concluded an agreement that is unacceptable in accordance with the antimonopoly legislation of the Russian Federation, or concerted actions inadmissible in accordance with the antimonopoly legislation of the Russian Federation and in the aggregate fulfilled the following conditions:

- the person admitted the fact of committing an administrative offense;
- the person refused to participate or further participate in the agreement or concerted actions;
- the information and documents provided are sufficient to establish the event of an administrative offense.

The person who second and third fulfills the conditions set out in note 5 to Article 14.32 of the Code of Administrative Offences of the Russian Federation has the opportunity to receive the minimum fine provided for the corresponding offense (in particular, for part 1 of Article 14.32 of the Code of Administrative Offences of the Russian Federation – 0,03% of the amount of the offender's proceeds from the sale of goods (work , services), on the market of which an administrative offense was committed, or the amount of the offender's expenses for the purchase of goods (work, services), on the market of which an administrative offense was committed, but not less than one hundred thousand rubles; for part 2 of Article 14.32 of the Code of Administrative Offences of the Russian Federation - 10% of the initial cost subject of the auction, but not more than

one twenty-fifth of the aggregate amount of the offender's proceeds from the sale of all goods (works, services) and not less than one hundred thousand rubles, etc.).

Exemption from administrative liability under the leniency program is possible only for the first applicant (subject to all conditions; mitigation of administrative liability under the program is possible only for the second and third applicant (subject to all conditions).

At the same time, the Code of Administrative Offences of the Russian Federation contains provisions on the possibility of applying mitigating and aggravating circumstances when calculating an administrative fine in a general manner. In this case, the calculation is made according to the formula, in accordance with the methodological recommendations.

If a company or individual employee is aware of the fact of cartel collusion, one can report it to the Federal Antimonopoly Service by sending an anonymous letter to the agency's email address or by filling out the form on the agency's official website.

Article 44 of Federal Law No. 135-FZ of 26.07.2006 “On Protection of Competition” an application for leniency is submitted in writing to the antimonopoly authority and must contain the following requirements:

- information about the applicant (surname, first name, patronymic and address of residence for an individual; name and location for a legal entity);
- information available to the applicant about the person in respect of whom the application was filed;
- description of the violation of the antimonopoly legislation;
- the nature of the claims that the applicant applies for;
- list of attached documents.

Article 44 of Federal Law No. 135-FZ of 26.07.2006 “On Protection of Competition” stipulates that the antimonopoly authority considers the application or materials within one month from the date of their submission. If there is insufficient or no evidence that allows the antimonopoly authority to conclude that there are or there are no signs of violation of the antimonopoly legislation, the antimonopoly authority may extend the period of consideration of the application or materials for collecting and analyzing additional evidence, but not for more than two months. The antimonopoly authority shall notify the applicant in writing about the extension of the deadline for consideration of the application or materials.

Sliding scale for mitigating administrative liability

For other persons involved in the cartel and who did not declare their participation first, it is still possible to reduce the amount of the fine, relying on section II of the

methodological recommendations of the Federal Antimonopoly Service of Russia for calculating fines in the following order:

- 40% of the basic fine − if the person found to have violated the antimonopoly legislation fulfilled the FAS Russia order before the end of the administrative violation proceedings;
- 20% of the amount of the basic fine − if, despite the conclusion of a cartel agreement, the person's behavior indicates that he does not comply with it and his behavior can be qualified as independent and competitive;
- 10% of the basic fine − if the person is not the initiator of the cartel agreement or has received a mandatory instruction to participate in it.

The specified values can be summed up and the exemption from punishment can be more than 40% of the value of the basic fine.

Exemption from criminal liability

Exemption from criminal liability of an individual has its own requirements, enshrined in the Article 178 of the Criminal Code of the Russian Federation and in no way related to the release or mitigation of the administrative liability of a legal entity, as described above.

Exemption from criminal liability is possible for each cartel member if the following conditions are:

- cartel member helped to solve a crime;
- in respect of damage to third parties or illegal income, the cartel member alternatively (i) reimbursed the damage caused to citizens, organizations or the State, or (ii) transferred to the federal budget the income received as a result of criminal actions; and
- his actions do not contain any other elements of a crime. The grounds for exemption from criminal liability are sufficiently fully regulated by the criminal procedure legislation.

Markers

In the classic form, following the example of the United States and the EU, the marker system is not provided for by Russian legislation. Within the framework of Russian legislation, the main marker is the receipt of a written application by an economic entity to the FAS Russia or its regional offices for exemption from administrative responsibility.

1.2.6. Revocation of the application for leniency

At the legislative level, the procedure for withdrawing a leniency application is not regulated. The FAS Russia also currently lacks relevant practice.

1.2.7. Possibility of a third party to file a claim for subsequent damages against the applicant

In the Russian Federation Articles 12 and 15 of the Civil Code of the Russian Federation and part 3 of Article 37 of the Law on Protection of Competition allow a person affected by a violation of antimonopoly legislation to recover both real damage and lost profits. To recover damages from a violator of the antimonopoly legislation, the affected person (plaintiff) must prove the following:

1. fact of violation of the antimonopoly legislation;
2. the act of existence of losses (including their amount);
3. cause-and-effect relationship between the violation of antimonopoly legislation and the losses caused.

The absence of evidence for at least one circumstance may lead to the rejection of the claim. The existence of a causal relationship is probably the most difficult element of proof in cases involving recovery of damages. Often, the courts refuse to satisfy claims precisely because the plaintiff has not proved the existence of a causal link between the violation and the resulting losses.

In addition, an auxiliary tool is the decision of the antimonopoly body in the case of violation of antimonopoly legislation. In this regard, in many cases, a preliminary appeal to the antimonopoly authority becomes the preferred step for potential plaintiffs in cases of recovery of losses.

However, mitigation of administrative liability does not entail exemption for the applicant from civil liability (the possibility of filing private or class actions). At the same time, release from administrative liability does not entail release from criminal liability. For this purpose, it is necessary to submit an appropriate application in accordance with Article 178 of the Criminal Code of the Russian Federation. It should be borne in mind that Russian legislation does not contain criminal liability for legal entities, it is provided only for individuals.

1.2.8. Privacy Policy

Provisions on privacy protection are provided for in article 26 of Federal Law No. 135-FZ of 26.07.2006 “On Protection of Competition”. According to the Law on Protection of Competition, a confidential nature is provided for an application for the conclusion of an unacceptable anti-competitive agreement or the implementation of coordinated actions submitted in accordance with Note 1 to Article 14.32 of the Administrative Code.

The obligation of the antimonopoly body to observe commercial, official, and other secrets protected by law is enshrined in Article 26 of the Law on Protection of Competition.

In accordance with part 3.3 of Article 45 of the Law on Protection of Competition, the materials of the case on violation of the antimonopoly legislation, containing information constituting state, commercial, official or other secrets protected by law, are formed and stored in accordance with the requirements of the legislation of the Russian Federation in a separate volume.

Disclosure by persons participating in the case, their representatives, experts, translators of information constituting a state, commercial, official or other secret protected by law entails liability in accordance with the legislation of the Russian Federation (part 3.4 of Article 45 of the Law on Protection of Competition).

At the same time, the obligation to maintain confidentiality in relation to statements of exemption from liability also follows from part 1 of Article 45.2 of the Law on Protection of Competition, according to which persons participating in a case on violation of antimonopoly legislation have the right to familiarize with statements, objections, explanations and other materials submitted on the initiative of the person participating in the case, to confirm the presence or absence of the fact of violation of the antimonopoly legislation, with the exception of the applications for exemption from administrative liability for administrative offenses provided for in parts 1 and 3 of Article 14.32 in the case materials of the Code of Administrative Offences of the Russian Federation, and (or) on exemption from criminal liability for criminal offenses provided for by Article 178 of the Criminal Code of the Russian Federation.

In addition, according to the Order of the FAS Russia of 21.08.2019 No. 1118/19 "On additional measures to enforce the note to article 14.32 of the Code of Administrative Offenses of the Russian Federation" actions that restrict competition are unacceptable in accordance with the antimonopoly legislation of the Russian Federation in accordance with the rules for recording and storing documents for official use.

The information about the applicant is not disclosed by the antimonopoly authority. At the same time, the disclosure of information about the applicant at the stage of judicial proceedings remains at the discretion of the court, since the antimonopoly authority, among other things, in the event of a judicial appeal against the decision of the antimonopoly authority, also transfers the application filed in the order of notes to Article 14.32 of the Code of Administrative Offences of the Russian Federation to the court.

1.2.9. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

For cases of violation of confidentiality rights the criminal liability is stipulated by Part 183 of the Criminal Code of the Russian Federation, administrative liability is stipulated by Article 13.14 of the Code of Administrative Offences of the Russian Federation.

1.2.10. Complaints about the cartel

Messages received via the hotline will be registered as an official appeal to the FAS Russia and considered in accordance with the procedure established by Federal Law No. 59-FZ of 02.05.2006 “On the Procedure for Considering Appeals from Citizens of the Russian Federation”.

The procedure for considering applications (including on grounds of violation of Articles 11, 11.1, 16, paragraph 1 of Part 1 of Article 17 of the Law on Protection of Competition) is enshrined in Article 44 of the Law on Protection of Competition, as well as the Administrative Regulations of the FAS Russia on the execution of the state function of initiating and consideration of cases on violations of the antimonopoly legislation of the Russian Federation, approved by Order of the FAS Russia of 25.05.2012 No. 339.

You can report on a cartel agreement using the form on the official website of the FAS Russia:

https://fas.gov.ru/pages/activity/antimonopoly-regulation/soobshhi-o-kartele!.html

1.3. India's leniency program

1.3.1. Applicable laws and guidelines

In terms of the provisions contained in Section 3 (1) of the Competition Act, 2002 (hereinafter, the Act) no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3 (2) of the Act declares that any agreement entered into in contravention of the provisions contained in Section 3 (1) of the Act, shall be void. Further, by virtue of the statutory presumption contained in Section 3 (3) of the Act, any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition. A recent amendment in Section 3(3) the Act (hereinafter, Amendment

2023) captures persons/entities acting as 'facilitator' or 'hub', though not engaged in identical or similar trade if it participates or intends to participate in the furtherance of such agreement.

Section 46 of the Act, in conjunction with the Regulations framed by the Competition Commission of India (CCI) *viz*. Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR) (amended in 2017), governs the leniency regime in India, generally known as the 'Lesser Penalty' regime. To further incentivise the leniency applicants to voluntarily come forward and self- report/disclose the existence of another cartel, the 'Lesser Penalty Plus' framework has been introduced through Amendment 2023. In this way, cartels, that would have remained undiscovered otherwise, could be disclosed.

Section 46 of the Act allows a cartel participant to come clean before CCI and assist it in busting the cartel in lieu of availing the benefit of reduction in the penalty amount to be imposed upon it. Under Section 46 of the Act, an enterprise (producer, seller, distributor or trader of goods or service provider) included in a cartel, may approach the Commission by way of filing an application seeking lesser penalty, acknowledging therein its participation in the cartel activity and providing full, true and vital disclosures and complete co-operation in this regard. The Commission may mitigate the liability of any cartel member if it is satisfied that the entity has provided full, true and vital disclosure about the cartel activities. The procedural aspects governing the lesser penalty program of CCI are provided in the LPR, which *inter alia* set out:

- the steps for applying for leniency;
- the conditions for grant of leniency;
- the sliding scale of mitigation of administrative liability;
- the confidentiality requirements with respect to identity of leniency applicant and information, evidence and documents provided by it.

1.3.2. Competent authority

The Commission administers and enforces the leniency program under the Competition Act.

1.3.3. Scope of the program

The leniency program covers all violation that constitute a 'cartel' within the meaning of Section 2 (c) of the Act, which are a violation of the provisions of Section 3 of the Act.

Section 2(c) defines 'cartel' to include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Such agreements between competitors may, *inter alia*, result in imposition of significant monetary penalties under Section 27 (b) of the Act. The leniency program in India is available for entities and/ or their individuals, who were a part of such agreements/ cartel, and who report about the same to the Commission and cooperate during inquiry and investigation.

There is no criminal liability for cartel behaviour in India under the Act. Thus, the leniency program applies only to administrative liability imposed for participation in a cartel.

1.3.4. Conditions for granting an exemption from liability

Under Regulation 4 of the LPR, CCI has the discretion to grant reduction in penalty to the tune of

- Upto or equal to 100 % to the first leniency applicant;
- Upto or equal to 50 % to the second leniency applicant; and
- Upto or equal to 30 % to the third and subsequent leniency applicants;

if they meet the following conditions:

- stop participating in the cartel from the moment of informing about the cartel to the Commission (unless otherwise directed);
- provide vital disclosures about a violation of provisions of Section 3 of the Act;
- provide all necessary information, documents, and evidence as required by the Commission;
- act in good faith extending genuine, full, continuous and expeditious co-operation during the investigation and other proceedings before the Commission; and
- do not conceal or destroy or manipulate the relevant documents in any manner.

The Commission may also impose additional conditions or restrictions, apart from the above, upon a leniency applicant, depending on the circumstances of the particular case.

An applicant may be granted benefit of reduction in penalty upto or equal to one hundred percent if the applicant is the first to make a vital disclosure by providing evidence of a cartel that allows the Commission to:

- form a *prima facie* opinion regarding existence of a cartel in contravention of the provisions of Section 3 of the Act, and the Commission at the time, had no sufficient evidence to form such an opinion; or
- establish a violation of the provisions of Section 3 of the Act by a cartel, in a matter already pending investigation, where the Commission and its Director General (CCI's Investigation arm) (DG) did not, at the time, have sufficient evidence to establish such contravention.

The second applicant and subsequent applicants may be granted maximum reduction in penalty allowed to them provided that they provide significant added value to the

evidence already in possession of the Commission or the DG, as the case may be, to establish existence of a cartel.

Sliding scale for mitigating administrative liability

Under the LPR, there is a sliding scale of administrative liability mitigation: the Commission can reduce fines for more than one applicant for leniency.

To the first applicant, reduction of upto 100% may be granted. The second and third applicant may receive a reduction of upto 50% and 30%, respectively, of the total penalty amount when presenting significant evidence that the Commission and/ or the DG did not previously have.

An amendment to the LPR in 2017 allowed applicants even after third one to receive reduced fine of upto 30% of the total penalty amount.

Exemption from administrative liability of individual

The above-mentioned conditions for granting exemption from administrative liability also apply to individuals approaching the Commission, in their own capacity as leniency applicants, or individuals included as part of the leniency applications filed by their employing entities.

If an individual involved in the cartel does not cooperate with the Commission and/or the DG, he/ she may be excluded from the benefits of leniency.

Exemption from or mitigation of criminal liability

Under the Act, anti-competitive agreements, including cartels, are not subject to criminal prosecution.

1.3.5. Submitting an application

An application for leniency must be submitted either prior to commencement of investigation or during the investigative process. No application for leniency is entertained by the Commission if the same is made after the DG has submitted the investigation report to the Commission.

An entity involved in a cartel, or any of its employees who was a part of the cartel on behalf of the entity, can submit an application for leniency.

Before applying, the applicant cannot receive informal instructions to determine whether it will be eligible for full exemption or commutation.

The initial contact displaying intention to file a leniency application may be made orally or in writing (e-mail, fax, post *etc*.); however, the detailed leniency application containing information specified in the Schedule to the LPR, must be submitted in writing within a stipulated period.

Markers

When an applicant approaches the Commission seeking to file a leniency application, it is granted a provisional marker status. Such first contact seeking marker may be oral or

in writing; however, detailed leniency application thereafter has to be filed in writing within 15 days of receiving the marker confirmation.

The leniency application process hence, consists of two stages:

1. applying for a marker status first, verbally, or in writing;
2. upon confirmation of grant of marker status, submission of a detailed written application for leniency within a period not exceeding 15 days from the date of receipt of marker letter (or within further extended time as allowed by the Commission). If the detailed application is not received within this period, the claim for priority status of the applicant may be forfeited and, consequently, the benefit of grant of lesser penalty.

Required information / evidence to apply for leniency

In accordance with the LPR, an application for leniency must include the following information:

- the names and addresses of all cartel members including applicant;
- if the applicant is located outside India, address of the applicant in India for communication (including phone number, email address, etc.);
- detailed description of alleged cartel arrangement, including its goals and objectives, as well as detailed information on the activities and functions performed to achieve these goals and objectives;
- goods or services involved;
  geographical market covered;
  duration of the cartel;
- estimated amount of business affected by the alleged cartel in India;
- details and data of all persons who, to the best of the applicant's knowledge, are or were involved in the alleged cartel, including applicant's own employees;
- details about other antitrust authorities, forums, or courts, if any, that were contacted or intended to be contacted in connection with the alleged cartel;
- a descriptive list of evidence in support of the leniency application;
- any other material information as may be directed by CCI.

Stages of the leniency program

1. Applicant contacts the Commission through designated authority, expressing intention to file for leniency;
2. Date and time of receipt of application is recorded by designated authority;
3. Application is placed before the Commission within five working days;
4. the Commission grants provisional marker status to the applicant;
5. Communication about marker status is made by the designated authority to the applicant;

6. Applicant is required to file detailed application containing information specified in the Schedule to LPR within 15 days (or extended time). If it does not file within such time, marker status of the applicant is deemed to be forfeited;
7. If detailed application is received, same is placed before CCI for consideration;
8. The Commission considers the leniency application and on the basis of that, either (i) initiates investigation referring the matter to the DG; or (ii) if the application relates to a matter already pending investigation, forwards the application received to the DG; or (iii) if the application is not found to be in accord with the requirement of law, rejects the application;
9. The DG considers and uses the evidence provided by leniency applicant during the course of its investigation and submits an investigation report containing its findings, and analysis of the evidence collected by it (including evidence provided by leniency applicant);
10. The Commission considers the investigation report, allows parties in the matter to make their submissions upon the evidences collected by the DG and the findings reached by it, and then makes the final decision, including decision on quantum of lesser penalty, if any, to be imposed upon the leniency applicants.

1.3.6. Revocation of the application for leniency

The Commission may revoke the marker status granted to a leniency applicant if the applicant fails to comply with the conditions provided in the LPR or fails to provide full and true disclosures of the information and evidence available with it or fails to cooperate during investigation and inquiry. However, before revoking of marker status, opportunity of hearing to the applicant is provided.
If the Commission cancels the marker status granted to any applicant(s), subsequent applicants move up in the order of priority and retain the right to receive leniency, accordingly.

1.3.7. Possibility of a third party to file a claim for subsequent damages against the applicant

The request for leniency does not affect subsequent claims for damages, if any, filed by third parties against cartel members.

1.3.8. Privacy Policy

Section 57 of the Act read with Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (amended in 2022) and Regulation 6 of the LPR (amended in 2017) provides for protection of confidential information received in the framework of leniency policy.
Under Regulation 6 of LPR, the identity of the leniency applicant, as well as information, evidence and documents provided by it in its leniency application, are

granted complete confidentiality by the Commission. The applicant's identity and such information, evidence and documents are kept confidential except in any of the following circumstances:

- law requires disclosure of such information;
- the applicant has given written consent to disclosure of such information;
- the applicant has publicly disclosed such information itself.

Upon the other information and submissions filed by the leniency applicant during the course of investigation before the DG and the Commission, confidentiality in terms of Regulation 35 of the General Regulations (amended in 2022), may be claimed if the parameters stated therein for grant of confidential treatment are met.

If during the course of investigation, the DG deems it necessary to disclose the information, documents and evidence furnished by the leniency applicant in its leniency application to any other party for the purposes of investigation, it may do so only upon grant of written waiver in this regard by the leniency applicant. However, if the applicant does not agree to such disclosure, the DG may still disclose such information, document and evidence to such other party for reasons to be recorded in writing, after taking prior approval from the Commission.

Further, as per the 2017 amendment to the LPR, after completion of investigation by the DG and sharing of the investigation report with the parties by the Commission, the non-confidential version of the leniency applications received in the matter are made available for inspection to the other parties.

1.3.9. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

Under the provisions of the Competition Act and the Regulations framed thereunder, the Commission is empowered to take suitable measures against the concerned.

1.3.10. Complaints about the cartel

Complaints about a cartel may be received either from the cartel participants themselves under the leniency program, or from any other entity by way of filing of an Information or a reference (by a government authority) under Section 19 of the Competition Act. Even *suo motu* cognizance may also be taken by the Commission in appropriate cases.

By virtue of the amendment made in the LPR in August 2017, the scope of leniency applicants was expanded to include individuals of cartelising entities to also file independent leniency applications with evidence of collusion before the Commission.

Protecting informants

Under Regulation 6 of the LPR, confidentiality on the identity of the leniency applicant is granted. Even with respect to the identity of other entities reporting competition law violations to the Commission by way of filing an information under Section 19 of the

Competition Act, confidentiality on identity of the informant may be granted under Regulation 35 of the General Regulations (amended in 2022). However, in such cases, where it is necessary or expedient to disclose the identity of the informant, CCI may do so after providing a reasonable opportunity to the Informant, to represent its case before the Commission.

There is no provision for reward for reporting a possible violation of competition law to the Commission except reduction in penalty to the leniency applicants.

1.3.11. Reform proposals

Recently, the Act has been amended by way of Competition (Amendment) Act, 2023. The Amendment introduced two changes in the extant leniency regime in India: (a) incentive in the form of leniency plus for reporting another cartel and (b) introduction of provision of withdrawal of leniency application. Regulations/detailed modalities for availing Leniency plus are underway and will be notified in due course.

1.4. Leniency program in China

1.4.1. Applicable laws and guidelines

The legal basis for leniency is stipulated by Article 46 of the Antimonopoly Law China (hereinafter referred to as AML). If an enterprise participating in a monopoly or anti-competitive agreement reports its behavior to the antimonopoly authority (State Administration for Market Regulation of the People's Republic of China) and provides substantial evidence, the antitrust authority may, at its discretion, grant the company full immunity or reduced penalties (paragraph 2, Article 46 of the AML).

In 2019, the State Administration for Market Regulation of the People's Republic of China (hereinafter referred to as SAMR) published the Temporary Provisions on the Prohibition of Monopoly Agreements (hereinafter referred to as the Provisions on Monopoly Agreements), which also contains provisions on exemption from liability and reduction of penalties.

In 2020, the Anti-Monopoly Committee of the State Council published the Guidelines for Applying the Liability Program in Cases of Horizontal Monopoly Agreements (hereinafter referred to as the Leniency Guidelines), providing companies with useful guidance on a leniency program.

1.4.2. Competent authority

According to the AML and the Monopoly Agreement Provisions, SAMR is responsible for anti-monopoly law enforcement. SAMR may, in accordance with Article 10(2) of AML, authorize the corresponding authorities in provinces, autonomous regions and municipalities directly under the Central Government (hereinafter referred to as provincial authorities) to take charge of anti-monopoly law enforcement in their respective administrative regions. Typically, SAMR shall be responsible for handling

(i) cases that cross provinces, autonomous regions or municipalities directly under the Central Government; (ii) cases that are complex or have significant impact across the country; and (iii) cases that it considers necessary to investigate and handle directly.

1.4.3. Scope of the program

According to the AML, there is no criminal liability for monopoly agreements. AML provides only for administrative and civil liability. The leniency program in China covers only administrative liability.

The leniency program does not exempt applicants for leniency from civil liability.

1.4.4. Conditions for granting leniency

SAMR may grant a full exemption or reduce the fine by at least 80% to the first applicant for leniency.

However, after submitting an application for leniency or a preliminary leniency report, SAMR may decide not to grant an exemption or reduction in the penalty if:

- the applicant did not stop the alleged violation immediately after the application for leniency was submitted (unless SAMR requires the applicant to continue the alleged violation to ensure the smooth progress of the investigation). If an enterprise has requested leniency from authorities in other jurisdictions and these authorities have requested that the alleged violation continue, they should report this to SAMR;
- the applicant failed to cooperate with SAMR in the investigation promptly, continuously, comprehensively and in good faith;
- the applicant failed to properly preserve and provide evidence and information, or concealed, destroyed, transmitted, or provided false materials/information;
- the applicant submitted their application to a third party without SAMR approval;
- the applicant's actions negatively affected the progress of the SAMR investigation.

If an enterprise organizes or forces other enterprises to participate in a cartel, prevents other cartel participants from cooperating in SAMR investigation, SAMR has the right to impose a reduced fine, rather than fully exempt the enterprise from the fine.

Sliding scale for mitigating administrative liability

The following sliding scale of administrative liability mitigation is available:

- the first applicant may be granted a full exemption from fines or a reduction of the fine by at least 80%.
- fine reduction of 30% to 50% may be granted for the second applicant;
- the third applicant may be granted a reduction of the fine from 20% to 30%;
- In general, the SAMR may grant leniency to a maximum of three applicants in the same monopoly agreement case. If the case is significant and

complex, involves a large number of enterprises and the enterprises applying for leniency do provide different and important evidence, the SAMR may consider granting leniency to more than three enterprises.

Exemption from administrative liability of individuals

Individuals such as managers or employees of the company are not responsible for the company's anti-competitive behavior. Thus, the leniency program does not apply to managers or employees of enterprises.

However, the SAMR can impose a fine of up to 100,000 yuan on individuals if, in the course of an investigation, they:

- refuse to provide relevant materials or information;
- provide false materials or information;
- conceal, destroy and transfer any evidence;
- refuse or obstruct the investigation in any other way.

Exemption from or mitigation of criminal liability

According to the AML, there is no criminal liability for any antitrust violations.

However, criminal liability can be applied for obstructing the investigation, if managers or employees committed the crimes.

1.4.5. Submitting an application

Businesses can apply for leniency before or after SAMR investigation begins, as well as before issuing a prior notice of administrative punishment.

Applications for leniency of liability must be submitted to the SAMR or provincial authorities.

The actual cartel member must submit the application. The legal adviser or employee of the company must submit applications on behalf of the company.

The AML and the Leniency Guidelines do not contain any specific provisions for obtaining informal confidential guidance prior to submitting a formal leniency application. However, Article 5 of the Leniency Guidelines provides that SAMR encourages businesses to report monopoly agreements as early as possible, and that businesses may contact SAMR before applying for leniency. Thus, Article 5 can be considered as a basis for obtaining informal confidential guidance prior to submitting an application for leniency.

The application may be submitted orally or in writing. SAMR issues oral statements in writing, which are then confirmed by an authorized person.

Markers

The Leniency Guidelines sets out the marker mechanism. A business that cannot provide a complete set of materials when applying for leniency may submit the

application as a marker. The company must then submit all necessary materials within SAMR deadline (up to 60 calendar days).

Required information / evidence to apply for leniency

The company applying for leniency must provide a report on the cartel, as well as important evidence in its possession.

The entity must explicitly admit in its report that it participated in a cartel, with detailed information about the cartel. The report should include, among other things, the following information:

- basic information about the participants of the monopoly agreement (including but not limited to name, address, contact information and participating representatives);
- information about the monopoly agreement (including but not limited to the contact time, location, content, and specific participants);
- main contents of the monopoly agreement (including but not limited to products or services, prices, and the number of cartel members), as well as information about the conclusion and implementation of the monopoly agreements by enterprises;
- geographic coverage and size of markets that may be affected;
- duration of the implementation of the monopoly agreement;
- explanation of the submitted evidentiary materials;
- whether it has applied to other foreign law enforcement agencies for leniency;
- other relevant documents and materials.

Stages of the leniency

The AML and the Provisions on Monopoly Agreements do not provide for a clear provision on applicable procedures and deadlines. However, in general, the following applicable procedures can be assumed:

1. Pre-communication between the enterprise and SAMR.
2. The company submits an application for leniency.
3. SAMR issues a written note and a list of materials received. If the application submitted by the first enterprise does not meet the requirements set out in the Leniency Guidelines, SAMR cannot issue a written receipt.
4. If the first entity submits a statement that meets the requirements of the Leniency Guidelines, but is unable to provide sufficient evidence, SAMR may register this and require the entity to supplement its statement with appropriate materials within a specified time, which is usually 30 days (but can be extended to 60 days in special circumstances). At this stage, the "marker" mechanism works.

5. The company takes all necessary measures to fully cooperate with SAMR during the investigation.
6. SAMR provides prior notice of administrative liability after the investigation be completed.
7. If SAMR makes a final decision on leniency, the decision must include the reason for the leniency and must be made public within a reasonable period of time.

1.4.6. Revocation application for leniency

SAMR annuls the applicant's place in the queue if the applicant does not meet the following conditions:

- if the company does not stop the alleged cartel immediately after the application for leniency, except in cases where SAMR requests the company to continue the above-mentioned conduct in order to facilitate the investigation. A company who has applied to other foreign enforcement agency for leniency and is required to continue the above-mentioned conduct, shall report to SAMR;
    - if the company does not cooperate with SAMR promptly, continuously, fully and in good faith;
    - if the company does not properly store and provide evidentiary materials, conceal, destroy and transfer evidentiary materials or provide false materials and information;
    - if the entity discloses its leniency statement to third parties without SAMR's permission;
    - if the company obstructs antitrust enforcement in any other way.

SAMR ranks an enterprise in order of when it applies for leniency and determines its place in the queue. If the enterprise fails to fulfill the obligations listed in Article 10 (1) of the Leniency Guidelines, SAMR will annul its place in the queue.

If leniency is denied to one applicant, the next applicant may not receive a full exemption in his place. In case of refusal to mitigate the responsibility of the applicant for reducing the fine, the next applicant in the queue rises to his place.

1.4.7. Leniency +

China does not provide the policy of leniency +. However, informing the company of other AML violations is considered a mitigating circumstance when assessing the amount of the fine determined by SAMR.

1.4.8. Possibility of a third party to file a claim for subsequent damages against the applicant

Third parties may file civil lawsuits seeking damages for monopolistic behavior.

Granting leniency does not preclude civil claims. However, the materials used in the statement of leniency (for example, statements of leniency and any related documents), cannot be accessed by any business unit or individual.

1.4.9. Privacy Policy

Where SAMR decides to grant leniency to an enterprise, it shall state clearly in the decision the result and reasons for granting leniency, and make the decision known to the public in a timely manner according to law.

All statements, as well as any related documents submitted by the business according to the Leniency Guidelines, should not be disclosed to the public without the consent of the business concerned, and no unit or individual may have access to these documents.

1.4.10. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

If a staff member of SAMR abuses power, neglects duties, plays favoritism and commits irregularities or leaks commercial secrets known in the course of enforcement, and it constitutes a crime, he or she shall be held criminally responsible according to law; if a crime is not constituted, sanctions shall be given according to law.

1.4.11. Complaints about the cartel

China has several tools for individuals to report competition violations, including cartels: a nationwide online platform, a hotline, and other channels such as the Internet, fax, telephone, mail, and email.

Protecting informants

SAMR is required to maintain the confidentiality of the individual who informs them of any suspected monopolistic activities.

In today's world, information is one of the most important resources that can be used for both good and harm.

The principle of confidentiality of leniency statements and information contained in them is a key aspect of leniency programs in the BRICS countries.

1.5. Leniency program in South Africa

1.5.1. Applicable laws and guidelines

Section 49E of the Competition Act No. 89 of 1998 (as amended) (Competition Act) requires the Competition Commission of South Africa to develop and publish a leniency program.

Currently, there is a leniency program called the "Corporate leniency policy".

There are no published guidelines for Corporate leniency policies, but the program provides its own application and process guidelines.

1.5.2. Competent authority

The Competition Commission of South Africa administers Corporate leniency policies.

1.5.3. Scope of the program

The corporate leniency policy applies only to cartel conduct, as follows:

- price fixing;
- market division;
- bid rigging.

Section 3 of the Competition Act provides that the Act applies to all economic activity within, or having an effect within, the Republic of South Africa. As such foreign firms can be prosecuted for a cartel conduct in South Africa even if they don't have a physical presence /offices in South Africa as long as their conduct has an effect in South Africa. Corporate leniency policies are administrative, not criminal, in nature.

1.5.4. Conditions for granting leniency

Exemption from liability

The leniency applicant will receive a full exemption from administrative penalties, if:

- ensure full and truthful disclosure of all available information;
- ensure full, prompt and continuous cooperation with the Competition Commission until the Commission completes the investigation and the subsequent legal proceedings;
- immediately cease cartel activities or act in accordance with the instructions of the Competition Commission;
- do not warn other cartel members about their request for leniency;
- do not destroy, falsify or conceal information, evidence or documents related to cartel activities;
- do not mislead the Commission about material facts about the cartel's activities.

Sliding scale of leniency

Exemption from leniency is possible only for the first applicant. Subsequent applicants may be entitled to a reduced fine, provided they cooperate with the Competition Commission. A reduced fine in these cases can be secured by settling a dispute with the Competition Commission. The settlement must be confirmed by the Competition Tribunal ("the Tribunal"). The Competition Commission has published a Guide to the Determinatio of Administrative Penalties, which sets out the methodology that the Competition Commission follows in determining the appropriate penalty in each case.

Exemption from administrative liability of individuals

The corporate leniency policy applies only to companies. The applicant firm is responsible for ensuring that its managers and employees cooperate with the Competition Commission, otherwise the Commission may refuse to grant leniency. The Competition Commission may send requests for information to employees. If

individuals refuse to cooperate voluntarily, the Competition Commission has powers to issue summons to compel managers and employees to provide the necessary information under summons.

Exemption from or mitigation of criminal liability

According to part 1 of Article 73A of the Competition Law, a person commits a criminal offense if:

- he is a director of the firm, holds or plans to hold a senior position in the firm;
- acknowledges his firm involvement in cartel behavior or agrees that the firm engages in cartel behavior.

Such conduct is subject to a fine of up to 500,000 South African rand or a prison term of up to ten years. Criminal prosecution is conducted through the National Prosecutor's Office and the criminal justice system.

The corporate leniency policy does not provide an exemption from criminal prosecution for the firm or its managers. However, in accordance with article a73A (4) (a) and (b) of the Competition Law, the Competition Commission:

- may not require prosecution of the firm or person who deserves leniency;
- the Ministry of Trade, Industry and Competition may submit applications to the National Prosecutions Authority ("NPA") in support of mitigating the liability of any person or firm prosecuted for a criminal offense. Nevertheless, the final decision is made by the NPA.

In practice, the law on criminal prosecution of cartel conduct is not used in South Africa, and to date there have been no cases of criminal prosecution of cartel conduct.

1.5.5. Submitting an application

As noted above, only the first applicant is eligible for leniency. In this regard, an application for leniency should be submitted as soon as the relevant firm becomes aware of its involvement in a possible violation. The corporate leniency policy allows one to receive a marker that fixes the applicant's place in the queue of applications for leniency. Usually, the marker is used when the firm suspects that it may have been involved in cartel behavior, but requires more time to investigate the problem and obtain evidence to support a formal statement of leniency. When providing a marker, the Competition Commission determines, on a case-by-case basis, the time during which a firm must submit an application for leniency. Marker applications and applications for leniency must be submitted in writing to the Competition Commission. Applications for leniency are submitted on behalf of the interested firm, usually by external legal consultants of the applicant.

An application for leniency may be submitted without disclosing the identity of the applicant, but it must contain sufficient information to enable the Competition Commission to determine whether another firm has already submitted an application for leniency in relation to this conduct. The Competition Commission can confirm whether a firm is first in line, but cannot confirm whether it is eligible for a full exemption, as this depends on the applicant's compliance with all the conditions and requirements of the Corporate leniency policy.

The application form can be found here: https://www.compcom.co.za/apply-for-leniency/

Required information / evidence to apply for leniency

Applicants must provide all information available to them, whether written or oral, including evidence, documents and objects. In accordance with the Corporate leniency policy, the applicant must admit a violation when entering into a confidential Conditional Release Agreement with the Competition Commission. However, the Commission may require the applicant to admit the violation before entering into a Conditional Release Agreement on a case-by-case basis.

Stages of the leniency program

The corporate leniency policy sets deadlines and sets a number of formal steps in the process, such as "first contact with the Commission", "first meeting with the Commission", "second meeting with the Commission", and "final meeting with the Commission." However, in practice, the Corporate leniency policy is not applied strictly in accordance with the established procedure. Usually, the following steps occur in this process:

- the applicant submits a marker or preliminary application. Applicant may choose to not disclose their identity but in most instances applicant disclose their identity when submitting a marker;
- if the Competition Commission confirms that the applicant is the first, the applicant is given a period of time, determined by the Commission on a case-by-case basis, to prepare and submit a detailed application for leniency, with all evidence attached;
- the Competition Commission reviews the application and evidence and may request additional information or details from the applicant on specific aspects of the violation;
- the competition commission conducts interviews with managers and employees of the applicant for leniency;
- the applicant and the Competition Commission enter into a conditional leniency agreement;

- the competition commission investigates other cartel members who can also conclude settlement agreements with the with the Commission if the Commission finds that the conduct contravenes the Competition Act;
- constested matters are referred to the Competition Tribunal for adjudicaition.
- managers and employees of the applicant for leniency act as witnesses to the Competition Commission at hearings in the Competition Tribunal;
- The applicant is granted a full exemption only after the conclusion of the proceedings before the Competition Tribunal or the Competition Appeal Court ("CAC").

1.5.6. Withdrawal of the application for leniency

The leniency application may be revoked at any time, if the applicant does not comply with the terms and conditions of the Corporate leniency policy. A full exemption is granted only after the conclusion of the proceedings before the Competition Tribunal or the Competition Appeal Court.

If the conditional release is revoked because the applicant has provided false information to the Competition Commission, the applicant may be held liable for an offence under article 73 (2) (d) of the Competition Law, which prohibits the provision of false information. A person found guilty of such an offence is liable to a fine of up to 2000 South African rand and / or a prison sentence of up to six months.

Revocation of conditional leniency means that the remaining cartel participants in the queue can be considered for providing them with leniency.

1.5.7. Leniency +

The general practice of the Competition Commission does not take into account the disclosure of information related to other cases.

1.5.8. Possibility of a third party to file a claim for subsequent damages against the applicant

The protection offered by the Corporate leniency policy is limited to exemption from administrative penalties. Section 65 (6) of the Competition Law provides that any natural or legal person who has suffered damage as a result of a cartel may file a claim for damages against the cartel participants. A potential claimant for damages should receive a certificate from the Competition Department confirming that the relevant conduct has been recognized as a prohibited practice. Further, the plaintiff for civil damages must prove a causal link between the cartel and the damage and prove the amount of compensation for damages. This mechanism is not yet sufficiently developed in South Africa.

1.5.9. Privacy Policy

The identity of an applicant for leniency is usually disclosed upon completion of the Competition Commission's investigation, when the case is referred to the Competition Tribunal for review.

The application for leniency and information submitted to the Competition Commission by the applicant is subject to protection in accordance with section 44 of the Competition Act. If the applicant wish to claim confidentiality over the information submitted to the Competition Commission, they should sign and submit the Confidentiality Form as prescribed under section 44 of the Competition Act. The Competition Commission may not disclose information claimed as confidential unless if it contests the confidentiality claim. Disputes over confidentiality claims may be resolved by the Competition Tribunal if parties cannot agree scope and nature of information claimed as confidential. The owner of confidential information may waive/ withdraw its claim for confidentiality, or the Competition Tribunal determine the scope and conditions for disclosure of such information. The Competition Commission may disclose confidential information in cases where it is necessary to ensure compliance with the Competition Law or to administer justice. The Competition Commission has concluded cooperation agreements with several antimonopoly agencies. These agreements recognize compliance with national legislation and confidentiality requirements. As such the Competition Commission may not disclose confidential information to Foreign Competition Authorities without the consent/ waiver by the CLP Applicant.

1.5.10. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

In South Africa, legislation is not providing any specific sanctions in case of violation of confidentiality rights and disclosure of confidential information.

1.5.11. Complaints about the cartel

-Informants and whistleblowers may submit information undercover / without disclosing their identity.

- An individual can only be considered an official complainant if they disclosed their identity and submit a signed Complaint Form known as Form CC1.

- Where an individual wishes to remain anonymous, the Competition Commission will initiate its own complaint based on the information submitted by anonymous. This is to guarantee the anonymity of the person who submitted the information.

Informants can contact the Competition Commission in person, by phone, email, or fax. Remuneration for informants and complainants of the case is not provided.

Section 2. Confidentiality

In today's world, information is one of the most important resources that can be used for both good and harm.

The principle of confidentiality of leniency statements and information contained in them is a key aspect of leniency programs in the BRICS countries.

2.1. Confidentiality of information provided under the leniency program: proper storage at the national level

An applicant's lack of confidence in the confidentiality of their application and information provided may undermine the effectiveness of the leniency program by reducing incentives for disclosure and cooperation. It can also undermine the integrity and effectiveness of investigations. Cartel members may refrain from applying for a leniency program if they do not have confidence in the proper confidentiality of the information and evidence they provide, as their disclosure may lead, inter alia, to: (1) claims for damages and private lawsuits; (2) the initiation of investigations in other jurisdictions where the cartel member did not apply for a leniency that exposes the applicant to a greater risk of liability; (3) avoiding interaction and "revenge" by other cartel members.
In this context, the protection of confidentiality in cross-border cartel cases is particularly important.

BRICS competition authorities guarantee the protection of confidential information obtained under the leniency program in accordance with the following provisions:

- In Brazil, these are paragraph 9, article 86 of the 2011 Law[10] and CADE Resolution No. 21 of 2018[11];
- In Russia, this is Article 26 of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition"[12];
- In India, under Section 57 of the Competition Act, 2002[13], CCI (Lesser Penalty) Regulations, 2009 and CCI (General) Regulations, 2009.

[10] http://www.russobras.com/doc/const_do_brasil_1988.pdf
[11] http://en.cade.gov.br/cade/assuntos/normas-e-legislacao/resolucao/resolucao-no-21-de-12-de-setembro-de-2018.pdf/view
[12] https://legalacts.ru/doc/FZ-o-zawite-konkurencii/
[13] https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

- In China, the Chinese civil procedure regime does not have a disclosure procedure. However, courts in China may collect certain evidence on their own initiative or at the request of the parties;
- In South Africa, this is article 44 of the Competition Act[14].

2.2. Sanctions in case of violation of confidentiality rights and disclosure of confidential information

If confidential information is disclosed, BRICS Competition Authorities may be subject to sanctions:

- In Brazil, it is regulated by Law No. 12 529/2011 (Competition Law) and the Administrative Council for Economic Defense (CADE);
- In Russia: criminal liability – Article 183 of the Criminal Code of the Russian Federation, administrative liability — Article 13.14 of the Code of Administrative Offences of the Russian Federation;
- In India, it is under the Competition Act, 2002 (as amended in 2023) and the CCI (General) Regulations, 2009 (as amended in 2022) and;
- In China, if a staff member of SAMR abuses power, neglects duties, plays favouritism and commits irregularities or leaks commercial secrets known in the course of enforcement, and it constitutes a crime, he or she shall be held criminally responsible according to law; if a crime is not constituted, sanctions shall be given according to law;
- In South Africa, legislation is not providing any specific sanctions in case of violation of confidentiality rights and disclosure of confidential information.

2.3. Exchange of confidential information when BRICS Competition Authorities cooperate with each other

Cooperation among BRICS Competition Authorities is key to successful coordination in dealing with cartel cases involving applicants in multiple jurisdictions.
The exchange of confidential information is possible only with the permission of the leniency applicant that provided information.
In this regard, the BRICS Competition Authorities ask the applicant to provide a waiver of confidentiality (waiver) for negotiating and exchanging information with the agency indicated in the waiver.

[14] https://www.comptrib.co.za/legislation-and-forms/competition-act

Section 3. Similarities and differences of the leniency programs in the BRICS countries

3.1. Legislation provides full exemption from liability

Brazil	Russia	India	China	South Africa
✓	✓	✓	✓	✓

The laws of all BRICS countries provide for full exemption from liability.

3.2. Legislation provides mitigation of liability

Brazil	Russia	India	China	South Africa
✓	✓	✓	✓	✓

The laws of all BRICS countries also provide for liability mitigation.

3.3. Submitting an application for participation in the program through the official website of the authority

Brazil	Russia	India	China	South Africa
✓	✓	✗	✗	✓

One can apply for participation in the program through the official websites only under legislation of Brazil, Russia and South Africa.

3.4. Administrative responsibility

Brazil	Russia	India	China	South Africa
✓	✓	✓	✓	✓

All BRICS countries have administrative liability for cartel offenses.

3.5. Criminal liability

Brazil	Russia	India	China	South Africa
✓	✓	✗	✗	✓

Among the BRICS countries, only India and China do not have criminal liability for the cartel.

3.6. The presence of a marker system

Brazil	Russia	India	China	South Africa
✓	✗	✓	✓	✓

There is marker system in all BRICS countries except of Russia.

3.7. Protection of confidential information filed under the leniency program

Brazil	Russia	India	China	South Africa
✓	✓	✓	✓	✓

The protection of confidential information submitted under the leniency program is guaranteed in all BRICS countries. Among all the BRICS countries, by law, the confidentiality of an informant is disclosed only in South Africa.

3.8. Compensation for participating in the leniency program

Brazil	Russia	India	China	South Africa
✗	✗	✗	✗	✗

Nobody from BRICS members is providing remuneration for informants and program participants.

3.9. Leniency +

Brazil	Russia	India	China	South Africa
✓	✗	✓[15]	✗	✗

So far Leniency + has been implemented only in Brazil.

3.10. Sanctions for disclosure of confidential information

Brazil	Russia	India	China	South Africa
✓	✓	✓	✓	✓

Sanctions for the disclosure of confidential information obtained under leniency programs are envisaged in all BRICS countries.

3.11. Criminal sanctions for disclosing confidential information

Brazil	Russia	India	China	South Africa
✗	✓	✗	✓	✗

Only the legislation of the Russia and China provides for criminal liability for the disclosure of confidential information.

[15] Introduced *vide* Competition (Amendment) Act, 2023. Regulations/detailed modalities for availing Leniency+ are underway and will be introduced in due course.

Section 4. Conclusion

The Leniency programs of BRICS competition authorities offers leniency or immunity to companies including their individuals that come forward and self-report about a cartel. Leniency programs can disrupt the stability of cartels by encouraging firms to defect and cooperate with authorities. By offering leniency or immunity to the firm to self-report its involvement in a cartel, the program creates an incentive for firms to defect and provide evidence against other members of the cartel. This can trigger a chain reaction of defections and cooperation, leading to the unravelling of the cartel.

The document covers in detail the policies of respective Leniency programs of BRICS competition authorities to bust cartels as well as important cartels busted with the help of leniency programs. The document highlights the significant contribution of Leniency programs in unearthing the cartels which is recognized as one of the pernicious anti-trust infringements.

This form of cooperation among the BRICS competition authorities offered an opportunity of learning from each other's policies and regulations in place as well as in the form of sharing of each other's experience in implementing them. Cooperation among the BRICS competition authorities has been further strengthened through continuous engagement in such endeavours. Such work products are therefore not only beneficial for competition authorities but are also of immense use to stakeholders including businesses, academia and government. It cannot be denied that joint working on such work products have been instrumental in promoting dialogue, knowledge sharing, and cooperation among the BRICS competition authorities, leading to enhanced coordination and joint enforcement efforts.

The BRICS competition authorities have extensive experience of interacting with each other in the implementation of antitrust enforcement aimed at identifying and preventing anticompetitive practices such as abuse of dominance and cartels including cross-border cartels carried out by large transnational corporations.

In order to conduct a comprehensive cartel investigation including those for cross-border cartels, the BRICS competition authorities recognize the importance of cooperation in the form of exchanging information within the overall framework of MOUs entered into by the authorities and respective legal framework governing protection of confidential information in all BRICS countries. This document covers all these aspects in ample details.

In conclusion, the study of leniency regimes, national practices for granting leniency and their potential for convergence to the extent possible in the existing legal environment, taking into account the specifics of the national legislation of the BRICS countries, should be considered today as an increasingly important driving force. This force serves as the strength of cooperation between the authorities on the one hand, and a significant factor in augmenting the number of leniency applications on the other hand, increasing the efficiency of the investigation and reducing its resource intensity for both competition authorities and applicants.