5 YEARS OF OPERATION *CAR WASH*: REVISITING BID RIGGING AND BRIBERY INVESTIGATIONS

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I. INTRODUCTION

The idea that the interface between antitrust, anti-corruption efforts, and criminal leniency agreements has been the hottest topic on Public Procurement & Antitrust in Brazil since at least 2013 would probably be widely accepted.

Since publication of our article on the topic in 2016,[3] there have been no significant changes to the general legal framework of leniency agreements. A lot, however, could be explored - for instance, on administrative regulation and case law studies addressing these agreements between companies and individuals, and the authorities concerned (antitrust watchdog CADE, anti-corruption authority CGU, and the criminal MPF – Federal Public Prosecutor). Unfortunately, this would be a huge task that would not fit into the scope of the present publication.

On the other hand, there are also more recent developments that certainly deserve our attention, especially since significant changes could take place as of this year (2019), as a consequence of Brazil electing a new federal administration, in power since January.

Antitrust and anti-corruption infringements remain unchanged since the enactment of their respective laws, Law 12,529 of 2011 and Law 12,846 of 2013. The same is true regarding penalties applicable to companies and individuals involved in bid rigging and bribery. Here, however, with the development of administrative regulation and Case Law it has become clear that the legal statutes are very far from providing the responses needed by authorities, defendants, and civil society. To explore these shortcomings, we will take a glimpse at what has been done by the authorities to move forward with the investigations derived from "Operation

3 Diaulas Ribeiro, Nefi Cordeiro & Denis Guimaraes, "Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements." *NAFTA: Law and Business Review of the Americas*, vol. 22, 2016, https://ssrn.com/abstract=2710448; see also Denis Guimaraes, "Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements (Short Version)." *Brazilian Antitrust Law (Law # 12,529/11): 5 years*. Sao Paulo: IBRAC, 2017, https://ssrn.com/abstract=2992175.

Car Wash."[4-5]

II. INFRINGEMENTS

Bid rigging is an antitrust violation that can frequently occur in combination with the payment of bribes to public officials, in exchange for facilitating collusion. Actually, Law 12,846 of 2013 also defines bid rigging as a corruption offense regardless of the presence of bribes, that is, the payment of bribes constitutes a different infringement.

There is a clear overlap regarding what constitutes infringements for antitrust, anti-corruption, and criminal law. Thus, there is no doubt that, in principle, both CADE and the CGU could impose administrative penalties on the same bid rigging practice, leaving aside the criminal penalties that can further be imposed by the Judiciary. In that sense, Article 29 of the anti-corruption law can be understood as a provision designed to avoid double jeopardy/*bis in idem*. Evidently, stating that both CADE and CGU have the power to convict a bid rigging practice implies that the same practice could, in theory, be punished twice by the authorities.

The fact that the anti-corruption law expressly recognizes the power of CADE to investigate and convict an antitrust infringement does not eliminate the possibility of *bis in idem*, but it is reasonable to assume that if both bodies can investigate a given practice *P* (bid rigging), there should be coordination between them in order to mitigate overlaps and increase synergies. This should raise the following considerations:

a. The overlap can be understood as positive, since it theoretically increases the chances that a possible illegal practice is investigated and punished: in practice, one of the two authorities may be willing to investigate while the other may not; and

b. The overlap exists and, if both authorities are willing to investigate the practice, they should coordinate to carry out possible simultaneous investigations efficiently and exploiting synergies. This would involve information sharing, including of evidence gathered in the files. Thus, it would be possible to reach the same fact-finding conclusions at the end of the investigation, which could allow both bodies to issue separate decisions without *bis in idem*. There could still be two convictions, but the penalties imposed should be agreed between CADE and CGU so that the sum of the penalties will be equal to the maximum penalty to be issued according to one of the laws – whether the antitrust or the anticorruption one.

It should be noted that this possibility, which would require information sharing from the investigation files, is not currently stated in the laws, but is included in the CADE/CGU cooperation agreement n. 02/2014.

In addition, it should be noted that the issuance of two convictions – one by CADE and another by CGU – with the sum of penalties not exceeding the maximum penalty established by one of the laws would be a very complex task. As will be shown in the next section, the penalties are somewhat similar but there are differences in the details, and this would matter when the authorities come to set the fines and decide on the enforcement of other kinds of penalties.

4 The so-called Operation *Car Wash* can be defined as the task force led by the Federal Public Prosecution Office and the Federal Police to dismantle Brazilian corruption scandals. Started in March 2014, it used to focus on public procurement promoted by the state-controlled oil company Petrobras (and its supplying construction companies), and the accusations alleged the existence of bid rigging and bribery. *Car Wash* investigations are significant due to its economic importance and the fact that they involve several important Brazilian politicians. Adapted from Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 141.

5 Operation *Car Wash* ("Operação Lava Jato") was the name adopted by the Federal Police to baptize that investigation. In Brazil, "Lava Jato" is a *"fast wash service"* for cleaning cars, normally within the area of gas stations. In the center of Brasilia, within a gas station, worked a disguised exchange broker office (*doleiro*: black market money dealer), used for money laundering. Ironically, within that gas station area didn't work - and it doesn't work until today -, a cleaning car service. The name "Lava Jato" isn't, literally, *Car wash*. That's a quibble. When the police realized they were on to something bigger when they discovered that the *doleiros* were working on behalf of an executive at Petrobras the conclusion was: there is enough money laundered to pay a jet (*Rectius*: more than 50 Airbus A-380), not just (to pay) a car. Consequently: *Jet Wash/Lava Jato*.

III. PENALTIES

A. Administrative Fines on Companies with Sales

Article 37(I)[6] of the antitrust law and Article 6(I)[7] of the anti-corruption law set the range of administrative fines that can be imposed in case there is conviction of a company. Both penalties range from 0.1 to 20 percent of the gross sales of the offender (excluding taxes) in the last fiscal year before the launching of the administrative proceeding, provided that the fine does not end up being lower than the advantage obtained, whenever such estimate is possible.[8]

There are some significant differences, though. In the antitrust law, the fine imposed on the offender can concern only one company that is being investigated in the administrative proceeding, or it can refer to the gross sales of the whole group or conglomerate. In the anti-corruption law, there is no definition on whether the fine can refer to a single company or the whole group. Our understanding is that the Article 6(I) should be interpreted as if it had the same wording as Article 37(I) of the antitrust law (company, or group or conglomerate), for two main reasons:

a. Article 4, §2, of the anti-corruption law states that: "The parent companies, subsidiaries, affiliates or co-members of a consortium, within the scope of the respective contract, will be jointly and severally liable for the practice of the acts described in this Act, being such liability limited to the payment of penalty fines and full compensation of the damages caused"; and

b. Article 16, §5, of the anti-corruption law states that: "The effects of the leniency agreements shall be extended to the legal entities of the same economic group, in fact and in law, subject to such legal entities also signing the agreement, becoming bound by the conditions set forth therein."

The above-mentioned provisions reflect an economic rationality intended to punish or benefit economically related entities linked to the practices, and not a formalistic *ratio* designed to focus on a particular legal entity.

There is another difference concerning the concept of gross sales. As antitrust practitioners with knowledge of Brazilian law are aware, the "field of business activity in which the violation occurred" (Article 37(I)) is a Brazilian alternative formula ultimately approved by Congress in substitution of the traditional criterion of relevant markets[9]. Regarding the interface between antitrust and anti-corruption laws, what is important to have in mind is that, in the antitrust law, the fines will generally be applied over a specific portion of the gross sales of the company/group/conglomerate, and not over the total gross sales of the entity(ies). *This is not applicable to the anti-corruption law*, as there is no antitrust/relevant market discussion in anti-corruption cases.

B. Administrative Fines on Entities without Sales and Employees of the Companies or Entities. Administrative Fines on Administrators or Managers of Companies.

Article 37, II, of the antitrust law and Article 6, Section 4, of the anti-corruption law set the range of administrative fines that can be imposed in case there is a conviction of an entity that does not perform business activities and, consequently, does not make sales (the concept of *gross sales* is inapplicable). In the antitrust law, fines applied to these entities range from BRL 50,000 to BRL 2,000,000,000, while in the anti-corruption law they range from BRL 6,000 to BRL 60,000,000. The reason for the difference is a matter of legislative drafting[10] that cannot be

6 "[I]n the case of a company, a fine of one tenth (0.1%) to twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof," http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

7 "[A] fine in the amount of 0.1% (zero point one percent) to 20% (twenty percent) of the gross revenues earned during the fiscal year prior to the filing of administrative proceedings, excluding taxes, which shall never be lower than the obtained advantage, when it is possible to estimate it," http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1.

8 Daniel Andreoli & Denis Guimaraes, "Comentários ao artigo 37 (multas administrativas)," *Comentários à Nova Lei de Defesa da Concorrência*. Rio de Janeiro: Forense; São Paulo: Método, 2012, p. 151.

9 *Id.* at 153.

10 Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 129.

addressed within the scope of this publication.

Article 37, II, of the antitrust law, is also applicable to the *individuals* that are employees of companies undertaking sales, and employees of any kind of entities not undertaking sales. Therefore, under the antitrust law, mere employees without the power to make decisions but able to concur with an anticompetitive practice are punishable, and their fines have the same range as the ones of entities that do not perform sales.

Conversely, Article 37, III, of the antitrust law targets administrators or managers directly or indirectly responsible for the infringement whenever negligence or willful misconduct is proven. The fines range from 1 to 20 percent of the fine applied to the company (Article 37(I) – in the presence of sales) or entity (Article 37(II) – in the absence of sales).

Finally, in regard to penalties applicable to individuals, there is a major difference between the antitrust and anti-corruption laws: while the former establishes fines applicable to administrators/managers and mere employees, the latter does not set any fines applicable to individuals. It is understood that the anti-corruption law "establishes the rules that discipline the civil and administrative *liability of legal entities* that carry out acts against national or foreign governments,"[11] but it is undeniable that at least one individual must act so that a company can infringe the law.

C. Other Penalties: Administrative Antitrust and Judicial Anti-corruption. Judiciary Antitrust Enforcement. Public Prosecution Office's Oversight of Administrative Anti-corruption Enforcement.

The comparison between Article 38 of the antitrust law and Article 19 of the anti-corruption law is justifiable since the former establishes penalties other than fines – all of them administrative – while the latter establishes judicial penalties. Indeed, all penalties established by the antitrust law are administrative and may be applied by CADE, while the anti-corruption law sets administrative penalties applicable by federal (CGU having a concurrent power in this case), state and local authorities (that may have suffered injuries through practices forbidden by the law's Article 5) as well as judicial penalties applicable upon request by the Federal Government, the States, the Federal District, the Municipalities (also because of possible injuries suffered as a result of practices forbidden by Article 5) and the Public Prosecution Offices, whether Federal or the State ones. These can prosecute offenders who may have caused injury to the public administration, each within their own jurisdiction.

Indeed, the summary below shows that antitrust administrative penalties applicable by CADE (Article 38) are similar to anti-corruption judicial penalties (Article 19, etc.). That is the case for:

a. items II and IV, b (38, antitrust) *vis-a-vis* item IV (19, anti-corruption) and items II and III (88, public procurement law – the anti-corruption law makes reference to it) – all of them concerning penalties such as suspension of the right to participate in bids and denial of access to *i)* credit from public financial institutions and agencies and *ii)* public incentives and subsidies;

b. item V (38, antitrust) *vis-a-vis* item II (19, anti-corruption) – concerning penalties such as partial suspension of activities or transference of corporate control, and;

c. item VI (38, antitrust) *vis-a-vis* item III (19, anti-corruption) – concerning penalties such as full termination of activities.

It is important to clarify that the Judiciary is not excluded from enforcement of antitrust law. Its participation can happen given the following cases:

a. Injured parties can request a judicial order to (i) cease respective anticompetitive practices; and to (ii) obtain compensation for the damages – all this according to Article 47 of the antitrust law. Although the possibility of judicial action before CADE's decisions is explicitly provided by the law, it is not common – judges prefer to have access to the decision of the specialized administrative tribunal;

b. A party in an administrative proceeding before CADE can appeal to the Judiciary in regard to any CADE decisions.

11 http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1.

In both cases a) and b), it should be noted that antitrust matters before the Judiciary are initially dealt by generalist single judges. Courts only decide such cases in the scope of appeals – either State Courts, Federal Courts, and The Superior Court of Justice ("STJ"). The Supreme Court of Justice ("STF") only deals with constitutional matters.

Finally, another provision of the anti-corruption law that may end up having significant importance should be addressed. Article 20 establishes that the Public Prosecutor's Office, *in addition* to the power of requesting enforcement of judicial penalties, can also request before the Judiciary the enforcement of administrative penalties set out in Article 6 of the Law, *provided that the administrative authorities fail to enforce them*.

A judicial decision over such failure or omission does not seem simple, that is, the Law seems to explicitly attribute to the Public Prosecutor's Office huge powers to oversee the administrative enforcement of the anti-corruption law, and the Judiciary will have the discretion to decide whether there has been a failure/omission. One the one hand, this power attributed to the Public Prosecutor's Office can increase the chances for effective enforcement of the anti-corruption law; on the other, it may also open the door for excessive oversight and intrusion through the powers of the federal, state and local governments to enforce the Law.

D. From the Broad Parameters set by the Legal Provisions to the Specifics of Administrative Regulation, Soft and Case Law: CADE Settlement Guidelines v. Advantage Obtained

Article 45 of the antitrust law and Article 7 of the anti-corruption law establish the parameters under which authorities should set the actual fines, within the broad ranges provided by those laws.

While these articles are quite similar, it is interesting to observe that, in this particularly, the anti-corruption law, through the issuance of its regulating Presidential Decree 8,420 of 2015, went far beyond antitrust regulation in terms of fines – what used to be done only through Law. There had been no regulation by CADE regarding the criteria for setting the fines as late as May 2016: parties had to rely exclusively on case law.

With the release of CADE's Settlement Guidelines (updated in September 2017[12]), the Council clarified[13] that the criteria used to set pecuniary contributions in cases of settlement agreements were basically the same that should be used (the Guidelines are not mandatory for CADE) by the authority to set fines in cases of full investigation and conviction.

Therefore, in very simple terms, the following steps were ultimately established for fines (convictions) and pecuniary contributions (settlements):

Calculation basis for fines

As already seen, this would primarily be the gross sales in Brazil, in the last fiscal year before launching the administrative proceeding, in the field of the business activity in which the violation occurred. The Guidelines also elaborate on the exceptions, that is, other calculation bases that may be used when such sales did not take place.

Percentage of the expected fine

As already seen, the percentage ranges between 20 percent and 0.1 percent. The Guidelines expressly mention that, generally, in hard-core cartels (which include bid rigging), 15 percent is applied in line with most case law. The expected fine equals the calculation basis multiplied by the percentage.

12 English version published in December 2016 and not yet updated, http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf.

13 This could already be inferred from early documents with the participation of the Brazilian antitrust authorities, such as: OECD Policy Roundtables. *Experience with Direct Settlements in Cartel Cases 2008*. October 1, 2009, p. 89, https://www.oecd.org/daf/competition/cartels/44178372.pdf. Note that settlements in cartel cases were only allowed in Brazil as of 2007.

Discount for the purposes of settlement agreements

In the case of multiple[14] settlements with regressive discounts in the same administrative proceeding, the following discounts apply:
First applicant: 50 to 30 percent of the expected fine
Second applicant: 40 to 25 percent
Third and further applicants: up to 25 percent

* Calculation of the pecuniary contribution for individuals

Administrators: generally, 1 percent of the pecuniary contribution charged from their companies, but not less than BRL 50,000. Aggravating circumstances may apply.

Other individuals: generally, BRL 50,000. Aggravating circumstances may apply.

It is very important to mention here not only the fines (convictions), but also the pecuniary contributions (settlements), due to the fact that since 2013 the number of settlement agreements executed by CADE has grown remarkably. That happened because the Council issued Resolution n. 5/2013 – regulating the aforementioned multiple settlements with regressive discounts in the same administrative proceeding – in order to simultaneously incentivize (i) collection of evidence; (ii) faster resolution of the proceedings (reducing procedural costs); and (iii) collection of part of the amount that would be due (fines) in case of conviction at the end of the investigations.

The above points (i), (ii), and (iii) could have led virtually any analyst to state that, with CADE's Resolution n. 5/2013 – and in addition to earlier developments[15] such as dawn raids and leniency agreements – the Brazilian anti-cartel policy had finally reached maturity,[16] perhaps at a similar stage of development as the most prestigious policies implemented by a few of the authorities from OECD[17] countries. However, more developments have since taken place.

As of 2016, two economist members of CADE's Tribunal (out of a total 7 members: 6 Commissioners and the President) started to argue that the pecuniary contributions (the majority of cases as of 2013) and fines were not being set according to the provisions of Brazilian antitrust law. Basically, they argued that pecuniary contributions/fines set according to the percentage range provided by Article 37(I) of the Law, and especially given the different calculation bases accepted by most Commissioners in several cases, ended up being set below the aforementioned requisite amount (item 3.1) established in the same legal prevision. In other words, that the fine cannot be lower than the advantage obtained by the defendant through said anticompetitive practice, provided that it is possible to estimate such advantage.

In addition, it should be mentioned that the Ministry of Finance (boosted into the Ministry of the Economy in January 2019) has a body devoted to competition advocacy, which in March 2018 issued a *Technical Note*[18] addressing the matter of the advantage obtained, in line with the work carried out by the two aforementioned CADE Commissioners since 2016[19].

14 For a critique of this regulation, see Roberto Taufick, "Suboptimal liability in cooperative supergames and resilient official cartels in Brazil," *Revista de Derecho Aplicado LLM UC* 2 (2018), p. 18, https://ssrn.com/abstract=3314907.

15 Marcelo Calliari & Denis Guimaraes, "Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation," *Antitrust Magazine*, Vol. 25, No. 3, 2011, p. 68, https://ssrn.com/abstract=2710408.

16 Marcelo Calliari & Denis Guimaraes, "Brazil: Toward a Mature Cartel Enforcement Jurisdiction?"; Adrian Emch, Jose Regazzini & Vassily Rudomino (eds.), *Competition Law in the BRICS Countries*. International Bar Association Series, Kluwer Law International, 2012, pp. 13-25, https://ssrn.com/abstract=2710434.

17 OECD's current assessment is that "CADE relies extensively on settlements (…) to resolve its investigations" (OECD Report by the Secretariat. *Competition Law and Policy in Brazil – A Peer Review*. 18 January 2019, p. 99).

18 SEPRAC – Secretaria de Promoção da Produtividade e Advocacia da Concorrência. "Poder dissuasório das multas aplicadas pelo Cade: relação entre o valor da multa e a vantagem auferida pelo infrator," *Nota Técnica SEI nº 1/2018/ASSEC/SEPRAC-MF*. Brasília: 1º de março de 2018, esp. p. 3, parágrafo 15.

19 The OECD, on the other hand, criticizes the "uncertainty about whether and how to calculate the benefit derived from the infringement" (*supra* note 17, 102).

1. CADE Settlements in investigations derived from the Operation *Car Wash* and the debate on pecuniary contributions/fines

The dissent between these two economists and the other 5 members of CADE's Tribunal (including its President) is reflected in the decision from November 21, 2018, that approved 16 settlements in the scope of 6 bid rigging investigations derived from the "Operation *Car Wash*" scandal.

The chart below illustrates how significant the difference can be between pecuniary contributions/fines set according to (i) the CADE Settlement Guideline; or (ii) more elaborated quantifications carried out with the purpose of estimating the advantage obtained through said anticompetitive practices.

Details regarding pecuniary contributions discussed by CADE's Tribunal									
Investigation	**Settlement**	**Defendant**	**Calculation basis**	**Percentage***	**Deterrent factor****	**Discount**	**Commissioner's dissenting vote*** (BRL)**	**CADE's decision**** (BRL)**	**Difference**
Onshore refineries (Petrobras)	1 2 3	OAS Carioca Odebrecht	Confidential	Confidential	40%	19% 14% 12%	917,591,042 190,081,572 1,949,250,962	116,220,578 49,356,180 300,651,617	690% 285% 548%
Nuclear plant (Angra III)	4	Odebrecht	Confidential	Confidential	40%	22%	37,346,147	13,349,110	180%
Shanty town urbanization (PAC Favelas)	5 6 7	OAS Carioca Odebrecht	Confidential	Confidential	40%	41% 32% 16.5%	54,019,075 30,406,752 152,862,155	12,967,312 6,914,016 28,088,245	317% 340% 444%
Arenas World Cup 2014	8 9	Carioca Odebrecht	Confidential	Confidential	40%	30.5% 48%	35,142,178 200,541,966	4,619,100 90,740,615	661% 121%
Petrobras's special buildings (Cenpes)	10 11 12	OAS Odebrecht Andrade Gutierrez*****	Confidential	Confidential	40%	46% 29% 19%	51,584,171 70,155,662 62,490,046	31,641,977 40,479,654 38,070,391	63% 73% 64%
Railways	13 14 15 16	OAS Odebrecht Carioca Andrade Gutierrez	Confidential	Confidential	40%	30% 16.9% 16.7% 50%	5,799,618 182,016,338 5,037,572 185,468,779	3,716,640 46,090,624 2,606,249 31,649,620	56% 295% 93% 486%
Total							4,129,794,035	817,161,929	405%

Adapted from CADEa. *Dissenting vote of Commissioner Schmidt – Table 1*. Brasilia: November 21, 2018, p. 4. * In all cases (except one), higher than 17%.
** The *deterrent factor* is not mentioned in the CADE Settlement Guideline. According to both dissenting Commissioners, in order to comply with the legal provision, the fines/pecuniary contributions must actually exceed the *advantage obtained*. Otherwise, defendants would be incentivized to engage in anticompetitive practices again. While in general Commissioner Schmidt sets the deterrent factor as a 20% increase over the amount defined under the preceding column, for the Car Wash settlements, she claimed it was necessary to set it as a 40% increase, alleging that it is more difficult to uncover bid rigging cases (p. 4, paragraph 43).
*** Pecuniary contributions that should be charged to comply with the *advantage obtained* requirement of the law, according to the more severe dissenting vote (there were two dissenting votes pro *advantage obtained*).
**** Pecuniary contributions negotiated between defendants and CADE's General Superintendence (*SG*), the investigative branch. The majority of the Commissioners of CADE's Tribunal approved these amounts.
***** Odebrecht, OAS, and Andrade Gutierrez, jointly with Camargo Correa and UTC (the last two had already executed settlement agreements before CADE in the scope of investigations derived from the Operation Car Wash), are considered by the investigators the leaders of the cartel (CADEb. Dissenting vote of Commissioner Resende. Brasilia: November 21, 2018, p. 3, paragraph 11, endnote 2).

It should be stressed that the significant difference between the amounts settled by CADE based on the Guidelines and the more rigorous amounts advocated by the dissenting Commissioners quoted above are due to the use of (i) different calculation bases; and (ii) the deterrent factor (used by both dissenting Commissioners).

2. Fines and penalties set by CGU in investigations derived from Operation *Car Wash*

In parallel to CADE's efforts to move forward with the investigations derived from Operation *Car Wash*, CGU has of course been doing the same. In 2017-18, the anti-corruption agency was able to issue its first fines, as shown in the chart below.

Details regarding fines (etc.) imposed by CGU/AGU[20]					
Leniency*	**Defendant**	**Injured party**	**Calculation basis**	**Percentage**	**CGU/AGU decision (BRL – approx.)**
1 07/2017	UTC Engenharia	Federal Government, Petrobras, others	Confidential	Confidential	**Subtotal 574,000,000** Specification between fine and indemnification** not available
2 04/2018	MullenLowe and FCB Brasil	Federal Government, public bank (CEF), others	Confidential	Confidential	*** **Subtotal 53,100,000** Fine - 8,000,000 Indemnification: Damages - 3,500,000 Profit - 38,500,000
3 07/2018	Odebrecht	Federal Government, Petrobras, others	Confidential	Confidential	**** **Subtotal 2,720,000,000** Fine - 442,000,000 Indemnification: Bribes - 900,000,000 Profit - 1,300,000,000
4 07/2018	SBM Offshore	Petrobras	Confidential	Confidential	***** **Subtotal 1,220,000,000** Fine - 264,000,000 Indemnification: Damages - 285,000,000 Not clear - 667,000,000
5 12/2018	Andrade Gutierrez	Petrobras, Federal Government, others	Confidential	Confidential	****** **Subtotal 1,490,000,000** Fine - 286,000,000 Indemnification: Bribes - 328,000,000 Profit - 875,000,000
Total					**6,050,200,000**

Self-elaboration, based on http://www.cgu.gov.br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia, accessed on 02/21/2019.

* The fines are imposed in the scope of leniency agreements because the anti-corruption law does not allow full immunity.

** Indemnification:

According to the Regulation (Normative Instruction CGU/AGU n. 2/2018 – Annex I, I – Introduction, 3, i and ii), the penalties are of two kinds:

- Administrative fine; and,
- Indemnification, understood as the undue advantage obtained or sought, which subdivides into three different categories:
  - Damages (uncontroversial);
  - Bribes;
  - Profit (undue – that is, that is obtained as a result of the corrupt practice).

*** MullenLowe and FCB Brasil:

This CGU/AGU leniency agreement has been also signed by the Federal Public Prosecution Office – MPF.

**** Odebrecht:

This amount will be subtracted from the USD 2.6 billion agreement between Odebrecht, MPF, the U.S. Department of Justice and the Office of the Attorney General of Switzerland (https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve).

***** SBM Offshore:

Note that in addition to this amount, Petrobras had already received BRL 1,475,000,000 as indemnification in the scope of criminal leniency agreements executed before the MPF.

****** Andrade Gutierrez:

From this amount it will be subtracted the BRL 1,000,000,000 leniency agreement executed between Andrade Gutierrez and MPF in 2016. The powers of the Federal Court of Auditors – TCU remain fully valid, in case the need of further indemnification rests evidenced in the future.

20 The Inter-Ministerial Ordinance 2,278/16 was issued jointly by CGU and AGU – the latter being the "Advocacy-General of the Union," (Brazilian Constitution, p. 58, Section II – The Public Advocacy).

In addition to the interesting opportunity of observing the cases, parties involved, steps for the definition of pecuniary contributions and fines, etc., and the amounts collected from the defendants (settlement or leniency applicants), more can be inferred from the charts and their notes.

3. Further comments on the interface between the *Car Wash* antitrust and anti-corruption investigations

The concept of *advantage obtained* is already part of the practice of both CADE and CGU,[21] even though its use by CADE is still advocated by a minority of the Tribunal.

The Federal Public Prosecution Office – MPF has already executed a leniency agreement jointly with CGU/AGU, which is necessary to grant criminal immunity for individuals[22] involved in corrupt practices.

CGU/AGU, MPF, and TCU have been working together to avoid double jeopardy/*bis in idem*, or, more importantly, excessive punishment that could unreasonably affect the activities of the companies and the Brazilian economy. CADE is also involved in these *complementary investigations*,[23] as stated by its President during the Session in which the *Car Wash* settlements were approved.

On the other hand, there is evidence that the desired coordination between simultaneous investigations – with the aim of mitigating overlaps, increasing synergies, and efficiently sharing information – still has room to evolve. For instance, CADE's dissenting Commissioners claim that it was not possible to obtain detailed information in respect to CGU/AGU and MPF leniency agreements to check whether the amounts charged by these authorities would also refer to the same contracts under analysis by CADE.[24]

IV. CONCLUSION

As we mentioned in the introduction, since January 2019 Brazil has a new federal administration. Even in countries with mature bureaucracies, government changes increase the possibility of policy shifts.

In the case of CADE, it is fair to say that its practice of publishing Guidelines addressed to market players and even the civil society has been a great success. On the other hand, that does not mean that improvements are not possible. There is indeed the possibility of policy changes.

Two Ministers, those in charge of Justice and the Economy, may be responsible for appointing 5 new leaders at CADE: The General Superintendent (head of investigations, who can be appointed to a second 2-year term) and 4 Commissioners (to be appointed to 4-year single terms). This means, for instance, that the current dissent around *CADE Settlement Guideline vs advantage obtained* can be changed. Nevertheless, we hope to have demonstrated in this article that such dissent does not seem to be too important, since all the aforementioned authorities involved in the fight against bid rigging and bribery (in addition to CADE: CGU/AGU, MPF, and TCU) have been working on defining criteria to set monetary penalties on players that are found liable for such antitrust and/or corrupt practices.

It is important that both the remaining and incoming policymakers make a collective decision in the sense of improving the *complementary investigations* that have already been conducted by the authorities.

21 Actually, not only just CADE and CGU, but also TCU and MPF, at least to some extent: CADEb, 2018: 7.

22 Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 170.

23 http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato.

24 CADEa, 2018: 6; also CADEb, 2018: 12.

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