

MEMORANDUM TO CLIENTS

ANTITRUST

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BRAZILIAN SUPERIOR COURT OF JUSTICE LIMITS THE CONFIDENTIALITY OF CADE'S LENIENCY AGREEMENTS

The Brazilian Superior Court of Justice ("STJ") has issued a ruling that seeks to limit the confidentiality of leniency agreements entered into with the Brazilian antitrust authority ("CADE"). Pursuant to the ruling, third parties may have access to such agreements and related materials (including contemporaneous evidence) after CADE's General-Superintendence issues its report on a given case and submits the case records to CADE's Tribunal.

The STJ upheld a decision issued by the São Paulo Court of Appeals ("TJSP") in a damages claim regarding an alleged cartel in the market for hermetic compressors for cooling systems. The TJSP granted the plaintiff's motion to compel CADE and the former Secretariat of Economic Law to produce documents related to a settlement agreement that some of the members of the alleged cartel had entered into with CADE.

The defendant (a compressor manufacturer) appealed the TJSP's ruling to the STJ arguing that the agreement with CADE was confidential and contained documents relating to its business strategy and industry secrets. These documents should not be shared with the plaintiff, the defendant argued, as the plaintiff was one of its competitors.

The rapporteur of the appeal at the STJ, Justice Marco Aurélio Bellizze, rejected such argument and upheld the TJSP ruling, thereby granting the parties harmed by the alleged cartel the right to access the leniency materials. Justice Bellizze indicated that although the confidentiality of the agreements played a crucial role in encouraging collaboration with the antitrust authority, it could not be absolute. He further stressed that the confidentiality should be limited to the leniency application, therefore not

covering the leniency materials supporting the leniency agreement. This means that contemporaneous evidence and information on the illegal conduct submitted by the leniency applicants should be made public in accordance with the general rule of publicity of administrative proceedings.

Justice Bellizze also drew a parallel with the Criminal Organizations Prosecution Act, which establishes that a whistleblower agreement ceases to be confidential after a criminal indictment is issued. Considering that whistleblower agreements and leniency agreements are similar, he concluded that the confidentiality of the leniency agreement should prevail only during the investigation phase of CADE's administrative proceeding and should cease after the General-Superintendence issues its report to CADE's Tribunal.

Justice Bellizze added that to deny public access to content, documents and information of leniency agreements entered into with CADE would be an illegal and disproportionate measure because it would prevent third parties harmed by the cartel from seeking compensation for damages.

The STJ decision goes against CADE's current position to not make public leniency and settlement agreements and related documents. In a motion submitted to the court, CADE stated that one of the purposes of the confidentiality is to mitigate the exposure of the leniency applicant and prevent it from being in a worse position than the parties that are not collaborating with CADE. Justice Bellizze, however, stated that CADE's argument could not be accepted because the legal "benefits" of the leniency applicant are restricted to administrative and criminal proceedings, not to civil proceedings such as damage claims.

Justice Bellizze concluded his decision by stating that CADE's confidentiality obligation ceases upon completion of the investigation phase of the administrative proceeding. Following this, CADE must provide leniency-related information and documents to the courts of law. In the event confidentiality is required for other reasons (e.g., protection of trade secrets), the court may decide to grant it on a case-by-case basis.

The STJ decision was unanimous. Justices Moura Ribeiro, João Otávio de Noronha, Paulo de Tarso Sanseverino and Ricardo Villas Boas Cueva concurred with Justice Bellizze's decision.

The decision raises an important concern for any company that has applied for, or is interested in applying for, leniency or settlement agreements in Brazil as it increases the risk that leniency materials be accessed by third parties through the Brazilian courts in order to substantiate their damages claims.

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The purpose of this memorandum is to inform our clients about important changes and developments in the area of law. We remain at the reader's disposal for any additional information that may be desired regarding the subject matter herein.

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